

SUPREME COURT OF NIGERIA

FRIDAY 14TH JUNE, 2013. SC. 189/2012

**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. DR. KEMDI OPARA
2. ALL PROGRESSIVE
GRAND ALLIANCE

..... APPELLANTS

AND

1. HON. BETHEL AMADI
2. INDEPENDENT NATIONAL
ELECTORAL COMMISSION

..... RESPONDENTS

APPEALS - Supreme Court - Preliminary objection - Purpose - If the objection is successful - Hearing in the appeal is brought to an end - So as to avoid engaging in futile venture (H1)

JURISDICTION - Fundamentality of - It is a threshold issue and once raised - It must be heard and resolved - As any proceeding conducted without jurisdiction - Amounts to a nullity (H2)

SUPREME COURT - Competence - Principles - The court is competent to hear the appeal if it is properly constituted - The subject matter is within its jurisdiction - And the case initiated by due process of law (H3)

APPEALS - Right of - Legislative Houses election - Appeal shall lie as of right from decisions of CA to SC - Only in items listed under 1999 Constitution s. 233(e)(i)(ii)(iii)(iv)(v)(vi) - Thus SC has no jurisdiction to hear appeal on such election petitions (H4)

APPEALS - Election - Legislative Houses - Final court - CA has jurisdiction in matters under 1999 Constitution s. 246(a)(b)(c)(i)(ii)(iii) - And its decisions on appeals arising from the election - Shall be final (H5)

ELECTIONS - Pre election matters - Jurisdiction - It is only Federal

and State High Courts that have jurisdiction in such matters - And judgment of Supreme Court is final in the matter (H6)

JURISDICTION - Elections - Fundamental rights - Ifegwu's case - Appellant's right to seek redress for breach of his right is not terminated - By reason of CA final judgment in the election proceedings - As such right can be pursued in a competent court (H7)

FACTS

Before the National Assembly Election Petition Tribunal sitting in Owerri, petitioners/appellants filed election petition praying inter alia, for a declaration that 1st appellant scored the majority of lawful votes cast and ought to have been returned elected. Appellants were not satisfied with the declaration of 1st defendant/1st respondent as the winner of the National Assembly election conducted by 2nd defendant/2nd respondent for the Mbaitoli/Ikeduru Federal Constituency of Imo State in the House of Representatives. The tribunal struck out the petition for failure of appellants to comply with the provisions of paragraphs 18(1) and (2) of the schedule to the Electoral Act 2010.

Dissatisfied with the ruling, appellants appealed to the Court of Appeal, Owerri Division. The court allowed the appeal and remitted the petition back to the Tribunal to be heard on merit. When the petition was set down for hearing on merit, respondents filed application seeking for order striking out appellants' petition for want of jurisdiction. Respondents contend that pursuant to section 285(6) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), the tribunal had ceased to have jurisdiction in the matter since the 180 days allowed for hearing the petition have elapsed. The tribunal after hearing the application struck out the petition. Aggrieved, appellants appealed to the Court of Appeal. The court dismissed the appeal and struck out the petition. Aggrieved further, appellants appealed to Supreme Court.

HELD (Unanimously striking out the appeal per ***RHODES-VIVOUR JSC***)

Preliminary objection - Purpose

1. A preliminary objection on jurisdiction of an appeal court; in this case the Supreme Court to hear the appeal, if successful brings the hearing of the appeal to an end. This is premised on sound reasoning that there is nothing as useless as doing efficiently what should not have been done in the first place.
(p. 3035 F)

JURISDICTION - Fundamentality of

2. It must be elementary now that jurisdiction is a threshold issue, and so once raised it must be heard first and resolved one way or the other. Any proceeding conducted without jurisdiction no matter how brilliantly handled would amount to a nullity if the court had no jurisdiction to entertain the matter. (p. 3035 G)

SUPREME COURT - Competence - Principles

3. This court would be competent to hear this appeal if or when:

1. It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and

2. The subject matter of the case is within its jurisdiction, and no feature in the case which prevents the court from exercising its jurisdiction, and

3. The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction. (p. 3036 A)

APPEALS - Right of - Legislative Houses election

4. After examining section 233 of the Constitution and its sub-sections, it is clear that appeals shall lie as of right from the decisions of the Court of Appeal to the Supreme Court only in the items listed under (e) (i), (ii), (iii), (iv), (v) and (vi). There is no provision for leave to appeal. It is thus abundantly clear that the Supreme Court does not have jurisdiction to hear appeal on National and State Houses of Assembly election petitions. (p. 3037 C)

Election - Legislative Houses - Final court

5. The interpretation of section 246 of the Constitution is that the Court of Appeal has jurisdiction to hear appeals on matters under (a), (b), (c), (i), (ii), (iii) and its decision on appeals arising from National and State Houses of Assembly election petitions shall be final.

My lords, the appeal before this court is for this court to decide who as between Hon. B. Amadi, PDP candidate, and Dr. K. Opara, APGA candidate won the National Assembly elections conducted on 9/4/11 for the Mbaitoli/Ikeduru Federal Constituency of Imo State in the House of Representatives. Subsection 3 of Section 246 of the Constitution provides that the decisions of the Court of Appeal in respect of appeals arising from the National and State Houses of Assembly election petition shall be final. No distinction is made between interlocutory and/or final decisions of the Court of Appeal. It is clear that section 246(3) has made the Court of Appeal the final court to hear appeals from the Court of Appeal on National Assembly elections. It becomes abundantly clear that the Supreme Court has no jurisdiction to entertain appeals from decisions of the Court of Appeal in respect of elections held for the Mbaitoli/Ikeduru Federal Constituency in the House of Representatives. The reason is simple, it is an appeal from the Court of Appeal on National Assembly elections. (p. 3038 B)

ELECTIONS - Pre election matters - Jurisdiction

6. In Odedo v. INEC (2008) 17 NWLR (pt. 117) 554 at 602 paras A - C this court per Niki Tobi, JSC interpreted section 285(1) of the Constitution as follows:-

“It is not my understanding of section 285(1)(a) of the Constitution that the subparagraph can accommodate pre-election matters. It is rather my understanding that the subparagraph provides for determination of whether any person has been validly elected as a member of the National Assembly. In my humble view the subparagraph provides for the election matters which give rise to post-election and not pre-election matters.”

tion proceedings. As the reliefs sought by the appellants are on pre-election matters, Section 285(1)(a) could not avail him as the subparagraph does not provide for litigation arising from party primaries.”

The above interpretation of section 285(1)(a) of the Constitution is correct. The dispute in *PDP v. Onwe* (supra) is an intra party pre-election matter which has nothing to do with elections. Tribunals have no jurisdiction over such matters. Being pre-election matter, only the Federal High Court and State High Court has jurisdiction. (See section 87(9) of the Electoral Act, 2011) and the judgment of the Supreme Court is final on such pre-election matters of selection or nomination of a candidate of a Political Party. (p. 3039 B)

JURISDICTION - Elections - Fundamental rights - Ifegwu’s case
7. The reasoning in *FRN v. Ifegwu* (supra) is that where, as in this case there is finality, once the Appeal Court delivers its judgment, it is only final in regard to the proceedings which gave rise to the appeal as the appeal finally terminates the proceedings but the appellants’ right to seek redress for an alleged breach of his fundamental rights is not terminated. Thus, it was held in *FRN v. Ifegwu* supra that the appellant is entitled to pursue his fundamental right arising from the proceedings in a competent court.

FRN v. Ifegwu (supra) did not decide anything new. If the appellants complain about a breach of their fundamental rights as a result of the proceedings, they are at liberty to seek redress in the appropriate court, but such proceeding cannot commence in the Supreme Court since the Supreme Court has no original jurisdiction for such matters. The Supreme Court can only hear appeals from courts below on decisions on fundamental rights applications. In the absence of any decision on the breach of the appellants’ fundamental rights, the Supreme Court has no jurisdiction to consider such an issue. (p. 3040 G)

REPRESENTATION

No Appearance for the Appellants

H. A. Malik, for the 1st Respondent

J. M. M. Majiyagbe, with Z. Gambo and O. Omo-Eghaegba, for the 2nd Respondent

CASES REFERRED TO

- B Dangana v. Usman (2012) ALL FWLR (pt. 627) 612
Awuse v. Odili (2003) 18 NWLR (pt. 851) 116
PDP v. Onwe (2011) 4 NWLR (pt. 1236) 166
Bature v. State (1994) 1 NWLR (pt. 320) 267
C Ishola v. Ajiboye (1994) 6 NWLR (pt. 352) 506
Okonkwo v. Ngige (2007) 12 NWLR (pt. 1047) 191
Madukolu v. Nkemdilim (1962) 2 NSCC 374
Odedo v. INEC (2008) 17 NWLR (pt. 117) 554
Udenwa v. Uzodinma (2012) 12 SC (pt. VII) 1
D FRN v. Ifegwu (2003) 15 NWLR (pt. 842) 113
Diapalong v. Dariye (No.2) (2007) 1 All FWLR (pt. 373) 128
Adisa v. Oyinwola (2000) 10 NWLR (pt. 674) 111
Tukur v. Govt. of Gongola (1989) 4 NWLR (pt. 1117) 561
Alao v. ACB Ltd. (2000) 9 NWLR (pt. 670) 264
E

STATUTES REFERRED TO

Constitution of Federal Republic of Nigeria 1999, ss. 36(1), 233(1), 246(3), 285(7)

- F Electoral Act 2011, s. 87(9)

LEAD JUDGMENT BY RHODES-VIVOUR JSC

- This is an appeal from the Ruling of the Court of Appeal Owerri Division, delivered on the 22nd day of March 2012. In that Ruling
G the Court of Appeal struck out the appellants' appeal for want of jurisdiction.

The facts are these.

- On the 9th day of April, 2011, INEC, (2nd respondent) the regulatory body charged with conducting elections in Nigeria conducted the National Assembly elections for the Mbaitoli/Ikeduru Federal Constituency of Imo State in the House of Representatives. Dr.
H K. Opara (the 1st appellant) was the candidate of APGA" while Hon. B. Amadi (the 1st respondent) was the candidate of the PDP. Candidates of several other parties contested the election, but they are

irrelevant in this appeal. At the end of the election INEC declared the 1st respondent the winner. Not satisfied with the results of the election the appellant as petitioner filed a petition. On the 25th day of September 2011 the Court of Appeal allowed the appeal and remitted the petition to the Election Petition Tribunal to be heard on the merit. On the 18th day of November 2011 the Tribunal struck out the Petition for lapse of time. Dissatisfied the appellant filed an appeal on the 21st day of December 2011. The appeal came up for hearing on the 26th day of January 2012. The Court of Appeal could not hear the appeal because as at that day 60 days as provided by section 285(7) of the Constitution had elapsed by 6 days. In a Ruling delivered on the 22nd day of March 2012 the Court of Appeal struck out the appeal for want of jurisdiction. This appeal is against that Ruling. B

In accordance with Rules of this court learned counsel for the parties filed and exchanged briefs of argument. The appellants' brief was filed on the 11th day of May, 2012, and a Reply brief on 14th day of June 2012. The 1st respondent's brief incorporating arguments on a Preliminary objection was filed on the 31st day of May, 2012, where the 2nd respondent's brief was deemed duly filed on the 21st day of June, 2012. C

Learned counsel for the appellants formulated three issues for determination. They are:

1. Whether the Court of Appeal's conclusion on the binding Supreme Court judgment in a situation of conflict between an earlier and a later judgment was correct in law. D

2. Whether the decision of the Court of Appeal that section 285(7) does not in any way infringe a party's right to fair hearing was correct. E

3. Whether section 285(7) is a valid alteration under the 1999 Constitution (as amended). F

Learned counsel for the 1st respondent formulated a sole issue for determination. It reads:

Having regard to the clear and unambiguous provision of section 285(7) of the 1999 Constitution (as amended), coupled with the binding nature of the decisions of the Supreme Court interpreting the said section, whether the lower court was not right in striking out the appellants appeal which emanated from the decision of an G

election tribunal and was caught up by the said Constitutional provision.

On his part learned counsel for the 2nd respondent formulated two issues for determination.

B 1. Whether the provision of section 285(7) of the Constitution is an infraction on section 36(1) of the Constitution thereby denying the appellants their right to fair hearing.

C 2. Whether the provision of section 285(7) of the 1999 Constitution (as amended) ought to be nullified on the ground that it amended section 36(1) of the Constitution without compliance with the Constitutional procedure.

D Before I advert my mind to consideration of the issues for determination, I must observe that the 1st respondent filed a Preliminary Objection urging this court to strike out this appeal for want of jurisdiction. The grounds for the preliminary objection are:

(a) The appellate jurisdiction of the Supreme Court is clearly delineated by section 233(1) of the 1999 Constitution (as amended).

E (b) The said section 233(1) does not clothe the Supreme Court with jurisdiction or vires to entertain appeals arising from decisions of the Court of Appeal in respect of Elections into the House of Representatives.

F (c) Per Force and by virtue of section 246(3) of the 1999 Constitution (as amended), the Court of Appeal is the final court in respect of appeals arising from decisions of Election Tribunals in relation to House of Representatives Elections.

G (d) The present Appeal is against the decision of the Court of Appeal handed down on the 22nd day of March 2012 in respect of the Election of the 9th day of April, 2011 into the Mbaitoli/Ikeduru Constituency of Imo State in the House of Representatives.

(e) The entire appeal has become a mere academic exercise, and a fortiori, the reliefs sought by the appellant in their Notice of Appeal and reiterated in their brief of argument have become sheer moot and hypothetical postulations.

H (f) The present appeal constitutes a gross abuse of court process.

The Preliminary objection raises the question whether the Supreme Court has the jurisdiction to hear appeals from the Court of Appeal on National Assembly election results.

Learned counsel for the 1st respondent observed that appeals arising from the decisions of election tribunals in respect of election into the National Assembly and State Houses of Assembly come to an end with the decision of the Court of Appeal. Reliance was placed on sections 233(1) and 246(3) of the Constitution. *Dangana v. Usman* 2012 ALL FWLR (pt. 627) p.612, *Awuse v. Odili* 2003 18 NWLR (Pt.851) p. 116. B

He urged this court to strike out this appeal for being an abuse of court process and conferring no jurisdiction on the court.

In response, learned counsel for the appellants argued that the decisions of the Court of Appeal that are final under section 246(3) of the Constitution are those on the items in subsection (b) (i) (ii) and (iii) of section 246 (1) of the Constitution, contending that any decision on any other item or issue over which the Supreme Court enjoys Constitutional jurisdiction is not final, and would be appealable to the Supreme Court. C D

He submitted that the finality provision of section 246(3) of the Constitution does not affect the jurisdiction of the Supreme Court under section 233 of the Constitution. Reliance was placed on *PDP v. Onwe* 2011 4 NWLR pt.1236 p.166. Concluding, he further submitted that the breach of fundamental right to fair hearing, and erosion of judicial power complained about in the appeal did not arise out of the pleadings in the petition but out of the act of application of section 285(7) of the Constitution contending that the Supreme Court should assume jurisdiction and determine this appeal. E F

A preliminary objection on jurisdiction of an appeal court; in this case the Supreme Court to hear the appeal, if successful brings the hearing of the appeal to an end. This is premised on sound reasoning that there is nothing as useless as doing efficiently what should not have been done in the first place. G

It must be elementary now that jurisdiction is a threshold issue, and so once raised it must be heard first and resolved one way or the other. Any proceeding conducted without jurisdiction no matter how brilliantly handled would amount to a nullity if the court had no jurisdiction to entertain the matter. See *Bature v. State* 1994 1 NWLR (Pt.320) p.267, *Ishola v. Ajiboye* 1994 6 NWLR (pt.352) p.506, *Usman Dan Fodio University* H

v. Kraus Thompson Organization Ltd. 2001 15 NWLR (pt.736) p.305.

This court would be competent to hear this appeal if or when:

1. It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and

2. The subject matter of the case is within its jurisdiction, and no feature in the case which prevents the court from exercising its jurisdiction, and

3. The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction. See Madukolu & Ors v. Nkemdilim 1962 2 NSCC p.374.

The issue raised in the Preliminary objection falls within (2) above. That is whether the subject matter of this appeal falls within the jurisdiction of this court.

It is important at this stage that the subject matter or substance of the appeal is identified to enable this court know if it has jurisdiction over such matters. After examining the petition it becomes clear that what is in issue is who as between Hon. B. Amadi, PDP, and Dr. K. Opara, APGA won the National Assembly Elections held on the 9th day of April, 2011 for the Mbaitoli/Ikeduru Federal Constituency of Imo State in the House of Representatives. The question to be asked now is, whether the Supreme Court has jurisdiction over such matters, and in answering the question sections 233(1) and 246 (3) of the Constitution which show the jurisdiction of the Supreme Court and Court of Appeal on Election must be examined.

Section 233 (1) (2) (e) (i) (ii) (iii) (iv) (v) (vi) (f) of the Constitution states that:

“233(1) The Supreme Court shall have jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Court of Appeal.

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

(e) decisions on any question

(i) Whether any person has been validly elected to the office of President or Vice President under this Constitution.

(ii) Whether the term of office of President or Vice President

has ceased;

(iii) Whether the office of President or Vice President has become vacant; and

(iv) Whether any person has been validly elected to the office of the Governor or Deputy Governor under this Constitution;

(v) Whether the term of office of a Governor or Deputy Governor has ceased;

(vi) Whether the office of Governor or Deputy Governor has become vacant; and

(f) Such other cases as may be prescribed by an Act of the National Assembly.”

After examining section 233 of the Constitution and its subsections, it is clear that appeals shall lie as of right from the decisions of the Court of Appeal to the Supreme Court only in the items listed under (e) (i), (ii), (iii), (iv), (v) and (vi). There is no provision for leave to appeal. It is thus abundantly clear that the Supreme Court does not have jurisdiction to hear appeal on National and State Houses of Assembly election petitions.

Now, does the Court of Appeal have jurisdiction on 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) decisions of the National and States Houses of Assembly Election Tribunals; and

(c) decisions of the Governorship 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 the Constitution.

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

(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.

(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.”

The interpretation of section 246 of the Constitution is that the Court of Appeal has jurisdiction to hear appeals on matters under (a), (b), (c), (i), (ii), (iii) and its decision on appeals arising from National and State Houses of Assembly election petitions shall be final.

My lords, the appeal before this court is for this court to decide who as between Hon. B. Amadi, PDP candidate, and Dr. K. Opara, APGA candidate won the National Assembly elections conducted on 9/4/11 for the Mbaitoli/Ikeduru Federal Constituency of Imo State in the House of Representatives. Subsection 3 of Section 246 of the Constitution provides that the decisions of the Court of Appeal in respect of appeals arising from the National and State Houses of Assembly election petition shall be final. No distinction is made between interlocutory and/or final decisions of the Court of Appeal. It is clear that section 246(3) has made the Court of Appeal the final court to hear appeals from the Court of Appeal on National Assembly elections. It becomes abundantly clear that the Supreme Court has no jurisdiction to entertain appeals from decisions of the Court of Appeal in respect of elections held for the Mbaitoli/Ikeduru Federal Constituency in the House of Representatives. The reason is simple, it is an appeal from the Court of Appeal on National Assembly elections.

Learned counsel for the appellants relied heavily on PDP v. Onwe (2011) 4 NWLR (pt.1236) p.166. If ever there was a case irrelevant in resolving this preliminary objection PDP v. Onwe supra scores high marks. In that case Dr. E. Onwe and Senator J. Ucha both members of the PDP, contested the primaries of their party to enable the party determine its candidate for the Ebonyi Central Senatorial Seat in the National Assembly. That is a pre-election matter on issues of nomination, substitution. It has to do with who is the PDP's

candidate for National Assembly elections and not who won the National Assembly elections. In the case (supra) only a High Court or Federal High Court can hear those pre-election issues and the Supreme Court has jurisdiction to entertain appeals on pre-election matters. PDP v. Onwe (supra) is a pre-election matter while this appeal is on the National Assembly elections. B

In Odedo v. INEC (2008) 17 NWLR (pt. 117) 554 at 602 paras A - C this court per Niki Tobi, JSC interpreted section 285(1) of the Constitution as follows:-

“It is not my understanding of section 285(1)(a) of the Constitution that the subparagraph can accommodate pre-election matters. It is rather my understanding that the subparagraph provides for determination of whether any person has been validly elected as a member of the National Assembly. In my humble view the subparagraph provides for the election matters which give rise to post-election and not pre-election proceedings. As the reliefs sought by the appellants are on pre-election matters, Section 285(1)(a) could not avail him as the subparagraph does not provide for litigation arising from party primaries.” C D E

The above interpretation of section 285(1)(a) of the Constitution is correct. The dispute in PDP v. Onwe (supra) is an intra party pre-election matter which has nothing to do with elections. Tribunals have no jurisdiction over such matters. Being pre-election matter, only the Federal High Court and State High Court has jurisdiction. (See section 87(9) of the Electoral Act, 2011) and the judgment of the Supreme Court is final on such pre-election matters of selection or nomination of a candidate of a Political Party. F G

In Dangana v. Usman 2012 ALL FWLR (pt.627) p.612.

The 1st respondent filed two notices of appeal to the Supreme Court on the decision of the Court of Appeal on the Senatorial election for Kogi State east district.

The petitioners filed preliminary objection for this court to refrain from hearing the appeals. H

Sustaining the preliminary objection, Adekeye, J.S.C. said in her leading judgment.

“...Pursuant to section 246(3) of the Constitution... the final

court is the Court of Appeal and the Supreme Court has no jurisdiction to adjudicate on it..."

Onnoghen, JSC said in his contribution that:

"...All appeals in relation to National and States Houses of Assembly election petitions terminate at the Court of Appeal."

B In my contribution I said:

"Subsection (3) of section 246 of the constitution is clear. The words used are plain as plain can be. The intention of the legislature, clearly expressed is that all appeals from National and State House of Assembly election petitions shall come to an end after the Court of Appeal delivers its judgment..."

C And finally Peter-Odili, JSC in her contribution said:

"....an election dispute covered by section 138(1) (a) of the Electoral Act and section 65(2)(b) of the Constitution within the jurisdiction of the election tribunal and thereby caught up by section 246(3) of the Constitution."

D In Chief A. Udenwa & Anor. v. Chief H. Uzodinma & Anor. 2012 12 SC (Pt.VII) p.1 the issue was on elections for the Imo West Senatorial Constituency. The issue before the Tribunal was who between the 1st appellant and 1st respondent is the elected Senator for Imo West Senatorial Constituency. The Court of Appeal affirmed the decision of the Tribunal. This court held, and correctly too, that by the provisions of section 246 (3) of the Constitution the decision of the Court of Appeal was final and so the Supreme Court has no jurisdiction to hear the appeal.

E Learned counsel for the appellants relied on FRN v. Ifegwu 2003 15 NWLR (pt.842) p.113 to contend that provisions of finality of an appeal does not operate when one is complaining of breach of fundamental rights. That is to say section 246 (3) of the Constitution is not applicable because according to learned counsel for the appellants, his clients complain of breach of fundamental rights.

G ***The reasoning in FRN v. Ifegwu (supra) is that where, as in this case there is finality, once the Appeal Court delivers its judgment, it is only final in regard to the proceedings which gave rise to the appeal as the appeal finally terminates the proceedings but the appellants' right to seek redress for an alleged breach of his fundamental rights is not terminated. Thus, it was held in FRN v. Ifegwu supra that the appellant is entitled***

H

to pursue his fundamental right arising from the proceedings in a competent court.

FRN v. Ifegwu (supra) did not decide anything new. If the appellants complain about a breach of their fundamental rights as a result of the proceedings, they are at liberty to seek redress in the appropriate court, but such proceeding cannot commence in the Supreme Court since the Supreme Court has no original jurisdiction for such matters. The Supreme Court can only hear appeals from courts below on decisions on fundamental rights applications. In the absence of any decision on the breach of the appellants' fundamental rights, the Supreme Court has no jurisdiction to consider such an issue.

In the light of all that I have been saying, this court has no jurisdiction to hear an appeal from the decision of the Court of Appeal on election for the Mbaitoli/Ikeduru Federal Constituency of Imo State in the House of Representatives in view of section 246(3) of the Constitution. The appeal is hereby struck out, since this court has no jurisdiction to hear it. Preliminary objection sustained. Appeal struck out.

ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother RHODES-VIVOUR, JSC, just delivered.

I agree with his reasoning and conclusion that the preliminary objection has merit and should be sustained.

It is not in dispute that the election petition which resulted in the appeal to the Court of Appeal relates to election into the House of Representatives which is a National Assembly election. By the provisions of Section 246(3) of the 1999 Constitution as amended, the Court of Appeal is the final Court of Appeal in respect of the appeals arising from National and State Houses of Assembly elections.

It is for the above reason and the more detailed reasons stated in the lead judgment of my learned brother that I too find merit in the preliminary objection and consequently sustain same.

The objection haven been sustained it means that this court has no jurisdiction to hear and determine the instant appeal, which

purported appeal is consequently incompetent and liable to be struck out.

I therefore order accordingly and abide by the consequential orders made in the said lead judgment of my learned brother including the order as to costs. Preliminary objection sustained. Appeal struck out.

MUNTAKA-COOMASSIE JSC

I was privileged to have read before now this all important lead judgment rendered by my learned brother Rhodes-Vivour JSC, I entirely agree. The appeal must and is hereby struck out.

However I wish to chip in a little bit on my own in support of the lead judgment.

The appellants filed a petition before the National Assembly Election Tribunal holden at Owerri in which they prayed for the following:-

1. A Declaration that the 1st Petitioner scored a majority of lawful votes and ought to have been returned.
2. An Order that the election of the 1st respondent is void.
3. An Order that the 1st respondent is duly elected.
4. An Order that the 1st respondent returns the Certificate of return issued to him by the 2nd respondent forthwith.

This petition is in respect of MBAITOLU/IKEDURU House of Representative constituency Election. On the 25th day of July 2011, the petition was struck out for failure to comply with the provisions of paragraphs 18(1) and (2) of the schedule to the Electoral Act 2010. The Tribunal held as follows;

“All said and done in this action, the petitioners have failed to comply with paragraphs 18(1) and (2) of the schedule to the Electoral Act 2010. The corollary of this is that, the petition is deemed abandoned. The consequential effect is dismissal of same by the Tribunal. Accordingly this petition is dismissed pursuant to paragraph 18(3) of the 1st schedule to the Electoral Act 2010 (as amended)”.

Dissatisfied with this ruling, the petitioners appealed to the court of Appeal Owerri Division hereinafter called the lower court. The lower court allowed the appeal and remitted the petition back to the Tribunal to be heard by different members. Again the respon-

dents filed a motion on notice in which they prayed the Tribunal as follows:-

1. An Order striking out or dismissing petition No.EPT/IM/NASS/HR/11/2011 between Dr. Kendi Okpara and Anor v. Bethel Amadi and Anor dated and filed on 1st May 2011 for want of jurisdiction.
2. And for such further order or orders as this honourable court may deem fit to make in the circumstances.

GROUNDS FOR THE APPLICATION

1. Section 285(6) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides for a maximum period of 180 days from the date of filing of an election petition as the time within which such petition (including this petition) shall be heard and judgment delivered in respect thereof.
2. The petition was filed in May 1, 2011.
3. The 180 days provided for hearing and delivery of judgment in respect of the petition has since expired on October 2011.
4. The Honourable Tribunal no longer has jurisdiction to hear and deliver judgment in this petition.

The application was duly heard, and on the 18th day of November, 2011 the Tribunal delivered its ruling in which the petition was struck out. In its conclusion the Tribunal held thus:-

“By the above therefore, and having regards to the doctrine of stare decisis, the Tribunal feels bound to follow the decision of the supreme court on the issue raised by the learned Senior counsel. I therefore answer the question whether this honourable Tribunal still has jurisdiction to hear and deliver judgment in this petition in the negative. I answer the question: whether the petition No.EPT/IM/NASS/HR/11/2011 has lapse in the positive more specifically I hold that this Tribunal no longer has the Jurisdiction to hear and deliver judgment in this petition and that petition No.EPT/IM/NASS/HR/11/2011 has lapsed. It is accordingly order to be struck out”.

Aggrieved by the decision of this latter decision, the petitioners again appealed to the court of Appeal, Owerri who also struck out the appeal, as it was held to have lapsed. The petitioners have now appealed to this Hon. Court.

Both parties filed and exchanged their respective briefs of argument. The appellants in their joint briefs or argument formulated three (3) issues for determination thus:-

a) Whether the court of Appeal's conclusion on the binding Supreme Court judgment in a situation of conflict between an earlier, and a later judgment was correct in law (Ground 2).

b) Whether the decision of the court of Appeal that Section 285(7) does not in any way infringe a party's right to fair hearing was correct. (Ground 1, 3)

c) Whether section 285(7) is a valid alteration under the 1999 Constitution (as amended) (Ground 4).

The 1st respondent only distilled one issue for determination in his brief of argument as follows:-

"Having regard to the clear and unambiguous provision of section 285(7) of the constitution (as amended), coupled with the binding nature of the decisions of the Supreme Court interpreting the said section, whether the lower court was not right in striking out the Appellants' decision of an election Tribunal and was caught up by the said constitutional provision"

Whilst the 2nd respondent formulated two issues for determination as follows:-

(1) Whether the provisions of section 285(7) of the constitution is an infraction on section 36(1) of the constitution thereby denying the Appellants their right to fair hearing.

(2) Whether the provisions of section 285(7) of the 1999 constitution (as amended) ought to be nullified on the ground that it has amended section 36(1) of the constitution without compliance with the constitutional procedure.

However it is pertinent to point out that the 1st respondent raised a preliminary objection to the hearing of this appeal. Since the objection touches on the jurisdiction of this court it will be prudence to first have it determined. By a notice of preliminary objection dated 28/5/2012 and filed on 31/5/2012, the 1st Respondent objected to the hearing of the appeal on the following grounds:-

1. The appellate jurisdiction of the Supreme Court is clearly delineated by section 233(1) of the 1999 constitution as amended.

2. The said section 233(1) does not clothe the Supreme Court with jurisdiction or vires to entertain appeals arising from decisions of the court of Appeal in respect of the Elections into the House of Representatives.

3. Per force and by virtue of section 246(2) of the 1999

constitution (as amended) the court of Appeal is the final court in respect of appeals arising from decisions of Election Tribunals in relation to House of Representatives election.

4. The present appeal is against the decision of the court of Appeal handed down on 22/03/12 in respect of the election of 09/04/11 into the Mbaitoli/Ikeduru constituency of Imo state is the House of Representative. B

5. The entire appeal has become a mere academic exercise and a fortiori the reliefs sought by the appellant in their notice of appeal and reinstated in their brief of argument have become sheer moot and hypothetical postulations. C

6. The present appeal constitutes a gross abuse of the court's process.

In arguing the preliminary objection the learned counsel to the 1st respondent referred to section 246(2) of the 1999 Constitution (as amended) and submits that the clear intention of the law makers is that the court of Appeal is the bus stop or final resting place where all appeals arising from the decisions of election Tribunal in respect of Election into the National Assembly and State Houses of Assembly are interfered. Cites the case of Diapalong v. Dariye (No.2) (2007) 1 All FWLR (pt.373) at 128 - 129; Adisa v. Oyinwola (2000) 10 NWLR (pt.674) 111. It was submitted that the jurisdiction of every court is always often delineated or circumscribed by the stature creating it. See Tukur v. Govt. of Gongola (1989) 4 NWLR (Pt. 1117) 561 at 572. E F

There is nothing in the entire section 318 of the 1999 Constitution which cloth the Supreme Court with the jurisdiction to entertain any appeal arising from the decision of the Court of Appeal which originated from the election Tribunal in respect of an election to the National Assembly. Learned counsel cites the decisions of this court in the consolidated appeals No.SC.460/2011 and SC.11/2012. Ocheji Dangana v. Ali Usman; Onuaguluchi v. Ndu (2001) 7 NWLR (pt.712) 309/321 - 522. He contended that jurisdiction is a fundamental pre-requisite in the adjudication of any matter. It is the live wire of all trial. He therefore contended that the entire appeal and/or the reliefs sought therein by the appellant to have become academic hypothetical, speculation and moot, and to this extent he urged this court to decline to entertain the appeal. The appeal is incompetent H

and should be struck out. The 2nd respondent, strangely, did not react to this fundamental issue in his brief of argument.

The Appellant in response conceded that every statute creating a court or Tribunal circumscribes and limits the extent and scope of its jurisdiction as stated by the Supreme Court in *Tukur v. Govt. of Gongola State* (1989) 4 NWLR (pt. 117) 577 at 561. He contended that Section 246(1) (b) of the constitution provides the appellate jurisdiction of the Court of Appeal on Election matters to be as to questions whether:-

C a. Any person has been validly elected as a member of the National Assembly or a House of Assembly of a state under the constitution.

b. Any person has been validly elected to the office of a Governor or Deputy Governor or

D c. The term of office of any person has become vacant.

Any decision on any other item or issue over which the Supreme Court enjoys constitutional jurisdiction is not final and would be appealable to the Supreme Court. This includes issues arising under Section 233(2) (b) and (c) of the constitution. That is, matters of appeal on interpretation and application of the provisions of the constitution and appeals. On matters relating to part IV of the constitution which constitutes part of the jurisdiction of the Supreme Court as provided in the constitution. It was therefore submitted 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) 1166 was cited. He pointed out that the appellants complaint in this appeal is that both the Tribunal and the court of Appeal wrongly abdicated jurisdiction relying on section 285 (b) and section of the constitution respectively. It was therefore submitted that this court has the competence to hear the appeal as of right on decision raising:-

H “questions as to the interpretation or application of this constitution”.

Learned senior counsel distinguished the case from the consolidated case of SC. 460/2011 and SC.11/2012 *Echeja Dangana v. Ali Usman* delivered on 24/2/2012.

It was further contended that a provision of finality of an appellate court or Tribunal does not operate when one is complaining about breach of fundamental right, cites FRN v. IFEGWU (2003) 15 NWLR (Pt. 842) 113 at 181.

The crux of this objection is the determination of whether this court has jurisdiction to hear an appeal arising from the decision of the court of Appeal on election matter relating to an election to the National Assembly. The section of the constitution that is put to question in the appeal is section 246 of the constitution which provides thus:-

“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 to this constitution.

b) decisions of the National Assembly Election Tribunal and Governorship and legislative House Election Tribunal 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

(iii) the term of office of any 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 National Assembly.

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

The 1st respondent has contended that this appeal being an appeal arising from decision of the Court of Appeal in respect of National Assembly Election petition and by virtue of the provisions of section 246 (3) is not appealable to this court, the Court of Appeal being a final court. On the other hand, the appellant had contended that the Court of Appeal’s decision could only be said to be final if the decision is in respect of items specified in section 246(2) (i) (ii) and (iii) of the constitution. But where the issue in the appeal relates to the interpretation of the constitution or the complaints on the infraction of paragraph iv of the constitution the court would be clothed

with the jurisdiction to hear the appeal by virtue of provision of Section 233 of the constitution - PDP v. ONWE supra, FRN v. IFEGWU supra. That this complaint in this appeal relates to the interpretation of section 246(2) and S.285 (7) of the constitution which denied the appellants right to have their petition determined on merit. In FRN V.

B IFEGWU supra at 118, this court held as follows:

“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 if 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 respondents entitlement to seek appropriate redress for the breach of his fundamental right arising from those proceedings in a competent court.”

With due respect to the learned senior counsel this decision D does not support the position canvassed. It is clear as it can be gleaned from the decision, the decision of the Court of Appeal put an end to the proceeding that gave rise to the appeal, while a complaint of breach of fundamental right can be commenced in a competent court presumably the state High court or the Federal High court.

E The main issue here is: what gave rise to this appeal?

The answer is not farfetched. It is an Election petition challenging the election of the 1st respondent as the duly elected member of the House of Representatives representing Mbaitoli/Ikeduru Federal constituency Imo State. I therefore hold that this appeal arose F from the item listed in section 246 (1) (b) (1) of the 1999 constitution. Equally the learned senior counsel cited the case of PDP v. ONWE (supra) to support his position. It is my respectful view this case is also not applicable as it relates to pre-election matter which the Tribunal G or Appeal Tribunal has no jurisdiction to hear and determined.

My lords I will be bold to state that this honourable court would foil any attempt to foist upon it a matter in which, institutionally and constitutionally, it has no jurisdiction to hear. Any surreptitious attempt to do so either hiding on the call to interpret the provisions of the constitution or compliant of breach of fundamental right H in a matter in which the bus stop has been put on the Court of Appeal as the final court would be seriously resisted. It is irrelevant whether the Court of Appeal properly determined the matter or not. This court has no supervisory role to play in such matter.

We are all subject to the provisions of the constitution, and this court will not be a party to the circumvention of its provisions, rather its provisions would interpret to reflect the intensions of the lawmakers. This court, in the consolidated appeal SC.480/2011 and SC.11/2012 Dangana v. Ali Usman delivered on 20/2/2013 stated the law poignantly by my learned brother Peter-Odili, JSC page 26 B at 27 thus:-

“So long as the starting point of the Litigation is the Election Tribunal, then at the Court of Appeal, once the subject matter is National Assembly or State Assembly seat it terminates. A purported appeal cannot therefore find its way to this court because of a feature or anything resembling issues that could be dealt with at the state High court or Federal High Court would not give it either the pass-port or visa to this court. Section 246 (3) of the constitution has seen to that” C D

His lordship Adekeye, JSC in the same case held as follows:

“It is apparent that the provisions of the 1999 constitution as amended do not envisage an appeal to the Supreme Court from the court of Appeal. National Assembly petitions based on whether anybody has been validity elected as a member of the National Assembly. The court of Appeal shall be the final court by virtue of section 246 (3) of the 1999 constitution. The provisions of section 246(3) affirms the previous decisions of this court” E

My lords, in view of the above, I have no doubt in my mind that this appeal amounts to a mere waste of this courts precious time, resources of the parties involved and the personnel of this court. As a result I have no other option but to sustain the preliminary objection. F

The appeal, it goes without saying, cannot stand same is hereby struck out. G

FABIYI JSC

I have had a preview of the judgment just handed out by my learned brother - Rhodes-Vivour, JSC. I agree that the appeal deserves to be struck out for want of jurisdiction by this court. H

It is not in contention that this appeal rests on the decision of the Court of Appeal in respect of the National Assembly elections for the Mbaitoli/Ikeduru Federal Constituency of Imo State in the House

of Representatives delivered on 22nd day of March, 2012.

The 1st respondent filed a preliminary objection urging this court to strike out the appeal for want of jurisdiction. I wish to touch on item (c) of the grounds for same which reads as follows:-

“(c) *Per force and by virtue of section 246(3) of the 1999 Constitution (as amended) the Court of Appeal is the final court in respect of appeals arising from decisions of Election Tribunals in relation to House of Representatives Elections.*”

It is clear from the above that the preliminary objection is rooted on the provision of section 246 (3) of the 1999 Constitution (as amended); inter alia. The section 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 of a case’.

The word ‘shall’ as employed in the stated section of the Constitution denotes obligation or a command and gives no room for discretion. It imposes a duty. A peremptory mandate is enjoined. See: *Bamaiyi v. Attorney-General Federation & Ors.* (2001) 12 NWLR (pt. 727) 468 at 497.

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 meaning. The decision of the court below handed out on 22nd March, 2012 is rooted in election appeal which the law stipulates that it should end at the stated court.

In the case of *Alao v. ACB Ltd.* (2000) 9 NWLR (pt. 670) 264, 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. It’s jurisdiction is basically appellate apart from first instance restricted matters. The court cannot confer jurisdiction on itself where none is given by the Constitution or by any statute. See: also *Raymond S. Dongtoe v. CSC Plateau State* (2001) 9 NWLR (Pt.717) 132 at 150.

It is clear to me that the decision of the court below, as entered on 22nd March, 2012 is final and not subject to appeal to this

court. I am of the considered view that this court is not imbued with the requisite jurisdiction and competence to hear this appeal. Refer to *Madukolu v. Nkemdilim* (1962) 2 NSCC 374.

The stance has been consistently taken by 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. B

I hope that I have made a point and 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. C

NGWUTA JSC

Having had the privilege of reading in draft the lead judgment of My Lord, Rhodes-Vivour, JSC, I entirely agree with the lucid reasoning and apt conclusion therein. D

I desire, however, to add a few observations. This appeal represents one in a series of ploys employed by litigants to set two sections of the 1999 Constitution (as amended) (Section 285 and Section 36) on a collision course against each other. E

One section of the Constitution cannot derogate from, or override the provision of another section of the same Constitution. The supremacy of the Constitution in Section 1 thereof is shared and enjoyed by all the Sections including the amended sections of the Constitution. F

The finality clause in Section 246 (3) of the Constitution is sacrosanct and remains so unless the Section is amended by the National Assembly. G

As demonstrated in the lead judgment, the case of *FRN v. Ifegwu* (2003) 15 NWLR (Pt. 842) page 113 did not break new jurisprudential grounds. It restated and reinforced the right of a litigant who claims a violation of his right under Section 36 (1) of the Constitution to seek redress in a Court of competent jurisdiction. H

In addition, the Supreme Court in *Ifegwu's* case considered the finality clause in the Failed Bank Decree of 1994 against the fair hearing provision in Section 36 (12) of the Constitution and upheld the supremacy of the latter. Here, the facts are different. The finality

clause in Section 246 (3) of the Constitution cannot be questioned based on Section 36 (1) of the same Constitution.

For the above and the fuller reasons in the lead judgment, I also sustain the preliminary objection and strike out the appeal for want of jurisdiction.

B

ARIWOOLA JSC

I had the privilege of reading in draft the lead judgment of my learned brother, Rhodes-Vivour, JSC just delivered. I am in agreement with his reasoning and the conclusion arrived thereat.

The preliminary objection on the competence of this court to hear the matter when the 1999 Constitution (as amended) says the Court of Appeal shall have the final say on the matter, is sustainable, and is hereby sustained. It renders the appeal liable to striking out. This court by virtue of Section 246 (3) of the 1999 Constitution has no jurisdiction on the subject of the appeal. Accordingly, I also strike out the appeal.

E

MUHAMMAD JSC

On having a preview of the lead judgment of my learned brother Rhodes-Vivour, JSC, just delivered, I agree with his lordship that the appeal is incompetent I join him in striking out the appeal.

It must be stressed that this court has held in very many decisions, some of which has been copiously alluded to in the lead judgment, that by virtue of section 246(3) of the 1999 Constitution (as amended) decisions of the court below pertaining the election which brought about the instant appeal are final. In other words, this court lacks the vires to entertain any appeal from the decision of the court below arising from the election to which subsection 3 of section 246 relates. The court remains bound by these decisions.

For the foregoing and the fuller reasons contained in the lead judgment I also strike out the purported appeal and abide by the consequential orders made in the lead judgment.