

SUPREME COURT OF NIGERIA
FRIDAY 19TH DECEMBER, 2014. SC. 131/2013
CORAM:- W. S. N. ONNOGHEN, S. GALADIMA,
M.U. PETER-ODILI, O. ARIWOOLA, K.B. AKA'AH, JJSC

CHIEF AMEKE CHRISCATO

IKECHUKWU

..... APPELLANT

AND

1. HON. TONY NWOYE

2. INDEPENDENT NATIONAL

ELECTORAL COMMISSION (INEC) RESPONDENTS

ELECTIONS - Certificate of return - Nullification - After the conduct of an election - Election tribunal has jurisdiction to invalidate the certificate - And may direct that the same be issued to another candidate (H1)

ORDERS OF COURT - Mandamus - Conditions - Court must be satisfied that there is public duty to be performed - And that the officer concerned has refused on demand to perform the duty (H2)

MANDAMUS - Application for - Validity - Having tied his grounds of application to pending suit - 1st respondent is bound to await outcome of the proceedings - His application cannot be granted (H3)

ACTIONS - Election - Parties - Joinder of - 1st respondent's action without joining appellant was not properly constituted - And his agitation to be declared a candidate is flawed in absence of prior suit against appellant (H4)

ELECTIONS - Court processes - Abuse of - It is an abuse for 1st respondent to return to FHC for his pre election dispute - After his quest at election tribunal to upstage appellant's return had failed (H5)

ELECTION PETITIONS - Dismissal - Finality of - Dismissal on grounds of abandonment completely terminates the case - And this is final decision on the merits (H6)

FACTS

Before the Federal High Court Awka, plaintiff/1st respondent instituted this action for an application for mandamus to compel defendant/2nd respondent to declare and accord him with rights as the candidate of the Peoples Democratic Party (PDP) for the April 2011 general election for Anambra East/West Federal Constituency in the House of Representatives. Prior to the application for mandamus, 1st respondent and some others had in a representative action, filed suit No.FHC/AWK/CS/05/2011 at the same court seeking to stop the Independent National Electoral Commission (INEC) from accepting any competing list of PDP candidates for the election. An interim order was granted to them, stopping INEC from accepting any such list pending the determination of the substantive suit. The said suit No.FHC/AWK/CS/05/2011 was still pending and not yet resolved when 1st respondent brought the application for mandamus. In formulating the grounds for his present application for mandamus, 1st respondent tied same around suit No.FHC/AWK/CS/05/2011 which is still pending.

It was on record that while 1st respondent was prosecuting his application for mandamus at the Federal High Court, he was at the same time prosecuting an election petition at the tribunal against the victory of appellant at the poll. 1st respondent's claim at the tribunal is that he is the duly nominated candidate of PDP and as such ought to be issued with a certificate of return for the legislative position. In the course of the proceedings at the tribunal, the petition was dismissed for abandonment. On appeal, Court of Appeal Enugu Division affirmed the dismissal. Having seen that he has finally lost the petition, 1st respondent returned to the Federal High Court for his mandamus application. Ten months after the judgment of the appeal court, the Federal High Court sitting in the mandamus application declared 1st respondent as the lawful candidate of PDP for the same election. INEC was therefore ordered to accord him with rights thereto and that he should be issued with the certificate of return for the elective post and that the one already issued to appellant be withdrawn. Aggrieved, appellant appealed to the Court of Appeal, which affirmed the decision of the Federal High Court. Aggrieved further, appellant has appealed to Supreme Court.

ISSUES FOR DETERMINATION

“i. Whether the court below was right when it failed to hold that the trial court had no competence as the time it did to deal with or to continue with the Proceedings at the Federal High Court including its delivery of the ensuing judgment.

ii. Was the Court below right in its reasoning and pronouncement by which it came to the conclusion that facts were not in dispute in this matter and that it was the name of the 1st respondent that was submitted by People’s Democratic Party (PDP) to independent Election Committee (Sic) (INEC) which conclusion led to the judgment being given against the appellant.”

HELD (Unanimously allowing the appeal per GALADIMA JSC)

ELECTIONS - Certificate of return - Nullification

1. As already noted, neither the Election Tribunal nor the Court of Appeal declared the 1st respondent the lawful candidate of PDP for the election and granted his bid to be issued with a Certificate of Return. But on 13/7/2012, about ten months after the judgment of the Court of Appeal on his mandamus application, the Federal High Court declared the 1st respondent as the lawful candidate for the election, ordered INEC to accord him the rights, privileges and entitlements of a lawful candidate. This would mean the issuance of Certificate of return to the 1st respondent while withdrawing the one already issued to the appellant. The law has not changed. It is crystal clear that after the conduct and conclusion of an election, it is the Election Tribunal that is clothed with jurisdiction to invalidate the Certificate of Return issued and directing that the same be issue to another candidate, in appropriate case. However, the qualification is that where there was a pre-election suit against the winner of the election prior to the election, the regular court has the jurisdiction to unseat the winner of the election. (p. 3863 G)

ORDERS OF COURT - Mandamus - Conditions

2. As I have already said from the reliefs claimed, it is clear that 1st respondent went to the Federal High Court to return him as duly elected member of the House of Representatives of the Anambra East/West Federal Constituency. His action for Judicial Review is in the nature of mandamus. Therefore the law requires that court must be satisfied, firstly that the 2nd respondent herein (INEC) has a duty of a public nature to perform; and secondly that he has refused, on demand to perform it.

The reason why a request for the performance of the official duty has first to be made before issuance of the order of mandamus is to offer the public body or person concern the opportunity of making amends or performing the duty. It is only when the person or body fails or refuses to do so that he or she can be compelled by an order of mandamus to do so. The prior demand for performance is to offer the public body the needed opportunity to perform the public duty in question or to make amends. (p. 3864 D)

MANDAMUS - Application for - Validity

3. In the instant case, giving the existence and pendency of the proceedings in suit No. FHC/JIWK/CS/05/2011 it is clear to me that the alleged interest of the 1st respondent as the lawful candidate of PDP for the election and the corresponding duty of the 2nd respondent, herein (INEC) to accord him the rights, privileges and entitlements of the PDP candidate had not yet arisen at the time of instituting the action for mandamus. I agree with the learned silk for appellant that the 1st respondent should be blamed for the unfortunate situation he created which greatly has impaired his right to approach the court with his action in mandamus proceedings. The effect of weaving or having to tie the application for mandamus around the earlier suit has made the present suit incompetent. It is a fact that it was the 1st respondent, who with others submitted the dispute voluntarily as to their candidature to court in suit No. FHC/AWK/CS/05/2011. It was he again who, in initiating the application for mandamus, tied his grounds of the appli-

cation and reliefs around the said unsettled dispute in the said suit. Having done that the 1st respondent was bound to await the outcome of the proceedings in that suit. Until he is able to show in his grounds for application that his earlier suit which he pleaded in this mandamus application was resolved in his favour, his application cannot be granted, as a matter of course, and it remains incompetent. (p. 3866 D)

Election - Parties - Joinder of

4. Again, his argument that the fact that the appellant was not made a party is immaterial. In making this line of submission, the learned counsel for 1st respondent is saying that the appellant is not a necessary party to that suit because he could have competently prosecuted the action against the 2nd respondent herein (INEC) as the sole respondent. For the learned counsel for 1st respondent to take this stand is to lose sight of the fact that the main purpose of his suit is for the court to declare him as the lawful candidate of PDP for the election and for him to be accorded all the rights and privileges and entitlements due to the candidate of his party, PDP. Is the 1st respondent now saying that while approaching the court to be declared the lawful candidate his interest is not competing with that of the appellant?

In the instant case, in the unlikely event that the 1st respondent proceeds against INEC alone, and gets judgment in his favour, the question is, whose shoes would he be asked to step into. Obviously not INEC'S shoes. Wither then the contention of the 1st respondent that the court can make orders against the appellant's interest in his absence?

The foregoing argument boils down to the fact that the 1st respondent's action instituted without joining the appellant was not properly constituted. His agitation to be declared and accorded the rights of a candidate is fatally flawed in that he had no suit against the appellant prior to the holding of the election. (p. 3867 E)

Court processes - Abuse of

5. It was an abuse of court process for the 1st respondent to

run back to the Federal High Court to take up his pre-election dispute against the appellant after his quest at the Election Tribunal to upstage the appellant's return had failed.
(p. 3869 A)

B ELECTION PETITIONS - Dismissal - Finality of

6. The court below saw this issue in a different perspective. To the court, the dismissal of the petition of the 1st respondent was not a dismissal on the merit and that it was not final; this implies that the matter dismissed in the election Petition can be resuscitated in another action.

C It is to be noted however, this decision of the court below cannot hold in an election in view of the special provisions on this point. An election Petition is not the same as ordinary civil proceedings. It is neither here nor there. It is a hybrid proceedings often referred to as being sui generis.

D An election Petition being special proceedings; its dismissal on grounds of abandonment completely terminates the case with finality and this is a final decision on the merits. In the case at hand, the Petition was dismissed pursuant to Para 18 (4) (5) of the 1st Schedule to the Electoral Act 2010 (as amended) on the said grounds of abandonment when the 1st respondent, as a Petitioner failed to file his pre-trial forms in accordance with the Electoral Act (Supra). His effort to appeal to the Court of Appeal to resuscitate the said Petition was as well dismissed.

E A Petition dismissed under the above provisions of the 1st Schedule to the Electoral Act cannot be revived by the Election Tribunal.

F With the dismissal of his Petition, the 1st respondent had lost on all the issues which he had submitted for adjudication in the said Petition. (pp. 3869 B/3870 D/H)

H NOTABLE POINT OF INTEREST
GALADIMA JSC

1. Civil proceedings – Dismissal – Implication of

The proceedings that took the parties up to this apex court in ABIGBE

v. OGBODUME (Supra) is an ordinary civil proceedings as opposed to the case at hand, being an election matter which, as I have observed is sui generis. In ordinary civil proceedings, a matter dismissed for want of diligent prosecution does not necessarily constitute a final judgment on merits. The same cannot be said of an election matter. (p. 3870 E)

B

REPRESENTATION

Arthur Obi Okafor (SAN) with Mahmud Abubakar Magaji (SAN), Chief Ikenna Egbuna Esq., Danjuma Ayeye Esq., Fidelis Aniukwu Esq., Ifeanyi Azuamah Esq., Amina Zukogi (Miss) Prisca Ozoilesike (Miss) Kenechukwu Azie Esq., Hamidu M. Tukur Esq. Chinyere Uzuegbunam (Miss), Prince Igajah Esq., Victor Ogbonna Esq., Ufuo Ufuo Asanwana Esq., for the Appellant

C

C. Chuma Oguejiofor Esq., with N.W Ezubuike Esq., A. T. Nwaka Esq., E. H. Ikoro Esq., T. Nweke Esq., for the 1st Respondent

D

S. O. Ibrahim Esq., with Goni Ahmed Ismail Esq., Maryam Ibrahim (Mrs.) I. S. Mohammed Esq., Okeke Okechukwu Esq., for 2nd Respondent

E

CASES REFERRED TO

Dangana v. Usman (2013) 6 NWLR (pt. 1349) 50

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

Ucha v. Onwe (2011) 4 NWLR (pt. 1237) 366

F

Odedo v. INEC (2008) 7 SC 25

Hassan v. Aliyu (2010) 17 NWLR (pt. 1223) 547

Emordi v. Igbeke (2011) 11 SC (pt. II) 107

Emeka v. Okadigbo (2012) 7 SC (pt. I) 14

Ezeigwe v. Nwawulu (2010) 2-3 SC (pt. 1) I

G

Layanju v. Araoye (1959) SCNLR 416

Ohakim v. Agbaso (2010) 19 NWLR 172

Fawehinmi v. I.G.P. (2002) 5 SC (pt. 1) 63

Amaechi v. INEC (2008) 5 NWLR (pt. 1080) 227

Adisa v. Oyinwola (2000) 10 NWLR (pt. 674) 116

H

Enwezor v. INEC (2009) 8 NWLR (pt. 1143) 223

Orubu v. INEC (1988) 5 NWLR (pt. 94) 323

STATUTES & RULES REFERRED TO

Electoral Act 2010 (as amended), 1st schdl. para. 18(4)(5), s. 31(1)
Constitution of the Federal Republic of Nigeria 1999, s. 246(3)
Federal High Court (Civil Procedure) Rules 2009, O. 34, r. 4

B LEAD JUDGMENT BY GALADIMA JSC

This appeal arose from the judgment of the Court of Appeal Enugu Division in Appeal No. CA/E/300/12 which affirmed the decision of the Federal High Court, sitting in Awka in suit No. FHC/AWK/CS/157/2011. The said suit was an application for Judicial Review, by a writ of mandamus brought by the 1st respondent to compel the 2nd respondent (INEC) herein to accord him the rights, privileges and all the entitlements due to a candidate of the Peoples Democratic Party (PDP) in the April 2011 general election for Anambra East/West Federal Constituency, on the ground that he won his party primaries and was duly nominated to fly the flag in the election. This was the pivotal relief 3 sought by the 1st respondent in his application for Judicial Review.

However, the salient grounds upon which the 1st respondent's "application was brought are the following:

1. *"That the applicant had contested in the primary election conducted by the National Committee of the Peoples Democratic Party on 8/1/2011 by Senator D. K. WAKU to elect its candidate for the Federal House of Representatives, (Anambra East/Anambra West Federal Constituency) and won, his name had been forwarded to the respondent by the same National Executive Committee of the party as its candidate for that Constituency in the election.*

2. *That when the respondent for reasons best known to her started dragging her feet on the matter and would not accept the list containing the applicant's name otherwise called the "WAKU LIST" that had been forwarded to her by the National Executive Committee of the party and was bent on receiving another list altogether different from the one containing the applicant's name and the names of other members of his group, they had approached the court in Suit No. FHC/AWK/CS/05/2011 for an order of court to stop the respondent from accepting any such list, the court had granted and or made the order on 13/1/2011. (Underlining Ours)"*

Now to the bare facts of this case: Sometime in early January,

2011, soon after the conduct of the PDP primaries for nomination of the party's flag-bearers in 2011 general elections in Anambra State, a dispute arose as to which list of candidates INEC should use as the PDP list of candidates for the election.

The 1st respondent and other aspirants in the primaries in a representative action submitted the dispute for resolution in Suit No. FHC/AWK/CS/05/2011; between: Prince Nicholas Ukachukwu v. INEC. The 1st respondent and some others sought for and were granted an interim order to stop INEC from accepting any competing list of PDP candidates for the election, pending the determination of the substantive Suit. It is noteworthy, however that the said Suit No. FHC/AWK/CS/05/2011 was still pending and had not resolved the dispute as to who was the lawful candidate of PDP for the election and no pronouncements on the merits of the case, when the 1st respondent again went to court in yet another Judicial Review proceedings, this time, by way of mandamus to compel INEC to accord him the rights, privileges and entitlements due to lawful candidate of PDP for the same election. May it be noted that the first action which was pending was also an application for Judicial Review which, like the present Judicial Review application for mandamus, is triable upon affidavit evidence. Furthermore, the 1st respondent, in formulating the present suit entangled or "weaved" same around the first application for Judicial Review which had not been determined and which had not resolved the question of who was the lawful candidate of PDP for the said election.

The 1st respondent relied heavily on the interim order made in Suit No. FHC/AWK/CS/05/2011, when it was obvious that the said order were just to maintain the status quo, and (it would appear) did not create any rights to enable the 1st respondent sustain a claim for mandamus.

Meanwhile, the name of the appellant herein, had been published by INEC (2nd respondent herein) as the PDP candidate, prior to the institution of the suit from which this appeal arose; and the appellant contested, won and was declared the winner of the election, held on 26th April, 2011. Again, shortly after the declaration of the said election result, it dawned on the 1st respondent that, for him to challenge the victory of the appellant at the polls and invalidate the return thereto, the 1st respondent, ought to initiate an Election

Petition against the appellant. On account of this he filed an Election Petition No. EPT/4N/SAE/HR/17/2011 at the Election Tribunal then sitting at Awka with the clear intention of having himself declared as the lawful candidate of PDP for the April 2011 Anambra East/West Federal Constituency election. It is to be noted that the 1st respondent for the first time brought into his litigation the appellant, wherein he is agitating to be declared the lawful candidate of PDP for the said election. The reliefs sought are found on page 365 of the record, particularly reliefs 3 and 5. Essentially in this petition, like in his application for mandamus he was praying for an order of court to accord him all rights, privileges and entitlements due to the candidate of PDP having been nominated and sponsored as such.

However, in the course of proceedings at the Election Tribunal the petition was dismissed as abandoned. This dismissal was affirmed by the Court of Appeal in its judgment delivered on 19/9/2011 in Appeal No. CA/E/EPT/36/2011.

The intriguing aspect of this case is that the 1st respondent was prosecuting the petition and in one fell swoop pursuing the proceedings in the application for mandamus, and when he finally lost at the Election Tribunal, he fell back on the application for mandamus. Here he got through the back door what the Court of Appeal (being the final court on the matter) had refused him in his agitation to be declared the lawful candidate of PDP for the election, and his bid to be issued with a certificate of return. But on 13/7/2012 (which is about 10 months) after the judgment of the Court of Appeal, the Federal High Court sitting on mandamus application, declared the 1st respondent as the lawful candidate of the election and ordered INEC to accord him the rights, privileges and entitlements of a candidate.

The appellant who was dissatisfied with the decision of the Federal High Court, appealed to the Court of Appeal on the 27th March, 2013. The Court of Appeal affirmed the decision of the Federal High Court in favour of the 1st respondent.

It is against the said decisions of the court below, that this appeal has been filed by the appellant vide his Amended Notice and containing 15 grounds of appeal filed on 27/9/2013.

The issues formulated by learned senior leading counsel for the appellant, ARTHUR OBI OKAFOR, SAN, in the brief of argument filed on 17/4/2014 are as follows:

“i. Whether the court below was right when it failed to hold that the trial court had no competence as the time it did to deal with or to continue with the Proceedings at the Federal High Court including its delivery of the ensuing judgment.

ii. Was the Court below right in its reasoning and pronouncement by which it came to the conclusion that facts were not in dispute in this matter and that it was the name of the 1st respondent that was submitted by People’s Democratic Party (PDP) to independent Election Committee (Sic) (INEC) which conclusion led to the judgment being given against the appellant.”

On his part, learned counsel for 1st respondent, CHUMA OGUEJIOFOR Esq. in the brief of argument filed on 12/5/2014 submitted the following, five issues for determination. *ISSUE NO. 1 Was the court below right in holding as it did that the suit leading to this Appeal was a pre-election suit over which the trial court had jurisdiction. (Ground 1)*

ISSUE NO. 2 Whether the court would still have jurisdiction to hear this appeal if the suit leading to the appeal was not a pre-election suit over which the trial court has jurisdiction, did the decision of the court of Appeal Enugu in CA/E/EPT/36/2011 extinguish the jurisdiction of the trial court to hear the suit leading to this appeal. (Grounds 2, 3)

ISSUE NO. 3 Whether the court below was right in dismissing the appeal of the appellant and in affirming the judgment of the trial court. (Grounds 4, 5, 10 and 11)

ISSUE NO. 4 Whether the court below was right when it held, that the 1st respondent’s suit at the trial court was not an abuse of the process of the court. (Grounds 15)

ISSUE NO. 5 Whether the legal principle of “Res Judicata” applies to this case so as to divest the court of the jurisdiction to hear the case. (Ground 13)”

It should be noted that upon service of the respondent’s brief of argument on the appellant the latter deemed it necessary to file a Reply Brief on 26/5/2014.

In my view, in consideration of the appeal, appellant’s two issues formulated for determination would suffice to dispose of the appeal.

On the first issue, learned counsel for the appellant has drawn

the attention of this court to the following fact. That as at the time the trial court gave judgment in the mandamus proceedings on 13/7/2012 the Election Petition Tribunal sitting at Awka had dismissed Petition No. EPT/AN/NAE/HR/17/2011, commenced against the appellant, INEC and PDP by the 1st respondent herein. It is submitted
 B that if the court below had properly adverted its mind that both the first action and 2nd action were for Judicial Review, triable upon affidavit evidence; that the second action was weaved around the 1st action and that the interim order made in the first action was just to
 C keep matters in status quo pending the final determination of the Suit, the court below would not have given a “clean bill” to the 1st respondent in instituting the second action at a time when the first action yet to be decided. That having weaved his case around the first Suit; the 1st respondent was bound to await the outcome of that
 D first suit before instituting any action on mandamus.

Learned counsel has contended that from the grounds for the application for mandamus it is obvious that the resolution of Suit No. FHC/AWK/CS/05/2011 is a condition precedent to the grant of the 1st respondent’s application. Furthermore, that the two courts below
 E erred when they tried to resolve the issue of who was the lawful candidate of PDP when the same issue had arisen in the earlier Suit, more so when the 1st respondent had tied his principal relief and the grounds for his application on mandamus to the said Suit No. FHC/AWK/CS/05/2011.
 F

Relying on the decision of this court in *DANGANA v. USMAN* (2013) 6 NWLR (Pt. 1349) 50 at 90, learned counsel has further contended that since the 1st respondent’s quest to upturn the appellant’s return as the winner of the election on grounds of competing nomination and sponsorship as between the said appellant and 1st respondent had been pronounced upon with finality by the court of Appeal, it was no longer open to him to maintain or continue with an action at the Federal High Court for Judicial Review on the same subject matter and/or cause of action. This is because the
 H decision by the court of Appeal has effectively terminated the 1st respondent’s quest for justice over matters of nomination and sponsorship.

It is submitted that with the dismissal of the Election Petition and the affirmation of the dismissal by the court of Appeal on 19/9/

2011, the 1st respondent ceases to have sufficient interest to ask for mandamus or continue with the action at the Federal High Court or the grant of mandatory injunction on the ground that he was the lawful candidate of PDP. That the only way the 1st respondent could have revived his interest in the matter was to have the judgment of the Court of Appeal No. CA/E/EPT/36/2011, on appropriate grounds, set aside and not to have gone back to the proceedings at the Federal High Court with a view to upstaging the judgment of the said Court of Appeal, which was the final court in the election matter. For the 1st respondent to go back to the proceedings at the Federal High Court after losing his Election Petition at the court of Appeal, learned counsel argued, smacks of forum shopping and the height of abuse of court process. He placed reliance on the case of DINGYADI v. INEC (NO. 1) (2010) 18 NWLR (Pt 1224) 1 at 75 and DINGYADI & ANOR v. INEC & 2 ORS. (2012) 11 SCNJ 1.

On the part of the 1st respondent, five issues have been identified for the determination of the appeal. I am of the view that the issues have been unnecessarily proliferated. These could be appropriately condensed into two issues formulated by the appellant. Respondent's issues 1, 2 and 3 are quite similar. Issues 4, 5 are peripheral not fully frontal. In any case the issues have been subsumed in the appellant's issues 1 and 2 and are so argued by the learned counsel. I shall now consider pieces of the arguments of the learned counsel from his issues as they relate to the main issue in the appeal.

Learned counsel for the 1st respondent has submitted that the court of appeal was right in holding that the suit leading to this appeal was a pre-election suit over which the trial court had jurisdiction. It is contended that the claim of the 1st respondent at the trial court was for Judicial Review that is, for orders of mandamus, declaration and injunction. He contended that he had filed a motion ex-parte on 7/4/2011 (more than 3 weeks before the 2011 general election was held) seeking leave of the court for orders of mandamus declaratory and injunctive reliefs. The said general election was held on 26/4/2011. That the fact that the 2nd respondent proceeded to hold and concluded the general election on 26/4/2011, during the pendency of the suit at the trial court did not rob the dispute its pre-election character and nature. Relying on UCHA v. ONWE (2011) 4 NWLR (Pt 1237) 366 at 394. And ODEDO v. INEC & ORS (2008) 7 SC. 25,

PP. 59-60.

It is submitted that the distinction the learned senior counsel for the appellant had tried to draw from the facts of *ODEDO v. INEC* (Supra) and the instant case does not hold. That the reliefs sought in the present suit leading to this appeal are all replicated on pre election matters, just as *ODEDO'S* case. That the respondent had not wasted time (as Odedo did) in filing this pre-election suit once it was clear to him that the 2nd respondent (INEC) would not accept his name as the candidate of the PDP, unless he was compelled to do so by order of mandamus. That the case of *HASSAN v. ALIYU* (2010) 17 NWLR (Pt 1223) 547, 589, also cited by the learned senior counsel for the appellant does not also apply to this case.

On the point made by the appellant's counsel that he had only been joined to the suit leading to this appeal after the election had been held, learned counsel for 1st respondent has urged this court to note the following facts: Firstly, it was the appellant who had applied for his joinder to the suit; his application had been strenuously opposed by the 1st respondent whose position on the issue was that no claim or relief was made or sought against the appellant but rather against INEC (2nd respondent herein). Furthermore, that it had been argued for the same 1st respondent that in application for mandamus, the only proper party is public body that bears the responsibility of a public nature to perform some public duties not an ordinary individual like the appellant.

Learned counsel for the 1st respondent has argued further at paragraphs 3.13, 3.14, and 3.14(a) of the brief of argument that this court should strike out appellant's name from this Appeal and in consequence strike out the appeal on the premise that the appellant had conceded that the appellant's joinder to the suit was incompetent.

Under his issue 2, learned counsel has argued that from the posture which the appellant has adopted in this appeal, he has no right of appeal to this court since it has been contended for the appellant that there has been a final judgment of the court of Appeal in an election matter. Reliance has been placed on Section 246 (3) of 1999 Constitution (as amended) and the case of *EMORDI v. IGBEKE AND 5 ORS.* (2011) 11 SC. (Pt. II) 107.

Learned counsel for the respondent has submitted that the

court below was right in dismissing the appeal of the appellant as it had done, and that the 1st respondent is entitled to the judgment of the court below. He gave his reasons as follows; firstly, that the 1st respondent was the person who had emerged victorious in the primaries held by the National Executive Committee of the Peoples Democratic Party on 8/1/2011, as the candidate of the party to run for the position of member of the Federal House of Representatives, Anambra East/West Federal Constituency. That his name was in the list of candidates sent to the INEC by the National Executive Committee of the party and National Working Committee of the party. Reliance was placed on the letter at page 40 of the record for Senator J.K. Waku to conduct the National Assembly primaries on 7/1/2011 and 8/1/2011 in Anambra State. That at page 41 of the record paragraph 9, in the list of the successful candidates, the name of the 1st respondent appears as the candidate of the party for the House of Representatives for Anambra East/West Federal Constituency. While at page 42 the name of Lady Margery. Okadigbo appears as the Senatorial candidate for Anambra North Senatorial District. It is contended that the 1st respondent like Lady Okadigbo had participated in the primary conducted by the National Executive Committee of the PDP. That again at pp. 187-194 of the record, there was minutes of meeting the National Working Committee of the PDP held on 30/1/2011 at the party National Senatorial, Wadata Plaza Abuja. In the meeting, the party had decided that the list of its candidates in the 2011 General Election must be submitted to the INEC, not later than 31/1/2011, and at page 93, the 1st respondent's name appears as the candidate of the party and not the appellant.

It is submitted that while the 1st respondent had won the primary conducted by the National Executive Committee of the party in the election, the appellant on the other hand participated in a contraption conducted by the Anambra State chapter of the party headed by one Benji Udezor, and at page 186 of the record the appellant appears as one of the persons whose name was submitted to the INEC by the Anambra State Chapter of the party. From paragraphs 3.30-3.41 are detailed gripping narratives of the circumstances that frustrated the 1st respondent into seeking a redress in the Election Tribunal and the Federal High Court for an order for mandamus against the 2nd respondent (INEC) herein that bears a public duty to

obey all the decisions of courts of competent jurisdiction, as in this case, the orders of the Federal High Court, Awka made on 13/1/2011, 11/2/2011 and 25/3/2011 (copied on pages 43-49 of the record). That apart from these orders of the said Federal High Court, this court has laid to rest all arguments or speculations about which
B list is that of the party for the purpose of April 26 election in the case of PRINCE JOHN OKECHUKWU EMEKA v. LADY MARGERY OKADIGBO in Appeal No. SC/69/2012 directing that the “Waku list” is the authentic list submitted by the party for the election and that
C any primary held by the State Chapter was illegal. That it was in the light of this decision the order of mandamus sought was granted by the Federal High Court, compelling the 2nd respondent (INEC) to recognize the 1st respondent as the candidate of the party for the election of 26/4/2011. It is contended that a similar dispute arose in
D an earlier case in respect of the nomination of the candidate for Anambra North Senatorial District for the April election and it was qualified by the apex court as a pre election matter. That the same court in the subsequent sister case of EMEKA & ORS v. OKADIGBO & ORS. (2012) 7 SC (pt. 1) at 14 also qualified the issue of sponsorship of a candidate as a pre-election matter. It is argued that the
E petitioner/plaintiff in the above two cases was, like the 1st respondent, one of the successful candidates in the National Assembly primaries, conducted by the Senator Waku led National Assembly Election panel whose names were sent to the 2nd respondent as the PDP candidates
F for the April, 2011 general election in Anambra State.

The learned counsel for the 1st respondent has therefore submitted that the court below was right when it held that the 1st respondent’s suit at the trial court was not an abuse of the process of
G court rather it is the present appeal that constitutes an abuse of court process in view of the fact that the appellant cannot expect this court to overrule its earlier decision in SC/69/2012 (Supra).

In conclusion, learned counsel has submitted that the 1st respondent was the candidate of the PDP in the election to the Federal
H House of Representatives for the Anambra East/West Federal Constituency having won the party’s primaries conducted by the National Executive Committee of the party, which the appellant never participated in, rather he had been part of the contraption which this court had held to be a complete nullity and no legal right ensuing

from it. It is submitted that this being the case the 1st respondent is entitled to the salaries entitlements, allowances etc due to a winner of the election to represent his constituency right from the date of the inauguration of the present National Assembly on 6/6/2011 till date.

Relying on the case of EZEIGWE v. NWAUWULU (2010) 2-3 SC (Pt 1) P. 1 at p.8, learned counsel has submitted that the 1st respondent, in the eyes of the law was the candidate of the PDP for the said election, and it was he who won the said election. B

Before considering the issues raised by the learned counsel for the parties and the arguments proffered therein, I shall make the following observations, the appellant's second issue is rather an expanded version of the first issue, unnecessary embellishments that do not improve the arguments on the second issue, spanning ten pages, is a quarter of the whole brief. Then the appellant's reply brief set out in tiny prints is for another ten pages. C

Learned counsel for the 1st respondent too, is not completely absolved from this. I have noted that the five issues formulated are unnecessarily proliferated. Hence in considering this appeal I shall consider the appellants issues 1 and 2 together and 1st respondents five issues together. Of course I shall be mindful of the appellant reply brief. D

The crucial issue for determination is whether the court of appeal was right when it failed to hold that the trial court had no competence, (as at the time it did) to deal with or to continue with the proceedings at the Federal High Court including its delivery of the ensuing judgment. I shall recapitulate the relevant facts I have earlier set out. F

It is a fact that as at the time the trial Federal High Court handed down judgment in suit No. FHC/AWK/CS/157/2011, on an application for Judicial Review by writ of mandamus brought by 1st respondent on 13th July, 2012, the Election Petition Tribunal sitting at Awka had dismissed his Petition No. EPT/AN/NAE/HR/17/2011 commenced against the appellant, INEC and PDP. The central issue in that Petition was that between the appellant and the 1st respondent who was the lawful candidate of PDP who ought to have been returned in April, 2011 election for Anambra East/West Federal Constituency. G

The reason for the dismissal of the 1st respondent Petition at the Tribunal was on the ground that it was abandoned. The court of H

Appeal sitting as the final court in the Election Petition affirmed the decision of the Tribunal vide its judgment in Appeal No CA/E/EPT/36/2011. Undisputed is the fact that it was after all agitations in respect of the 1st respondent's Petition had been long concluded that he incautiously, as it were, obtained judgment on the mandamus application. I agree with the learned counsel for the appellant herein, that this judgment has the effect of "unseating" the appellant from the National Assembly. I shall dwell fully on the propriety and competence of the 1st respondent continuing with his application on mandamus after he had lost finally at the election Petition Tribunal. But let me look at the nature of relief sought by the 1st respondent in his application for mandamus. His relief 3 (found at page 35 dovetailing into page 36 of the record) produced here under reads:

"An order of Mandamus or mandatory order of injunction of the court compelling the respondent forthwith to accord to the applicant all the rights, privileges and entitlement due to a candidate of the Peoples Democratic Party in the April, 2011 general election having won its primaries been duly nominated by the party to fly its flag in the election of the Anambra East/West Federal Constituency and as a result of the order of the court in FHC/AWK/CS/5/2011."

The grounds upon which the application was predicated are as follows:

"1. The applicant had contested in the primary election conducted by the National Executive Committee of the Peoples Democratic Party on 8/1/2011 by Senator J. K WAKU to elect its candidate for the Federal House of Representatives, (Anambra East/West Federal Constituency) and won, his name had been forwarded to the respondent by the same National Executive Committee of the party as its candidate for that constituency in the election.

2. That when the respondent for reasons best known to her started dragging her feet on the matter and would not accept the list containing the applicant's name otherwise called the "WAKU LIST" that had been forwarded to her by the National Executive Committee of the party and was bent on receiving another list altogether different from the one containing the applicant's name and the names of other members of his group, they had approached the court in suit No. FHC/AWK/CS/05/2011 for an order of court to stop the respondent from accepting such list, the court had granted and or

made the order on 13/1/2011. (Underlining Ours)”

The 1st respondent's Petition before the Election Tribunal which was abandoned and dismissed was for the purpose of having himself declared as the lawful candidate of PDP for the April, 2011 election. In the Petition, for the first time, he brought the appellant and the PDP into his litigation. The reliefs sought in the Petition particularly 3 B and 5 read thus:

“(3) A declaration of court that the return made in favour of the 1st respondent by the constituency returning officer on 27/4/2011 was undue and invalid in that the petitioner and not the said 1st respondent was the candidate of the PDP who actually contested the election and earned the majority votes of 16,020 votes in the election.

(5) An order of injunction that the INEC issues a certificate of return in favour of the petitioner to enable him take his rightful place at the National Assembly to represent the Anambra East/West Federal Constituency, Anambra State, and further order of injunction restraining the 1st respondent from parading or putting himself forward as the person returned or elected as the member of the afore-said Anambra East/West Federal Constituency or from enjoying any rights/perquisites of that office. (Underlining ours)”

These reliefs sought in the 1st respondent's petition read conjunctively no doubt, portend that he claims to be the nominated and sponsored candidate of PDP for the election and that he was entitled to be issued with a Certificate of Return. Careful reading of his application for mandamus, where he had prayed for order of court for mandatory injunction against INEC to accord him all “rights, privileges and entitlements”, will show clearly that this is exactly what he also sought to achieve in his petition.

As already noted, neither the Election Tribunal nor the Court of Appeal declared the 1st respondent the lawful candidate of PDP for the election and granted his bid to be issued with a Certificate of Return. But on 13/7/2012, about ten months after the judgment of the Court of Appeal on his mandamus application, the Federal High Court declared the 1st respondent as the lawful candidate for the election, ordered INEC to accord him the rights, privileges and entitlements of a lawful candidate. This would mean the issuance of Certifi-

cate of return to the 1st respondent while withdrawing the one already issued to the appellant. The law has not changed. It is crystal clear that after the conduct and conclusion of an election, it is the Election Tribunal that is clothed with jurisdiction to invalidate the Certificate of Return issued and directing that the same be issue to another candidate, in appropriate case. However, the qualification is that where there was a pre-election suit against the winner of the election prior to the election, the regular court has the jurisdiction to unseat the winner of the election.

The contention of the appellant in the instant case is that he won the election and was the respondent's opponent and was not sued before the election but was only joined after he had been declared as the winner of the election.

Now to the propriety and competence of the application for order of mandamus or mandatory injunction to which the 1st respondent resorted after he had lost at the Election Petition Tribunal and at the Court of Appeal finally.

As I have already said from the reliefs claimed, it is clear that 1st respondent went to the Federal High Court to return him as duly elected member of the House of Representatives of the Anambra East/West Federal Constituency. His action for Judicial Review is in the nature of mandamus. Therefore the law requires that court must be satisfied, firstly that the 2nd respondent herein (INEC) has a duty of a public nature to perform; and secondly that he has refused, on demand to perform it. See *LAYANJU v. ARAOYE* (1959) SCNLR 416 at 420; *OHAKIM v. AGBASO* (2010) 19 NWLR 172 at 222 and 229.

The court below rightly captured this in its judgment at page 1159 of the record, when it held as follows:

'An order of mandamus lies to compel the performance of a public duty (usually ministerial) at the instance of a person who has sufficient interest in the performance of that public duty.'

The reason why a request for the performance of the official duty has first to be made before issuance of the order of mandamus is to offer the public body or person concern the opportunity of making amends or performing the duty. It is only when the person or body fails or refuses to do so that he

or she can be compelled by an order of mandamus to do so. The prior demand for performance is to offer the public body the needed opportunity to perform the public duty in question or to make amends. LAYANJU v. ARAOYE (Supra).

In the case at hand what public duty is the 1st respondent asking the Federal High Court to compel its performance and what interest does the 1st respondent have in performance of that public duty to invoke the jurisdiction of the said Federal High Court to issue the order of mandamus? Here is the answer! It is found from the grounds and reliefs sought by the 1st respondent in his application for order of mandamus. The public duty in question is the alleged duty of INEC to accord the 1st respondent with the rights, privileges and entitlements due to the candidate of PDP for 2011 Anambra/East Federal Constituency of general election while the alleged interest of the 1st respondent is that he was the duly nominated candidate of PDP for the said election. I have earlier reproduced above, the reliefs 3 and 5 and grounds 1 and 2 upon which the 1st respondent brought this action on mandamus. From the reliefs and grounds the following 5 clear facts stand undisputed.

“1. *The fact that prior to the filing of the Application for mandamus, there was an existing dispute between the 1st respondent and INEC as to which list of PDP candidates will be used for the election.*

2. *That the 1st respondent with other aspirants for the positions of Senators and members of the Federal House of Representatives had decided to initiate and submit the said dispute for adjudication, suing INEC as the respondent in suit No. FHC/AWK/CS/05/2011, then pending at the Federal High Court,*

3. *That as at the time of filing the application for mandamus and the judgment in the said application both at the Federal High Court of Appeal, the issue of whether the 1st respondent was lawful candidate of PDP for the election and whether INEC should accept his name as lawful candidate had not been finally determined in the said suit No. FHC/AWK/CS/OS/2011. In other words the 1st respondent's interim order made that his name be accepted as the lawful candidate of PDP and the duty of INEC to accord him the rights, privileges and entitlements of the lawful candidate for the election was still in dispute and unresolved in the said earlier suit No. FHC/AWK/CS/05/2011.*

4. That the said interim order made by the Federal High Court above is to the effect that INEC should not accept any list of candidates of PDP for the April, 2011 Election except it is the list containing names of the 1st respondent herein and those other candidates. In effect the said interim order did not order INEC to make 1st respondent the lawful candidate for the election but rather ordered that INEC should not accept any other list of candidate of PDP for the election except that of 1st respondent See PP 43-49 of the record for the order.

C That mandamus being a high prerogative writ lies to secure the performance of a public duty, in the performance of which the applicant must show that he has a sufficient legal interest to protect and that he has demanded the performance of the public duty from those obliged to do so and was refused. See *FAWEHINMI v. I.G.P.* D (2002) 5 SC (Pt. 1) 63.

In the instant case, giving the existence and pendency of the proceedings in suit No. FHC/JIWK/CS/05/2011 it is clear to me that the alleged interest of the 1st respondent as the lawful candidate of PDP for the election and the corresponding duty of the 2nd respondent, herein (INEC) to accord him the rights, privileges and entitlements of the PDP candidate had not yet arisen at the time of instituting the action for mandamus. I agree with the learned silk for appellant that the 1st respondent should be blamed for the unfortunate situation he created which greatly has impaired his right to approach the court with his action in mandamus proceedings. The effect of weaving or having to tie the application for mandamus around the earlier suit has made the present suit incompetent. It is a fact that it was the 1st respondent, who with others submitted the dispute voluntarily as to their candidature to court in suit No. FHC/AWK/CS/05/2011. It was he again who, in initiating the application for mandamus, tied his grounds of the application and reliefs around the said unsettled dispute in the said suit. Having done that the 1st respondent was bound to await the outcome of the proceedings in that suit. Until he is able to show in his grounds for application that his earlier suit which he pleaded in this mandamus application was resolved in his favour, his application cannot

be granted, as a matter of course, and it remains incompetent.

The court below no doubt saw it from the angle that the first respondent had two actions in court against INEC with respect to the same subject matter. However, the court did not well advert its mind to the facts that the two actions are both applications for Judicial Reviews (in contents) seeking the same remedies; particularly the reliefs in the second application for mandamus where 1st respondent had tied those reliefs to the first action still pending in court awaiting resolution.

On this point, from the arguments proffered in his issue No.1 in paragraph 4-10 of the brief, it appears that the 1st respondent is glossing over the complaints of the appellant relating to the decision of the Court of Appeal which held that the trial court had jurisdiction over 1st respondent's suit at the time it heard the matter. Relying on ODEDO v. INEC (supra) 1st respondent has put up the argument that owing to the fact that the 1st respondent's suit was already pending before the April, 2011 election and that the reliefs sought in the suit are all predicated on pre-election matters, the subsequent conduct of the election did not change the pre-election character of his suit and that the trial Federal High Court at all times material had jurisdiction to determine the suit. The answer to this wrong assumption is well ventilated in my foregoing paragraphs.

Again, his argument that the fact that the appellant was not made a party is immaterial. In making this line of submission, the learned counsel for 1st respondent is saying that the appellant is not a necessary party to that suit because he could have competently prosecuted the action against the 2nd respondent herein (INEC) as the sole respondent. For the learned counsel for 1st respondent to take this stand is to lose sight of the fact that the main purpose of his suit is for the court to declare him as the lawful candidate of PDP for the election and for him to be accorded all the rights and privileges and entitlements due to the candidate of his party, PDP. Is the 1st respondent now saying that while approaching the court to be declared the lawful candidate his interest is not competing with that of the appellant? There is infinite wisdom in the decision of this court, in situations where there was such competing interest; in

case of AMAECHI v. INEC (2008) 5 NWLR (Pt 1080) 227, ODEDO v. INEC (Supra) etc; where it was held that the successful party who had been denied of his candidacy would be allowed to step into the shoes of the candidate hitherto occupying the seat, because the other party was a party to the proceedings and was before the court. **In the instant case, in the unlikely event that the 1st respondent proceeds against INEC alone, and gets judgment in his favour, the question is, whose shoes would he be asked to step into. Obviously not INEC'S shoes. Wither then the contention of the 1st respondent that the court can make orders against the appellant's interest in his absence?**

The foregoing argument boils down to the fact that the 1st respondent's action instituted without joining the appellant was not properly constituted. His agitation to be declared and accorded the rights of a candidate is fatally flawed in that he had no suit against the appellant prior to the holding of the election.

The contention of the appellant is that prior to the holding of the election the issue of candidacy, which in the beginning was a pre-election issue transmuted into a post-election issue as between the appellant and the 1st respondent; for there was no suit against the appellant before the holding of the election. In the decision of this court in ADISA v. OYINWOLA (2000) 10 NWLR (Pt 674) 116 at pp. 167-168, a case that the Court of Appeal relied upon in ENWEZOR v. INEC (2009) 8 NWLR (Pt 1143) 223 at 237, it was held as follows:

"This gives credence to the decision that it is not at the commencement of a suit that enabling jurisdiction of a court may be raised, if jurisdiction of a court ceases, to exist in the-case, the suit determines.

Closely following and related to the foregoing enunciated principle of law is the recent decision of this court in the case of DANGANA v. USMAN (2013) 6 NWLR (Pt 1349) 50 at 90 where it was held, per Onnoghen JSC that:

Where an aggrieved party decides to challenge or, question the qualification of such candidate his right of appeal terminates at the Supreme Court. Where, however, he decides to go through the Election Tribunal route and the election to which the issue relates is a National or State House of Assembly Election, then his quest for

justice constitutionally terminates at the Court of Appeal by operation of section 246 (3) of the 1999 Constitution (Supra)".

It was an abuse of court process for the 1st respondent to run back to the Federal High Court to take up his pre-election dispute against the appellant after his quest at the Election Tribunal to upstage the appellant's return had failed. B

The court below saw this issue in a different perspective. To the court, the dismissal of the petition of the 1st respondent was not a dismissal on the merit and that it was not final; this implies that the matter dismissed in the election Petition can be resuscitated in another action. C
The court placed reliance mainly on two decisions of this court in OBASI BROTHERS MERCHANT CO. LTD v. MERCHANT BANK OF AFRICA SECURITIES LTD (2005) 2 SCNJ 272 at 279 and ABIGBE v. UGBODUME (1973) LPELR 36, to posit that in a matter where the dismissal of the suit did not completely terminate the case, the court views such dismissal as mere striking out. D

It is to be noted however, this decision of the court below cannot hold in an election in view of the special provisions on this point. An election Petition is not the same as ordinary civil proceedings. It is neither here nor there. It is a hybrid proceedings often referred to as being sui generis. E
It is eloquently described in ORUBU v. INEC (1988) 5 NWLR (Pt 94) 323 at 347 by UWAIS JSC (as he then was) thus:

"An election Petition is not the same as ordinary civil proceedings. It is a special proceeding because of the peculiar nature of elections which by reason of their importance to the well being of a democratic society, are regarded with an aura that places them over and above the normal day to day transaction between individuals which give rise to ordinary or general claims in court." F G

See further ONITIRI v. BENSON (1960) 6 FSC 150, OYEKAN v. AKINJIDE (1965) NMLR 281. ***An election Petition being special proceedings; its dismissal on grounds of abandonment completely terminates the case with finality and this is a final decision on the merits. In the case at hand, the Petition was dismissed pursuant to Para 18 (4) (5) of the 1st Schedule to the Electoral Act 2010 (as amended) on the said grounds of abandonment when the 1st respondent, as a Petitioner failed*** H

to file his pre-trial forms in accordance with the Electoral Act (Supra). His effort to appeal to the Court of Appeal to resuscitate the said Petition was as well dismissed.

Paragraph 18 (4) and (5) of the 1st Schedule to the Electoral Act (Supra), pursuant to which the 1st respondent's Petition was dismissed reproduced here under reads as follows:

"(4). Where the Petitioner and the respondent fail to bring an application under this paragraph, the Tribunal or Court shall dismiss the Petition as abandoned Petition and no application for extension of time to take that step shall be filed or entertained.

(5). Dismissal of a Petition Pursuant to subparagraphs (3) and (4) is final and the Tribunal or Court shall be functus officio."

These provisions are clear and unambiguous. The golden rule of interpretation is that clear and unambiguous words in legislation must be given their ordinary literal meaning. See DAILY TIMES (NIG) PLC v. AMAIZU (1999) 12 NWLR (Pt 631) 439. KRAU THOMPSON ORGANIZATION v. NIPSS (2004) 17 NWLR (Pt 901) 4 SC.

A Petition dismissed under the above provisions of the 1st Schedule to the Electoral Act cannot be revived by the Election Tribunal. See ENWEZOR v. INEC (Supra) MAKINDE v. ADEOGUN (2008) 3 LRECN 355 at 372.

The proceedings that took the parties up to this apex court in ABIGBE v. OGBODUME (Supra) is an ordinary civil proceedings as opposed to the case at hand, being an election matter which, as I have observed is sui generis. In ordinary civil proceedings, a matter dismissed for want of diligent prosecution does not necessarily constitute a final judgment on merits. The same cannot be said of an election matter. In MAKINDE v. ADEOGUN (Supra) the Petition was dismissed for want of diligent prosecution and the Court of Appeal, in interpreting paragraph 5(1) and (3) of the Election Tribunal and Court Practice Direction 2007 held thus:

"Viewed either from paragraph 5 (1) or 5 (3) supra, the lower Tribunal is certainly not empowered by the applicable law to review and set aside its judgment and order of 21-9-2007." Final judgment" means such that have (sic) determined the rights of the parties thereto, with the power of review of same belonging only to the appellate court."

With the dismissal of his Petition, the 1st respondent had

lost on all the issues which he had submitted for adjudication in the said Petition. Viz; whether:

(i) *The 1st respondent was the lawful candidate of PDP at 26/4/2011 election.*

(ii) *He contested the said election*

(iii) *He ought to have been returned and declared elected and not the appellant, herein.*” B

I am of the respectful view that the 1st respondent had wrongly presumed that he could have his interest revived in the matter by appealing the judgment of the Court of Appeal in Appeal No. CA/E/ EPT/36/2011, to this Court. He cannot do that. Neither could he have gone back to the proceedings at the Federal High Court with a view to upstaging the judgment of the said Court of Appeal, (which court was the final Court in the election matter). The sacrosanct principle of stare decisis loathes the approach of the 1st respondent to this matter. It does not matter that the application for mandamus was pending before the institution of the election Petition. C

It suffices to say that the resolution of the two main issues raised by the appellant in his favour determines the appeal. Needless going into other irrelevant discourse by the parties. E

On the whole, in view of the foregoing, this appeal succeeds and is allowed. The judgment of the court below which affirmed the decision of the trial Federal High Court in mandamus application is hereby set aside. I award costs assessed at N250,000 against each 1st and 2nd respondents, in favour of the appellant. F

ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother, GALADIMA, JSC just delivered. I agree with his reasoning and conclusion that the appeal is meritorious and should be allowed.

The facts of the case have been stated in detail in the lead judgment. I therefore do not intend to repeat them herein except as may be needed to emphasize the point being made. H

The action giving rise to this further appeal came to court by way of judicial review by which the 1st respondent, by a motion on notice filed on 11th April, 2011 sought the following reliefs:-

“1. A declaration of court that the respondent being a public body upon which a lot of constitutional and statutory responsibilities have been reposed especially in the matter of conducting a free and fair election in Nigeria in April, 2011 must in doing so act dispassionately, independently and fairly without bias for or against any person(s) including the applicant.

2. A declaration of court that the respondent cannot be allowed to approbate and reprobate at the same time or to speak from both sides of the same mouth at the same time and is therefore bound by its declarations and statements especially as set out and or contained in its letter dated 10/2/2011 and cannot be allowed to resile from the same.

3. An order of mandamus or mandatory order of injunction of the court compelling the respondent forthwith to accord to the applicant all the rights, privileges and entitlements due to a candidate of the Peoples Democratic Party in the April 2011 general elections having won its primaries, been duly nominated by the party to fly its flag in the election to the Anambra East/West Federal Constituency and as a result of the order of the court in FHC/CS/AWK/5/2011”

The action as constituted supra was initiated against the Independent National Electoral Commission (INEC) alone. It was very much later that appellant was joined in the proceedings as a party.

While the action for judicial review was pending, the general election of April, 2011 was conducted and a winner of Anambra East/West Federal Constituency was declared making it necessary for 1st respondent to approach the election tribunal. It was appellant that was declared winner of the said election. 1st respondent therefore instituted an election petition against appellant in No. EPT/ANE/HR/17/2011 seeking to be declared the lawful candidate of PDP for the election in issue. The petition was declared abandoned by the tribunal and consequently dismissed which dismissal was subsequently affirmed by the Court of Appeal in its judgment delivered on the 19th day of September, 2011 in appeal No. CA/E/EPT/36/2011. The Court of Appeal is the final Court of Appeal in relation to Federal House of Representatives election,

Realising that he had suddenly come to the end of the road in the proceedings, 1st respondent then went back to the earlier action for judicial review which seeks, essentially, the same reliefs as those in

the dismissed election petition. In short, 1st respondent maintained actions on the same subject matter in which he was seeking the same reliefs in two courts of parallel jurisdictions simultaneously!!

The Federal High Court, in the mandamus proceedings, declared the 1st respondent as the lawful candidate for the election in issue and ordered INEC to accord him the rights, privileges and entitlements of a candidate. B

Appellant was dissatisfied with the decision and appealed to the lower court which dismissed the appeal and affirmed the judgment of the trial court resulting in the instant further appeal to this Court, the issues for the determination of which have been identified in the appellant brief of argument filed on 17/4/2014 as follows C

“1. Whether the court below was right when it failed to hold that the trial court had no competence as at the time it did to deal with or to continue with the proceedings at the Federal High Court including its delivery of the ensuing judgment. D

2. Was the court below right in its reasoning and pronouncement by which it came to the conclusion that facts were not in dispute in the matter and that it was the name of the 1st respondent that was submitted by Peoples Democratic Party (PDP) to Independent National Electoral Commission (INEC), which conclusion, led to the judgment being given against the appellant.” E

This appeal brings, once again to the front burner the dangers inherent in the practice of instituting and maintaining actions on the same subject matter against the same parties claiming essentially the same reliefs in two courts of parallel jurisdiction. The result of such an action can only be disastrous for the judiciary. The action is not only in abuse of process but in bad taste. The result is most likely to be conflicting judgments from the courts of parallel jurisdiction as happened in this case. It is a practice that should not be encouraged at all by legal practitioners. The courts in particular, owe a duty to keep an eagle eye on the proceedings before it with a view to nibbling in the bud, this practice which is usually adopted by desperate politicians with the active support of some legal practitioners. F G H

To me, apart from the issue as to whether the continuation of the proceedings for judicial review after the dismissal of the election petition by the final appellate court in the matter was not in abuse of process and without jurisdiction, the fundamental issue remains

whether, in the circumstances of the facts of this case, the remedy of judicial review is available to the 1st respondent in the first place. I am surprised that none of the counsel for the parties referred the court to the decision of this Court in the consolidated appeal NOS. SC/3/2010; SC/51/2010 and SC/54/2010 between CHIEF IKEDI OHAKIM VS CHIEF MARTIN AGBASO & ORS delivered on the 16th day of July, 2010 which is very much on all fours with the instant appeal. The decision is reported in (2010) 19 NWLR (pt. 1226) at 172.

In the above consolidated appeals, I referred to and relied on the judgment of this Court in the case of ANPP vs Returning Officer, Abia State (2007) 11 NWLR (pt. 1045) 431 at 434 - 436 where the court stated the position of the law as follows:-

“Election matters are in a class of their own and are entirely statutory. The writs of certiorari and mandamus being Common Law remedies cannot be invoked in a purely election matter and where they are invoked, they cannot change the character of the matter as election matter clearly belongs to the election tribunal and clearly outside the jurisdiction of the Federal High Courts.”

It is very clear from the above statement of the law that the Federal High Court lacks the jurisdiction to entertain the matter as constituted as a result of which the lower court was robbed of the jurisdiction to hear and determine the appeal arising there from.

It is for the above reason and the more detailed assigned in the lead judgment that I too find merit in the appeal and consequently allow same.

The judgments of the lower courts are hereby set aside and suit NO. FHC/AWK/15/2011 is hereby dismissed for lack/want of jurisdiction.

I abide by the other consequential orders made in the said lead judgment including the order as to costs. Appeal allowed.

PETER-ODILI JSC

I agree totally with the judgment just delivered by my learned brother, Suleiman Galadima, JSC, and to underscore my support, I shall make some comments.

This is an appeal from the Judgment of the Court of Appeal, Enugu Division which affirmed the decision of the Federal High Court

sitting in Awka on an application for Judicial Review to wit: a Writ of Mandamus brought by the 1st Respondent to compel INEC to grant to the 1st Respondent the rights, privileges and entitlements of a candidate of PDP for the April, 2011 election for Anambra East/West Federal Constituency.

The grounds upon which the Application was brought are recast hereunder:-

1. The applicant had contested in the Primary election conducted by the National Executive Committee of the Peoples Democratic Party on 8/1/2011 by Senator D.K. WAKU to elect its candidate for the Federal House of Representatives (Anambra East/West Anambra Federal Constituency) and won, his name had been forwarded to the respondent by the same National Executive Committee of the party as its “candidate for that constituency in the election.

2. That when the respondent for reasons best known to her started dragging her feet on the matter and would not accept the list containing the applicant’s name otherwise called the “WAKU LIST” that had been forwarded to her by the National Executive Committee of the party and was bent on receiving another list altogether different from the one containing the applicant’s name and the names of other members of his group, they had approached the court in Suit No. FHC/AWK/CS/05/2011 for an order of court to stop the respondent from accepting any such list, the court had granted and or made the order on 13/1/2011.

FACTS:

The facts of this case are to the effect that sometime in earlier in January, 2011 soon after the conduct of the PDP primaries for nomination of the party’s flag bearers in 2011 general elections in Anambra State, a dispute arose as to which list of candidates INEC should use as the PDP list of candidates for the election. The 1st Respondent and other aspirants in the primaries in a representative action submitted the dispute for resolution in Suit No.FHC/AWK/CS/05/2011 between Prince Hon. Nicholas Ukachukwu v. INEC. The 1st Respondent and his co-travelers sought for and were granted an interim order to stop INEC from accepting any competing list of PDP candidates for the election pending the determination of the substantive suit.

The said Suit No. FHC/AWK/CS/05/2011 was still pending and

had not resolved the dispute as to who was the lawful candidate of PDP for the election and had not made any pronouncements on the merits of the case when the 1st Respondent cruised into court in for yet another Judicial Review proceedings this time around by way of Mandamus to compel INEC to accord him with the rights, privileges and entitlements due to the lawful candidate of PDP for the self-same election.

The 1st Respondent being aware of the unresolved Suit No. FHC/AWK/CS/05/2011 had not resiled his rights to the candidature of PDP for the election pleaded the interim orders made in the said suit as well as his alleged futile demands on INEC as the plank upon which case of Mandamus was built.

The name of the Appellant was published by INEC as the Candidate of PDP prior to the institution of this suit and the Appellant contested, won and was declared the winner of the election held on 26th April, 2011. It was on that declaration of the victory of the appellant that 1st Respondent initiated the Election Petition against the Appellant at the Election Petition Tribunal seeking the election of the Appellant to be invalidated.

A conjunctive reading of the reliefs sought to the Petition portends that the 1st Respondent claims to be the nominated and sponsored candidate of PDP for the said election and that he was entitled to be issued with a Certificate of Return to enable him sit in the National Assembly as the member representing Anambra East/West Federal Constituency is exactly what the 1st Respondent also seeks to achieve in Iris Application for Mandamus when he prayed for an order of Court by way of Mandamus or mandatory injunction to compel INEC to accord him all rights, privileges and entitlement due to the candidate of PDP having been nominated and sponsored as such.

In the course of the proceedings at the Election Tribunal the Petition was dismissed as an abandoned Petition and this dismissal was affirmed by the Court of appeal in its judgment delivered on 19th September, 2011 in Appeal NO. CA/E/EPT/36/2011. Meanwhile, the 1st Respondent while prosecuting the petition with one hand was also using the other hand to ply the wheel of the proceedings in his Application for Mandamus and when he lost finally at the Election Tribunal, he fell back on the application for Mandamus. The Election Tri-

bunal and the Court of Appeal sitting in the Appeal as the final Court on 19th September, 2011 refused the 1st Respondent's agitation to be declared the lawful candidate of PDP for the election and his bid to be issued with a Certificate of Return but on 13th July, 2012, about 10 months after the Judgment of the Court of Appeal, the Federal High Court sitting in Mandamus Application declared the 1st respondent as the lawful candidate for the self-same election and ordered INEC to accord him the rights, privileges and entitlements ordered to be accorded the 1st Respondent in the issuance of Certificate of Return to him while withdrawing the one already issued to the Appellant.

The Appellant appealed to the Court of Appeal or Court below against the decision of the trial Federal High Court which Court below affirmed the decision of the Federal High Court in favour of the 1st Respondent hence an appeal to the Supreme Court.

On the 21st October, 2014 date of hearing, learned counsel for the Appellant, Arthur Obi Okafor SAN adopted their Brief filed on 17/4/2014 which the learned senior advocate had settled. He had formulated therein two issues for determination, viz:-

i. Whether the Court below was right when it failed to hold that the trial Court had no competence as at the time it did to deal with or continue with the proceedings at the Federal High Court including its delivery of the ensuing judgment,

ii. Was the Court below right in its reasoning and pronouncement by which it came to the conclusion that facts were not in dispute in this matter and that it was the name of the 1st Respondent that was submitted by Peoples Democratic Party (PDP) to Independent Election Committee (INEC), which conclusion led to the judgment being given against the Appellant.

The Appellant also filed a Reply Brief on 26/5/14. Mr. Chima Oguejiofor, learned counsel for the 1st Respondent settled a Brief of argument filed on 12/5/14. He raised two issues for determination which

1. Was the Court below right in holding as it did that the suit leading to this Appeal was a pre-election suit over which the trial court had jurisdiction (Ground 1).

2. Whether the court would still have jurisdiction to hear this appeal if the suit leading to the appeal was not a pre-election suit

over which the trial court has jurisdiction, did the decision of the Court of Appeal Enugu in CA/E/EPT/36/2011 extinguish the jurisdiction of the trial court to hear the suit leading to this appeal. (Grounds 2, 3)

B 3. Whether the Court below was right in dismissing the appeal of the appellant and in affirming the judgment of the trial court. (Grounds 4, 5, 10)

C 4. Whether the Court below was right when it held that the 1st respondent's suit at the trial court was not an abuse of the process of the court (Ground 15).

5. Whether the legal principle of "Res Judicata", applies to this case so as to divest the court of the jurisdiction to hear the case (Ground 13).

D The issues as couched on either side seem repetitive in content and Issue 1 of the Appellant is another way of stating Issue 3 of the 1st Respondent which crafting is easier to follow and I shall so utilise in the determination of this appeal, and that is:

Whether the Court below was right in dismissing the appeal of the Appellant and in affirming the judgment of the trial Court?

E Learned counsel for the Appellant after recasting the reliefs and grounds for the application at the Court of trial contended that prior to the filing of the Mandamus application, there was an existing dispute between the 1st Respondent and the INEC as to which list of PDP candidates that will be used for the election and 1st Respondent F and others had submitted before the Federal High Court Awka in Suit NO. FHC/AWK/CS/05/2011. That as at the time of the Mandamus application and the judgment therefrom, both in the Federal High Court and Court of Appeal, the issue of whether the 1st Respondent was the lawful candidate of PDP for the election and whether G INEC should accept his name as the lawful candidate had not been determined in the said suit in Suit No. FHC/AWK/CS/05/2011. Therefore, the 1st Respondent's interest in his name being accepted as the lawful candidate of PDP and the duty of INEC to accord him the H rights, privileges and entitlements of the lawful candidates was yet unresolved and subject of the pending suit aforesaid. That the 1st Respondent was bound to await the outcome of that first suit before instituting any action on Mandamus based on the same subject matter. He cited Okafor v Nweke (2007) 10 NWLR (Pt. 1043) 521.

Learned Senior Counsel for the Appellant contended that the Appellant was not a party to the interim orders in Suit No. FHC/AWK/CS/05/2011 and cannot be affected by the said orders and so, the Court below erred in finding that the 1st Respondent is entitled to the order of Mandamus based on the interim orders of Court in Suit No. FHC/AWK/CS/05/2011 by which it stripped the Appellant of his status as the winner of the April, 2011 general election. B

He stated on that with the dismissal of the Election Petition and affirmation of the dismissal by the Court of Appeal on the 19th day of September, 2011, the 1st Respondent ceased to have sufficient interest to ask for Mandamus on the ground that he was the lawful. C

That it is to be noted that judgment was given by the Federal High court on 13th July, 2012 several months after the court of appeal delivered the final judgment in the Petition. Also that the 1st Respondent's enterprise in the application of Mandamus was thereby aborted as INEC ceased to have any public duty to perform by way of according 1st Respondent those rights, privileges etc or issuing him with a Certificate of Return. D

Mr. Okafor SAN submitted that the 1st Respondent could not go back to continue with the proceedings in the Federal High Court on the dismissed by the Election Tribunal confirmed by the Court of Appeal as it was to upstage the final order of the Court of Appeal, which is an abuse of Court process. He cited *Dingyadi & Anor v INEC & Ors* (2012) 11 SC NJ1; *Dingyadi v INEC* (NO.1) (2010) 18 NWLR (Pt. 1224)1 at 75. F

Mr. Okafor SAN went on to say that the fact that the Appellant was joined after the election to canvass the jurisdictional issue cannot revive the jurisdiction which the regular court lost after the holding the election and declaration of results. That parties cannot by their act or conduct confer jurisdiction to the court if the court had none. He relied on *Hassan v Aliyu* (2010) 17 NWLR (Pt. 1223) 547 at 589 - 590; *Pwechem Ind. Ltd v Spica Shipping Co. Ltd* (2013) 3 NWLR (Pt. 1287) 343. G

Also submitted for the Appellant is that the appellant was not joined to the proceedings till after the expiration of 3 months from the accrual of the cause of action in the suit which went contrary to the dictates of Judicial Review which is a special proceeding regulated by time. He cited Order 34, Rule 4 Federal High Court (Civil Proce- H

dure) Rules, 2009.

For the Appellant was canvassed that mandamus being a prerogative writ can only be obtained upon a proper case previously shown to the satisfaction of the court and in this instance that proper case cannot be said to have been made if the essential ingredient forming the background to the facts and circumstances imposing a public duty upon a person alleged to have failed to perform that duty is not supported by evidence. He cited *Shitta-Bay v Federal Public Service Commission* (1981) 1 SC 40 at 53; *Fawehinmi v. IGP* (2002) 7 NWLR (Pt. 767) 606 at 686

Responding, Mr. Chima Oguejiofor for the 1st Respondent stated that it is trite that the claim of the plaintiff or applicant as in this case that determines the jurisdiction of the court to hear the case. He cited *Adeyemi v Opeyori* (1976) 9 - 10 SC 31 at 51; *Barclays Bank D v Central Bank* (1976) 6 SC 175 at 193.

He stated that the decision of the Election Petition Tribunal or Court of Appeal did not and cannot act to extinguish the jurisdiction of the trial court in the suit leading to this appeal to hear the suit, since the Election Petition Tribunal never heard any pre-election issues in the Election Petition. That the prevailing circumstances show that 2nd Respondent, INEC still bore the statutory duty imposed on it by Section 31(1) of the Electoral Act, 2010 (as amended) to accept the list of Candidates' names including that of 1st Respondent sent by the National Executive Committee of PDP to choose their candidate in the 2011 General Election. Also that the 2nd Respondent bore the public duty to obey all the decisions of Courts of competent jurisdiction including the orders of the Federal High Court, Awka made on 13/1/2011, 11/2/2011 and 25/3/2011 and the judgment of the Supreme Court in SC.69/2012 that only one primary election had been conducted in Anambra State to elect candidates to represent PDP in 2011 election, in the case of *Emeka v Okadigbo* in SC.69/2012.

For the 1st Respondent was further contended that the Election Petition Tribunals lack jurisdiction to hear pre-election matters and so where as in this case, the subject matter of a pre-election suit and the issues raised in the same court cannot be the same as the subject matter or issues raised in a post election petition at the Election Petition Tribunal. That the judgments of the trial court and the Court of Appeal were based on the judgment of the Supreme Court

in SC.69/2012 to which those Courts below are bound by the principle of “stare decisis” and so the suit leading to this Appeal is not an abuse of Court process.

Mr. Oguejiofor of counsel submitted that what in a nutshell is at play is that while in the Election Petition the 1st Respondent had queried certain actions of INEC taken after the election including declaring the Appellant who did not contest the election as winner, in the suit leading to the current appeal which was filed before the election the acts of INEC were taken before the election were the subject matter of the suit. He cited *Dakolo & Ors v Dakolo & Ors* (2011) 6 - 7 SC (Pt. III) 104 at 109; *Ezeigwe v Nwawulu* (2010) 2 - 3 SC (Pt. I) 1 at 6; *Emeka v Okadigbo & Ors* (2012) 7 SC (Pt.I) 1 at 14. B
C

The contest between the parties may be briefly stated to be, on the part of the Appellant is that the 1st Respondent’s application for Mandamus which was filed subsequently and which was woven around Suit No. FHC/AWK/CS/05/2011 was prematurely filed, incompetently filed and determined. That the decision of the Election Petition Tribunal and the Court of Appeal as final Court being over the same subject matter with the present action on Mandamus knocked the bottom off the proceedings on mandamus as Appellant cannot be made to defend the same cause of action twice. That was at the time the Appellant was joined into the Mandamus proceedings after the holding of the election and declaration of results thereof, all pre-election disputes between 1st Respondent and Appellant had transmuted into post-election disputes determinable only by the Election Tribunal and so the proceedings for Judicial Review became dead against the Appellant when Appellant was not sued or joined into the Mandamus proceedings within 3 months of the accrual of the cause of action. D
E
F
G

On the other part, 1st Respondents stance is that the legal principles of Res Judicata and Abuse of Court process do not apply to this case as the parties, subject matter, facts and issues in the election petition in EPT/AN/NAE/HR/17/2011 are the same as in the suit giving rise to this Appeal, also that the facts, issues, subject matter and parties in FHC/UM/092/2011 are not the same as the present case, That the combined effect of Sections 233 and 246 (3) of the Constitution of Nigeria 1999 (as amended) is that this court lacks jurisdiction to entertain appeals in post-election matters relating to election H

to the National Assembly, the Court of Appeal is the final appellate Court in that regard. That this Apex Court had held in the case of *Emeka v Okadigbo* in SC/69/2012 that the only valid primary of the PDP is that conducted by the National Executive Committee of the Party, while that one of Anambra State Chapter is a nullity and so
 B order of mandamus can properly be made to enforce the decision of a court of competent jurisdiction and the suit is not an abuse of the process of Court.

At the foundation of this appeal is the order of Mandamus
 C sought by the 1st Respondent to compel the performance of a public duty at his instance on the ground that he had sufficient interest in the performance of that public duty of the 2nd Respondent. The grounds for the mandatory order of Mandamus are reproduced below for clarity thus:-

D 1. The applicant had contested in the primary election conducted by the National Executive committee of the Peoples Democratic Party on 8/12011 by Senator D. K. WAKU to elect its candidate for the Federal House of Representatives, (Anambra East/Anambra West Federal Constituency) and won, his name had been forwarded
 E to the respondent by the same National Executive Committee of the party as its candidate for that constituency in the election.

2. That when the respondent for reasons best known to her started dragging her feet on the matter and would not accept the
 F “WAKU LIST” that had been forwarded to her by the National Executive Committee of the party and was bent on receiving another list altogether different from the one containing the applicant’s name and the names of other members of his group, they had approached the court in Suit No. FHC/AWK/05/2011 for an order of court to
 G stop the respondent from accepting any such list, the court had granted and or made the order on 13/1/2011.

The facts that are easily distilled from the grounds for the prerogative order of Mandamus sought are stated as follows:-

H 1. Before the application for Mandamus was filed, there was an existing dispute between the 1st Respondent and INEC (2nd Respondent) as to which list of candidates INEC would be utilised for the general election, which earlier dispute was before the Federal High Court in Suit No. FHC/AWK/CS/05/2011 at Awka.

2. Up to the time of filing of the Application for Mandamus

and judgment delivered therefore both at the Federal High Court and the Court Of Appeal, the earlier dispute before the Federal High Court Awka as to who was the lawful candidate and whose name 2nd Respondent was to accept had not been determined in the said Suit NO. FHC/AWK/CS/05/23011.

3. Another way of restating the point in (2) above is that 1st B Respondent's interest in his name being accepted as the lawful candidate of PDP and the duty of INEC to accord him the rights, principles and entitlements of the lawful candidate was still disputed and not resolved in the said earlier Suit NO. FHC/AWK/CS/05/2011.

4. In effect what is at play is the Applicant using the interim order made by the Federal High Court in Suit NO. FHC/AWK/CS/05/2011 as basis for the application of the order of Mandamus. C

The implication of what was on ground is that the sufficient interest needed for the seeking of mandamus was built on the interim order of the Federal High Court in FHC/AWK/CS/05/2011 which interim order was to keep matters in status quo pending the final determination of the dispute as to who the rightful candidate of PDP was and so the utilisation of such a temporary order to anchor mandamus was premature and that had not properly crystallized. Therefore, it cannot be properly said that the mandamus is a relief in respect of the infringement of some public duty or right where no effective relief can be obtained in the ordinary cause of action. See Ulegede v Commissioner of Agriculture, Benue State (1996) 8 NWLR (Pt. 467) 437 at 449; Fawehinmi v. IGP (2002) 7 NWLR (Pt. 767) 606 at 694. E F

Again, of interest is the fact that the Appellant was not a party to the interim orders in Suit No. FHC/AWK/CS/05/2011 and so it certainly is prejudicial to have those same orders affect him in the new application of Mandamus. It is trite that a non party to an action cannot be bound by orders emanating from the said suit. I rely on Maikori v Lere (1992) 3 NWLR (Pt.231) 252; Ndulue v Ibezim (2002) 12 NWLR (Pt 780) 139 at 165. G

To be useful to the application of mandamus, the suit in PHC/ AWK/CS/05/2011 ought to have been fully determined and the status of the contending parties well established before such a suit can be a based for a new action such as the one before us now. H
Of note is the related Election Petition in EPT/AN/NAE/HR/17/2011

wherein the 1st Respondent had sought to be returned and declared elected and not the appellant on the ground that 1st respondent was the lawful candidate of PDP at the 26th April, 2011 election. The Appellant had raised an objection to the competence on the petition on the ground that the basis of the petition was pre-election dispute.

B The 1st Respondent had contended otherwise and the Tribunal upheld his view that it was competent and within the ambit of the Electoral Act. However, the Petition was dismissed by the Tribunal as an abandoned Petition and the appeal by the 1st respondent was equally dismissed. The Court of Appeal being the final court sequel to Section 246 (3) of the 1999 Constitution as amended, the matter ought to have rested. The resultant effect is that the 1st Respondent after that final pronouncement of dismissal by the final court to attempt to maintain this action before the Federal High Court for Judicial Review in the name of .Mandamus is not acceptable and rather reprehensible.

The dictum of my learned brother Onnoghen, JSC in *Dangana v Usman* (2013) 6 NWLR (Pt. 1349) 50 at 90 is apt for our purpose here and I shall quote thus:-

E *“Whether an aggrieved party decides to go to the High Court to challenge or question the qualification of such candidate, his right of appeal terminates at the Supreme Court. Where, however, he decides to go through the election tribunal route and the election to which the issue relates is a National or State Houses of Assembly*
F *Election, then, his quest for justice constitutionally terminates at the Court of Appeal by operation of Section 246 (3) of the 1999 Constitution.”*

G The summary of what I am labouring to say is that the issue of the rightful candidate for that election contest of 26 April, 2011 having been laid to rest when the Petition was dismissed by the Tribunal and affirmed by the Court of Appeal, the inquiry as to the proper candidate died with that final determination at the Court of Appeal.

H For the 1st Respondent to go back to the Federal High Court in the quest to resuscitate a dead issue of candidature is not only forum shopping but a gross abuse of Court process. The case of *Dingyadi & Anor v INEC & Ors* (2012) 11 SCNJ 1 is applicable.

From the foregoing, it is clear that no jurisdiction exists in this searching expedition and the 1st respondent ought to have taken a

break from further judicial inquiries into imaginary possibilities upon which he has sought to usurp the right belonging to another, nor can the 1st Respondent through his quest confer jurisdiction on the Court where there is none. See *Purchem Ind. Ltd v Spica Shipping Co. Ltd* (2013) 3 NWLR (Pt. 1287) 343.

I have no difficulty in allowing the appeal and abide by the consequential orders earlier made. B

ARIWOOLA JSC

I had the privilege of reading in draft, the lead judgment of my learned brother, Galadima, JSC just delivered. I am in total agreement with the reasoning therein and the conclusion arrived thereat. C

The appeal is meritorious and should be allowed. Accordingly, I allow the appeal and award in favour of the appellant, the same costs as awarded in the lead judgment. Appeal is allowed. D

AKA'AH'S JSC

Immediately after the conduct of the PDP primaries in January, 2011 to nominate candidates for Anambra State who would contest in the general elections slated for April, 2014; a dispute arose as to which list of candidates INEC should use for the election. In suit No.FHC/AWK/CS/05/2011 between Prince Nicholas Ukachukwu v INEC, the 1st Respondent and others sought for and were granted an interim order to Stop INEC from accepting any competing list of PDP candidates for the election pending the determination of the substantive suit. That suit was still pending and the issue of who was the lawful candidate of PDP had not been resolved on the merit when the 1st respondent filed another suit No.FHC/AWK/CS/157/2011 seeking a judicial review by way of mandamus to compel INEC to accord him the rights, privileges and entitlements due to a lawful candidate of PDP for the same election. Before suit FHC/AKW/CS/157/2011 was filed INEC had published the name of the 1st appellant as the PDP candidate to contest for the Anambra East/West Federal Constituency election. Although the 1st respondent did not join the appellant in any of the suits, he heavily relied on the interim order which the court made in FHC/AKW/CS/05/2011. This was the E
F
G
H

state of affairs as at 26/4/2011 when the election was conducted and the appellant was declared the winner. Following the declaration of the results of the election, the 1st respondent filed an election petition No. EPT/AN/NAE/HR/17/2011 challenging the election and sought for a declaration that the return made in favour of the appellant (then 1st respondent) by the constituency returning officer on 27/4/11 was undue and invalid in that he (the petitioner), and not the 1st respondent was the candidate of the PDP who actually contested the election and earned the majority of 16,020 votes in the election. He also prayed the Tribunal to order INEC to issue a certificate of return in his favour and to restrain the 1st respondent from parading or putting himself forward as the person returned or elected as the member of the aforesaid Anambra East/West Federal Constituency or from enjoying any rights/perquisites of that office. The petition was deemed abandoned and consequently dismissed. The dismissal of the petition was affirmed by the Court of Appeal in Enugu on 19/9/2011 in appeal No. CA/E/EPT/36/2011. When he lost at the Election Tribunal, he fell back on the application for mandamus. On 13/7/2012 the Federal High Court delivered its judgment declaring him (1st respondent) as the lawful candidate of the PDP and ordered INEC to accord him the rights, privileges and entitlements of a candidate. The appellant appealed against the decision but the appeal was dismissed; hence the present appeal to this Court.

I have read the leading judgment of my learned brother, GALADIMA, JSC and I agree with him that had the issue as to who the PDP nominated to contest the 2011 election been decided before the Election Petition was determined, the 1st respondent's claim to being the lawful candidate who should have contested the election would have enabled him to challenge the election as the candidate who was properly nominated but unlawfully excluded from the election. The flouting of the interim order of the Court which stopped INEC from accepting any competing list of PDP candidates for the election pending the determination of the suit could only give rise to contempt proceedings against INEC since neither the appellant nor PDP were joined in the suit. Since the Election Petition No. EPT/AN/NAE/HR/17/2011 was dismissed and the decision affirmed by the Court of Appeal which is the final Court in National election matters by virtue of section 246(3) of the Constitution of the Federal Repub-

lic of Nigeria 1999 (as amended), the two lower Courts lacked jurisdiction to make a declaration that the 1st respondent was the candidate of the PDP who actually contested the election and earned the majority of 16,020 lawful votes. Consequently, the two lower courts could not make a consequential order that INEC should issue a certificate of return to the 1st respondent. The appeal therefore has merit and it is hereby allowed. The judgment of the Federal High Court, Awka in suit No. FHC/AWK/CS/157/2011 delivered on 13/7/2012 and affirmed by the Court of Appeal, Enugu in CA/E/300/2012 on 27/3/2013 are hereby set aside. In its place suit No. FHC/AWK/CS/157/2011 is dismissed. I abide by the order made on costs.

D

E

F

G

H