

**SUPREME COURT OF NIGERIA**  
FRIDAY 20TH FEBRUARY, 2015. SC. 130/2013  
**CORAM:- J. A. FABIYI, B. RHODES-VIVOUR,**  
**M. D. MUHAMMAD, C. B. OGUNBIYI,**  
**K. B. AKA'AH, JJSC**

- |   |                   |
|---|-------------------|
| 1. CHIEF FRANCIS<br>UCHENNA UGWU                |                   |
| 2. EMEKA INNOCENT ABA                           |                   |
| 3. EUGENE OYEBUCHI ODO                          | ..... APPELLANTS  |
| 4. CHARLES IFEANYI<br>OGBUANYA                  |                   |
| 5. AUGUSTINE ISIANI<br>AND                      |                   |
| 1. PEOPLES DEMOCRATIC PARTY                     |                   |
| 2. INDEPENDENT NATIONAL<br>ELECTORAL COMMISSION |                   |
| 3. SENATOR AYOGU EZE                            |                   |
| 4. HON. IFEANYI UGWUANYI                        | ..... RESPONDENTS |
| 5. EZEUGWU IKECHUKWU<br>MELETUS                 |                   |
| 6. JOHN KEVIN UKUTA                             |                   |
| 7. NWAMBA CHRISTIAN CHINEDU                     |                   |

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ACTIONS - Striking out - Effect - Miscarriage of justice is not occasioned - Since an order striking out the suit for non justiciability of subject matter - Has the same effect as dismissing the suit (H1)

ELECTIONS - Primaries - Jurisdiction - Where dispute arises as to which of the primaries produced candidate for a political party - The matter is taken outside Electoral Act 2010 s. 87(4)(b)(ii), (c)(ii) & (9) (H2)

ELECTIONS - Primaries - Relief - The injunctive relief sought against 2<sup>nd</sup> respondent cannot be made - As 1<sup>st</sup> respondent can no longer submit appellants' name as the party's candidate (H3)

**FACTS**

By an originating summons filed before the Federal High Court sitting in Enugu, plaintiffs/appellants commenced this action seeking inter alia for declaratory reliefs that they were entitled to have their names submitted by 1st defendant/1<sup>st</sup> respondent to 2nd defendant/2<sup>nd</sup> respondent as the candidates for the elections in respect of the Enugu North Senatorial District, Igboeze North/Udenu Federal Constituency and the Udenu, Uzo Uwani and Nsukka East Constituencies of the State. Their claim is that they participated and won the primary elections conducted by the Peoples Democratic Party for the aforementioned elections.

Application for joinder of parties made by 3<sup>rd</sup> to 7<sup>th</sup> defendants/respondents was granted. 3<sup>rd</sup> to 7<sup>th</sup> respondents alleged that subsequent rerun primary elections were conducted following series of complaints made against the earlier primaries conducted. They stated that after the rerun, names of 3<sup>rd</sup> to 7<sup>th</sup> respondents were forwarded to 2<sup>nd</sup> respondents as the candidates of 1<sup>st</sup> respondent for the elections. Notices of preliminary objection were brought by the respondents, asking the court to strike out the suit for being non-justiciable and that the court lacked jurisdiction to entertain same. The matter went on hearing and at the end of which the court upheld the objection of 1<sup>st</sup> respondent and dismissed the suit. Appeal by appellants to the Court of Appeal Enugu Division was equally dismissed. Aggrieved further, appellants have appealed to Supreme Court.

**ISSUES FOR DETERMINATION**

1. Whether the recent decision of this Court in Senator Yakubu Garba Lado & Ors v. Congress for Progressive Change (2012) 48 NSCQR 501, (2011) 18 NWLR (part 1279) 689 is on all fours with the facts of this case and thus operated to wrest jurisdiction from the courts below with the matters in controversy.

2. Whether the interpretation placed on Orders 29 and 48 of the Federal High Court (Civil procedure) Rules 2009 by the court below led to a miscarriage of justice.

3. Whether the decision of this Court in Senator Yakubu Garba Lado & Ors v. Congress for progressive Change & Ors is not a recipe for injustice having regard to section 87 (9) of the extant Electoral Act 2010.

4. Was the court below correct in the approach it took when it

made material findings on issues which the trial court did not consider?

**HELD** (Unanimously dismissing the appeal per AKA'AHS JSC)

*ACTIONS - Striking out - Effect*

**1. The learned trial judge in agreeing with the arguments of the learned counsel for the 1st respondent relied on Lado's case to say that the Court lacks the jurisdiction to determine the validity of the two elections allegedly held or choose between the two lists of candidates by preferring one list of candidates to the other since this is the exclusive or sole domain of the political party. Although the learned trial Judge dismissed the suit instead of striking it out for lack of jurisdiction, I agree with the finding made by the lower court that the error did not occasion a miscarriage of justice since an order striking out the suit for non justiciability of the subject matter has the same effect as dismissing the suit. (p. 741 B)**

*ELECTIONS - Primaries - Jurisdiction*

**2. The position which this Court had earlier taken in Lado's case is that once there arises a dispute as to which of the two primaries conferred a right of candidature on the parties to represent a political party in an election the matter is taken outside the purview of Section 87(4)(b)(ii), (c)(ii) and (9) of the Electoral Act, 2010 (as amended). In this regard therefore the lower court was wrong to affirm the decision of the Federal High Court, Enugu when it declined jurisdiction to entertain the appellants' claim that they were the persons entitled exclusively to have their names submitted by the 1st respondent to the 2nd respondent for election into the Enugu North Senatorial District, Igboeze North/Udenu Federal Constituency, Udenu Uzo Uwani and Nsukka East State Constituencies respectively to contest the election. On this score, I agree with learned counsel for the appellants that since the learned trial Judge held that the action was non justiciable**

**and consequently declined jurisdiction which was endorsed by the lower court, an appeal to this court to test the correctness of the two lower courts' decisions cannot be said to be academic. The preliminary objection of the 1st respondent is overruled and struck out.**

**B I am of the considered view that the trial court will be abdicating its responsibility if it declares that the suit is not justiciable. It has a duty to say which of the two primaries is the authentic one. This is the reason why Section 87(1) (4) (c) (i) (ii) and (9) has been put in place and to avoid arbitrariness by some officials of the Political Party who may want to impose their preferred candidates who probably did not take part in the primaries.**

**D In this appeal the 3rd-7th respondents are claiming that the appellants were handpicked by the then chairman of the PDP to contest the elections and when they protested, the said nomination which produced the appellants was nullified and a fresh primary was conducted which the respondents won. Because of the conflicting claims by the parties it is only the Court that could resolve the issue. (pp. 743 G/746 B/747 A)**

### *ELECTIONS - Primaries - Relief*

**3. Despite the finding that the Federal High Court ought to have exercised jurisdiction to determine the authentic primaries conducted by the 1st respondent for the elective offices of the Constituencies (State and National Assembly) for Enugu North Senatorial District for the 2011 general elections, the injunctive relief sought against the 2nd respondent cannot be made. The 1st respondent can no longer submit the names of the appellants to the 2nd respondent as the Party's candidates for the election. See section 33 of the Electoral Act. (p. 747 D)**

## **H NOTABLE POINT OF INTEREST**

### **AKA'AHS JSC**

#### ***1. Conflict in affidavit – Resolution***

In *Falobi v. Falobi* (1976) 9-10 SC, this Court laid down the principle

that where the affidavit evidence filed are in conflict, the Court seised of the matter must resolve the conflict by calling oral evidence.  
(p. 747 C)

### ***REPRESENTATION***

Awa U. Kalu, SAN with Ugo Ukwueze; A. A. Nwodo (Miss); C. L. B  
Obidike and W. B. Musa, for the Appellants  
Ifeanyichukwu for the 1st Respondent  
S. O. Ibrahim for 2nd Respondent  
Tochukwu Maduka for 3rd - 7th Respondents C

### ***CASES REFERRED TO***

Lado v. CPC (2012) 48 NSCQR 501  
CPC v. Ombugadu (2013) 18 NWLR (pt. 1385) 66  
PDP v. Sylva (2012) 13 NWLR (pt. 1316) 85 D  
Eyiboh v. Abia (2012) 16 NWLR (pt. 1325) 51  
Falobi v. Falobi (1976) 9-10 SC  
Ohakim v. Agbaso (2010) 12 (pt. 2) SCM 134  
Ladoja v. INEC (2007) 12 NWLR (pt. 1047) 119  
Abe V. Unilorin (2013) LPELR E  
Onuoha v. Okafor (1987) 2 SCNLR 244

### ***STATUTE & RULES REFERRED TO***

Electoral Act 2010 (as amended), ss. 33, 87(1)(4)(9)  
Federal High Court (Civil Procedure) Rules 2009, O. 29, O. 48 r. 4 F  
Supreme Court Rules, O. 22

### ***LEAD JUDGMENT BY AKA'AHs JSC***

The Plaintiffs who claimed to have participated and won the G  
primary elections conducted by the Peoples Democratic Party for the  
nomination of candidates in respect of the Enugu North Senatorial  
District, Igboeze North/Udenu Federal Constituency and the Udenu,  
Uzo Uwani and Nsukka East Constituencies of Enugu State respec- H  
tively for the 2011 General Elections but whose names were not  
forwarded by the Party to the (INEC) instituted an action by Orig-  
inating Summons at the Federal High Court Enugu in Suit No. FHC/  
EN/CS/47/2011 seeking declaratory reliefs that they were the people  
entitled to have their names submitted by the 1st defendant to the

2nd defendant as the candidates for the said elections.

The 3rd - 7th Defendants whose names the Party sent to the Independent National Electoral Commission to contest the election applied to be joined and the application was granted. They alleged that following series of complaints by aspirants on the conduct of the  
 B Enugu State House of Assembly and National Assembly primaries in Enugu North Senatorial District, the National Working Committee (NWC) of the Peoples Democratic Party ordered a re-run election for aspirants to membership of the state and National Assemblies in the  
 C Enugu North Senatorial District of the State. After the said re-run primaries, the 1st defendant submitted the names of the 3rd-7th defendants to the 2nd defendant as the duly nominated candidates of the PDP for the various elective positions in the forthcoming general elections.

D The defendants filed Notices of preliminary objection and prayed the Court to strike out the suit for being non-justiciable and that the court lacked the jurisdiction to entertain same. The grounds for the applications were:-

1. That the fundamental issue for determination before the  
 E Court falls within the exclusive domestic domain of the political party - Peoples Democratic Party.

2. That the said issue is non - justiciable and as such this Court lacks the requisite jurisdiction to entertain same.

F Learned counsel for the parties submitted written addresses.

On 16/5/2012, the learned trial Judge upheld the objection of the 1st defendant and dismissed the suit. The ruling came more than one year after the holding of the elections. The plaintiffs now appellants appealed to the Court of Appeal Enugu which dismissed  
 G the appeal on 8/3/2013. Not satisfied with the decisions of the two lower courts, they further appealed to this Court in the Notice of Appeal dated 18/3/2013 which contained 8 grounds from which the following four issues were distilled:-

1. Whether the recent decision of this Court in Senator Yakubu  
 H Garba Lado & Ors v. Congress for Progressive Change (2012) 48 NSCQR 501, (2011) 18 NWLR (part 1279) 689 is on all fours with the facts of this case and thus operated to wrest jurisdiction from the courts below with the matters in controversy. (Grounds 1, 4 and 6)

2. Whether the interpretation placed on Orders 29 and 48 of

the Federal High Court (Civil procedure) Rules 2009 by the court below led to a miscarriage of justice. (Grounds 2 and 3)

3. Whether the decision of this Court in Senator Yakubu Garba Lado & Ors v. Congress for progressive Change & Ors is not a recipe for injustice having regard to section 87 (9) of the extant Electoral Act 2010. (Grounds 7 and 8) B

4. Was the court below correct in the approach it took when it made material findings on issues which the trial court did not consider? (Ground 5)

The 1st as well as 3rd - 7th respondents filed Notices of Preliminary objection. The 1st respondent urged this Court to strike out the appeal together with the suit as same have become an academic exercise. Apart from the objection the 1st respondent raised a lone issue for determination which is the same as the preliminary objection. C

The preliminary objection of 3rd - 7th respondents is concerned with grounds 2, 6, 7 and 8 contained in the Notice of Appeal filed by the appellants. Apart from the preliminary objection, learned counsel for the 3rd - 7th respondents identified the following four issues for determination and they are:- D

1. Whether the court below was wrong in upholding the decision of the trial court declining jurisdiction to entertain the appellants suit relying on the Supreme Court authority of Senator Yakubu Garba Lado & ors v. Congress for Progressive Change (2012) 48 NSCQR 501? (Grounds 1, 4, 6, 7 and 8) E

2. Whether the court below was wrong in holding that the appellants did not challenge the merit of the trial court's decision acceding to hear the preliminary objection at the stage it was heard? (Ground 2) F

3. Whether the court below was wrong in its interpretation of the provisions of Order 48 Rule 4 of the Federal High Court (Civil Procedure) Rules 2009? (Ground 3) G

4. Whether the court below placed reliance of (sic) facts which the trial court made no finding (Ground 5). H

1st Respondent's preliminary Objection

The 1st respondent's preliminary objection prayed this court for an order striking out this appeal and the suit from which the appeal arose as the same have become an academic exercise. One of

the grounds in support of the application is that a favourable resolution of the appeal and the substantive suit will not confer any benefit on the appellants. Mr. Nnenna Nnaji who deposed to a 16 paragraph affidavit in support of the Notice stated as follows in paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the said affidavit:

B “3. At the re - run primary election for the House of Assembly and National Assembly in Enugu North Senatorial District of Enugu State held on 20th January 2011, in which the appellants herein contested but lost, the 3rd - 7th respondents were elected candidates of the PDP for various elective positions for the April, 2011 general elections respectively, as follows, Enugu North Senatorial Seat, Igbo Eze North/Udenu Federal Constituency Seat, Udenu State Constituency Seat, Uzo Uwani State Constituency State and Nsukka East State Constituency Seat.

D 4. The said re-run primary election for the House of Assembly and National Assembly in Enugu North Senatorial District which held on 20th January 2011 was monitored by the 2nd Defendant/Respondent who thereafter issued a report on the conduct of the said re - run primary election.

E 5. The 1st Respondent/Objector herein submitted the names of the 3rd - 7th respondents as the duly elected candidates of the 1st respondent for the various elective positions for which they had been elected at the re-run primary election of 20/1/2011.

F 6. The Appellants/Respondents to this objection on 1st February, 2011 by an Original (sic) summons commenced the suit leading to the instant appeal at the Federal High Court Abuja (but later transferred to Enugu Division of the Court) claiming inter alia declarations that they, the Appellants/Respondents are the persons entitled exclusively to have their names submitted by the 1st respondent to the 2nd respondent as the candidates for purposes of contesting the April, 2011 general elections into the respective elective/ political offices which they aspire to. They further claim (sic) an order of perpetual injunction restraining the 1st Respondent from submitting any other names other than their names as candidates of the 1st Respondent for the 2011 general elections, and also an order of perpetual injunction restraining the 2nd respondent from accepting the name of any person or persons in place of or in substitution for the appellants as the candidates for the April, 2011 general elections



on the platform of the 1st respondent.

7. The trial court on 16th May, 2012 struck out the said suit on the ground that it lacked the jurisdiction to entertain the suit.

8. The 1st respondent did not at any time submit the names of the appellants to the 2nd respondent as the candidates of the party for the April, 2011 general election into the various elective/<sup>B</sup> political offices which they aspire to.

9. I know as a fact that the 1st respondent can no longer submit the names of the appellants to the 2nd respondent as the Party's candidate for election to the Enugu North Senatorial Seat, Igbo Eze North/Udeni Federal Constituency Seat, Udeni State Constituency Seat, respectively for the April, 2011 general election as they aspire to in this suit. <sup>C</sup>

10. Only the 3rd - 7th Respondents whose names were submitted by the 1st Respondent to and accepted by the 2nd respondent contested the April, 2011 general elections into the said offices for the Enugu North Senatorial Seat, Igbo Eze North/Udeni Federal Constituency Seat Udeni Seat (sic) Constituency Seat, Uzo Uwani Constituency Seat, respectively as candidates of the 1st respondent and won. They were duly sworn in and have been in these elective <sup>E</sup> offices since 2011.

11. The said 2011 general election to the offices for the Enugu North Senatorial Seat, Igbo Eze North/Udeni Federal Constituency Seat, Udeni State Constituency Seat, Uzo Uwani Constituency Seat <sup>F</sup> and Nsukka East Constituency Seat was conducted and concluded in April, 2011, almost three years ago, all election petition arising therefrom have been taken and concluded within the time allowed by law."

In the reply to the preliminary objection, learned counsel for <sup>G</sup> the appellants observed that no reference was made to the affidavit in support of the preliminary objection in the arguments of learned counsel to the 1st respondent. This is not true because in the opening paragraph 2.10 on page 2 lines 9 - 10 of the 1st respondent's brief, <sup>H</sup> learned counsel stated as follows;

*"The facts relevant to the preliminary objection as contained partly in the Records of Appeal and the affidavit in support of the objection are..."*

And to buttress the claim that there was a re - run of the pri-

maries which was monitored by the 2nd respondent who issued a report, learned counsel referred to paragraphs 6, 26 - 21 of the 1st respondents counter - affidavit on pages 206 - 207 and 212 - 213 of the records.

B There is no denying the fact that the 1st respondent forwarded  
the names of the 3rd - 7th respondents as the candidates to contest  
the April, 2011 election for the Enugu North Senatorial Seat, the  
Igbo Eze North/Udenu Federal Constituency Seat and the three State  
C Constituency Seats for Udenu, Uzo Uwani and Nsukka East. What  
the appellants are contesting is the re - run which they claim was  
never sanctioned by the National Working Committee of the PDP to  
which they annexed the extract of the NWC meeting of 14th, Janu-  
ary, 2011 of their counter - affidavit dated 14th February, 2012. The  
list did not include any constituency throughout Enugu State where  
D a re - run was to be conducted. However on 19th January, 2011 a  
letter signed by Prince Uche Secondus, the National Organising Sec-  
retary of the P.D.P. was addressed to Hon. James Anbua, Secretary,  
State/National Assembly Electoral Panel, Enugu State informing him  
of his membership of an Electoral Panel for Election Re - Run for  
E aspirants to membership of the State House of Assembly and Na-  
tional Assembly in Enugu North Senatorial District in Enugu State.  
(See page 243 of the records). This followed series of letters by other  
aspirants alleging that no primaries took place in the whole of Enugu  
North Senatorial Zone but rather that people gathered in the coun-  
F try home of the National Chairman, Dr. Okwesilieze Nwodo at Ukehe,  
Igbo - Etti Local Government to compile, albeit fraudulently names  
of persons to present as candidates for all elective positions in Enugu  
North for the PDP.

G As stated in the leading judgment of Agbim J.C.A. at page 940  
of the records, it was as a result of the facts in the counter - affidavit  
that the appellants brought an application to amend the originating  
summons to contend that the re - run primaries of 20th January,  
2011 were illegal and sought for a declaration to declare them as  
H such. This application was still pending when the respondents ap-  
plied for extension of time to bring an application to strike out the  
suit for being non justiciable and for lack of jurisdiction to entertain  
same.

The application to amend the Originating Summons dated

16th May, 2011 changed the complexion of the suit and the Court was now called upon to decide which of the two primaries that produced the appellants and the 3rd - 7th respondents was the valid primaries. By the time the amended Originating Summons was filed, the election had been held and winners declared.

***The learned trial judge in agreeing with the arguments of the learned counsel for the 1st respondent relied on Lado's case to say that the Court lacks the jurisdiction to determine the validity of the two elections allegedly held or choose between the two lists of candidates by preferring one list of candidates to the other since this is the exclusive or sole domain of the political party. Although the learned trial Judge dismissed the suit instead of striking it out for lack of jurisdiction, I agree with the finding made by the lower court that the error did not occasion a miscarriage of justice since an order striking out the suit for non justiciability of the subject matter has the same effect as dismissing the suit.***

In the argument of learned counsel for 1st respondent/objector on whether the instant appeal and the originating suit have now become academic. It was submitted that a suit is academic where it is merely theoretical and of no practical utilitarian value to plaintiff even if judgment is given in his favour. It is argued that in the context of the present appeal, the determining factor on whether the appeal, the original suit and the issue arising therein have become academic is whether the decision will confer any right or benefit on the appellants. Learned counsel submitted that the court cannot grant the declaratory reliefs and injunctive orders which the appellants sought for in the originating summons filed on 1st February, 2011.

Learned counsel for the appellants argued that since the learned trial Judge declined jurisdiction and terminated the suit in limine and the Court of Appeal endorsed the decision, test of the correctness of that decision cannot become academic; moreso since this court decided in Congress for Progressive Change (CPC) & anor v. Hon Emmanuel David Ombugadu & anor (2013) 18 NWLR Part 1385) 66 that the Court has jurisdiction in a dispute as to which of two primaries of a political party is the correct one and who the actual victor is.

In the Originating Summons filed on 1st February, 2011, the

appellants as plaintiffs prayed the Honourable Court in respect of each of the plaintiffs and for the respective Senate, Federal or State Constituency as follows:-

B “1. A declaration that the 1st plaintiff is the person entitled exclusively to have his name submitted by the 1st defendant to the 2nd defendant as the candidate for election into the Senate from Enugu North Senatorial District in the 2011 general election on the platform of the Peoples Democratic Party.

C 2. A declaration that the plaintiff is the person entitled exclusively to have his name submitted by the 1st defendant to the 2nd defendant as the candidate for election into the House of Representatives from Igboeze North/Udenu Federal Constituency on the platform of the Peoples Democratic Party.

D 3. A declaration that the 3rd plaintiff is the person entitled exclusively to have his name submitted by the 1st defendant to the 2nd defendant as the candidate for election into the Enugu State House of Assembly from Udenu State Constituency on the platform of the Peoples Democratic Party.

E 4. A declaration that the 4th plaintiff is the person entitled exclusively to have his name submitted by the 1st defendant to the 2nd defendant as the candidate for election into the Enugu State House of Assembly from Uzo Uwani State Constituency on the platform of the Peoples Democratic Party.

F 5. A declaration that the 5th plaintiff is the person entitled exclusively to have his name submitted by the 1st defendant to the 2nd defendant as the candidate for election into Enugu State House of Assembly from Nsukka East State Constituency on the platform of the Peoples Democratic Party.

G 6. An order for perpetual injunction restraining the 1st defendant whether by itself, servants, agents or by any person whomsoever or howsoever from submitting any other names other than the names of the plaintiffs herein as candidates of the Peoples Democratic Party.

H 7. An order of perpetual injunction restraining the 2nd defendant whether by itself, servants agents or by any person whomsoever or howsoever from accepting the name of any person or persons in place of or in substitution for the 1st, 2nd, 3rd, 4th and 5th plaintiff as the candidates for the elections aforesaid on the platform

*of the Peoples Democratic Party.”*

The April 2011 general elections in respect of which the appellants want to be declared exclusively (and no other) entitled to have their names submitted by the 1st respondent to the 2nd respondent as the candidates of the Party for the various constituencies in Enugu North Senatorial District was conducted and concluded almost four years ago and another general election is just around the corner. It is also not in doubt that the 1st respondent did not submit the names of the appellants as its State and National Assembly candidates for the said April, 2011 general election in Enugu State. At the time the Amended originating Summons was filed which introduced the fact that another primaries were conducted on 20th January, 2011 which produced the 3rd - 7th respondents as the candidates for the election, the election had already taken place but the issue still remained unresolved.

The question remains as to whether the latter decision of this court in *C.P.C. & Anor v. Hon. Emmanuel David Ombugadu & anor supra* has altered the legal position on the non justiciability by the Court in deciding which of two primaries conducted by the party is the valid primary for the purpose of identifying the candidates who are supposed to be presented to the Independent National Electoral Commission for the election.

There seems to be a slight shift as regards the jurisdiction of the Federal/State/FCT High Court in deciding which of two primaries conferred a right of candidature on the parties to represent a political party in an election. In *C.P.C. & Anor v. Hon. Emmanuel David Ombugadu & Anor supra* this Court citing Section 6 (1) & (2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) held that the special jurisdiction vested in the High Court (Federal, State or FCT) does not derogate from the general jurisdiction of the High Court, being one of the courts established for the Federation.

***The position which this Court had earlier taken in Lado's case is that once there arises a dispute as to which of the two primaries conferred a right of candidature on the parties to represent a political party in an election the matter is taken outside the purview of Section 87(4)(b)(ii), (c)(ii) and (9) of the Electoral Act, 2010 (as amended). In this regard therefore the lower court was wrong to affirm the decision of the***

***Federal High Court, Enugu when it declined jurisdiction to entertain the appellants' claim that they were the persons entitled exclusively to have their names submitted by the 1st respondent to the 2nd respondent for election into the Enugu North Senatorial District, Igboeze North/Udenu Federal Constituency, Udenu Uzo Uwani and Nsukka East State Constituencies respectively to contest the election. On this score, I agree with learned counsel for the appellants that since the learned trial Judge held that the action was non justiciable and consequently declined jurisdiction which was endorsed by the lower court, an appeal to this court to test the correctness of the two lower courts' decisions cannot be said to be academic. The preliminary objection of the 1st respondent is overruled and struck out.***

D 3rd - 7th Respondents' Preliminary Objection

The 3rd - 7th respondents raised objection to grounds 2, 6, 7 and 8 in the Notice of Appeal. Learned counsel pointed out that grounds 6 and 7 alleged errors in law but there is nothing in the particulars supplied what the errors are; instead they contain particulars of misdirection while ground 8 is completely bereft of any particulars.

It was argued that no proper issue was raised from ground 2. I find no merit in the objection to ground 2 because issue 2 in the appellant's brief is said to have been distilled from grounds 2 and 3. The issue raised from the said grounds 2 and 3 is concerned with the application of Orders 29 and 48 of the Federal High Court Rules 2009. The objection to the said ground 2 is hereby overruled.

Having resolved the preliminary objection of the 1st respondent against it and in favour of the appellants, it is necessary to consider the amended originating summons vis-à-vis Section 87 (1) (4) (c) (i),(ii) (7) & (9) of the Electoral Act 2010 (as amended) which provides as follows:-

*"87 - (1) A political party seeking to nominate candidates for election under this Act shall hold primaries for aspirants to all elective positions*

*(4) A political party that adopts the system of indirect primaries for the choice of its candidate shall adopt the procedure outlined below-*

*(c) in the case of nominations to the position of a Senatorial Candidate House of Representatives and State House of Assembly a political party shall, where they intend to sponsor candidates -*

*(i) hold special congresses in the Senatorial District, Federal Constituency and the State Assembly Constituency respectively, with delegated voting for each of the aspirants in designated centres on specified dates;*

*(ii) The aspirant with the highest number votes at the end of voting shall be declared the winner of the primaries of the party and the aspirant's name shall be forwarded to the commission as the candidate of the party.*

*(7) A political party that adopts the system of indirect primaries for the choice of its candidate shall clearly outline in its constitution and rules the procedure for the democratic election of delegates to vote at the convention, congress or meeting*

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

The appellants claimed that the special congresses which held between 9th, 10th and 11th January, 2011 and which they won were conducted by an Electoral Panel was constituted by the National Working Committee of the PDP. The 3rd-7th respondents equally claimed they are the candidates who won the re-run primaries conducted by the Electoral Panel set up by the National working Committee on 20th January, 2011. Learned counsel for the appellants submitted that the purported re-run primary of 20/1/2011 was invalid because it fell outside the timetable established by INEC and so could not constitute a parallel sufficient to oust the Court's jurisdiction; consequently the case of Senator Lado v. C.P.C. is distinguished from the present case.

Learned counsel for the 3rd-7th respondents on the other hand submitted that the trial court having found from the affidavits, counter-affidavits and exhibits before the Court that the principal question in this case is as to which of the two primary elections claimed by the respective parties herein produced the authentic candidates the 1st

respondent in Enugu North Senatorial District. With respect to the elective offices being contested for by the parties was right to decline jurisdiction to entertain the case. He went on to say that the trial court was entitled in the circumstances to feel bound and guided by the decision of the Supreme Court in Lado's case to declare that the suit is not justiciable.

***I am of the considered view that the trial court will be abdicating its responsibility if it declares that the suit is not justiciable. It has a duty to say which of the two primaries is the authentic one. This is the reason why Section 87(1) (4) (c) (i) (ii) and (9) has been put in place and to avoid arbitrariness by some officials of the Political Party who may want to impose their preferred candidates who probably did not take part in the primaries.***

This Court in PDP v. Sylva (2012) 13 NWLR (Pt. 1316) 85 stated that the right to nominate or sponsor a candidate by a political party is a domestic right of the party and a member of the party has no legal right to be nominated/sponsored by his party, it was held however per Rhodes-Vivour, JSC at page 125 supra that-

*"...where the political party conducts its primary and dissatisfied contestant at the primary complains about the conduct of the primaries, the Courts have jurisdiction by virtue of the provisions of Section 87 (9) of the Electoral Act to examine if the conduct of the primary elections was conducted in accordance with the party's Constitution and Guidelines. This is so because in the conduct of its primaries, the Courts will never allow a political party to act arbitrarily or as it likes. A political party must obey its own Constitution. See Hope Uzodinma v. Senator Osita Izunaso (2010) Vol. 5 (Pt. 1) MJSC 27; (2011) 17 NWLR (Pt. 1275) 30."*

What informed this Court's pronouncement that a member of the party has no legal right to be nominated/sponsored by his party stemmed from the fact that Governor Sylva contested and won the primaries in January, 2011 for the general election in respect of the Governorship of Bayelsa State was cancelled. Another primary was held on 19/11/2011 to choose the party's candidate for Governor of Bayelsa State which was fixed for 12/2/2012 but he was prevented from contesting that primary. He then instituted an action in court and prayed that the result of the primaries held in January,



2011 be reinstated to enable him contest the election scheduled for 12/2/2012 since his name had been cleared and forwarded to the Independent National Electoral Commission to contest the election.

***In this appeal the 3rd-7th respondents are claiming that the appellants were handpicked by the then chairman of the PDP to contest the elections and when they protested, the said nomination which produced the appellants was nullified and a fresh primary was conducted which the respondents won. Because of the conflicting claims by the parties it is only the Court that could resolve the issue.*** This is the dimension which the decision in C.P.C. v. Ombugadu (supra) introduced. See also: Eyiboh v. Abia (2012) 16 NWLR (Pt. 1325) 51. In *Falobi v. Falobi* (1976) 9-10 SC, this Court laid down the principle that where the affidavit evidence filed are in conflict, the Court seised of the matter must resolve the conflict by calling oral evidence.

***Despite the finding that the Federal High Court ought to have exercised jurisdiction to determine the authentic primaries conducted by the 1st respondent for the elective offices of the Constituencies (State and National Assembly) for Enugu North Senatorial District for the 2011 general elections, the injunctive relief sought against the 2nd respondent cannot be made.*** See *Ohakim v. Agbaso* (2010) 12 (Pt. 2) SCM 134. ***The 1st respondent can no longer submit the names of the appellants to the 2nd respondent as the Party's candidates for the election. See section 33 of the Electoral Act.***

For the foregoing, the appeal is unmeritorious and it is accordingly dismissed. I make no order as to costs.

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### FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Aka'ahs, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal lacks merit and should be dismissed.

The hegemony between the contending parties relates to the 3rd-7th respondents' claim that the appellant were handpicked by the then Chairman of the 1st respondent to contest the elections which they protested and same was nullified. A fresh primary was

conducted and the stated respondents maintained that they won. Their names were submitted to the 2nd respondent. The parties conflicting claims fell to be resolved by the court which cannot shy away from same. The decision of this court in *Eyiboh v. Abia* (2012) 16 NWLR (Pt.1325) 1 is in point here.

B It occurs to me that the injunctive relief sought by the appellants, as plaintiffs at the trial court against the 2nd respondent from accepting the names of the 3rd-7th respondents in substitution for their own names in respect of the April, 2011 elections is no longer feasible. It cannot be made any longer. See *Ohakim v. Agbaso* (2010) C 12 SCN (Pt.2) 134.

I agree that the 1st respondent can no longer submit the names of the appellants to the 2nd respondent as the PDP's candidates for the April 2011 elections. This is so in view of the provision of Section D 33 of the Electoral Act 2010 (as amended) which is reproduced below for ease of reference:-

*“33. A political party shall not be allowed to change or substitute its candidate whose name has been submitted pursuant to Section 31 of this act, except in the case of death or withdrawal by E the candidate.”*

For the above remarks and more especially the detailed reasons contained in the lead judgment, I too, feel that the appeal lacks merit and deserves an order of dismissal. I hereby order accordingly F and endorse the order on costs therein contained.

### **RHODES-VIVOUR JSC**

I have had the advantage of reading in draft the leading judgment delivered by my learned brother Aka'ahs, JSC. I agree with it G and for the reasons which he gives I would dismiss the appeal.

### **MUHAMMAD JSC**

H Having had a preview of the lead judgment of my learned brother Aka'ahs JSC. I share his lordship's reasoning and conclusion that this appeal lacks merit. I also dismiss the appeal.

The appellants had commenced Suit No.FHC/EN/CS/47/2011, at the trial Federal High Court seeking that they be declared

1st respondent's candidates in the various elections in Enugu State details of which are contained in the lead judgment.

Following the objections raised by the defendants to the suit, the trial court in its ruling delivered subsequent to the elections in which the appellants sought to be 1st respondents, candidates, on 16-5-2012, declined jurisdiction over appellants' cause of action in Suit No. FHC/CS/47/2011. B

It is the Lower Court's affirmation of the trial court's ruling that brought about the instant appeal.

The 1st and 3rd-7th respondents by their respective preliminary objections have urged us to strike out this appeal as same has become a moot question and an academic exercise. I cannot agree more. C

It must be realized that at best, on appellants' success, should this Court find that the courts below had wrongly declined jurisdiction, their case would be remitted back to the trial court for same to be heard on the merits. With the conflict in the affidavits for and against appellants' originating summons persisting, this Court cannot determine the matter at this level sequel to the provision of Order 22 of the rules of the court. See *Ladoja V. INEC* (2007) 12 NWLR (pt. E 1047) 119. D

Now, the term the appellants would serve, on succeeding in their bid to be declared the 1st respondent's candidates for the elections under reference, expires by May 2015. Their case would hardly be decided at the trial court by then and, with our culture of litigating right through to the apex court, it is inconceivable that the appellants' quest will fetch them any realistic result. F

In *Professor E. A. Abe V. University of Ilorin & anor* (2013) LPELR - SC.85/2003 I had the opportunity of stating as follows:- G

*"Learned respondents counsel is right in his submission that events have overtaken the issues the appeal raises and no court wastes its precious time on causes the determination of which bear no consequence on the dispute between the parties. Acting in vain never forms part of this Court's function and practice does not certainly facilitate that... The court, therefore, will refuse to engage in the fruitless exercise of proceeding to determine the appeal. This explains my sustaining the respondents' preliminary objection and disallowing the appeal."* H

The foregoing applies to the facts of the instant case even with greater force. It is for this and the detailed reasons contained in the lead judgment that I also dismiss this appeal. I abide by the consequential orders made in the lead judgment.

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### **OGUNBIYI JSC**

The appeal is against the judgment of the Court of Appeal Enugu Division which affirmed the decision of the trial court. The appellant's suit at the Federal High Court was for declaratory reliefs.

The trial court dismissed the appeal on the ground that it lacked jurisdiction. The Court of Appeal also upheld the trial court's decision and hence the appeal before us.

There were two primaries conducted, and while the appellants claimed that their candidature came as a result of the congress conducted by an Electoral panel constituted by the National Working Committee of PDP which was held between January the 9th-11th 2011, the 3rd-7th respondents also claimed that their candidature came as a result of their victory at the re-run primaries also conducted by the Electoral Panel set up on 20th January, 2011.

The appellants herein as plaintiffs in the originating process claimed to have won the primary elections of PDP and were therefore entitled to have their names submitted to INEC (2nd respondent) for purpose of contesting the general election. Section 87(9) of the Electoral Act envisages that an aggrieved party should have an avenue to lay complaint and ventilate his grievance for purpose of seeking redress. Such complaint must however arise as a result of non compliance with the party's Constitution and guidelines for purpose of conferring jurisdiction on the Court. For ease of reference, the subsection states as follows:-

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

It is the party's Constitution and guidelines that determines whether or not the subject matter is justiciable and upon which the

court can exercise jurisdiction. The section as it were gives a candidate of a political party the right to apply to the Federal or State high Court for redress notwithstanding the provisions of the Act or rules of a political party.

The law is well established as held by this court that sponsorship of candidates for election is within exclusive control and domain of the political party and this is binding on all courts pursuant to Section 287 of the 1999 Constitution as amended; the Section which relates to enforcement of decisions. Also in the case of Onuoha V. Okafor (1987) 2 SCNLR 244, this court held and said:-

*“The party like any other corporation operates within the guidelines, the powers and duties set out in its Constitution. All its members are bound by its provisions and their right and obligations created by their Constitution can be remedied as provided by the Constitution if breached by any of its members.”*

A further confirmation is the case of Senator Yakubu Garba Lado & Ors V. Congress for Progressive Change & Ors. (2011) 48 NSCQR Page 501, where the issue of jurisdiction raised was in respect of the competence of a court to hear and determine matters relating to the nomination of candidates by political parties for general elections which the courts, in the circumstance, have generally held that it is within the exclusive domestic jurisdiction of the political parties; the courts are excluded and cannot be seen to interfere therewith. In other words the nature of the complaint is not justiciable for purpose of seeking redress in court.

In the case at hand, the appellants did not participate in all the stages of the general elections for the respective political offices they claim to be the duly nominated candidates of 1st respondent. It is also relevant to state that even if they did participate, time has run out against them with their case relating the 2011 general election; they cannot now be declared winners with election petition having been long concluded, elapsed and gone. The appeal is in the circumstance academic and without any utilitarian value.

Finally, the appellants have not also shown that the concurrent decisions of the two Lower Courts should be over turned.

In the result and with the few words of mine supra and more particularly on the fuller reasons advanced in the lead judgment of my learned brother Aka’ahs, JSC, I also find the appeal without any

merit and is hereby dismissed in terms of the lead judgment inclusive of the order made as to costs.

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