

SUPREME COURT OF NIGERIA
FRIDAY 6TH MARCH, 2015. SC. 85/2014
**CORAM:- M. S. MUNTAKA-COOMASSIE, S. GALADIMA,
N. S. NGWUTA, J. I. OKORO, C. C. NWEZE, JJSC**

TIMIPRE SYLVA APPELLANT
AND
1. INDEPENDENT NATIONAL
ELECTORAL COMMISSION
2. PEOPLES DEMOCRATIC PARTY
3. GOV. HENRY SERIAKE DICKSON RESPONDENTS

ACTIONS - Commencement - Limitation - Public Officers Protection Act - The plea can be raised by any of the respondents - And a successful defence under the Act ousts jurisdiction of court (H1)

FAIR HEARING - Public Officers Protection Act - Defence - A person cannot be said to have been given fair hearing - If he is not allowed to rely on the provisions of an Act of parliament as defence (H2)

JURISDICTION - Action - Striking out - Where court has no jurisdiction to determine a case - It has no jurisdiction to dismiss it - It should strike out the matter (H3)

JURISDICTION - Determination - Court has jurisdiction to determine whether or not it has jurisdiction over a matter - And what it says may be profound - But not made per incuriam (H4)

APPEALS - Locus standi - Res judicata - Appellant is stopped per rem judicatam - From bringing same case before the court - As he cannot question conduct of election - In which he did not participate (H5)

FACTS

Plaintiff/appellant (a former Governor of Bayelsa State) in his quest to validate his cancelled nomination by the Peoples Democratic Party (2nd respondent) for the April 2011 governorship election in the State, commenced this action by way of originating sum-

mons filed before the Federal High Court Yenegoa. Appellant had in the time past commenced a similar action in suit no. FHC/ABJ/CS/93/2011 which gave rise to appeals Nos. SC.9/2012 and SC.28/2012 in which the Supreme Court held in the judgment delivered on 20th April, 2012 that the election for which appellant was nominated by 2nd respondent was cancelled and that appellant, by seeking to contest the primary for the 2012 election, had abandoned the nomination he won for the 2011 election that was cancelled.

1st respondent filed counter-affidavit in opposition to the originating summons. 2nd and 3rd respondent applied to be joined in the matter. Having been joined, each of 2nd and 3rd respondents raised preliminary objections to the jurisdiction of the court to determine the matter, the same having been finally dealt with by the apex court. In a consolidated ruling on the applications, the learned trial Court upheld the preliminary objections. The suit was dismissed. Dissatisfied, appellant appealed to the Court of Appeal Port Harcourt Division. The appeal was also dismissed and appellant still being dissatisfied, appealed to Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the lower Court was right when it held that the defence of limitation of action under the Public Officers Protection Act could be validly raised by the 3rd Respondent.

2. Whether the lower Court having regard to the decision of the Supreme Court in SC/28/2012 and SC/9/2012 the appellant did not have the requisite locus standi to institute the case which is also caught by the doctrine Locus Standi.

HELD (Unanimously dismissing the appeal per
NGWUTA JSC)

ACTIONS - Commencement - Limitation

1. The import of the 3rd Respondent’s defence is that the action in which he and the other respondents were defendants cannot lie because it was commenced at the expiration of the three month period prescribed by the POPA for instituting such action. It is my view that the plea could be properly raised by any of the Respondents for his benefit and the benefit of the

co-respondents. Furthermore, a successful defence under this Act oust the jurisdiction of the Court. One of the four conditions for the Court to exercise jurisdiction in a given case is that the suit must have been commenced by due process of law and upon fulfillment of any condition precedent to assumption of jurisdiction. A suit commenced after the expiration of the time stipulated in the Act cannot be said to have been commenced by due process. (p. 1090 C)

FAIR HEARING - Public Officers Protection Act - Defence

2. The section encompasses the twin pillars of justice, namely:

“(a) Audi alteram partem (hear the other party).

(b) Nemo judex in causa sua (no one should be a judge in his own cause.)”

The first of the two pillars of justice is relevant to the facts herein. A person cannot be said to have been given a fair hearing if he is not allowed to rely on the provision of an Act of Parliament as an answer to the case against him. It is not necessary for the Act to confer a right of defence on anyone. The defence is encompassed in the provision relating to fair hearing in s.36 (1) of the Constitution. (p. 1091 C)

JURISDICTION - Action - Striking out

3. Generally, where the Court has no jurisdiction to hear and determine a case, it has no jurisdiction to dismiss it. It should strike out the matter.

The implication of a general rule or principle is that there are exceptions thereto. The issue of jurisdiction may arise from a matter that does not relate to the merit of the case. On the other hand, it may arise from the very essence of the claim. In the first case above, the Court has no jurisdiction to dismiss the case but will merely strike it out in limine and the appellant may re-litigate the matter by correcting the matter that gave rise to lack of jurisdiction. In this scenario, the order of striking out does not preclude the party from fresh litigation on the matter. (p. 1092 B)

JURISDICTION - Determination

4. On the other hand, the Court has jurisdiction to determine whether or not it has jurisdiction in the matter. If the circumstances of the case are such that the Court, in exercising the jurisdiction to determine whether or not it has jurisdiction, delves into and determines the merit vel non of the case the order striking it out is as good as an order for dismissal, thereby precluding the plaintiff/applicant from re-litigating the matter.

This was the case when this Court decided it had no jurisdiction in the consolidated appeals Nos. SC.28/2012 and SC.9/2012 and, consequently struck it out. With due respect to the learned Silk for the Appellant, what he referred to as “...the profound statements made by Honourable Judges of the apex Court in the consolidated appeal Nos. SC/28/2012 and SC.9/2012 which were made per incuriam” are really determination made by the Court which led it to the conclusion that it had no jurisdiction in the matter.

Learned Senior Counsel on his perceptions, albeit wrong, argued that the only thing a Court can validly do if it has no jurisdiction to entertain a matter is simply to strike it out. This is not correct. The Court cannot, out of blues, declare it has jurisdiction or no jurisdiction over a matter. As stated earlier in this judgment, any Court has jurisdiction to determine whether or not it has jurisdiction over a matter before it.

What the Court says in the exercise of its power to determine whether or not it has jurisdiction in a matter may be profound but it is not, without more, made per incuriam.
(pp. 1092 E/1093 D)

Locus standi - Res judicata

5. In the circumstance, I agree with the Respondents that the appellant lacks the locus standi to relitigate the subject matter of the consolidated appeals Nos. SC.28/2012 and SC.9/2012. He cannot question the conduct of an election in which he did not take part as a contestant.

The doctrine of Res judicata applies not only against the appellant but also against the jurisdiction of the Court itself in the sense that appellant is stopped per rem judicatam from

bringing the same case before the Court and the jurisdiction of the Court is ousted. (p. 1093 G)

NOTABLE POINTS OF INTEREST

NGWUTA JSC

1. Issues for determination – Clarity and brevity of

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The main purpose of formulation of issues for determination is to enable the parties to narrow the issues in controversy in the grounds of appeal in the interest of accuracy, clarity and brevity. It follows that an issue for determination in an appeal must be a concise statement of law or facts. It should not contain a conjecture or opinion. (p. 1088 A) C

2. Jurisdiction – Fundamentalality of

Jurisdiction is the power which a Court has to hear and determine a cause or complaint made before it. Jurisdiction is a threshold issue and since it is a *sine qua non* to adjudication and proceedings taken without jurisdiction is a nullity, the issue could be raised at any stage by any party or by the Court *suo motu* to avoid an exercise in futility. D E

Though learned Silk did not dispute the fact that the defence under the Act raises an issue of jurisdiction, he made heavy weather of the fact that the 3rd Respondent did not comply with the rules in raising same. However, there is no special format of raising the issue of jurisdiction. (p. 1090 G) F

3. Court process – Abuse of

My noble Lords, I seek your indulgence to say that this appeal borders dangerously on abuse of Court process. It goes beyond matter than can be regarded as irregularity. It is a fundamental vice deserving of the dismissal of the appeal. G

The election for which the appellant won the primaries was cancelled outright. In appreciation of the fact that the election for which he was nominated was cancelled, the appellant prepared himself for other primaries to be held in place of the one cancelled. He spent his money obtaining the relevant form and campaigned extensively and when he was screened out of the contest he developed a brain wave to resurrect the result of the primaries he won but which H

he impliedly agreed and accepted was dead and buried.

He was not a party to the primaries for the election to which he makes the absurd claim of applying the result of primary which was abandoned when the election for which it was conducted was cancelled. He is certainly a busy body, an interloper who had no reasonable ground to believe in the success of his action. And he had the temerity to defy the concurrent decisions of the two Courts below to continue his abuse of process of Court in the apex Court.

The political class may have unlimited funds and time at their disposal but the Court's time is precious and should not be wasted in pursuit of shadows by any party or person. (p. 1094 B)

4. Right of action – Sources of

But it is also well settled that the exercise of a right of action is derived from the fundamental law of the land, or any statute specifically conferring such right. The court can only exercise jurisdiction with respect to a right of action, and cannot assume jurisdiction unless the plaintiff who has brought the action before it has a right of action. (p. 1101 C)

REPRESENTATION

Chief R. Nobert Clarke, SAN with Mrs. Dokpesi and I. B. Muhammed, for the Appellant

A. Olaleru with A. O. Olorinje, for 1st Respondent

Chief Joe K. Gadzama, SAN with S. John Bull, S. Brisne, T. Anyankpele and E. Erebi, for 2nd Respondent

Tayo Oyetibo, SAN with Samuel Brisibe and Mofe Tayo-Oyetibo, for 3rd Respondent

CASES REFERRED TO

Marwa v. Nyako (2012) 5 NWLR (pt. 1296) 199

Olusola v. Trusthome Property Ltd (2010) 8 NWLR (pt. 1185) 1

Ohakim v. Agbaso (2010) 19 NWLR (pt. 1226) 172

H Oronti v. Onigbajo (2004) 17 NWLR (pt. 903) 601

Ladoja v. INEC (2007) 12 NWLR (pt. 1047) 115

Ajayi v. Adebisi (2012) 11 NWLR (pt. 1310) 137

PDP v. INEC (2012) 7 NWLR (pt. 1300) 538

Madukolu v. Nkemdilim (1962) 2 SCNLR 341

Okanika v. Samuel (2013) 7 NWLR (pt. 1352) 19
 Gbagbanigha v. Toruemi (2013) 6 NWLR (pt. 1350) 289
 PDP v. Okorocha (2012) 15 NWLR (pt. 1323) 205
 Duke v. Akpubuyo L. G. (2005) 19 NWLR (pt. 959) 130
 Makum v. FUT Minna (2011) 19 NWLR (pt. 1279) 190
 UAC v. Macfoy (1961) 3 WLR 1405
 A-G Lagos State v. Eko Hotels Ltd (2006) NWLR (pt. 1011) 378

B

STATUTES & RULES REFERRED TO

Public Officers Protection Act Cap. 141 LFN 2004, s. 2(a)
 Constitution of the Federal Republic of Nigeria 1999, ss. 6(6)(b), 33,
 36(1)
 Supreme Court Act, s. 22
 Supreme Court Rules, O. 6 r. 5(3)

C

D

BOOKS REFERRED TO

Black's Law Dictionary 8th Ed. p. 2
 Constitutional & Administrative Law (London: Penguin Books, 1971)
 118
 Public Servant & the Law (University of Ife Press 1971) 144
 Administrative Law in Nigeria

E

LEAD JUDGMENT BY NGWUTA JSC

My Lords, the suit from which this appeal emanated is an off-
 shoot of the judgment of this Court delivered on 27th January, 2012
 in *Marwa v. Nyako* (2012) 5 NWLR (Pt. 1296) 199. Here are the
 relevant facts:

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The appellant who was the Governor of Bayelsa State had, by
 the time the said judgment was delivered on 27/1/2012, overstayed
 his mandate, the same having expired on 29th May 2011.

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The 1st Respondent, the Independent National Electoral Com-
 mission, held the view, and rightly so as events turned out, that the
 four year tenure of the appellant would end on 28th May, 2011 and
 prepared for the next gubernatorial election. The 2nd Respondent,
 the Peoples Democratic Party, conducted her primary election in Janu-
 ary, 2011 at which the appellant emerged as the candidate of the
 2nd Respondent at the then coming election. His name and particu-
 lars were sent to the 1st Respondent.

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However, before the election at which he was to represent his party as the governorship candidate could be held, appellant approached the Federal High Court sitting at Yenogoa, Bayelsa State, seeking a declaration that his term had not ended but was still running. The judgment of the Federal High Court, granting the relief B sought by the appellant was affirmed by the Court of Appeal, Port Harcourt.

In compliance with the judgments, the electoral umpire, the 1st Respondent, cancelled the 2011 election, the appellant continued in office as Governor of Bayelsa State as the Federal High Court C decided, and the Court of Appeal affirmed, that the tenure of office of the appellant would expire on 28th January, 2012. Accordingly to the 2nd Respondent as well as the appellant, abandoned the primary election at which he, the appellant, was nominated the 2nd D Respondent's candidate at the election that should have been held in 2011.

Before that matter could get to the Supreme Court, the 2nd Respondent announced a date in February, 2012 for the conduct of the election in Bayelsa State. In the subsequent primary election conducted by the 2nd Respondent, the appellant abandoned the result E of the 2011 primaries and purchased forms for the 2012 election. He was screened and dropped by the 2nd Respondent.

As a result of his exclusion from the election, appellant filed suit No. FHC/ABJ/CS/93/2011 which gave rise to appeals Nos. SC.9/ F 2012 and SC.28/2012 in which the Supreme Court held in the judgment delivered on 20th April, 2012 that the election for which the appellant was nominated by the 2nd Respondent was cancelled and that the appellant, by seeking to contest the primary for the 2012 G election, had abandoned the nomination he won for the 2011 election that was cancelled.

In an attempt to validate his nomination for the April, 2011 election that was cancelled and to claim the benefits of the 2nd Respondent's victory in the 2012 election the appellant went back to H Court.

In the originating summons issued at the Registry of the Federal High Court sitting at Yenogoa against the 1st Respondent as the sole defendant, the plaintiff (now appellant) on 21/1/2013 raised the following issues/questions for the trial Court to resolve:

“(1) Whether having regard to the clear provision of Section 178(2) of the 1999 Constitution (as amended) and the Supreme Court judgment in the consolidated Appeal of Marwa v. Nyako (2012) 5 NWLR (Pt. 1296) 199 delivered on 27th January, 2012 wherein the Court held that the tenure of the plaintiff as the Governor of Bayelsa State had long expired since 29th May, 2012 (sic) the Gubernatorial Election in Bayelsa State became due since 29th April, 2011.

(2) If question 1 is answered in the affirmative and whether having regard to the plaintiff who being the incumbent Governor of Bayelsa State under the auspices of the Peoples Democratic Party (PDP) as at 29th April, 2011 and whose name had been submitted as a candidate of Peoples Democratic Party (PDP) for the Gubernatorial Election, the plaintiff was the only valid candidate of the Peoples Democratic Party (PDP) for the Bayelsa State Gubernatorial Election conducted thereafter.

(3) Whether by virtue of Section 33 of the Electoral Act, 2010 (as amended) a person whose name had been submitted as a candidate for the Bayelsa State Governorship election can be jettisoned other than by his death or withdrawal.

(4) Whether by virtue of Section 33 of the Electoral Act (as amended) the Defendant can be legally regard (sic) as the candidate for the Bayelsa State Governorship election following the expiration of the tenure of office on 20th April, 2011 (sic) any person other than the plaintiff, who had neither died nor withdraw his candidacy.

(5) If questions 1 and 2 are answered in the affirmative, and having regard to the position of the plaintiff being the only valid candidate of the Peoples Democratic Party (PDP) as at when the Bayelsa State Gubernatorial Election was due, the provision of s.221 of the 1999 Constitution (as amended) and the Supreme Court’s authority of Amaechi v. INEC (2008) 5 NWLR (Pt. 1080) 227 wherein it was held that it is only a person that canvassed votes and wins election, whether the plaintiff being the only valid candidate of the Peoples Democratic Party when the election was conducted ought to be declared the Governor of Bayelsa State in view of the party’s victory in the said election.”

Based on his anticipation that the five questions raised in his originating summons would be resolved in his favour, the appellant

(then plaintiff) prayed the Court for the following reliefs:

“(a) A declaration that by virtue of the Supreme Court judgment in Marwa v. Nyako (2012) 6 NWLR (Pt. 1296) page 199, that the plaintiff’s tenure as Governor of Bayelsa State expired on 29th May, 2011.

B *(b) A declaration that by virtue of the same judgment, the Gubernatorial Election in Bayelsa State became due since April, 2011.*

(c) A declaration that was (sic) at April, 2011 the plaintiff was/ is still the only valid and authentic Gubernatorial candidate on the platform of PDP for Bayelsa State.

C *(d) An order directing INEC to give effect to the above declarations by declaring the plaintiff as the Governor of Bayelsa State being the candidate of the party (PDP) that won the election.*

OR in the alternative:

D *(e) An order directing the defendant to conduct a fresh gubernatorial election in Bayelsa State with the plaintiff as the candidate of PDP (Peoples Democratic Party). ”*

E In support of the originating summons is an eight-paragraph affidavit deposed to by Zeken Garuba, a legal practitioner in the firm of Clarke, Paiko & Co. who represent the appellant. Exhibited are documents marked Exhibits A to C. Learned Senior Counsel filed a written address in support of the originating summons.

F On behalf of the defendant (now Respondent) is a six-paragraph counter-affidavit deposed to by Paave Demenongo of the legal service of the Respondent. Exhibited thereto are documents marked Exhibits 1 and 2. Learned Counsel for the Respondent filed a written address in opposition to the originating summons.

G I stated earlier that the 1st Respondent was the sole defendant in the suit. On their own applications, the 2nd and 3rd Respondents herein were joined as defendants. The order joining the 2nd and 3rd Respondents was issued on 13th February, 2013. The 1st, 2nd and 3rd Respondents, by their respective applications dated 18/3/2013, 14/3/2013 and 15/3/2013, raised preliminary objections to the jurisdiction of the Federal High Court to adjudicate in the matter.

H In a consolidated ruling on the three applications, the learned trial Court upheld the preliminary objections.

Appellant was aggrieved and he appealed the consolidated rulings to the Court of Appeal, Port Harcourt, which Court, in its

judgment delivered on 13th January, 2014 dismissed the appeal and affirmed the rulings of the trial Court. Still aggrieved, the appellant filed a Notice of Appeal to this Court on three grounds on 31/1/2014. From the three grounds of appeal, the learned Silk, lead Counsel for the appellant, distilled the following two issues for resolution:

“1. Was the lower Court (Court of Appeal) correct in applying the provisions of s.2 (a) of the Public Officers Protection Act, Cap. 141, LFN 2012 (sic) when it held that the 3rd Respondent therein is at liberty to raise the special defence of limitation as raised in his own defence, when such defence which is a special defence inuring only to the 1st Respondent, as such defence is only available to a specific class of people to whom the 3rd Respondent does not belong.

2. Were the Justices of the lower Court (Court of Appeal) correct in holding in law that the profound statements made by Honourable Judges of the Apex Court in the Consolidated Appeal Nos. SC/28/2012 and SC/9/2012 which were per incuriam, could be relied upon in determining the issues raised on Res Judicata, Estoppel, etc. in the face of the many decisions of the Supreme Court clearly stating the consequences of “a striking out order.”

In his brief of argument, the learned Silk leading for the 1st Respondent, isolated the following two issues for determination:

“(a) Whether or not the lower Court is right in holding that the 3rd Respondent can raise and rely on the defence of limitation of action having regards to the facts of this case and the Constitution of the Federal Republic of Nigeria as amended. Ground one.

(b) Whether or not the decision of the Supreme Court of Nigeria in the consolidated Appeal Nos. SC/28/2012 and SC/9/2012 can sustain the defence of res judicata, estoppels, stare decisis and lack of locus standi on the part of the appellant, in favour of the respondents in the instant case. Grounds two and three.”

The learned Senior Counsel leading for the 2nd Respondent, in his brief, presented the following two issues for determination:

“1. Whether the lower Court was right when it held that the defence of limitation of action under the Public Officers Protection Act could be validly raised by the 3rd Respondent. (Distilled from grounds of the Notice of Appeal)

2. Whether the lower Court was right when it held that having regard to the decision of the Supreme Court in SC.28/2012 and

SC/9/2012 the appellant did not have the requisite locus standi to institute the case which is also caught by the doctrine of locus standi. (Distilled from grounds 2 and 3 of Notice of Appeal)”

In his own brief of argument, the learned Senior Counsel leading for the 3rd Respondent raised the following two issues for resolution of the appeal:

“1. Whether the Court below was not right in deciding that the 3rd Respondent was entitled to raise the defence of limitation of action under Section 2 (a) of the Public Officers Protection Act Cap P.4, Laws of the Federation 2004, which defence if raised by the 1st Respondent will have disposed of the suit against all the Respondents including the 3rd Respondent. (Distilled from ground one)

2. Whether the Court below was not right in deciding that by the decision of this Court in consolidated appeals SC/28/2012 and SC/9/2012 reported as *Peoples Democratic Party v. Sylva (2012) 13 NWLR (Pt. 1316) 85* the appellant’s action instituted at the trial Court is caught by the doctrine estoppel per rem judicatam and that the appellant has no locus standi to institute this action. (Distilled from grounds two and three)”

Arguing issue one in his brief, the learned Senior Counsel for the appellant submitted that the court below erred in its decision that the 3rd Respondent could rely on the special defence of limitation of action in its own defence. He contended that the special defence offered by s. 2(a) of the Public Officers Protection Act is open only to specific class of persons to which the 3rd Respondent does not belong.

He referred to the counter-affidavit of the 1st Respondent in the originating summons and argued that the 1st Respondent who could have properly raised the special defence did not raise same in its counter-affidavit. The learned senior counsel referred to Black’s Law Dictionary 8th Edition at page 2 for the meaning of the word “abandonment” and page 1611 for the meaning of the word “waiver” and submitted that the 1st respondent, having failed/neglected to plead the special defence under the Act had abandoned and waived his right to same. He contended that s.36(1) of the constitution as amended does not confer on a respondent the right to raise a special defence except he is entitled to do so under the enabling statute - the Public Officers Protection Act.

He argued that the failure of the 1st Respondent who is entitled to raise and rely on the special defence to do so does not confer on the 3rd Respondent a right to raise or rely on the defence. Learned Senior Counsel contended that the lower Court erred in its decision that the 3rd Respondent could validly raise the defence of limitation of action in his own defence. B

In issue 2, the learned Silk referred to SC.28/2012 and SC.9/2012 and said that this Court having determined that it lacked jurisdiction to entertain the appeal, made an order striking it out. He argued that notwithstanding anything done before the Court came to the conclusion to strike out the appeal, the legal consequence is that the matter was not determined on the merit and as such the unsuccessful appellant reserves the right to re-litigate the subject matter of the appeal. C

He relied on *Olusola v. Trusthome Property Ltd* (2010) 8 NWLR (Pt. 1185) 1 at B1 (paras B-C). He urged the Court to rely on *Ohakim v. Agbaso* (2010) 19 NWLR (Pt. 1226) 172 at 256 (B-C) for the decision that a suit struck out was not decided on the merits and the party whose case is struck out can recommence action based on the subject matter of the suit struck out. D E

He relied on a number of cases for the same principle including *Oronti v. Onigbajo* (2004) 17 NWLR (Pt. 903) 601 at 603 paragraphs A-B. He argued that the order striking out the appeals cannot sustain a plea of *res judicata*, *estoppels* or *want of locus standi*. According to learned Senior Counsel, since the appeals were struck out for want of jurisdiction, the appellant (as plaintiff) reserves every right to have a “second bite at the cherry”. F

Based on the above, he argued that the Court below erred in law by dismissing the appeal in which it lacked jurisdiction. He urged the Court to invoke s. 22 of the Supreme Court Act to hear the matter as all the materials are contained in the record of appeal. G

In summary and conclusion, he submitted as follows:

(i) Though the 1st Respondent invoked the provision of Public Officers Protection Act in its motion of 18th March, 2013 it is deemed to have abandoned the special defence for failure to raise it in its counter-affidavit in opposition to the originating summons. H

(ii) By the Supreme Court decision in *Ketu v. Onikoro* (1984) 10 SC 250, among others, the Supreme Court has established that

for anyone to rely on same the special defence must be specifically pleaded.

(iii) By the decision of the Supreme Court in *Mobil Producing Nigeria Unlimited v. Lagos State Environmental Protection Agency* (2002) 18 WNLR (Pt. 798) 1 at 36-37 a condition imposed for the benefit of a particular person or class of persons can be dispensed with.

(iv) The 1st Respondent having voluntarily waived his right to rely on the defence afforded by s.2 Public Officers Protection Act cannot be allowed to further rely on same under any guise whatsoever.

(v) The Public Officers Protection Act protects persons acting in the execution of public duties and Section 2 of it protects against action against anyone for an act done in pursuance or intended execution of a public duty.

(vi) Affidavit filed on behalf of the 1st Respondent did not state that the 3rd Respondent did any act in the execution of any public duty but the action is directed against the 1st Respondent for neglect or default in the exercise of its public duty under the Constitution and the Electoral Act.

(vii) That only the 1st Respondent is entitled to the protection under the Act as there is no complaint made against the 3rd Respondent.

(viii) That the 3rd Respondent cannot hide under s.36 (1) of the Constitution to seek protection under s.2 (a) of the Public Officers Protection Act.

(ix) The Supreme Court in *Afolabi v. Governor Osun State* (supra) stated the condition to sustain the plea of *res judicata*.

(x) That the four conditions must be satisfied and it is not enough to satisfy only one condition.

(xi) That in this case the 2nd (sic) Respondent satisfied only one of the four conditions for a plea of *res judicata*.

(xii) That even if the subject of the suits resulting to the consolidated appeals are the same the decision is not on the merit and the appellant has a preserved right to bring a fresh action."

Learned Senior Counsel pleaded that in case the appeal succeeds, the Court should invoke its power pursuant to Section 22 of the Supreme Court Act as he said the Court did in *Ladoja v. INEC*

(2007) 12 NWLR (Pt. 1047) 115 at 186. He adopts and relies on the plaintiff/appellant's process to invoke s.22 of the Supreme Court Act. He finally urged the Court to resolve both issues in favour of the appellant.

In issue one in his brief, the learned Silk leading for the 1st Respondent referred to the facts of the case as well as admissions made by the appellant and contended that it is beyond dispute that the 1st Respondent is a public officer entitled to the protection of the Public Officer Protection Act. He relied on *Ajayi v. Adebisi* (2012) 11 NWLR (Pt. 1310) 137. B

He reproduced the relevant provisions of the Act and argued that the Court below was right in its decision that the 3rd Respondent could raise the defence of limitation in his own defence. From the provisions of the Act, learned Counsel concluded that the Act protects "any person" who has done any act in (a) pursuance, (b) execution, (c) intended execution, of any Act, Law or of any public duty, etc. C

From the above, he argued that the 3rd Respondent, in pursuance of the provisions of the 1999 Constitution of the Federal Republic of Nigeria as amended and the Electoral Act, 2010 as amended, presented himself for election as the Governor of Bayelsa State of Nigeria, a State created by the constitution of Nigeria and pursuant to the Electoral Act, 2010 as amended, obtained the necessary forms from the 1st Respondent, completed and returned same to the 1st Respondent who published his name as the Governorship candidate of the 2nd Respondent for the 2012 Governorship Election in Bayelsa State. E
F

He emphasized that the election has been conducted by the 1st Respondent and 3rd Respondent was declared winner and was issued a Certificate of Return as required by law. He said that the suit filed by the appellant against the Respondents will fail or succeed against all the parties jointly and severally. G

In the circumstances, he argued that the act of the 1st Respondent cannot deny the 3rd Respondent the constitutional rights to fair hearing under the Constitution. On the appellant's reliance on the Rules of Court, learned Senior Counsel argued that the rules are meant to help the Court do justice and should not be applied in a way to cause injustice to any party. He relied on *PDP v. INEC* (2012) H

7 NWLR (Pt. 1300) 538.

Relying on *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341, *Okanika v. Samuel* (2013) 7 NWLR (Pt. 1352) page 19 at 46, he submitted that the suit is incompetent and ipso facto the Court has no jurisdiction to entertain same. Having regard to *Gbagbanigha v. Toruemi* (2013) 6 NWLR (Pt. 1350) page 289 at 306 paragraph D, learned Senior Counsel submitted that the respondents took proper steps to challenge the competence of the suit.

With reference to *PDP v. Okorocha* (2012) 15 NWLR (Pt. 1323) 205 at 258, he argued that the issue of competence of the suit can be validly raised by the Court at any stage suo motu, adding that the sanctity of the jurisdiction of the Court cannot be defeated and made ineffective by a mere procedural rule. He stated that the Court has to have jurisdiction before considering compliance with its rules. He relied on *Duke v. Akpubuyo Local Government* (2005) 19 NWLR (Pt. 959) 130 at 142-143 paras. G-A. The learned Silk urged that the issue be resolved in favour of the Respondents.

In issue 2, learned Senior Counsel referred to *Makum v. Federal University of Technology, Minna* (2011) 19 NWLR (Pt. 1279) 190 at 232 wherein this Court laid down the preconditions for successful plea of estoppel rem judicatam. He argued that by the rule of estoppel per rem judicatam, where a final judgment is given by a court of competent jurisdiction as in this case, the parties thereto cannot be heard to contradict the judgment in any subsequent litigation on the same subject matter.

Learned Senior Counsel drew a distinction between estoppel per rem judicatam as a plea and as evidence. In the former, he contended, it operates as a bar to a subsequent litigation and in the latter it is conclusive between the parties to the suit. He contended that the plea applies to the effect that where a Court has given a final decision on the matter like deciding that it had no jurisdiction and there is no appeal against the decision, the matter is closed for ever.

The resolution of the issue of application of the doctrine of res judicata calls for a determination of what informed the holding of the Supreme Court that it had no jurisdiction in the consolidated appeals SC.28/2012 and SC.9/2012, he contended, adding that before reaching a decision that it had no jurisdiction in the matter, this Court exhaustively resolved the issues distilled for determination in the ap-

peal and as such the issues cannot be re-litigated.

Learned Senior Counsel pointed out that the facts the appellant relies on now are the same set of facts that were involved in the consolidated appeals heard by this Court. He further submitted that as the Supreme Court ruled in the consolidated appeals, the appellant who did not take part in the 2nd Respondent's primary election of 19th November, 2011 leading to the election of February, 2012 has no locus standi to challenge the process and has no benefit to derive from the outcome of the election. B

He argued that an order for non-suit is different from an order striking out a matter, contending that in the former case, no issues are resolved but a matter can be struck out after a resolution of the issues pointing to the fact that the Court has no jurisdiction. He referred to the argument of the learned Senior Counsel for the appellant to the effect that the judgment of the Supreme Court was given per incuriam and said that the argument is borne out of misunderstanding of the Latin phrase and is therefore misconceived, more so as the appellant did not show in what respect the judgment in the consolidated appeals was delivered per incuriam. C D

On the invocation of s.22 of the Supreme Court Act, it was contended for the Respondents that the suit is incompetent and the Court has no jurisdiction to entertain it. Reliance was put on *UAC v. Macfoy* (1961) 3 WLR 1405. In the alternative, it was submitted that even if the suit is competent, the Court cannot invoke its powers under s.22 of the Supreme Court Act as there are contentious issues in the case which makes it unsuitable to commence by way of originating summons. Learned Senior Counsel urged the Court to resolve this issue in favour of the Respondents. E F

Against the background of the learned Senior Counsel's argument and his summary/conclusion, he urged the Court to dismiss the appeal and affirm the judgment of the Court below. G

In his issue 1, the learned Silk for the 2nd Respondent referred to pages 761-763 of Volume 2 of the record and submitted that the defence of limitation was not solely raised in liminie by the 3rd Respondent but was also raised by the 1st Respondent. He submitted further that the decision on the defence of limitation was not predicated solely upon the submission of the 3rd Respondent but also on the plea of the 1st Respondent and that the aspect of the judgment H

appealed against amounts to obiter which is not appealable.

Learned Senior Counsel reproduced Section 2 of the POPA and submitted that a court would take a holistic view of a statute and will not apply a section of it in isolation. He relied on *Rabiu v. State* (1980) 8-11 SC 130, *Mobil Oil (Nig) Plc v. IAL INC.* (2006) 6 NWLR B (Pt. 659) 146 3, *NURTW v. Atean* (2012) 1 SC (Pt. 2) 119. He argued that POPA protects not the public officer quo person but that it is the action of the public officer that is protected.

He argued that in essence, it is the act or omission of the public officer that is protected from subjection to judicial scrutiny. He relied C on *A-G Lagos State v. Eko Hotels Ltd* (2006) NWLR (Pt. 1011) 378. This being the case, he argued, a person who has benefited and acted upon the action of the public officer that is being challenged is entitled to raise the defence of limitation as it is not the person that is D being protected but his action.

The learned Silk maintained that the concurrent findings of the two Courts below are in accord with the constitutional principles of fair hearing that a party be allowed to raise a point of law which would assist the Court in the determination of his civil rights and E obligation. He relied on s.36 (1) of the Constitution of the Federal Republic of Nigeria, 1999 and *Ajayi v. Adebisi* (2012) 11 NWLR (Pt. 1310) 137.

He relied on *Adeogun v. Fasosbon* (2011) 8 NWLR (Pt. 1250) F 427 at 448 in his contention that a party in Court proceedings has the right to raise any issue of law which would advance his case, adding that the appellant has not shown that the defence raised by the 3rd Respondent could not advance his interest in the litigation. He urged the Court to resolve the issue in favour of the Respon- G dents.

In issue 2 on whether or not appellant had locus standi to institute the action, he argued that the term locus standi entails the legal capacity of instituting an action in a competent Court of law or tribunal without any inhibition, obstruction or hindrance from any H person or body of persons or provisions of any existing law. He referred to:

1. *Oyewunmi v. Osunbade* (2001) FWLR (Pt. 82) 1919,
2. *Elendu v. Ekwoaba* (1995) 3 NWLR (Pt. 387) 704,
3. *Ladojobi v. Oguntayo* (2001) FWLR (Pt. 45) 780

4. Thomas v. Olufisoye (1988) 2 SC 325, and

5. Ojukwu v. Ojukwu (2008) 18 NWLR (Pt. 1119) 439 at 458.

In response to the argument of the appellant that he has a right or interest in the office of the Governor of Bayelsa State, learned Senior counsel argued that the right or interest is not a mere proclamation but the right or interest must be recognizable by law and the plaintiff must have the capacity to pursue such rights. He said that locus standi is an aspect of justiciability and where the right sought is not in existence or justiciable, then the party pursuing same would be bereft of locus standi. He relied on *A-G Anambra State v. Eboh* (1992) 1 NWLR (Pt. 218) 508. B
C

He relied on the pronouncement of the Court in *PDP v. Sylva* (2012) 13 NWLR (Pt. 1316) 85 at 122-123 to the effect, inter alia, that “...with the cancellation of the elections of April 2011 the primaries conducted in January 2011 are no more of any relevance” (emphasis supplied) to say that the appellant has no legally recognizable right or claim to the office of the Governor of Bayelsa State. D

He said that the lower Court was right to have decided that the appellant has no locus standi to pursue his alleged right. He referred to s.173 of the Evidence Act in support of his contention that res judicata which he traced to the opinion of De Grey, CJ, in the case of *Duchess of Kingston* 20 ST TR (1775-1802) All ER Rep to the effect that “Judgments upon the same matter and between the same parties was as a plea a bar and as evidence conclusive” is now part of our corpus juris. He relied on *Bonny v. Yunsha* (1966) 1 ANLA 320 among others. E
F

Learned Senior Counsel argued that all the conditions to sustain a plea of res judicata have been satisfied in this case. He referred to *Ebong v. Effiong* (2007) 17 NWLR (Pt. 1062) 92 at 109 and argued that there is no magic wand in the use of the words “struck out” or “dismissed” and that the meaning of any of the words will depend on the context in which it is used, adding that on the facts of this case, struck out means the same as dismissed since the matter was struck out after the resolution of all the issues. G
H

He urged the Court to resolve the issue in favour of the Respondents since the doctrine of res judicata was correctly upheld by the lower Court. Following his summary and conclusion, the learned Silk urged the Court to dismiss the appeal and affirm the decision of

the lower Court.

In dealing with issue 1 in his brief, the learned Silk leading other Counsel for the 3rd Respondent raised a poser as to the status of the appellant's action at the time he commenced it. He reproduced Section 2 (a) of the Public officers protection Act C141 Laws of the Federation of Nigeria, 2004 and concluded that the action filed in January, 2013 was filed about eleven months after the cause of action accrued and about eight months after the expiration of the period within which he, the applicant, could institute the action.

Learned senior counsel relied on *Egbe v. Adefarasin* (1987) 1 NWLR (Pt. 47) 1 in his submission that the appellant's action was statute-barred and no court has jurisdiction to entertain it. He relied also on the following: *Hassan v. Aliyu* (2010) 17 NWLR (Pt. 1223) 547, *Ochubeko v. Fowler* (1993) 7 NWLR (Pt. 308) 637, *Ibrahim v. JSC* (1998) 14 NWLR (Pt. 584) 1, *Adeosun v. Jibesin* (2001) 11 NWLR (Pt. 724) 290.

Based on the above authorities, he contended that the appellant approached the Federal High Court after his right to seek relief had been extinguished. Relying on *Madukolu v. Nkemdilim* (1962) 25 SCNLR 341, *Dingyadi v. INEC* (No. 1) (2010) 18 NWLR (Pt. 1224) 1 among others, he argued that the trial court had no jurisdiction to entertain the suit.

Learned Senior Counsel argued that the fact that the 2nd and 3rd Respondents subsequently joined the proceedings did not alter the fact that the Federal High Court lacked jurisdiction in the matter and since the defence under s.2 (a) of the Act will dispose of the matter against all defendants, it is immaterial who among them raised it. He relied on *Wajoku v. Adeleke* (2007) 4 NWLR (Pt. 1025) 423 among others. He added that since the defence is one of jurisdiction, the failure of a party to raise the same timely cannot revive an action dead on arrival, as it were, having been extinguished by the Act at the time of its institution.

He referred to and relied on s. 36 (1) of the Constitution (supra) and submitted that the 3rd Respondent, as any other respondent in the case, has a right to raise any legal defence in answer to the appellant's claim against him. He urged the Court to resolve issue 1 in favour of the 3rd Respondent.

In issue 2, learned Senior Counsel impugned the appellant's

contention that the appeal in PDP v. Sylva was merely struck out and not decided on the merits, thus giving him the liberty to approach the court again on the same subject matter and same set of facts. He submitted that when an issue is determined with finality by a court of competent jurisdiction, there can never be further litigation upon the same subject matter by the same parties or their privies. B

He relied on Aro v. Fabulunde (1983) SCNLR 58 where that court, per Aniagolu, JSC, held, *inter alia*: "... public policy demands that there should be an end to litigation..." He relied on Ito v. Ekpe (2000) 3 NWLR (Pt. 650) 678, Suragie v. Uwaeachie (1972) 3 SC 21 C among others.

The learned silk reproduced and discussed various portions of this Court's judgment in PDP v. Sylva (*supra*), the issues involved and the parties and concluded that not only was the appellant's case caught by the doctrine of estoppels *per rem judicatam* but the appellant lacked the *locus standi* to institute the matter since he was not a candidate in the gubernatorial election for Bayelsa state which took place in February, 2012. D

He urged the Court to resolve the issue against the appellant. In conclusion, learned Senior Counsel urged the Court to dismiss the appeal and affirm the decision of the Court below. E

Learned Senior Counsel for the appellant filed a reply brief to each of the 1st, 2nd and 3rd Respondents' briefs. While an appellant may pursuant to Order 6 Rule 5 (3) of the Supreme Court Rules file in Court and serve on the Respondent a reply brief such a brief, is filed when an issue or argument raised in the Respondent's brief calls for reply. Where the Respondents merely replied to the argument in the appellant's brief without introducing new issues but only joining issues in the briefs, there will be no need for a reply. See Nwali v. State (1991) 3 NWLR 663 at 671. The provision of Order 6 Rule 5 (3) of the Supreme Court Rules permitting the filing of a reply brief is not a licence to upgrade the appellant's brief in quality and/or scope. F

I have considered the replies to the Respondents' briefs and, with profound respect; it is my view that the same are mere amplification of the arguments in the applicant's brief. I will therefore ignore them in the determination of the appeal. H

My noble Lords, I have carefully examined the issues formulated on behalf of the parties. An issue for determination must be a

proposition of law or of fact or both. See *Nteogwuiji & Anor v. Ikwu* (1998) 11 NWLR (Pt. 569) 267 at 288, *Ugo v. Obiekwe* (1989) 1 NWLR (Pt. 99) 566, *Dantata v. Mohammed* (2000) 78 LRCN 1422 at 1460.

The main purpose of formulation of issues for determination is to enable the parties to narrow the issues in controversy in the grounds of appeal in the interest of accuracy, clarity and brevity. See *Sha v. Kwan* (7000) 78 LRCN 1645 at 1665 at 1666, *Ogbuinyinya & Ors v. Obi Akudo & Ors* (1990) 4 NWLR (Pt. 146) 551 at 568. It follows that an issue for determination in an appeal must be a concise statement of law or facts. It should not contain a conjecture or opinion.

In the appellant's issue 1, there is the phrase "*...when such defence which is a special defence, ensuring only to the 1st Respondent, ...as such defence is only available to a specific class of people to whom the 3rd Respondent does not belong.*"

In the same vein, in issue 2 is contained the following phrase "*... that the profound statements made by the Honourable Judges of the apex court... which were made per incuriam...*" (Underlining mine). The underlined phrases are neither law nor facts. That the defence raised and relied on by the 3rd Respondent enures only to the 1st Respondent or is only available to a specific class of people to which the 3rd Respondent does not belong and that the apex court made profound statements which were made per incuriam are at the stage of raising them matters of opinion or even speculation. As it is said, opinions are free but they should not be confused with facts which are sacred.

The contents of the phrases are parts of the case the appellant has to make before this court. They cannot be taken as given. It is akin to starting to solve the problem with the conclusion to be reached much like putting the cart before the horse. It is also observed with dismay that the learned Silk for the Appellant made no attempt to marry his issues with the grounds of appeal.

In issue 2 in the 2nd Respondent's brief the phrase "...which is also caught by the doctrine of locus standi" is a conclusion that can be reached in the resolution of the relevant issue in the appeal, and not a fact.

Shorn of unhelpful verbiage and embroidery, appellant's issues are a replication of the issues raised by the 1st-3rd Respondents

in their briefs. I will determine the appeal on the two issues raised in the 2nd Respondent's brief.

For ease of reference, the two issues are hereunder reproduced once more:

"1. Whether the lower Court was right when it held that the defence of limitation of action under the Public Officers Protection Act could be validly raised by the 3rd Respondent. (Distilled from ground 1 of the Notice of Appeal)

2. Whether the lower Court having regard to the decision of the Supreme Court in SC/28/2012 and SC/9/2012 the appellant did not have the requisite locus standi to institute the case which is also caught by the doctrine Locus Standi. (Distilled from grounds 2 and 3 of the Notice of Appeal)"

I will resolve the two issues seriatim. In issue 1 the focus is on the provisions of Section 2 of the Public Officers Protection Act which reads:

"Where any action, prosecution of other proceeding is commenced against any person for any Act done in pursuance or execution or intended execution of any Act or Law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, Law, duty or authority, the following provisions shall have effect:

(a) The action, prosecution or proceedings shall not be or be instituted unless it is commenced within the months next after the act, neglect or default complained of, or in the case of a continuance of damage or injury, within the months after the ceasing thereof provided that if the action, prosecution or proceeding be at the instance of any person for cause arising while such person was a convict it may be commenced within the months after the discharge of such person from person."

In sum the argument of the appellant is that the Act protects only a public officer such as the 1st Respondent and will not apply to a non-public officer such as the 3rd Respondent. From the appellant's argument the defence under the Act is restricted to a public officer and not available to any other person even if that person is sued with the public officer. With profound respect, this is not the intendment of the Act. It is a fallacy borne out of a skewed interpretation of the title of the Act: "Public Officers Protection Act" without reference to

the provision itself.

The expression “against any person for any Act” aptly demonstrates the falsity of the appellant’s contention that the defence under the Act is limited to a class of persons to which the 3rd Respondent does not belong. Appellant does not dispute the right of the 1st Respondent to raise the defence under the Act. The Respondents stand or fall together. The result of the defence being raised by the 1st Respondent would have enured to all Respondents as defendants.

In the circumstance, I do not see any reason why it would make a difference who among the Respondents raised the defence. It would have been a different matter if the 3rd Respondent had raised the defence in a purported status of a public officer. See *Rufus Alli Momoh v. Afolabi Okewale & Anor* (1977) 6 SC 81 at 92.

The import of the 3rd Respondent’s defence is that the action in which he and the other respondents were defendants cannot lie because it was commenced at the expiration of the three month period prescribed by the POPA for instituting such action. It is my view that the plea could be properly raised by any of the Respondents for his benefit and the benefit of the co-respondents. Furthermore, a successful defence under this Act oust the jurisdiction of the Court. One of the four conditions for the Court to exercise jurisdiction in a given case is that the suit must have been commenced by due process of law and upon fulfillment of any condition precedent to assumption of jurisdiction. See Madukolu v. Nkemdilim (1962) 2 SCNLR 341, Sken Consult v. Ukey (1981) 1 SC 6. A suit commenced after the expiration of the time stipulated in the Act cannot be said to have been commenced by due process.

Jurisdiction is the power which a Court has to hear and determine a cause or complaint made before it. See *Ikine v. Edjerode* (2001) (1988) 92 LRCN 3288 at 3316, *Adeyemi v. Opeyori* (1976) 9-10 SC 31. Jurisdiction is a threshold issue and since it is a *sine qua non* to adjudication and proceedings taken without jurisdiction is a nullity, the issue could be raised at any stage by any party or by the Court suo motu to avoid an exercise in futility.

Though learned Silk did not dispute the fact that the defence under the Act raises an issue of jurisdiction, he made heavy weather of the fact that the 3rd Respondent did not comply with the rules in

raising same. However, there is no special format of raising the issue of jurisdiction. See *Akegbejo & Ors v. Dr. D. O. Atasa & Ors* (1993) 1 NWLR (Pt. 534) 459 at page 469. It follows that the issue of jurisdiction cannot be defeated by any rule of court. See *Akegbejo & Ors v. Dr. D. O. Ataga & Ors* (supra).

Finally on this issue, Section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides:

“In the determination of his civil rights and obligation, including any question or determination by or against any government or authority a person shall be entitled to a fair hearing within a reasonable time by a Court or other tribunal established by law and constituted in such manner to secure its independence and impartiality.”

The section encompasses the twin pillars of justice, namely:

“(a) Audi alteram partem (hear the other party). ”

(b) Nemo judex in causa sua (no one should be a judge in his own cause.) ” See *PHCN v. Alabi* (2011) All FWLR (Pt. 557) 698.

The first of the two pillars of justice is relevant to the facts herein. A person cannot be said to have been given a fair hearing if he is not allowed to rely on the provision of an Act of Parliament as an answer to the case against him. It is not necessary for the Act to confer a right of defence on anyone. The defence is encompassed in the provision relating to fair hearing in s.36 (1) of the Constitution (supra).

I entirely agree with the position of the respondents on issue 1 in the appeal. Consequently, the issue is resolved against appellant.

Issue 2 questions the locus standi of the appellant to bring the action in view of the decision of this Court in the consolidated appeals Nos. SC.28/2012 and SC.9/2012 reported as *PDP v. Sylva* (2012) 13 NWLR (Pt. 1316) 85. The appellant in this appeal was also the appellant in the consolidated appeals. This Court struck out the appeals for lack of jurisdiction. For the bare fact that the appeals were struck out and not dismissed appellant insists on having a second bite at the cherry as it were.

In my humble view, the determinant fact here is what stage in the proceedings did this Court struck out the appeals. Did the Court call the case and struck it out without more? Was it just said that the

Court had no jurisdiction and the matter was struck out? The answer to each poser is No. Before it struck out the consolidated appeals, the Court exercised its jurisdiction to determine whether or not it had jurisdiction to hear and determine the appeal. And it decided that it lacked jurisdiction to hear and determine the appeal.

B *Generally, where the Court has no jurisdiction to hear and determine a case, it has no jurisdiction to dismiss it. It should strike out the matter.* See *Ulor v. Benson* (2000) 9 NWLR (Pt. 673) 570, *Dim v. A-G Federation* (1986) 1 NWLR (Pt. 17) 471.

C *The implication of a general rule or principle is that there are exceptions thereto. The issue of jurisdiction may arise from a matter that does not relate to the merit of the case. On the other hand, it may arise from the very essence of the claim. In the first case above, the Court has no jurisdiction to dismiss the case but will merely strike it out in limine and the appellant may re-litigate the matter by correcting the matter that gave rise to lack of jurisdiction. In this scenario, the order of striking out does not preclude the party from fresh litigation on the matter.*

E *On the other hand, the Court has jurisdiction to determine whether or not it has jurisdiction in the matter. If the circumstances of the case are such that the Court, in exercising the jurisdiction to determine whether or not it has jurisdiction, delves into and determines the merit vel non of the case the order striking it out is as good as an order for dismissal, thereby precluding the plaintiff/applicant from re-litigating the matter.*

G *This was the case when this Court decided it had no jurisdiction in the consolidated appeals Nos. SC.28/2012 and SC.9/2012 and, consequently struck it out. With due respect to the learned Silk for the Appellant, what he referred to as “...the profound statements made by Honourable Judges of the apex Court in the consolidated appeal Nos. SC/28/2012 and SC.9/2012 which were made per incuriam” are really determination made by the Court which led it to the conclusion that it had no jurisdiction in the matter.*

For instance, at page 122 of the report, Rhodes-Vivour, JSC in the lead judgment, expressed the views that:

“My Lords, the 1st Respondent the appellant in the instant appeal, paid N5.5 million (Five million, five hundred thousand) presented himself to the Screening Committee extensively for the fresh primary election fixed by his party for 19/11/11 to choose its candidate to stand for Governorship of Bayelsa State in the election fixed for 12/2/2. These are clear acts indicative of the fact that the 1st Respondent had abandoned the result of the primaries he won in January, 2011. He was now interested in the primary election fixed for 19/11/11. Further more, the primaries that the 1st Respondent won in 2011 fades into insignificance since the election to which the said primaries was conducted was cancelled.”

The above portion of the statement and others in the same vein are characterized by learned Senior Counsel for the Appellant as profound and made per incuriam, for the simple reason that where a Court lacks jurisdiction to entertain the only thing the Court can do is to make an order striking it out. Profound the statements are indeed. However, the reasons offered for saying that they were made per incuriam is tenuous and cannot stand the test of reason.

Learned Senior Counsel on his perceptions, albeit wrong, argued that the only thing a Court can validly do if it has no jurisdiction to entertain a matter is simply to strike it out. This is not correct. The Court cannot, out of blues, declare it has jurisdiction or no jurisdiction over a matter. As stated earlier in this judgment, any Court has jurisdiction to determine whether or not it has jurisdiction over a matter before it. See *A-G Federation v. Guardian Newspapers Ltd.* (2001) FWLR (Pt. 32) page 97.

What the Court says in the exercise of its power to determine whether or not it has jurisdiction in a matter may be profound but it is not, without more, made per incuriam. In the circumstance, I agree with the Respondents that the appellant lacks the locus standi to relitigate the subject matter of the consolidated appeals Nos. SC.28/2012 and SC.9/2012. He cannot question the conduct of an election in which he did not take part as a contestant.

The doctrine of Res judicata applies not only against the appellant but also against the jurisdiction of the Court itself in the sense that appellant is stopped per rem judicatam from

bringing the same case before the Court and the jurisdiction of the Court is ousted. See *Lamidi Ladimeji & Anor v. Suara Salami & Ors* (1998) 5 NWLR (Pt. 548) 1 SC ratio 3.

In addition, the appellant has not demonstrated any perversity in the concurrent findings of the two Courts below and ipso facto this Court will not disturb the findings. See *Chikwendu v. Mbamali* (1980) 3-4 SC 31, *Okafor v. Idigo* (1984) 1 SCNLR 481, *Kponuglo v. Kodadja* (1933) 2 WACA 24. I resolve issue 2 also against the appellant.

My noble Lords, I seek your indulgence to say that this appeal borders dangerously on abuse of Court process. It goes beyond matter than can be regarded as irregularity. It is a fundamental vice deserving of the dismissal of the appeal. See *Okafor v. A-G Anambra State* (1991) 6 NWLR (Pt. 200) 659.

The election for which the appellant won the primaries was cancelled outright. In appreciation of the fact that the election for which he was nominated was cancelled, the appellant prepared himself for other primaries to be held in place of the one cancelled. He spent his money obtaining the relevant form and campaigned extensively and when he was screened out of the contest he developed a brain wave to resurrect the result of the primaries he won but which he impliedly agreed and accepted was dead and buried.

He was not a party to the primaries for the election to which he makes the absurd claim of applying the result of primary which was abandoned when the election for which it was conducted was cancelled. He is certainly a busy body, an interloper who had no reasonable ground to believe in the success of his action. And he had the temerity to defy the concurrent decisions of the two Courts below to continue his abuse of process of Court in the apex Court.

The political class may have unlimited funds and time at their disposal but the Court's time is precious and should not be wasted in pursuit of shadows by any party or person.

The two issues having been resolved against the Appellant, I find no merit in the appeal which is hereby dismissed. Appellant is to pay cost of N500,000 to the 3rd Respondent. 1st and 2nd Respondents shall bear their respective costs.

Appeal dismissed; judgment of the lower Court affirmed.

MUNTAKA-COOMASSIE JSC

This is another protracted and very evasive political case which has the tendency of un-necessary wasting the precious time of the courts.

I have closely gone through the lead judgment rendered by my noble lord I beg to entirely agree with him. The reasoning and conclusions are through and correct in law. I cannot improve of same. I also hold that the appeal lacks merit same is hereby dismissed. I endorse the order as to costs made by my learned lord in the lead judgment.

C

GALADIMA JSC

I have had the benefit of reading in draft, the judgment of my learned brother NGWUTA, JSC just delivered. I agree with his reasoning and conclusion that the appeal is devoid of merit and ought to be dismissed.

I am yet to fathom, the reason why this appeal has been brought to this court. My noble Lord has painstakingly set out the background facts leading to this appeal. He has equally summarized the various submissions of the learned counsel for the respective parties in this appeal. Issues have been formulated by the parties. Two issues raised by the 2nd respondent capture the real problems of this appeal. The first issue focused on the provision of Section 2(a) of the Public officers Protection Act Cap P4, Laws of the Federation 2004, which defence if raised by the 1st respondent will have disposed of the suit against all the respondents.

The second issue is focused on the locus standi of the appellant to bring the action in view of the decision of this court in the Consolidated Appeals No.SC.28/2012 and SC.9/2072 reported as: PDP v. SYLVA (2012) 13 NWLR (pt.1316) 85. I shall only comment on the second issue. May it be noted that the appellant herein in this appeal was also the appellant in the two suits consolidated appeals. It will be recalled that this court struck out the said appeals for lack of jurisdiction. Appellant has argued that because the appeals were struck out and not dismissed he must be given second opportunity to put his case across. He has insisted that his case is not caught by the doctrine of locus standi.

Generally, any proceedings conducted by a court without jurisdiction is a nullity. It is trite law also that where the court has no jurisdiction to hear and determine a case it has no jurisdiction to dismiss. The matter, in that case should be struck out. See DIM v. ATTORNEY-GENERAL, FEDERATION (1986) NWLR (pt.17) 471; CHUKWU v. AMADI (2012) 4 NWLR 136 at 137. In that case the order of court striking out does not preclude the law from instituting fresh litigation. However, where the court has to decide whether it has jurisdiction to hear and determine the case or not, it can delve into the matter and determine the merit vel non of the case; in this respect the order it makes striking out is as good as an order for dismissal: See POPOOLA v. PAN AFRICAN DISTRIBUTORS AND ORS (1972) ALL N.L.R. 831, (1972) 11 SC 32 at 26; COTCENA INT'L LTD v. IMB LTD. (2006) 9 NWLR (Pt.985) 275 at 297. In my humble opinion what this court decided on 20th April, 2012 in the consolidated appeals No.SC.28/2012 and SC.9/2012, was on the merit of the matter. I cannot fathom the reason why the learned counsel for the appellant is still contending that the appellant still reserves the right to relitigate on the subject matter of this appeal which subject matter is in pari materia with the said consolidated appeals.

The law is that where a matter has been decided with finality by a court of competent jurisdiction between the same parties and for their privies, there can be no further litigation upon the same subject matter by the same parties or privies. There should be a bar to relitigate on the already decided issues and matters. The rationale for this is grounded in public policy which dictates that there must be end to litigation. This proposition is well settled in the decision of this court in ARO v. FABOLUDE (1983) 1 SCNLR 58 where it stated G thus:

“...public policy demands that there should be an end to litigation once a court of competent jurisdiction has settled, by a final decision, the matters in contention between the parties. Not only must the court not encourage prolongation of a dispute, it must also discourage proliferation of litigation. And so the maxim interest re-publica ut sit finis litium has for long been accepted as one of the established principles of our law. Of equal importance in our law-that no man ought to be twice vexed, if it is proved to the court that memo debet bis vexari, si constat curiae quod sit pro una et cadem

causa, the principle runs through the entire gamut of our legal approach, whether it be in civil or criminal matters. It therefore forms the foundation of the plea of res judicata in civil cases””See also ITO v. EKPA (2000) 8 NWLR (Pt.650) 678; SAVAGE v. UWAECHIE (1972) 3 SC 27; AFOLABI v. GOVERNOR OF OSUN STATE (2002) 13 NWLR (Pt.835) 119, ADOMBA v. ODIESE (1990) 1 NWLR (Pt.125) 165, ATTORNEY-GENERAL NASARAWA STATE V. ATTORNEY-GENERAL PLATEAU STATE (2012) 170 NWLR (Pt.1309) 419. B

The pertinent question here is whether the Appellant’s suit is caught by the doctrine of estoppels per rem judicata. A passionate perusal of the parties and subject matter of the decision in P.D.P v. SYLVA (supra) and the instant appeal will undoubtedly show that this action is caught by the doctrine of estoppels per rem iudicatam. The parties in P.D.P v. SYLVA and those in the instant case are the same. The 1st respondent in P.D.P v. SYLVA is the appellant in this appeal and was the plaintiff at the trial court. In the said P.D.P v. SYLVA the other parties to the suit were the 1st Respondent, and the 2nd Respondent herein. The only party to this suit who was not involved in that case is the 3rd respondent who at all times material to his suit has been and still remains a privy of the 1st respondent in this appeal, being the person who was declared by the 1st respondent as the winner of the Bayelsa Governorship Election. D

Also, a careful perusal of the decision of this court in P.D.P v. SYLVA will reveal that the issue therein centred squarely on the appellant’s contention that he is the person entitled to have contested the Bayelsa State Governorship Election on the platform of the 2nd respondent, having won the 2nd respondent’s primary election conducted on 12/1/2011. In the instant case, the question as to whether the appellant was the 2nd Respondent’s Gubernatorial candidate for the Governorship election had been distinctly put in issue and determined against the appellant herein. It is in the concurring judgment of my learned brother Mohammed JSC [as he then was] that he put the matter very succinctly thus: E

“In the determination of the issues identified, it is very important to take into consideration that although the 1st Respondent (Appellant in this Appeal) contested and won his party’s primary election held in January, 2011 which produced him as the candidate for the appellant P.D.P in the Governorship election in Bayelsa State then F

scheduled for April 2017, that election did not hold in Bayelsa State following the order of the Federal High Court and affirmed by the Court of Appeal that election should not hold until 2012. That order of court was made at the instance of the 1st Respondent who complained to the court that his tenure of office as the Governor of Bayelsa State would not end until 2012. Therefore, even though his name was forwarded to and received by Independent National Electoral Commission as the Candidate to contest the Governorship election scheduled for April, 2011 in Bayelsa State, the cancellation of that election by the order of court had swept away all right acquired by the 1st Respondent from the result of the primary election of January, 2011 and the forwarding of his name to Notional Electoral commission as P.D.P candidate to contest the election that never took place...”

This is the same issue which has been decided that is being raised in this suit, when the Appellant sought in his Originating Summons in paragraph ‘C’ as follows:

“C. A declaration that as at April, 2011, the plaintiff was/is the only valid and authentic Gubernatorial Candidate on the platform of P.D.P for Bayelsa State.”

In so far as this court had decided that the appellant was not the candidate of the 2nd Respondent for the general election conducted on 12/2/2012 into the office of Governor of Bayelsa State, he lacks locus standi to seek in this suit a relief that he be declared as Governor of that state.

It is on this premise and in view of the elaborate consideration of all other issues raised and determined in the lead judgment, that I should hold that the court below was right when it held that on the basis of the decision of this in P.D.P v. SYLVA (supra) the appellant’s suit was caught by the doctrine of estoppels and that he has no locus standi to bring this suit. I too dismiss this appeal and abide by order made as to costs.

H

OKORO JSC

I have had the privilege of reading before now the judgment just delivered by my learned brother, Ngwuta, JSC with which I am in agreement that this appeal lacks merit and ought to be dismissed.

There is no doubt that my learned brother has meticulously and quite efficiently dealt with the salient issues submitted for the determination of this appeal. However, I intend to make a few comments only in support of the judgment.

Two issues have been formulated for the determination of this appeal. They are:-

1. Was the Lower Court correct in applying the provisions of Section 2(a) of the Public Officers Protection Act, Cap 141 Laws of the Federation of Nigeria 2004, when it held that the 3rd respondent therein is at liberty to raise the special defence of limitation as raised in his own defence, when such defence which is a special defence, inuring only to the 1st respondent, was not raised by the 1st respondent, as such defence is only available to a specific class of people to whom the 3rd respondent does not belong.

2. Were the Justices of the Lower Court correct in holding in law that the profound statements made by Honourable Justices of the Apex Court in the consolidated Appeal Nos. SC.28/2012 and SC.9/2012, which were made per incuriam, could be relied upon in determining the issues raised on Res Judicata, Estoppel etc, in the face of the many decisions of the Supreme Court clearly stating the consequences of “a striking out order.”

On the first issue, the contention of the appellant is that the court below erred in law when it held that the 3rd respondent can rely upon and raise the defence of limitation of action under the Public Officers Protection Act because the 3rd respondent was not the Public Officer whose action was being challenged. It is his view that since it is the action of the 1st respondent that is being challenged, no other person can raise the defence of limitation under the said Act.

The respondents however, argued that although the protection offered by Section 2(a) of the Act is special and reserved for a special class of defendants, in circumstances like in the instant case, where the defence is raised by any of the parties will dispose of the entire suit against the defendants, any of the parties is in a position to raise the defence available under Section 2(a) of the Act. According to the respondents, this goes to the jurisdiction of the court and as such it can be raised by any of the parties.

Now, Section 2(a) of the Public Officers Protection Act, Cap.

141, Laws of the Federation of Nigeria, 2004, provides:

“2. Where an action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such Act, Law, duty or authority, the following provisions shall have effect:-

(a) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of, or in the case of a continuation of damage or injury, within three months after the ceasing thereof; Provided that if the action, prosecution or proceeding be at the instance of any person for cause arising while such person was a convict it may be commenced within three months after the discharge of such person from prison.”

The law is crystal clear on the effect of an action caught by the statute of limitation. Any suit or action which is filed after the period allowed by a statute is statute barred. I need say that such an action is not maintainable and the operation of the limitation law leaves the plaintiff with a right of action which is dead in law and accordingly, no court will have jurisdiction to entertain the action. Where a statute of limitation prescribes period within which an action must be commenced, legal proceedings cannot be properly or validly instituted after the expiration of the prescribed period. Also, where an action is statute-barred, a plaintiff who might otherwise have had a cause of action loses the right to enforce it by judicial process because the period of the time laid down by the limitation for instituting such an action has elapsed. See *Aremo II v. Adekanye* (2004) 13 NWLR (Pt.891), 572, *Eboigbe v. NNPC* (1994) 5 NWLR (Pt. 347) 649, *Odubeko v. Fowler* (1993) 7 NWLR (Pt. 308) 637, *Sanda v. Kukawa Local Government* (1991) 2 NWLR (Pt. 174) 379.

The facts of this case disclose that the Governorship Election for Bayelsa State took place in February, 2012 and as was rightly held by the learned trial judge, the appellant's cause of action accrued on the date the election was held in February, 2012. The action giving rise to this appeal was filed by the appellant in January, 2013 which is about 11 months after his cause of action occurred and about 8 months after the period within which he was allowed by

Section 2(a) of the Public Officers protection Act to have brought the action.

The question may be asked whether it was only the 1st respondent, i.e. Independent National Electoral Commission which could have raised the issue before the trial court? I must state clearly that this is an issue which touches on the jurisdiction of the court. It is true that courts guard their jurisdiction jealously and will not lightly surrender to a provision taking away their jurisdiction. It is however well settled that where the words of a statute as to the jurisdiction of the court are clear and unambiguous, they must be given effect.

But it is also well settled that the exercise of a right of action is derived from the fundamental law of the land, or any statute specifically conferring such right. The court can only exercise jurisdiction with respect to a right of action, and cannot assume jurisdiction unless the plaintiff who has brought the action before it has a right of action. See *Attorney General of the Federation v. Sodde* (1990) NWLR (Pt.128) 500, *Attorney General of Anambra State v. Attorney General of the Federation* (2003) 1 NWLR (Pt.801) 221.

It is also important to note that before a court can exercise jurisdiction over a cause or matter, the subject matter of the case must be within the court's jurisdiction and there must be no feature in the case which prevents the court from exercising its jurisdiction. See *Madukolu v. Nkemdilim* (1962) 2 SCNLR, 341.

Thus, being an issue of jurisdiction, any party who is sued can raise it before the court. It can even be raised by the court even at the appellate level. The reason is that where a court has no jurisdiction to entertain a matter and it is covered up by any means, the entire proceedings, no matter how well conducted, is a nullity. So, for me, I agree that the 3rd respondent was right to have raised the issue of statute of limitation even though it inured to the first respondent.

Having said so much on the 1st issue, I shall adopt the views of my learned brother Ngwuta, JSC regarding the second issue which he has admirably resolved. With the above few words of mine including the reason advanced and the more detailed ones in the lead judgment, I too hold that this appeal is devoid of merit. It is also dismissed by me. I abide by the consequential orders made in the lead judgment, that relating to costs, inclusive.

NWEZE JSC

My erudite Lord, Ngwuta JSC, availed me of the draft of the leading judgment just delivered now. I agree that, from the state of authorities, this appeal lacks merit and should be dismissed.

B However, I have a different kind of concern regarding the Public Officers' Protection Act which the leading judgment dealt with as issue one. Although numerous decisions of this court have upheld it, I find it amazing that fifty five years after flag independence, common
C law concepts which only found historical and jurisprudential justification on the peculiarities of English constitutional history could still be pleaded in our superior courts.

In my humble and most respectful view, there is even a laughable irony in all of this! Most of those concepts were actually associated with the notion of the Prerogative of the Crown: a notion which
D could only be explained on the basis of the quondam hypothesis that the English Monarch was not accountable for a wrongful act in the courts. Professor S. A. de Smith explains that by the time of Elizabeth 1, there had developed a "*fairly coherent theory of the royal prerogative*": ...matters of private rights were for the courts of common
E law and equity; matters of State, or public rights, were for the King and his extraordinary tribunals and the King could withdraw such questions from the cognisance of the courts...

F S. A. de Smith, *Constitutional and Administrative Law* (London: Penguin Books, 1971) 118, cited in A. Emiola, *Public Servant and the Law* (Ile-Ife: University of Ife Press, 1971) 144; See, also, the masterful articulation of the nuances of this prerogative in the scintillating treatise of the leading authority on Administrative Law in Nigeria, Professor D. I. O. Ewelukwa, "*Proceedings by and Against the State*", in (1973) *Nigerian Bar Journal* Vol, X1 page 10; also, M. C. Okany, "*The Idea of State Immunity in the Nigerian Courts*", in (1980) *Nigerian Bar Journal* Vol XV1 page 57.

H What makes the matter more irksome is that some of those concepts have been abolished in the land of their nativity, namely, England. Is it then, not curious that here in Nigeria, we are pretending to be more catholic than the Pope?

The Independence Constitution of 1960 accommodated some of these Victorian ideas. The prevalent notion at the time of indepen-

dence was that owing to the antecedents of Nigeria's constitutional history, citizens could not enforce their claims against the Central and Regional Governments. It took the stature and eminence of the Supreme Court to dissipate that anachronistic position in *Ransome Kuti v. A-G of the Federation* [1985] 2 NWLR (Pt. 6) 211.

The Republican Constitution of 1963 dealt the first, even if feeble, blow at some of those inherited common law usages. In the first place, it enrobed itself with the garb of supremacy. Section 1 of that Constitution (the Constitution of the Federation, 1963 No. 20) provided as follows:

"This Constitution shall have the force of law throughout Nigeria ...if any other law (including the Constitution of a Region) is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void..."

Secondly, Section 22 (1) of the said Constitution made incremental progress in this regard. The section provided for the determination of rights. However, it was the Constitution of the Federal Republic of Nigeria, 1979, that conferred a plenitude of powers on the courts.

Section 6 (6) (b) of the Constitution was noteworthy for the share breadth and amplitude of the powers it vested on the courts. It extended judicial powers to "all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto..." There was another user-friendly provision: Section 33 (1). It was very generously-worded. It empowered courts to determine "civil rights and obligations, including any question or determination by or against any government or authority". The Constitution of the Federal Republic of Nigeria, 1999, (as amended) has endorsed this trend in sections 6 (6) (b) and 36, respectively.

I concede that this is not the issue we are confronted with in this appeal. So, let it abide the opportune occasion when, hopefully, it would be presented before this court for determination. Having said that, I, too, shall enter an order dismissing this appeal is an abuse of court process. I abide by the consequential orders in the leading judgment.