

SUPREME COURT OF NIGERIA
FRIDAY 19TH DECEMBER, 2014. SC. 475/2011
**CORAM:- M. MOHAMMED CJN, M. S. MUNTAKA-
COOMASSIE, B. RHODES-VIVOUR, N. S. NGWUTA,
J. I. OKORO, JJSC**

DR. CHIGBO SAM ELIGWE APPELLANT
AND
1. OKPOKIRI NWANAKA OKPOKIRI
2. PEOPLES DEMOCRATIC PARTY RESPONDENTS
3. INDEPENDENT NATIONAL
ELECTORAL COMMISSION

APPEALS - Judgment - Correctness of - Once CA's decision is correct - SC cannot set it aside on the ground that reasons for the decision are wrong - As what matters is the conclusion arrived at (H1)

APPEALS - Briefs - Reply - Purpose of - It is not meant to repeat or emphasize arguments in appellant's brief - As repetition of argument does not improve its efficacy (H2)

ORDERS OF COURT - Consequential order - Meaning of - It is one which follows necessarily as being incidental to the principal order - And where the latter is refused - The former cannot be rightly made (H3)

ELECTIONS - Pre election - Jurisdiction - Is not ousted by Electoral Act 2010 s. 141 - As pre election can be nullified and order for fresh one made - But where not feasible aggrieved candidate can seek for damages (H4)

ELECTIONS - Pre election - Damages - Redress provided in Electoral Act 2010 s. 87(9) connotes political as well as civil remedy - Which is not extinguished by the conclusion of election (H5)

FACTS

1st respondent and appellant along with some others contested the Peoples Democratic Party primaries for nomination of its

candidate for the Ahoada West constituency seat in the Rivers State House of Assembly sometime in 2011. At the end of voting, 1st respondent who scored 118 votes was declared the winner against appellant who came second with 109 votes. 1st respondent was therefore screened and cleared to contest the election. Being dissatisfied with the outcome of the primary election, appellant approached the Federal High Court and sought relief to be declared the actual winner of the primaries. At the end of the hearing, the Federal High Court granted appellant the relief sought and directed INEC to accept the nomination of appellant as the candidate of 2nd respondent for the House of Assembly election.

Appellant therefore contested and won the election. He was issued with certificate of return before he was sworn in as a member of the Rivers State House of Assembly. Meanwhile, 1st respondent appealed against the judgment of the Federal High Court to the Court of Appeal Port Harcourt Division. Appellant in response, filed a notice of preliminary objection contending inter alia that the appeal had become academic as there was no live issue and that the court had no jurisdiction to entertain the appeal. The court dismissed the motion for objection in its entirety, assuming jurisdiction and granting leave to 1st respondent to file six additional grounds of appeal by way of amendment of the original grounds of appeal. Aggrieved, appellant lodged appeal in Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court below is right in over-ruling the appellant’s preliminary objection and in relying on the cases of Amaechi v. INEC (2008) 5 NWLR (Pt.1080) 227 and Obi v. INEC (2007) 11 NWLR (Pt.1046) 430 decided by this Court under repealed Electoral Act, 2006 without considering at all the effect of Section 141 of the Electoral Act, 2010 which has unambiguously changed the law and rendered the appeal pending at the Court below a futile academic exercise which the Court below has no jurisdiction to entertain?”

2. Whether the Court below is right in granting prayers 1 and 2 contained in the motion on notice filed on 6th June, 2011 by the first Respondent (who was the appellant in the Court below)?,”

HELD (Unanimously dismissing the appeal per NGWUTA JSC)

Judgment - Correctness of

1. What is in issue in this appeal is the propriety vel non of the Lower Court's order overruling the preliminary objection on the basis of Amaechi v. INEC (supra) and Obi v. INEC (supra) or at all. I say "at all" because once the Lower Court's decision is correct this court cannot set it aside just because the reasons for the decision are wrong. What matters is the conclusion at which the Lower Court arrived. (p. 3824 A)

APPEALS - Briefs - Reply - Purpose of

2. A reply brief is not meant to repeat or emphasize the arguments in the appellant's brief. After all, repetition of an argument does not improve its efficacy.

The respondent's brief has joined the respondent need not reopen issues with the appellant's brief and argument on the issues so joined, either by way of emphasis or expatiation. A reply to the respondent's brief, paragraph by paragraph, is not the essence of a reply brief. (p. 3831 B)

ORDERS OF COURT - Consequential order - Meaning of

3. Now, a consequential order in its ordinary meaning is an order following from the judgment.

It is essentially one which makes the principal order effective and effectual or which follows necessarily as being incidental to the principal order in the matter.

Where the principal order sought is refused an incidental order cannot be rightly made as there would be no principal order on which such incidental order can stand or lean. (p. 3832 C)

ELECTIONS - Pre election - Jurisdiction

4. With profound respect to the Silk, I do not share his views that the change in the law brought about by S.141 of the Electoral Act 2010 (as amended) has rendered the appeal at the

Court below a futile academic exercise or that the change in the law has ousted the jurisdiction of the Court below to hear the appeal.

It is contestable to argue that a pre-election matter must abate once the election is held and the winner sworn or that the mere fact that the election had been held and the winner inaugurated as a member of the legislative house for which the election was conducted, the Court has no jurisdiction in the pre-election matter relating to same. But that is not the case in view of S.87 (9) of the Electoral Act, 2010 (as amended). I shall say more on it later.

If the 1st respondent succeeds in the Court below, he would not, thanks to S.141 of the Electoral Act, be declared winner of the election in which he did not actually participate. His remedy will have the election declared null and void and a fresh election in which he will contest as his party's candidate ordered. But even if fresh election cannot be held due to time constraints, all is not lost as far as he is concerned.

As a matter of fact, the expiration of the term for which the election was conducted does not affect the jurisdiction of the Court to determine the pre-election matter, depending on the claim before the Court. An aspirant for elective office, who contested and won the primary election but was denied the opportunity to contest in the main election for which the primaries were conducted, has a claim in damages against the person or authority that prevented him from contesting the election.

The pre-election matter or appeal arising from same is not extinguished by the mere fact the election took place and the winner sworn-in as a member of the legislative house for which the election was held and from which the pre-election arose. To deny a person who contested and won the primary election the right to contest the main election is an infringement of the right he acquired by winning the primary election for which he can sue the person or authority concerned for damages.

I agree with the learned Counsel for the 1st respondent that S.141 of the Electoral Act, 2010 (as amended) does not ap-

ply against the 1st respondent in the circumstances of this appeal.

This automatically determines issue 2 in the appellant's and 1st respondent's briefs. Since the Court below has jurisdiction in the matter, it can validly make the order it made in favour of the 1st respondent.

Consequently, the appeal lacks merit and it is hereby dismissed. The Court below is to continue with the appeal before it. (pp. 3832 H/3834 G)

ELECTIONS - Pre election - Damages

5. Section 87(9) of the Electoral Act, 2010 (as amended) provides:

"S.87(9): Notwithstanding the provisions of this Act or rules of a political party an aspirant who complained that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election may apply to the Federal High Court or the High Court of a State or FCT for redress."

In my humble view, redress in the Section reproduced above connotes "political" as well as civil remedy and so it is not extinguished by the conclusion of the election or the inauguration of the person declared winner of the election, as in this case. The cause of action or right to seek redress subsists beyond the conclusion of the election and the inauguration of the winner. It therefore follows that the argument that the appeal has been rendered academic by the inauguration of the appellant as a member of the Rivers State House of Assembly is misconceived. (p. 3833 H)

REPRESENTATION

B. E. I. Nwofor (SAN) with J. N. Onyebuchi (Miss) and Chief Joshua E. Aibo, for the Appellant

M. S. Agwu Esq., O. J. Iheko (Miss), M. U. S. Amadi Opareli and Abdulaziz Sani, for the Respondents

CASES REFERRED TO

- Amaechi v. INEC (2008) 5 NWLR (pt. 1080) 227
 Obi v. INEC (2007) 11 NWLR (pt. 1046)
 Nwobodo v. Onoh (1984) 1 SCNLR 1
 Chukwuogor v. Chukwuogor (2006) 7 NWLR (pt. 979) 302
 B Egbe v. Alhaji (1990) 1 NWLR (pt. 128) 546
 Fawehinmi v. IGP (2007) 7 NWLR (pt. 767) 606
 Tanko v. Caleb (1999) 8 NWLR (pt. 616) 506
 Amadi v. NNDC (2000) 10 NWLR (pt. 674) 76
 C Newswatch Comm. Ltd v. Attah (2006) 12 NWLR (pt. 993) 144
 Hart v. Igbi (1998) 10 NWLR (pt. 508) 28
 University of Calabar v. Essien (1996) 10 NWLR (pt. 477) 247
 Kuti v. Jibowu (1970) 6 SC 147
 Abubakar v. Yar'adua (2008) All FWLR (pt. 404) 1409
 D Adeosu v. Fashosben (2008) 5-6 SC (pt. 1) 23
 Governor of Lagos State v. Ojukwu (1986) 1 NWLR (pt. 18) 621

STATUTES & RULES REFERRED TO

- Electoral Act 2010 (as amended), ss. 87(9), 133(1)(2), 138(1)(A),
 E 141
 Evidence Act 2011, ss. 89(e), (90)(i)(c)
 Constitution of the Federal Republic of Nigeria (as amended) 1999,
 ss. 240, 241(1)(a)
 F Court of Appeal Rules 2011, O. 6 rr. 2(4), 15

LEAD JUDGMENT BY NGWUTA JSC

- On 3rd January, 2011 the Peoples Democratic Party (PDP),
 the 2nd Respondent in this appeal, held its primary election to nomi-
 G nate its candidate for the Ahoada west constituency seat in the Rivers
 State House of Assembly. The primary election was held at the Ahoada
 West Local Government Council Secretariat at Akinima. One Mr.
 Sunny Daniel was the Returning officer. He was assisted by one Bar-
 rister Kingsley Ajuzieogu.
 H Appellant and 1st Respondent contested the primary elec-
 tion along with seven other contestants. The result of the primary
 election, as declared by the Returning Officer, showed that the 1st
 Respondent scored a total of 118 votes against the appellant's 109
 votes and consequently, he, 1st Respondent, was declared winner

by the Returning Officer.

Following his victory at the primary election, 1st Respondent was presented the flag of his party, PDP, by the Governor of Rivers State. The Party, PDP (2nd Respondent) submitted his name to the Nation's Electoral Umpire, the 3rd Respondent, as nominated candidate of the 2nd Respondent to contest the election for the Ahoada West seat in the Rivers State House of Assembly. B

Not satisfied with the result of the primary election, the appellant herein wrote two petitions the next day, 4th January, 2011. The first of the two petitions was addressed to the Chairman of the 2nd Respondent's "Panel of Appeal". He complained of "Irregularities and over voting" in the 3rd January primary election. C

The second petition, also addressed to the 2nd Respondent's "Panel of Appeal" protested that the 1st Respondent was not qualified to contest the primary election. This complaint was found on the grounds: D

(1) That the 1st Respondent was not a registered and card carrying member of the 2nd Respondent at the time of the primary election, and

(2) That the 1st Respondent had not attained the age of 35 E years at the time of the primary election, among others.

It is interesting to note that on the said 4th January, 2011 the Returning Officer, Mr. Sunny Daniel, contrary to his declaration the previous day that the 1st Respondent won the primary election conducted on 3rd January, 2011 wrote to the 2nd Respondent's "Panel of Appeal" that whereas 264 delegates were accredited to vote, 280 F votes were recorded, leading to the conclusion that 16 un-accredited delegates voted at the primary election. The records do not show for whom the un-accredited delegates cast their votes, having in mind G that a total of nine aspirants contested the primary election.

In view of the two complaints he made and the report of the Returning Officer, the appellant urged the Chairman of the 2nd Respondent's "Appeal Panel" to "use your good office to critically look into the matter and let justice be done." H

Apparently not satisfied with the steps, if any, being taken by the "Appeal Panel" of the 2nd Respondent, the appellant approached the Federal High Court on 14th February, 2011 by way of Originating Motion in a bid to overturn the declaration of the 1st Respondent

as the winner of the primary election and for himself to be declared winner of the said election.

The learned trial Judge delivered judgment in the case on 21st April, 2011 granting the reliefs sought by the appellant in the originating motion. His Lordship ordered the 2nd Respondent to forward the name of the appellant to the 3rd Respondent as its candidate for the election slated for 26th April, 2011 and the 3rd Respondent was also ordered to accept the appellant as the 2nd Respondent's candidate.

In apparent show of respect for the Court and rule of law, the 2nd Respondent submitted the name of the appellant to the Electoral Umpire by a letter received by the 3rd Respondent on 25/04/2011, the eve of the election slated for 26/4/2011.

On 21/4/2011 after the Federal High Court delivered its judgment, the 1st Respondent filed an appeal before the Court of Appeal Port Harcourt. He also filed a motion for a stay of the execution of the judgment pending the determination of the appeal. The notice of appeal and the motion for a stay of execution were served on the 3rd Respondent but in spite of the service of the processes on it, the 3rd Respondent held the election as scheduled on 26/4/2011 with the appellant as the candidate of the 2nd Respondent.

The appellant was declared winner of the election by the 3rd Respondent. He was duly sworn in as a member representing Ahoadia West in the Rivers State House of Assembly. On account of his inauguration, the appellant (as respondent in the appeal filed by the 1st Respondent in the court of Appeal, filed a notice of preliminary objection, arguing that the appeal had become academic as there was no live issue, that the court below had no jurisdiction and the motion for leave to file additional grounds should be struck out as the appeal was dead.

The court below dismissed the motion in its entirety, assuming jurisdiction and granting leave to the 1st Respondent (as appellant in the appeal) to file six additional grounds of appeal by way of amendment of the original grounds of appeal.

The appellant was aggrieved and appealed to this court on five grounds of appeal from which the following two issues were isolated for resolution:

"1. Whether the Court below is right in over-ruling the

appellant's preliminary objection and in relying on the cases of Amaechi v. INEC (2008) 5 NWLR (Pt.1080) 227 and Obi v. INEC (2007) 11 NWLR (Pt.1046) 430 decided by this Court under repealed Electoral Act, 2006 without considering at all the effect of Section 4 of the Electoral Act, 2010 which has unambiguously changed the law and rendered the appeal pending at the Court below a futile academic exercise which the Court below has no jurisdiction to entertain?

2. Whether the Court below is right in granting prayers 1 and 2 contained in the motion on notice filed on 6th June, 2011 by the first Respondent (who was the appellant in the Court below)?,"

From the appellant's five grounds of appeal, the first respondent, in his brief of argument, distilled the following two issues for determination:

"1. Whether the Court below was right when it came to the conclusion, based on the decision in Amaechi v. INEC (2008) 5 NWLR (Pt.1080) 227 and Obi v. INEC (2007) 11 NWLR (Pt.1046) that its jurisdiction to hear and determine this pre-election appeal is not ousted by the purported subsequent declaration and swearing-in of the appellant as the winner of the election into the Rivers State House of Assembly for Ahoada West Constituency seat which events took place whilst the appeal was pending before the Court below. (Distilled from grounds 1 and 2 of the Respondent's grounds of appeal).

2. Whether the Court below was right in its decision granting the 1st Respondent (as appellant before the Court) leave to file additional grounds of appeal and to amend its notice of Appeal by incorporating therein the said 6 additional grounds in all the circumstances of this case?" (Distilled from grounds 3, 4 and 5 of the appellant's grounds of appeal).

On its own part, the 2nd Respondent, in its brief of argument, isolated a single issue for determination. The issue reads:

"1. Granted that the appellant's winning the election of 26/4/2011 and his swearing-in did not oust the Court of Appeal's jurisdiction. Will the provisions of s.141 of the Electoral Act, 2011 (as amended) not have the effect of rendering the appeal before the Court below otiose and an academic exercise?"

The 3rd Respondent (INEC) filed no brief. Learned counsel for the appellant filed replies to the 1st and 2nd respondents' brief.

What is in issue in this appeal is the propriety vel non of the Lower Court's order overruling the preliminary objection on the basis of Amaechi v. INEC (supra) and Obi v. INEC (supra) or at all. I say "at all" because once the Lower Court's decision is correct this court cannot set it aside just because the reasons for the decision are wrong. What matters is the conclusion at which the Lower Court arrived. Notwithstanding the simple and narrow issue in this appeal, learned senior counsel for the appellant deemed it necessary to present a brief replete with verbosity and unnecessary details. From the learned Senior Counsel's wordy argument, I will take only so much as is required to settle the issue in dispute one way or the other.

Arguing issue 1 in his brief, learned Silk for the appellant properly identified the issue in the appeal as whether or not the court below was right in overruling the preliminary objection to the appeal before it. He said that the cases of Amaechi v. INEC (supra) and Obi v. INEC (supra) upon which the Lower Court relied in dismissing the preliminary objection were decided under the repealed Electoral Act, 2006, adding that the Lower Court failed or neglected to consider S.141 of the Electoral Act, 2010 which he said rendered the appeal a futile academic exercise and deprived the court of jurisdiction to hear the appeal.

Placing reliance on Nwobodo v. Onoh & 2 ors (1984) 1 SCNLR 1 on page 25, learned senior counsel argued that the Repealed Electoral Act, 2006 under which the cases of Amaechi v. INEC and Obi v. INEC were decided and which cases were relied on by the lower court in dismissing the preliminary objection did not contain any provision similar to Section 141 of the Electoral Act, 2010. He added that the two cases decided under the Repealed Electoral Act, 2006 are no authority to be relied on in this case decided under Electoral Act, 2010 (as amended).

Relying on a plethora of cases such as Chukwuogor & 3 ors v. Chukwuogor & 2 Ors (2006) 7 NWLR (pt.979) 302 at 316 (paras B to C); Egbe v. Alhaji (1990) 1 NWLR (Pt.128) 546; Fawehinmi v. IGP (2007) 7 NWLR (Pt.767) 606, he argued that the Lower Court was in error to have ignored the clear and unambiguous language of S.141 of the Electoral Act, 2010 and applied same to the matter before it.

He contended that the principle of “stepping into shoes” employed by this Court in Amaechi’s case is no longer the law in view of the provision of S.141 of the Electoral Act, 2010. He relied on National (2008) 5 NWLR (Pt.1081) 519 p.540 paras D-G; Tanko v. Caleb & 3 Ors (1999) 8 NWLR (Pt.616) 506; Amadi v. NNDC (2000) 10 NWLR (Pt.674) 76, among others, in his contention that the use of the phrase “shall not under any circumstances” is mandatory and admits of no discretion. B

Learned senior counsel referred to suit No.FHC/PH/CS/114/2011 in which the trial court delivered judgment on 21st April, 2011 deciding that the appellant is the rightful candidate of the PDP and based on the said judgment, the appellant contested the election, won the election and was issued a certificate to that effect and was sworn-in as a member of the Rivers State House of Assembly, thus implying that even if the appeal was decided in favour of the appellant in the Lower Court, the circumstances are such that he cannot call in aid of S.141 of the Electoral Act, 2010. C D

He argued that the issue of who, between the appellant and the respondent, is the rightful candidate in the election is no longer a live issue between the parties and the court is without jurisdiction to determine same. E

Learned senior counsel contended that the appeal in the Lower Court is indirectly questioning the election of the appellant on the ground that he was not qualified to contest the election under S.138(1)(A) of the Electoral Act, 2010 a matter which he argued can only be canvassed in Election petition. He characterized the appeal before the Lower Court as “undisguised illegal election petition through the back door” and urged the Court to sustain the preliminary objection and strike out the appeal in the Court below. F G

In issue 2, the Silk argued that the motion granted by the Court below was predicated on an incompetent appeal and, ipso facto, is therefore incompetent and should not have been granted. He referred to prayer 1 in the motion and said the same is incompetent as the Court of Appeal Rules, 2011 has no provision for leave to file additional grounds of appeal. He referred to Newswatch Communications Ltd v. Alhaji Ibrahim Atta (2006) 12 NWLR (Pt.993) 144 at page 179 paragraph F where it was held that: H

“An application not recognised by the rules of Court cannot be

described as a proper application.”

He referred to Order 6 Rule 15 of the Court of Appeal Rules, 2011 that “a notice of appeal may be amended by or with the leave of court at any time” and contended that the failure or neglect of the appellant to exhibit the certified true copy of the notice of appeal sought to be amended rendered the relief incompetent. He added that the notice of appeal annexed to application for leave to file and argue additional grounds of appeal must be either an original or certified. He invoked the provisions of Sections 89(e) and (90)(i)(c) of the Evidence Act, 2011.

He relied on *Dangote v. Civil Service Commission, Plateau State & 2 Ors* (2001) 9 NWLR (Pt.217) 132 at 161 - 162 paragraphs H to A; *Hart v. Igbi* (1998) 10 NWLR (Pt.508) 28, among others, in his contention that the Lower Court ought to have denied the application since the applicant failed to provide the materials necessary for the Court to exercise its discretion in his favour.

He said the Court below erred in falling back on Order 20 Rules (2) on waiver of compliance and said issue of waiver of compliance will not arise in absence of provision in the rules requiring compliance. Relying on *University of Calabar v. Dr. Okon J. Essien* (1996) 10 NWLR (Pt.477) 247 paragraph F to H page 248 paragraph A; *Kuti v. Jibowu* (1970) 6 SC 147 at pages 772-173 and impugned the decision of the Court below in raising the issue of waiver suo motu and settling the issue without affording the parties opportunity to address the Court on the issue so raised.

He contended that the appellant in the Court below, having failed to comply with the rules of Court cannot be heard to canvass the omnibus ground of substantial justice. Finally, learned Senior Counsel urged the Court to resolve the two issues he formulated in the negative for the following reasons:

“1. The appeal before the Court below is incompetent and invalid and the Court below lacks jurisdiction to entertain it since it is merely academic.

2. The preliminary objection to the hearing of the appeal in the Court below is sound and unanswerable and should therefore be upheld.

3. The decision of the Court below which overruled the objection is clearly erroneous and cannot be supported and should be

set aside, and

4. This appeal has substantial merit and should therefore be allowed.”

In issue 1 in his brief, learned Counsel for the 1st respondent referred to pages 7 to 26 of the Appellant’s brief and said that the appellant’s case is that the 1st respondent’s appeal before the Court below is devoid of any live issue worthy of judicial consideration in view of the fact that the decision of the trial Court appealed against has been fully complied with by the swearing-in of the appellant as a member of the Rivers State House of Assembly and that in view of S.141 of the Electoral Act, 2010 (as amended) the 1st respondent cannot be declared winner of the election even if the substantive appeal succeeds.

Learned Counsel for the 1st respondent submitted that appellant’s argument is misconceived and erroneous in law. He contended that the pre-election matter from which this appeal arose was brought before the trial Court pursuant to Section 87 (9) of the Electoral Act, 2010 (as amended). He added that the decision of the trial Court against which the 1st respondent appealed to the Court below falls within Section 240 and 241 (1) (a) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). He argued that the right of appeal granted in the above sections of the Constitution cannot be taken away by any statute or even the Courts. He relied on and of *Abubakar v. Yar’adua* (2008) All FWLR (Pt.404) 1409 at 1439 paragraph E-G.

He contended that contrary to the position taken by the appellant, the constitutional right of appeal under the Constitution cannot be fettered or ousted by the subsequent election at which the appellant was returned, the issuance of certificate of return, his inauguration as a member of the Rivers State House of Assembly or the provision of S.141 of the Electoral Act, 2010 as amended.

Learned Counsel made the point that all the processes in the appeal and the application for a stay of execution of the judgment of the trial Court were served on the parties and the Court was aware of same. He contended that parties in the trial Court should have maintained the status quo to avoid foisting on the appellant Courts a fait accompli.

He re-emphasized the fact that the 2nd and 3rd respondents

were well aware of the pendency of the appeal and the motion for stay of execution but defiantly, the 2nd respondent submitted the name of the appellant to the 3rd respondent which received same, conducted the election with the appellant as a candidate, declared him winner and issued him a certificate of return and inaugurated him as a member of the Rivers State House of Assembly for the Ahoada West Constituency.

Learned Counsel maintained that the electoral umpire in collusion with the appellant and the 2nd respondent acted in violation of established rules of procedure and urged the Court not to hesitate to hold that the respondents ought to have maintained the status quo pending the determination of the appeal before the Lower Court. He relied on *Peter Obi v. INEC* (2007) 11 NWLR (Pt.1046) 565 at 672 paragraphs B-E; *Adeosu v. Fashosben* (2008) 5-6 SC (Pt.1) 23 at 41; *Governor of Lagos State v. Ojukwu* (1986) 1 NWLR (Pt.18) 621 at 636-638; *Ezeebu v. FATB Ltd* (1992) 1 NWLR (Pt.220) 699 at 724-725. He urged the Court not to allow the appellant to profit from his own acts of impunity and wrongdoing. He relied on *Odedo v. INEC* (2008) 17 NWLR (Pt.1117) 554 at 601 in his contention that “*a pre-Election matter cannot be said to be one of mere academic exercise. On the contrary, it is a life issue.*”

He referred to and relied on the dictum of Tabai, JSC to the effect, inter alia:

“*The respondents cannot by doing what is sought to be prevented turn round to plead that the action has become merely academic. That would amount to their determination of the rights and obligation of the appellants. That cannot be.*” (See page 623 of the record).

With reference to the case of *Amaechi v. INEC* (supra), learned counsel said that all that the Court of Appeal did in its ruling was to come to the conclusion that the jurisdiction of the court is not ousted by a declaration and inauguration of the appellant as a member of Rivers State House of Assembly. He referred to page 315, paragraph B of the judgment where Oguntade, JSC, held inter alia that:

“*The jurisdiction of the ordinary Courts to adjudicate in pre-election matters remains remain (sic) intact and unimpaired by Sections 178 (2) and 285 (2) of the 1999 Constitution.*”

Learned counsel contended that nothing in S.141 of the Electoral Act, 2010 as amended can be construed as fettering or ousting the jurisdiction of civil courts in the determination of pre-election dispute once an election is held or an inauguration obtained as in this case. He relied on *Uyovwukerhi v. Afonughe* (1976) 4 SC 918 at 105. He relied also on *Abioye v. Yakubu* (1991) 5 NWLR (Pt.190) B 130 at 205 paragraphs F-H.

Learned Counsel reproduced and relied on relief No.8 in the appellant's originating motion in the Federal High Court and argued that having founded his case on *Amaechi v. INEC* (supra) and *Obi v. INEC* (supra), thus accepting that the jurisdiction of the trial Court in pre-election matters is not affected by the holding of the election and/or subsequent inauguration of the winner, it is too late in the day for the appellant to change his position and argue to the contrary. He referred to *Bisimillahi v. Yagba-East Local Government* (2009) FWLR D (pt.141) page 1939 at 1966 where it was held that:

"...a declaration will be granted even when the relief has been rendered unnecessary by the lapse of time for the action to be tried if at the time the action was brought, it raised substantial issues of law."

He urged the Court to resolve issue 1 in the 1st respondent's brief in the affirmative and to dismiss the appeal with substantial and punitive costs.

In issue 2, learned Counsel for the 1st respondent stated the two grounds upon which the appellant attacked the 1st respondent's motion in the Court below:

"1. That the notice of appeal sought to be amended to reflect additional grounds was predicated on an incompetent appeal which the Court below had no jurisdiction to entertain."

2. That there is no provision in the Court of Appeal Rules, G 2011 for "An order granting leave to the Appellant/applicant to file six (6) additional grounds of appeal."

In the first ground of attack by the appellant, learned Counsel for the 1st respondent adopted the argument he addressed to issue 1. He added that the substantive appeal before the Court below is valid and subsisting and that the Court below has the jurisdiction to continue to entertain same and determine it on the merit irrespective of the subsequent holding of the election and the inauguration of the appellant as a member of the Rivers State House of

Assembly. He relied on *Amaechi v. INEC* (supra) and *Odedo v. INEC* (supra).

On the second ground of attack by the appellant, Counsel argued that it is not true that the Court of Appeal Rules do not provide for leave to file and argue additional grounds or that such application is unknown to the rules. On the contrary, he relied on Order 6 Rule 2(4) of the Court of Appeal Rules, 2011. He argued that the only way to introduce the additional grounds is motion for leave to file and argue additional grounds of appeal as done by the 1st respondent as appellant in the Court below.

He relied on *Tsokwa Martins v. Uba* (2008) 2 NWLR (Pt.107) 347 where the Court held that application for leave to file additional grounds of appeal was known to law. He relied also on *Aja v. Okoro* (1991) 7 NWLR (Pt.703) 260 at 272, 284.

On the appellant's complaint that a certified true copy of the notice of appeal ought to have been exhibited to the application, learned counsel argued that no rule requires that a certified copy of a process already before the court should be exhibited to the application before such an application can be granted.

He referred to and relied on *Nwankwo v. Nwankwo* (1993) 5 NWLR (Pt. 293) 281 at 287 paras A-C in support of the argument that since the document complained of already form part of the record of appeal before the Court, the application cannot be denied merely because a certified copy of the document is not exhibited. Learned Counsel urged the Court to resolve issue 2 against the appellant. Finally, learned Counsel urged the Court to dismiss the appeal with substantial costs.

Learned Counsel for the 2nd respondent had, in his brief, raised the issue of whether or not S.141 of the Electoral Act 2011 (as amended) has the effect of rendering the appeal otiose and an academic exercise. He submitted that the facts that the appellant won the election of 26/4/2011 and his subsequent swearing-in do not have the effect of ousting the jurisdiction of the court of Appeal to hear and determine the 1st respondent's appeal.

He referred to s.87 (10) of the Electoral Act 2011 (as amended) and argued that the courts have unfettered jurisdiction to hear and determine complaints arising from a political party's primary election. He relied on *Osu v. Ekweremadu* (2005) All FWLR

(pt. 260) page 1 at pages 23-24; Adigbije v. Wogu (2011) All FWLR (pt.559) page 1006 at 1039 paras B-J. He contended that S.141 of the Electoral Act does not fetter or take away the jurisdiction of courts under S.87 (10) of the same Act.

Learned Senior Counsel for the appellant filed a reply to each of the briefs filed for the 1st and 2nd respondents. This is in consonance with Order 6 Rule 2 (5) of the Supreme Court Rules (as amended) but the contents of the reply briefs are another different issue.

A reply brief is not meant to repeat or emphasize the arguments in the appellant's brief. After all, repetition of an argument does not improve its efficacy. See Ogbu & Anor v. The State (2007) 2 SC 273.

The respondent's brief has joined the respondent need not reopen issues with the appellant's brief and argument on the issues so joined, either by way of emphasis or expatiation. See Ochemaje v. The State (2008) 6-7 SC (Pt.11) page 1.

A reply to the respondent's brief, paragraph by paragraph, is not the essence of a reply brief.

In substance, issue 1 in each of the briefs filed on behalf of the appellant and 1st and 2nd respondents is the same. The central point of the issue is whether or not the Court below had jurisdiction to hear the appeal arising from a pre-election matter after the election had been held and the winner sworn-in as a member of the Legislative House for which the election was held. The second issue in the appellant's and 1st respondent's brief will abide the determination of issue 1.

In Amaechi v. INEC (2008) 5 NWLR (Pt.1080) 227, one of the cases cited and relied on by the appellant to say that the Court below had no jurisdiction to hear the appeal and by the 1st respondent in the argument that the Court below had jurisdiction to determine the appeal the matter, like the one at hand, was a pre-election matter. The main issue in the case was who was the rightful candidate of the PDP in the Gubernatorial election of 2007, Amaechi who won the primaries conducted by the PDP or the person with whom he was replaced by the PDP and who actually contested and won the election?

Notwithstanding the fact that Amaechi's replacement actually

contested and won the election and was already inaugurated as Governor of Rivers State, this Court did not decline jurisdiction but declared that the appellant was the rightful candidate of PDP at the election. This is the aspect of the case that is relevant to the issue in contention in this appeal.

B In my view, the order of this Court by which Amaechi became the Governor of Rivers State following the 2007 Governorship election which he did not actually contest, was a consequential order following and emphasizing the determination that Amaechi who won the primary election conducted by the PDP was the party's rightful candidate who should have contested the election on the platform of the party.

Now, a consequential order in its ordinary meaning is an order following from the judgment. See *Obayegbona v. Obazee* D (1972) 5 SC 247; *Mimah v. VAB Petroleum Inc* (2000) FWLR 810. ***It is essentially one which makes the principal order effective and effectual or which follows necessarily as being incidental to the principal order in the matter.***

E ***Where the principal order sought is refused an incidental order cannot be rightly made as there would be no principal order on which such incidental order can stand or lean.*** See *Ofondu v. Niweigha* (1993) 2 KLR 1; *Olurofemi v. Ise* (1993) 12 KLR 80; *Registered Trustees of Apostolic Church v. Okoro Lemi* (1990) 6 NWLR (pt.158) 514.

F In any case, the consequential order made in Amaechi's case can no longer be granted under the Electoral Act 2011 as amended. Section 141 thereof provides:

G *"S.141: An electoral tribunal or Court shall not under any circumstance declare any person a winner at an election in which such a person has not fully participated in all the stages of the said election."*

The learned Silk for the appellant has argued with considerable heat that the above reproduced section of the Electoral Act:

H *"...has unambiguously changed the law and rendered the appeal pending at the Court below a futile academic exercise which the Court below has no jurisdiction to entertain."*

With profound respect to the Silk, I do not share his views that the change in the law brought about by S.141 of the Elec-

toral Act 2010 (as amended) has rendered the appeal at the Court below a futile academic exercise or that the change in the law has ousted the jurisdiction of the Court below to hear the appeal.

It is contestable to argue that a pre-election matter must abate once the election is held and the winner sworn or that the mere fact that the election had been held and the winner inaugurated as a member of the legislative house for which the election was conducted, the Court has no jurisdiction in the pre-election matter relating to same. But that is not the case in view of S.87 (9) of the Electoral Act, 2010 (as amended). I shall say more on it later.

If the 1st respondent succeeds in the Court below, he would not, thanks to S.141 of the Electoral Act, be declared winner of the election in which he did not actually participate. His remedy will have the election declared null and void and a fresh election in which he will contest as his party's candidate ordered. But even if fresh election cannot be held due to time constraints, all is not lost as far as he is concerned.

As a matter of fact, the expiration of the term for which the election was conducted does not affect the jurisdiction of the Court to determine the pre-election matter, depending on the claim before the Court. An aspirant for elective office, who contested and won the primary election but was denied the opportunity to contest in the main election for which the primaries were conducted, has a claim in damages against the person or authority that prevented him from contesting the election.

The pre-election matter or appeal arising from same is not extinguished by the mere fact the election took place and the winner sworn-in as a member of the legislative house for which the election was held and from which the pre-election arose. To deny a person who contested and won the primary election the right to contest the main election is an infringement of the right he acquired by winning the primary election for which he can sue the person or authority concerned for damages.

Section 87(9) of the Electoral Act, 2010 (as amended)

provides:

“S.87(9): Notwithstanding the provisions of this Act or rules of a political party an aspirant who complained that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election may apply to the Federal High Court or the High Court of a State or FCT for redress.”

The first respondent who claimed he was nominated but denied the right to contest the election approached the High Court of Rivers State to seek redress under the Section of the Act reproduced above. His right to “political remedy” consists of having the election declared null and void for him to contest a fresh election as the rightful candidate of his party. It does not include his being declared winner of the election in which he did “not fully participate in all the stages of the said election in terms of s.141 of the Act. If for any reason, such as time constraints, it is impracticable to conduct a fresh election, the aggrieved aspirant may seek redress outside the political arena. He can seek damages for the wrong done to him by the denial of his right to contest the election for which he was duly nominated.

In my humble view, redress in the Section reproduced above connotes “political” as well as civil remedy and so it is not extinguished by the conclusion of the election or the inauguration of the person declared winner of the election, as in this case. The cause of action or right to seek redress subsists beyond the conclusion of the election and the inauguration of the winner. It therefore follows that the argument that the appeal has been rendered academic by the inauguration of the appellant as a member of the Rivers State House of Assembly is misconceived.

I agree with the learned Counsel for the 1st respondent that S.141 of the Electoral Act, 2010 (as amended) does not apply against the 1st respondent in the circumstances of this appeal.

This automatically determines issue 2 in the appellant’s and 1st respondent’s briefs. Since the Court below has jurisdiction in the matter, it can validly make the order it made in

favour of the 1st respondent.

Consequently, the appeal lacks merit and it is hereby dismissed. The Court below is to continue with the appeal before it. Parties to bear their respective costs.

Appeal dismissed.

B

MOHAMMED CJN

I have been privileged before today of reading the lead judgment just delivered by my learned brother Ngwuta JSC in this appeal. I entirely agree with the reasoning and ultimate conclusion arrived at in resolving the issues placed before this court by the Appellant for the determination of this appeal.

C

The facts giving rise to the dispute between the parties in this appeal, are not quite plain in this pre-election matter. The 1st Respondent and the Appellant with others contested the Peoples Democratic Party (P.D.P) primaries for nomination of its candidate for the Ahoada west constituency seat in the Rivers State House of Assembly held on 3rd January, 2011. At the close of voting the same day, the 1st Respondent who scored 118 votes was declared winner against the Appellant who came second with 106 votes. The 1st Respondent who filled and submitted his nomination Form, was screened and cleared to contest the election. The Appellant who was not satisfied with the outcome of the primaries went to the Federal High court and sought relief to be declared the actual winner of the primaries conducted on 3rd January, 2011. At the end of the hearing, the Federal High court granted the Appellant the relief sought and directed INEC to accept the nomination of the Appellant as the candidate of the 2nd Respondent for the April election into the Rivers state House of Assembly. The Appellant therefore contested and won the election. He was issued with certificate of return before he was sworn in as a member of the Rivers State House of Assembly.

E

F

G

Meanwhile, the 1st Respondent appealed against the judgment of the Federal High Court to the Court of Appeal. At the hearing of the appeal, the Appellant who was the 1st Respondent at the Court of Appeal raised an objection to the competence of the appeal, which objection was heard and dismissed by that court to give rise to the present interlocutory appeal to this court by the Appellant.

H

The issues raised in the Appellant's brief of argument are:

B "1. *Whether the Court below is right in over-ruling the appellant's preliminary objection and in relying on the cases of Amaechi v. INEC (2008) 5 NWLR (Pt.1080) 227 and Obi v. INEC (2007) 11 NWLR (Pt.1046) 430 decided by this Court under repealed Electoral Act, 2006 without considering at all the effect of Section 141 of the Electoral Act, 2010 which has unambiguously changed the law and rendered the appeal pending at the Court below a futile academic exercise which the Court below has no jurisdiction to entertain.*

C "2. *Whether the Court below is right in granting prayers 1 and 2 contained in the motion on notice filed on 6th June, 2011 by the first Respondent (who was the appellant in the Court below)."*

D The main question from the 1st issue is whether the Federal High Court whose jurisdiction to hear and under Section 87(9) of Electoral Act 2010 (as amended), can be deprived of that jurisdiction by the provisions of Section 141 of the Electoral Act, 2010 (as amended).

Section 87(9) of the Electoral Act states -

E "“(9) *Notwithstanding the provisions of the Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court or the High Court of a State or F.C.T. for redress.*”

G The Appellant no doubt, as an aspirant who complained that his right had been violated in the conduct of the party Primaries which produced the 1st Respondent as a candidate of the 2nd Respondent for the April, 2011 election, was heard at the Federal High Court which granted him reliefs against the 1st Respondent, the court of Appeal to which the 1st Respondent sought refuge to ventilate his grievances against the judgment of the Federal High court, cannot be said to have no jurisdiction in the 1st Respondent's appeal because H of Section 141 of the Electoral Act 2010 (as amended)! What section 141 provides in plain language is simply meant to take care of the position of candidates who for whatever reason have not fully participated in all the stages of election to turn round in an election petition and claim to be returned as duly elected. The Section states -

“141. An Election Tribunal or Court shall not under any circumstance declare any person a winner at an election in which such person has not fully participated in all the stages of the said election.”

The section is clearly directed at an Election Tribunal or a Court like the Court of Appeal exercising their first instance jurisdiction in the hearing and determination of election petitions brought by aggrieved candidates at the conclusion of an election. This position is traceable to the provision of Section 133(1) and (2) of the Electoral Act 2010 (as amended) which states -

“133(1) No election and return at an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or undue return (in this Act referred to as an “election petition”) presented to the competent Tribunal or Court in accordance with the provisions of the Constitution or of this Act, and in which the person elected or returned is joined as a party.

(2) In this Section “Tribunal or Court” means -

(a) in the case of Presidential Election, the Court of Appeal; and

(b) In the case of any other election under this Act the election Tribunal established under the Constitution or by this Act.”

Thus, by necessary extension, the word “Court” in Section 141 of the Electoral Act is not referring to any court in Nigeria other than the court of Appeal which has been conferred with exclusive jurisdiction under the 1999 Constitution of the Federal Republic of Nigeria (as amended) and the Electoral Act, 2010 (as amended) to hear and determine election petitions arising from Presidential Election conducted by the Independent National Electoral commission under the constitution and the Electoral Act.

The section is not directed at regular courts which have been conferred with jurisdiction to hear and determine candidates complaints arising from the conduct of primaries by political parties to produce or nominate candidates for the parties to contest election. Therefore the appeal brought by the 1st Respondent to the Court of Appeal Port-Harcourt from the decision of the Federal High court in a pre-election matter brought under Section 87(9) of the Electoral Act 2010 (as amended), is certainly properly before the Court of Appeal for hearing and determination in the normal exercise of its Appellate jurisdiction under Section 240 of the 1999 constitution (as

amended) to hear appeals from decisions of the Federal High court in all cases including decision arising from pre-election matters notwithstanding the provisions of Section 141 of the Electoral Act, 2010 (as amended).

Although the Appellant is relying heavily on decision of this Court in the case of C.P.C. Ombugadu (2013) 18 N.W.L.R. (pt.1385) 66 at 119 - 120, that the 1st Respondent pending appeal at the Court of Appeal is no longer a live issue, that case is not directly relevant to the present case because in that case, it was the substantive appeal that came to the Supreme Court for hearing without leaving any pending appeal at the Court of Appeal, as in the present case.

In any case the substantive appeal by the 1st Respondent is still pending at the Court of Appeal waiting to be heard and determined by that court on the merit. This court certainly has no jurisdiction to determine that pending appeal in this interlocutory appeal under any guise that the appeal is purely academic. No matter the exigencies or the frivolities or the vexatious nature of the substantive appeal, this court cannot hear the substantive appeal from the judgment of the Federal High Court which is now pending and awaiting hearing and determination by the court of Appeal. To succumb to the prayers of the Appellant to dismiss the Respondents' pending appeal on the ground that it is no longer alive but purely an academic exercise, is to usurp the jurisdiction of the Court of Appeal. Such usurpation will certainly amount to the violation of the Constitution of the Federal Republic of Nigeria 1999, an exercise which this court shall not allow itself to be dragged into under any guise. See *Irene Harriman v. Chief Hope Harriman* (1937) 3 N.W.L.R. (Pt.60) 244 at 257.

Looking at the situation in the present case from another angle is to say that this court being a creation of the constitution, cannot therefore for the sake of doing Justice, confer on itself a jurisdiction that is not given to it by the Constitution or by any statute. See *Alao v. African Cont. Bank* (2000) 9 N.W.L.R. (Pt.672) 264.

I therefore agree with my learned brother Ngwuta JSC that this appeal must be dismissed. Accordingly, I also dismissed the appeal and abide by the order on costs in the lead judgment.

MUNTAKA-COOMASSIE JSC

This is an appeal against the decision of the Court of Appeal Port-Harcourt Division hereinafter called court below.

At the initial stage it is to be noted that this is a pre-election matter. There is no doubt about it. One Dr. Chigbo Sam Eligwe and Okpokiri Nwanaka Okpokiri the 1st respondent and the appellant respectively with others contested the Peoples Democratic Party (PDP) primaries for nomination or sponsorship of its candidate for the Ahoada West Constituency seat in the Rivers State House of Assembly which was held on 3rd January 2011.

After counting the votes the 1st respondent, Okpokiri Nwanaka okpokiri, who scored the total votes of 119, was declared winner against the appellant, herein who scored votes and became second in the hierarchy. The 1st respondent was allowed to fill its nomination form for screening which was done and was cleared to contest the election. The appellant herein was aggrieved with the result of the primaries went to the Federal High court, herein called the trial Tribunal, and sought relief to be declared the “proper winner” of the primaries conducted on 3rd January 2011.

At the close of the hearing, fortunately or unfortunately, the trial court entered judgment in favour of the appellant Dr. Chigbo Sam Eligwe and granted all the reliefs sought and directed INEC to accept the nomination of the appellant as the proper candidate of the 2nd respondent, PDP for the April election into the Rivers State House of Assembly. The position now is this that the appellant contested and won the election. He was accordingly issued with “Certificate of return” before he was sworn-in as a member of the Rivers State House of Assembly.

Dissatisfied, the 1st respondent appealed to the Court of Appeal, Port-Harcourt Division hereinafter called court below as stated earlier.

During the hearing of the appeal the 1st Respondent, now appellant, raised a very serious objection to the competence of the appeal itself. The objection was heard and dismissed by the court below. That being the case, there is an interlocutory appeal to this court by the Appellant. Two issues were formulated by the Appellant thus:-

1. Whether the Court below is right in over-ruling the Appellant's preliminary objection and relying on the cases of Amaechi V. INEC (2008) 5 NWLR (Pt.1080) 227 and Obi V. INEC (2007) 11 NWLR (Pt.1046) 436 decided by this court under the Repealed Electoral Act, 2006 without considering at all the effect of Section 141 of the Electoral Act, 2010 which has unambiguously changed the law and rendered the appeal pending at the Court below a futile academic exercise which the court below has no jurisdiction to entertain.

2. Whether the court below is right in granting prayers 1 and 2 contained in the motion on notice filed on 6th June, 2011 by the 1st Respondent (who was the appellant in the court below).

It was clearly stated that the Court of Appeal i.e. Lower Court was right in its judgment and that there is nothing left for this court to decide upon. Appeal is therefore dismissed.

My Lord Ngwuta JSC has left no stone un-turned. I have therefore nothing more useful to add.

RHODES-VIVOUR JSC

I have had the privilege of reading in draft the leading judgment prepared by my learned brother, Ngwuta, JSC. I am in full agreement with his lordship reasoning and conclusions. I propose to add only a few observations on interlocutory appeals.

The appellant and the 1st respondent both members of the Peoples Democratic Party (PDP) contested the parties primaries held on 3/1/2011 to enable the party nominate its candidate for the Ahoada West Constituency seat in the Rivers State House of Assembly. At the end of the primaries the 1st respondent was declared the winner, having scored 118 votes. The appellant came in second with 109 votes. 1st respondent's name was submitted to the 3rd respondent (the Regulatory body charged with the conduct of Elections in Nigeria) as the PDP candidate for the General Elections for the Ahoada West seat in the Rivers State House of Assembly later in 2011.

Dissatisfied with the results of the primaries the appellant filed an action in the Federal High Court. In that action he prayed that the court declares him the winner of the PDP primaries held on 3/1/2011. The learned trial judge acceded to his prayer and declared him (i.e. the appellant) the winner of the primaries. His lordship ordered the

PDP to send the appellant's name to INEC (the 3rd respondent) as the PDP's candidate for the General Elections fixed for 26/4/2011. The PDP complied.

The appellant contested and won the election. He was sworn in as member of the Rivers State House of Assembly, representing Ahoada West Constituency. He is still there. B

Dissatisfied with the turn of events the 1st respondent filed an appeal against the judgment of the Federal High Court. Rather than defend the judgment of the Federal High Court on appeal the appellant filed a preliminary objection on the competence of the appeal. He contended therein that the Court of Appeal had no jurisdiction to hear the appeal as there was no live issue to be considered. The Court of Appeal dismissed the Preliminary Objection and assumed jurisdiction to hear the appeal. C

Disgruntled with the Ruling of the Court of Appeal dismissing his Preliminary Objection, the appellant filed this interlocutory appeal. The tenure of the Rivers State House of Assembly commenced in 2011 and would come to an end mid 2015. D

Primaries for the 2015 General Elections to enable Parties nominate their candidates for the new legislative house that would commence sitting in 2015, are already being held all over the country and the Court of Appeal has not heard the main appeal which is to decide who between the appellant and the 1st respondent is the PDP's authentic candidate for 2011 legislative elections, and this is as a result of this unnecessary interlocutory appeal. On these facts on interlocutory appeal would only be necessary if its success would bring the hearing of the substantive appeal to an end. E F

The better course would be to proceed with the hearing of the substantive appeal after the Ruling dismissing the Preliminary Objection on jurisdiction, since jurisdiction issue could be made or included as one of the grounds of appeal after judgment. This approach can only ensure that pre-election matters are dealt with speedily. Filing an interlocutory appeal on these facts amounts to playing for time, a waste of judicial time and litigants' resources. I said so in *Society Bic S.A. & 2 Ors v. Charzin Industries Ltd* 2014 2 SC (pt. ii) p.57. G H

For, this and the more detailed reasoning in the leading judgment I dismiss the appeal.

OKORO JSC

I read in advance the judgment of my learned brother, Nwali Sylvester Ngwuta, JSC just delivered with which I am in agreement that this appeal lacks merit and ought to be dismissed.

At the end of its primary election to nominate its candidate for the Ahoada West Constituency seat in the Rivers State House of Assembly, the 2nd Respondent declared the 1st Respondent winner with 118 votes as against the Appellant with 109 votes. Not being able to get the PDP appeal panel to reverse the result thereof, the appellant filed a suit at the Federal High Court by way of an originating motion seeking the reversal of the result of the primary election. The suit was filed on 14th February, 2017. The learned trial judge entered judgment for the appellant on 21st April, 2011, ordering the 2nd respondent to forward the name of the appellant to the Electoral Body (INEC), the 3rd respondent in this appeal. The 3rd respondent accepted the appellant as the candidate of the 2nd respondent for the election which held on 26th April, 2011.

On the 21st April, 2011 when the Federal High Court delivered the judgment, the 1st respondent filed an appeal at the Court of Appeal and followed it up with a motion for stay of execution. Before the appeal could be heard, the 3rd respondent conducted the election which the appellant won. He was subsequently sworn into office.

Before the hearing of the appeal at the court below, the appellant argued his notice of preliminary objection which he had filed, urging the court below to strike out the appeal for being an academic exercise since he had been sworn in. The Lower Court dismissed the objection. It is the dismissal of the objection which has given birth to this appeal.

For me, the main issue which would determine the appeal is issue one of the appellant which is also issue one as distilled by the 1st respondent. The sole issue by the 2nd respondent has the same tenor. I love the version as couched by the 1st respondent. It states:

“Whether the court below was right when it came to the conclusion, based on the decision in Amaechi V INEC (2008) 5 NWLR (Pt.1080) 227 and Obi V INEC (2007) 11 NWLR (Pt.1046) that its jurisdiction to hear and determine this pre-election appeal is not ousted by the purported subsequent declaration and swearing in of

the appellant as the winner of the election into the Rivers State House of Assembly for Ahoada West Constituency seat which events took place whilst the appeal was pending before the court below.”

The learned counsel for the appellant argued strenuously that the appeal of the 1st respondent herein pending at the Court of Appeal is now academic and devoid of any live issues worthy of any judicial consideration ostensibly because the appellant had been sworn into office, the 2nd and 3rd respondents having fully complied with the judgment of the trial high court in placing his name on the ballot. He further argued that by Section 141 of the Electoral Act 2010 (as amended), even if the 1st respondent (as appellant at the court below) wins the appeal, no benefit can avail him.

The 1st respondent, on the other hand submitted that the pre-election case initiated by the present appellant at the Federal High Court was brought pursuant to Section 87 (9) of the Electoral Act, 2010 (as amended) for which it can be heard on appeal to the apex court. He submitted further that the matter falls squarely with the category of civil proceedings recognized by law, thus bringing the decision of the trial court within matters which can be appealed to the Court of Appeal by virtue of Section 240 and 241 (a) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

There is no controversy that pre-election matters which are filed in the High Court before the holding of the elections can be heard up to the Supreme Court notwithstanding the holding of the election and declaration of results. See *Amaechi V INEC* (2008) 5 NWLR (Pt.1080) 227. Even where the winner of the election has been sworn into office that does not make the pre-election matter to abate or become an academic exercise.

Section 87 (9) of the Electoral Act, 2010 (as amended) provides a window of opportunity for aggrieved persons who participated in the primary election of parties to ventilate their grievances before the Federal High Court, High Court of a state or of the Federal Capital Territory. I agree with the learned counsel for the 1st respondent that matters arising from Section 87 (9) of the Electoral Act, 2010 (as amended) fall within matters which can be appealed against to the Court of Appeal and even to this Court. See Sections 240 and 241 (a) of the 1999 Constitution (as amended). Thus an appeal against a pre-election matter is constitutionally endowed. An

appellant in the circumstance of the 1st respondent should not be denied this right. In view of this, no court of law has the jurisdiction to take away from or deny an appellant his constitutional right to appeal. See *Abubakar V. Yar'adua* (2008) All FWLR (pt.404) 1409 at 1436 para E - G.

B I need to state here that it has not been alleged that the 1st respondent's appeal pending at the court below is incompetent. No such argument or feature has been suggested. Thus, the appeal appears competent and at this stage, the issue as to whether the 1st
C respondent would win or not does not arise. The question is whether the jurisdiction of the court below is ousted in view of the decision of this court in *Amaechi V INEC* (supra). Although by reason of the new Section 141 of the Electoral Act 2010 (as amended) an election tribunal or court shall not, under any circumstance declare any person
D a winner at an election in which such a person has not fully participated in all the stages of the said election, that provision does not operate to oust the jurisdiction of the court. An appellant who wins his appeal and is adjudged as the candidate of his party can be ordered to participate in a re-run or by-election and he being the
E candidate of his party.

It is my view that the Court of Appeal was right to dismiss the preliminary objection of the appellant herein and hold that it has the requisite and unfettered jurisdiction to continue to hear the 1st
F respondent's appeal before it. It is on this note and in view of the detailed reasons articulated in the lead judgment that I agree with my learned brother, Nwali Sylvester Ngwuta, JSC that this appeal has no merit at all. Accordingly, I also dismiss this appeal and order that the court below continue with the hearing and determination of the 1st
G respondent's appeal before it. I abide by the order as to costs.

H