

**SUPREME COURT OF NIGERIA**  
FRIDAY 9TH DECEMBER, 2011. SC. 423/2011  
**CORAM:- M. MOHAMMED, O. O. ADEKEYE,**  
**N. S. NGWUTA, M. U. PETER-ODILI,**  
**O. ARIWOOLA, JJSC**

PROGRESSIVE PEOPLES ALLIANCE ..... APPLICANT  
AND  
INDEPENDENT NATIONAL  
ELECTORAL COMMISSION & ANOR ..... RESPONDENTS

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ELECTIONS - Nomination - Clarification of - INEC has legal and moral duty to point out - That applicant was not a candidate at the election it conducted (H1)

APPEALS - Preliminary objection - Basis - Under SC Rules 1999 preliminary objection is not restricted to grounds of law or facts - And even if affidavit is struck out - Grounds for the objection is intact (H2)

ELECTION PETITIONS - Appeals - Time limit - At expiration of 60 days stated in Constitution 1999 s. 285(7) - Right of appeal either as of right or with leave is lost - And court has no jurisdiction in the matter (H3)

ELECTION PETITIONS - Appeals - Filing - Time limit - Electoral Act s. 143(1)(2) - Appeal shall be lodged within 21 days - From date of delivery of judgment - Otherwise right or leave to appeal is lost (H4)

APPEALS - Facts - Review of - Basis - Facts to be reviewed by appellate court are those presented by parties at trial court - Otherwise appeal is incompetent and the court has no jurisdiction (H5)

**FACTS**

By a Motion on Notice filed before the Supreme Court of Nigeria, applicant brought the application pursuant to section 243(a) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), Order 2 rules 28(1)(2)(3), Order 6 rules 2(1), Order 7 rules 1(2)(e), 6 & 7 and Order 10 rules 1(1)(2)(4)(5) of the Supreme

Court Rules, seeking inter alia for leave (as a person having interest in the matter) to appeal against the decision of the Court of Appeal Benin Division.

Upon being served with the motion, 1<sup>st</sup> respondent filed a notice of preliminary objection pursuant to section 285(7) of the Constitution (as amended), section 143(1)(2) of the Electoral Act 2010 (as amended) and Order 2 rule 8 of the Supreme Court Rules. The grounds of the objection among others are that the application has become an academic exercise as no useful purpose shall be served if it is granted, that no competent appeal was filed within the twenty one days from the date the trial tribunal delivered the ruling sought to be appealed against and that neither the Court of Appeal nor the Supreme Court can extend the time to appeal.

### **ISSUES FOR DETERMINATION**

*“(1) Whether having regards to the provisions of Section 285(7) of the Constitution of the Federal/Republic of Nigeria the application has not become an academic exercise.*

*(2) Whether the court can extend the time within which to appeal the decision of an Election Tribunal beyond the mandatory twenty-one days.*

*(3) Whether the application is not incompetent as the title and parties in the decision appealed against have not been duly reflected.”*

**HELD** (Unanimously striking out the application per ADEKEYE JSC)

***1. The 1<sup>st</sup> respondent, INEC, conducted the questioned election. It has a legal and a moral duty to the electorate in Delta State to point out that the applicant was not a candidate at the election it conducted, and this duty does not derogate from its position as the electoral umpire. (p. 2951 B)***

***2. This is a competent ground for preliminary objection and it is an issue of fact. Preliminary objection under Order 2 r.8 of the Supreme Court Rules 1999 (as amended) is not restricted to grounds of law or facts. Even if the affidavit is struck out,***

***the grounds for preliminary objection will remain intact and not affected at all. In my view, the preliminary points have no bearing on the preliminary objection or argument on the grounds for same. (p. 2951 D)***

***3. The decision against which the applicant seeks leave to appeal was rendered on 7<sup>th</sup> September 2011 by the Election Tribunal constituted for Delta State. The period of 60 days within which an appeal from the decision of a tribunal or court shall be heard and disposed of has expired. At the expiration of the 60 days stipulated in S. 285(7) (supra) the right of appeal either as of right or with leave either by a party to the proceeding or by an interested party, is lost for all times and for all purposes.***

***The court has no jurisdiction with respect to the subject matter as the right of appeal is lost. (p. 2951 H)***

***4. Issue two relates to a community reading of section 143 (1) and (2) of the Electoral Act 2010 (as amended). The effect of the two subsections of s. 143 is that an appeal against the judgment of the tribunal shall be lodged within 21 days from the date the judgment was delivered. At the expiration of the 21 day period, the right of appeal or the right to seek leave to appeal as an interested party is extinguished.***

***As in section 285(7) of the Constitution (supra) the period provided in S. 143(1) & (2) of the Electoral Act 2010 (as amended) cannot be enlarged since an election matter is time-bound. The applicant herein ought to have filed an application for leave to appeal and his notice of appeal within the 21 days prescribed in S. 143(1) & (2) of the Act. The court will not grant a relief that is of no use or benefit to the applicant. Above all, the applicant did not advance a reason or reasons for this court to interfere with or depart from its recent decision based on application of S. 285(7) of the Constitution in SC. 272/2011, SC. 227/2011 (Consolidated) Peoples Democratic Party (PDP) v. Congress for Progressive Change (CPC) delivered on 31/10/2011. (p. 2952 D)***

***5. The facts the appellate court will review in an appeal are facts presented by or elicited from the parties at the trial court.***

***If any party is displaced and a stranger to the proceedings at the trial court has usurped his place, the appeal will be incompetent and the appellate court will lack jurisdiction to hear it. This applies equally to an application for leave to appeal. In the application before us, the petitioners before the trial tribunal, Chief Sam Nkire and Progressive Peoples Alliance (PPA) have been cast aside as it were and an impostor has taken their place, parading as applicant.***

***The proper thing to do is to leave the parties on record intact notwithstanding the decision of the trial tribunal and state the name of the interested party and identify him as the applicant. Based on the alteration of the parties, I agree with the respondents that the application is incompetent and ought to be struck out.*** (p. 2953 A)

## D NOTABLE POINTS OF INTEREST

### **NGWUTA JSC**

#### ***1. Appeal – Meaning of***

An appeal is “an invitation to a higher court to review the decision of a lower court to find out whether on a proper consideration of the facts placed before it and the applicable law, the court arrived at a correct decision”. (p. 2952 H)

### **ADEKEYE JSC**

#### ***2. Appeals - Preliminary objection to be determined first***

Where a preliminary objection is raised to the competence of an appeal, the jurisdiction of the court to entertain the appeal becomes an issue and it becomes fundamental for the court to consider, determine or resolve the objection first before going into the merits or the main issues in the appeal. (p. 2960 B)

#### ***3. Statutes – Interpretation of***

It is the duty of the courts in accordance with the power vested in them by Section 6 (6) of the Constitution to interpret these laws in their simple, unambiguous and literary meaning to reveal the intention of the lawmakers. Under no circumstance shall any provision of the law be construed in a manner that may result in the breach of a constitutional provision like in this case where the constitution and other laws make provision for the period of time to hear and deter-

mine election matters. (p. 2962 C)

#### ***4. Appeals – Meaning of an interested party***

On the issue of the status of the applicant in describing himself as a person having interest, raised by the learned senior counsel, such person is synonymous with a person aggrieved, which means a person who has suffered a legal grievance, a person whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something. We can in the circumstance of this case concede this to the applicant. (p. 2962 E)

#### **REPRESENTATION**

Chief Theo Nkire with Paul C. Ananaba, Esq.; Chisom Nwarungwa, Esq.; Chinyere Akoma, Esq.; Ogechi Ogbonna and Henry Endeley, Esq., for the Applicant

Dr. Onyechi Ikpeazu, SAN with H.M. Liman, SAN; Ahmed Raji; Prisca Ozoilesike; Lynda Chuba-Ikpeazu; Tobechukwu Nweke and Mavis Ekwechi, for the 1<sup>st</sup> Respondent

Dr. Alex Izinyon, SAN with K. O. Omoruan, A Esq.; Hannatu Abdulraham [Mrs.]; F. O. Izinyon, Esq.; E. Oghojafor; Otonvioen Ibori; L. O. Fagbemi (Jnr.), Alex Izinyon II, Esq.; L. A. Ikhanoba, Esq., for the 2<sup>nd</sup> Respondent

#### **CASES REFERRED TO**

Bowaje v. Adediwura (1976) 6 SC 143

Ojukwu v. Gov. Lagos State (No.1) (1985) 2 NWLR (pt. 10) 806

Braithwaite v. Braithwaite (1964) Probate 356

Madukolu v. Nkemdiliin (1962) NSCC 374

Orubu v. N.E.C. (1988) 5 NWLR (pt. 94) 323

Oredoyin v. Arowolo (1989) 4 NWLR (pt. 114) 172

Egbe v. Adejarasin (No. 2) (1987) 1 NWLR (pt. 47) 1

Onajade v. Olayiwola (1990) 7 NWLR (pt. 161) 130

Nzom v. Jinadu (1987) 1 NWLR (pt. 51) 533

Iroegbu v. Okwordu (1990) 6 NWLR (pt. 159) 643

Bello v. INEC (2010) 8 NWLR (pt. 1196) 342

UBA Plc. v. A.C.B. (Nig.) Ltd. (2005) 12 NWLR (pt. 939) 232

N.P.A. v. Eyamba (2005) 12 NWLR (pt. 939) 409

N.N.B. Plc. v. Imonikhe (2002) 5 NWLR (pt. 760) 294

Awolowo v. Shagari (1979) 6-9 SC 51

**STATUTES & RULES REFERRED TO**

- Constitution of Federal Republic of Nigeria 1999, ss. 233(1)(5), 243(a), 285(7)  
 Electoral Act 2010 (as amended), s. 143(1)(2)  
 B Supreme Court Rules, O. 2 rr. 8, 28(1)(2)(3), O. 6 r. 2(1), O. 7 r. 1(2)(e), 6, 7  
 Court of Appeal Rules, O. 7 r. 6

**LEAD JUDGMENT BY NGWUTA JSC**

- C In a motion on notice dated, and filed on, 17/11/11, brought pursuant to “*S. 243(a) of the Constitution, Ord. 2 rule 8(1) (2) and (3); Ord. 6 rule 2(1); Ord. 7 rules 1(2) (e); 6 and 7; 10 rule 1(1) (2) (4) and (5) of the Supreme Court Rules*”, the applicant prayed the court for the following reliefs:

- D “1. *An order granting leave to the applicant (as a person having an interest in the matter) to appeal against the decision of the Court of Appeal, Benin Division given on the 3<sup>d</sup> day of November, 2011.*

- E *2. An order for a departure from the rules allowing the Supreme Court:*

*(a) to hear the present appeal on the bundle of papers titled ‘Election petition record from Court of Appeal Benin Judicial Division - To Supreme Court of Nigeria Abuja’ compiled by the applicant;*

- F *(b) to accelerate the time for hearing the application and the appeal;*

*(c) to give timelines for the hearing of any application and the appeal to enable the court to comply with the 60 days period allowed it by law which ends on January 2, 2012;*

- G *(d) to abridge the time allowed the parties to file their briefs of argument in this appeal.*

*3. An order deeming the notice of appeal already filed and served as having been duly filed and served.*

- H *4. An order for leave to appeal on grounds of fact and mixed law and fact.”*

The application was predicated on the following grounds:

*“(1) The Court of Appeal dismissed the application leave.*

*(2) The court did not consider our appeal.*

*(3) The trial tribunal had held applicant was not a party. ( 4 )*

*The Court of Appeal made no decision whether or not applicant was a party.*

*(5) Applicant has a great interest in the subject matter of the proposed appeal.*

*(6) The trial tribunal found as a fact that the 2<sup>nd</sup> petitioner on record was indeed misnomer for the applicant.* B

*(7) According to S. 285(7) of the Constitution, the Supreme Court has only 60 days to hear this appeal.*

*(8) It took the court below 11 days (from the 3<sup>rd</sup> to the 4<sup>th</sup> November) to release the proceedings and judgment subject of the appeal to us.* C

*(9) Today (17<sup>th</sup> November) with only 46 days to go it will be impossible to wait for the registry to compile the records for us”*

The following documents were exhibited:

(1) A copy of the proposed notice of appeal. D

(2) A certified copy of the ruling sought to be appealed against.

(3) The bundle of papers constituting the record.

(4) The notice of appeal.

(5) Certified copy of the judgment of the trial Tribunal. E

Learned lead counsel for the 1<sup>st</sup> respondent, Dr. Onyechi Ikpeazu, SAN, OON filed a notice of preliminary objection pursuant to 285(7) of the 1999 Constitution (as amended), S. 143(1) & (2) of the Electoral Act 2010 (as amended); Order 2 rule 8 of the Supreme Court Rules and under the inherent jurisdiction of the Court. Learned Senior Counsel predicated the preliminary objection on the following grounds:

*“(1) The application has become an academic exercise as no useful purpose shall be served even if it is granted.* G

*(2) No competent appeal was filed within the 21 days from the date the trial tribunal delivered the ruling sought to be appealed against and neither the Court of Appeal nor this court can extend the time to appeal.*

*(3) The application is incompetent as the title and parties in the decision appealed against have not been duly reflected.* H

*(4) The application is incompetent as it ought to be an application for leave to appeal against the ruling of the trial tribunal the Court of Appeal having not granted A leave to appeal.”*

Learned Senior Counsel stated the grounds for the preliminary objection as:

*“(1) By virtue of Section 285(7) of the 1999 Constitution (as amended) an appeal arising from the decision of a Tribunal or court shall be heard and determined within sixty (60) days.*

B *(2) The ruling of the trial tribunal the subject matter of the appeal to the Court of Appeal was delivered on 7<sup>th</sup> November 2011. (3) The names of the other parties to the matter, to wit, Chief Sam Nkire (1<sup>st</sup> Petitioner) and Peoples Progressive Alliance, (2<sup>nd</sup> Petitioner) are not reflected in this appeal.”*

C The preliminary objection was supported by a 7-paragraph affidavit deposed to by Prisca Ozoilesike, Esq, Legal Practitioner, of 13 Sheda Close, Area 8, Abuja. In a written address in support of the preliminary objection the following three issues were distilled for determination:

D *“(1) Whether having regards to the provisions of Section 285(7) of the Constitution of the Federal/Republic of Nigeria the application has not become an academic exercise.*

E *(2) Whether the court can extend the time within which to appeal the decision of an Election Tribunal beyond the mandatory twenty-one days.*

*(3) Whether the application is not incompetent as the title and parties in the decision appealed against have not been duly reflected.”*

F In his argument on Ground one, learned Senior Counsel said that S. 285(7) had been interpreted and applied by this Court in SC.272/2011 and SC.276/2010 (Consolidated) *Peoples Democratic Party (PDP) v. Congress for Progressive Change (CPC)* in which judgment was delivered on 31/10/2011. He argued that the applicant cannot appeal as the 60 days prescribed in S. 285(7) of the Constitution had expired.

G On ground 2, he said that no competent appeal can be lodged against the judgment of the Tribunal beyond the 21 days stipulated. He urged the Court to strike out the application.

H Learned counsel referred to S. 143(1) and (2) of the Electoral Act 2010 (as amended). He contended that a person seeking to appeal as an interested party is bound to seek leave, obtain leave and appeal within the period of 21 days from the date of judgment. He relied on *Bowaje v. Adediwura* (1976) 6 SC 143. Learned counsel argued that granting this application will mean extending the time for appeal under S. 143(1) and (3) of the Electoral Act.



In Ground No.3, learned counsel impugned the application on the ground that the title and parties in the petition in which the decision sought to be appealed against was delivered have not been duly reflected. He relied on Ord. 2 r.8 of the Supreme Court Rules.

In conclusion, learned counsel said the application had become academic in view of S. 285(7) of the Constitution. The court cannot extend time beyond the 21 days stipulated for appeal in section 143(1) & (2) of the Electoral Act and that the application is incompetent as the title and parties in the trial tribunal were not reflected in the application.

Dr. Izinyon, SAN, lead counsel for the 2<sup>nd</sup> respondent, did not file a written notice of preliminary objection but adopted the submissions of his brother Silk, Dr. Ikpeazu, SAN. Learned senior counsel made the following submission on points of law:

*“(1) By the Practice Direction of the Supreme Court issued on 17/10/11 appeal from the Court of Appeal to the Supreme Court shall be brought within 14 days from the date of the judgment appealed against.*

*(2) Application cannot be granted in view of the decision of the court in SC. 332/11 SC. 333111 consolidated and SC.352111 delivered on 31/11/11.”*

He urged the court to dismiss the application.

Mr. Ananaba, learned counsel for the applicant, adopted and relied on his written response to the preliminary objection.

In what appears to be a preliminary objection to the hearing of argument in the 1<sup>st</sup> respondent's preliminary objection, learned counsel for the applicant, relied on a pronouncement of the learned President of the Court of Appeal in Oshiomhole's case (2009) 4 NWLR (Pt. 1132) page 607 at 664-665 and castigated the 1<sup>st</sup> respondent (INEC) for daring to raise a preliminary objection to the hearing of the application. He invited the court to strike out the preliminary objection of the 1<sup>st</sup> respondent because, according to him, the 1<sup>st</sup> respondent must be seen at all times to be, and remain impartial.

Learned counsel also queried whether a preliminary objection can be based on facts. He referred to Ord. 2 r.9 and argued that there is no place for affidavit in preliminary objection. He urged the court to strike out the affidavit as well as the argument based on the affidavit. In the alternative, learned counsel replied to the three issues upon which the learned silk for the 1<sup>st</sup> respondent argued his pre-

liminary objection.

In purporting to argue Issues 1 & 2 in the 1<sup>st</sup> respondent's written address together, learned counsel for the applicant chose to dwell on series of motions he filed at the tribunal and the lower court as a result of the release of the decision of the tribunal on 12th October 2011, 35 days after the decision was taken. Learned counsel once again took on the 1<sup>st</sup> respondent for seeing no evil in the conduct of the chairman of the tribunal at Asaba who refused to list the applicant's motion for leave filed on 21/9/2011 until 29/9/2011, a day after the 21 days within which applicant could appeal had expired.

He contended he did not pray the court to extend time for applicant to appeal but merely asked the Supreme Court to "*exercise her awesome power under S. 22 of the Supreme Court Act in the applicant's favour and hear the Petition*". He argued that the decision in *Bowaje v. Adediwura* (1976) 6 SC 143 at 146 did not apply to this application because Ord. 7 r. 6 of the Court of Appeal Rules was not brought to the attention of the court.

He urged the court to hold that neither the application nor the appeal to the lower court or to this court is an academic exercise and that this is not application for extension of time to appeal to the Court of Appeal or the Supreme Court against a decision of the Electoral Tribunal.

On issue 3, he argued that Ord. 2 r.8 of the Supreme Court Rules is not applicable since the trial tribunal held that the two petitioners on record were not parties known to law and that the applicant was not a party to the petition. He argued that a strict application of Ord. 7 r. 8 is not required and urged the court to avoid unnecessary technicality.

In conclusion, learned counsel urged the court to dismiss the 1<sup>st</sup> respondent's preliminary objection for the following reasons:

*"(1) As an umpire, 1<sup>st</sup> respondent should not be seen to descend into the arena.*

*(2) The application has not become an academic exercise; the Supreme Court is still well within her powers to hear and determine the application, and the appeal. There are still some 24 days left of her 60 days*

(3) *There is no intention or application to ask the court to extend time for doing anything.*

(4) *There is substantial compliance with 0.2 r. 8. A strict adherence to the Rule will be recourse to technicality.”*

Permit me, my Lords, to deal first of all with the preliminary issue raised by the applicant in its reply to the 1<sup>st</sup> respondent’s preliminary objection. B

***The 1<sup>st</sup> respondent, INEC, conducted the questioned election. It has a legal and a moral duty to the electorate in Delta State to point out that the applicant was not a candidate at the election it conducted, and this duty does not derogate from its position as the electoral umpire.*** C

The second preliminary point made by learned counsel for the applicant is a non-issue. If learned counsel is at a loss as to whether a preliminary objection can be based on facts, I refer him to the second D ground for the preliminary objection, for instance, it reads:

*“The ruling of the trial Tribunal, the subject matter of the appeal to the Court of Appeal was delivered on 7<sup>th</sup> September 2011.”*

***This is a competent ground for preliminary objection and it is an issue of fact. Preliminary objection under Order 2 r.8 of the Supreme Court Rules 1999 (as amended) is not restricted to grounds of law or facts. Even if the affidavit is struck out, the grounds for preliminary objection will remain intact and not affected at all. In my view, the preliminary points have no bearing on the preliminary objection or argument on the grounds for same.*** E F

I will now deal with the three issues in the 1<sup>st</sup> respondent’s written address which was adopted by learned Senior Counsel for the 2<sup>nd</sup> respondent. Issue one is anchored on S. 285(7) of the 1999 G Constitution (as amended), hereunder reproduced:

*“An appeal from a decision of an election tribunal or Court shall be heard and disposed of within 60 days from the date of the delivery of judgment.”*

***The decision against which the applicant seeks leave to appeal was rendered on 7<sup>th</sup> September 2011 by the Election Tribunal constituted for Delta State. The period of 60 days within which an appeal from the decision of a tribunal or court shall be heard and disposed of has expired. At the expiration*** H

**of the 60 days stipulated in S. 285(7) (supra) the right of appeal either as of right or with leave either by a party to the proceeding or by an interested party, is lost for all times and for all purposes.**

**The court has no jurisdiction with respect to the subject matter as the right of appeal is lost.** See Braithwaite v. Braithwaite (1964) Probate 356 at 387-388; Madukolu v. Nkemdiliin (1962) NSCC 374 at 379-380, (1962) 2 SCNLR 341; Orubu v. N.E.C. (1988) 5 NWLR (Pt. 94) 323.

**The court will not grant a relief that is of no use or benefit to the applicant. Above all, the applicant did not advance a reason or reasons for this court to interfere with or depart from its recent decision based on application of S. 285(7) of the Constitution in SC. 272/2011, SC. 227/2011 (Consolidated) Peoples Democratic Party (PDP) v. Congress for Progressive Change (CPC) delivered on 31/10/2011.**

**Issue two relates to a community reading of section 143 (1) and (2) of the Electoral Act 2010 (as amended). The effect of the two subsections of s. 143 is that an appeal against the judgment of the tribunal shall be lodged within 21 days from the date the judgment was delivered. At the expiration of the 21 day period, the right of appeal or the right to seek leave to appeal as an interested party is extinguished.**

**As in section 285(7) of the Constitution (supra) the period provided in S. 143(1) & (2) of the Electoral Act 2010 (as amended) cannot be enlarged since an election matter is time-bound.** The authority of Bowaje v. Adediwura (1976) 6 SC 143 relied on by the learned silk for the 1<sup>st</sup> respondent is appropriate. **The applicant herein ought to have filed an application for leave to appeal and his notice of appeal within the 21 days prescribed in S. 143(1) & (2) of the Act.**

Order 2 r. 8 of the Supreme Court Rules is specific in its provision. It reads:

*“Ord. 2 r. 8 notices of appeal, applications for leave to appeal, briefs and all other documents whatsoever prepared in pursuance of the appellate jurisdiction of the court for filing in accordance with the provisions of these Rules, shall reflect the same title as that which obtained in the Court of Trial.”*

**An appeal** is “an invitation to a higher court to review the decision of a lower court to find out whether on a proper consideration of the facts placed before it and the applicable law, the court arrived at a correct decision”. See Oredoyin v. Arowolo (1989) 4 NWLR (Pt. 114) 172 at 211 per Oputa, JSC. See also Egbe v. Adejarasin (No. 2)

(1987) 1 NWLR (Pt. 47) 1 at 23; Onajade v. Olayiwola (1990) 7 NWLR (Pt. 161) 130 at 157.

***The facts the appellate court will review in an appeal are facts presented by or elicited from the parties at the trial court. If any party is displaced and a stranger to the proceedings at the trial court has usurped his place, the appeal will be incompetent and the appellate court will lack jurisdiction to hear it. This applies equally to an application for leave to appeal. In the application before us, the petitioners before the trial tribunal, Chief Sam Nkire and Progressive Peoples Alliance (PPA) have been cast aside as it were and an impostor has taken their place, parading as applicant.***

***The proper thing to do is to leave the parties on record intact notwithstanding the decision of the trial tribunal and state the name of the interested party and identify him as the applicant. Based on the alteration of the parties, I agree with the respondents that the application is incompetent and ought to be struck out.***

In view of the above, the preliminary objection raised and argued by the respondents is sustained. It is ordered that the application dated and filed on 17/11/11 be, and is hereby, struck out as incompetent. There shall be no order on costs.

### MOHAMMED JSC

By a motion on Notice dated 17th November, 2011 and filed the same day, the applicant has brought the application pursuant to Section (sic) 243(a) of the 1999 Constitution of the Federal Republic of Nigeria as amended, Order 2 rules 28(1)(2) and (3); Order 6 rules 2(1); Order 7 rules 1(2)(e) 6 and 7; and Order 10 rules 1(1)(2)(4) and (5) of the Supreme Court Rules asking for several reliefs including an order granting leave to the applicant (as a person having interest in the matter) to appeal against the decision of the Court of Appeal, Benin Division given on 3<sup>rd</sup> November, 2011; departure from the rules of this court to argue the appeal on the bundle of papers prepared by the applicant; accelerated hearing of the appeal etc.

On being served with the motion on notice, the 1<sup>st</sup> respondent through its learned senior counsel, filed a notice of preliminary objection on 17th December, 2011 pursuant to Section 285(7) of the 1999 Constitution as amended, Section 143(1) and (2) of the

Electoral Act 2010 as amended and Order 2 rule 8 of the Supreme Court Rules. The grounds of the objection among others are; that the application has become an academic exercise as no useful purpose shall be served if it is granted; that no competent appeal was filed within the twenty one (21) days from the date the trial tribunal delivered the ruling sought to be appealed against and that neither the Court of Appeal nor this court can extend the time to appeal; that the application is incompetent as the title of the parties in the decision appealed against, have not been duly reflected and that the application is incompetent as it ought to be an application for leave to appeal against the ruling of the trial tribunal, the Court of Appeal having not granted the leave to appeal.

On the grounds of the preliminary objection, learned senior counsel for the 1<sup>st</sup> respondent pointed out that by virtue of Section 285(7) of the 1999 Constitution as amended, an appeal arising from the decision of a Tribunal or Court, shall be heard and determined within sixty (60) days and since the ruling of the tribunal was delivered on 7<sup>th</sup> September, 2011 and up till today 8<sup>th</sup> December, 2011 there is no appeal against that decision, neither the Court of Appeal nor this court in the present application can enlarge the time to appeal against that ruling beyond the mandatory 21 days within which to appeal. Learned senior Counsel concluded that the appeal having lapsed since 7<sup>th</sup> November, 2011, the present application is incompetent and ought to be struck out.

Learned senior counsel to the 2<sup>nd</sup> respondent associated himself with the submission of the learned senior counsel to the 1<sup>st</sup> respondent and urged this court to uphold the objection and strike out the application. In his response to the objection, learned counsel to the applicant insisted that this application with the accompanying appellant's notice of appeal having been filed on 17<sup>th</sup> November, 2011 against the ruling of the Court of Appeal given on 3<sup>rd</sup> April, 2011, were filed within time and therefore competent notwithstanding the fact that the application was not heard by this court until today 8<sup>th</sup> December, 2011.

Learned counsel maintained that the case of *Bowaje v. Adediwura* (1976) 6 Sc. 143 at 146, does not apply to the present case and therefore urged the court to dismiss the preliminary objection.

The applicant's application for leave to appeal is against the ruling of the Court of Appeal delivered on 3<sup>rd</sup> November, 2011

dismissing the applicant's application for leave to appeal against the decision of the trial tribunal of 7th September, 2011. This situation therefore means that as at today 8<sup>th</sup> December, 2011, there is no appeal against the decision of the trial tribunal to the Court of Appeal, nor is there a valid appeal from the decision of the Court of Appeal to this court refusing the applicant's application for leave to appeal not to talk of an appeal against the final decision of the Court of Appeal arising from the decision of the Election Tribunal striking out the petition. Certainly, any determination of this application today even in favour of the applicant, will not be of any benefit to the applicant in the absence of a determination of the appeal against the striking out of the petition by the trial tribunal at the Court of Appeal. Thus, the determination of the issues in the application having become academic, this court lacks jurisdiction to go into the exercise of its determination. See *Overseas Construction Company (Nigeria) Ltd. v. Creek Enterprises (Nigeria) Ltd.* (1985) 3 NWLR (Pt.13) 107 and *Nzom v. Jinadu* (1987) 1 NWLR (Pt. 51) 533 at 539. B C D

Looking at this application from another angle, the law is well settled that where leave to appeal is required as in the present case, the application for leave, the grant of the leave to appeal by the court to the applicant as well as the filing of the notice of appeal itself, shall be done and completed within the period of time stipulated for exercising the right of appeal. See *Bowaje v. Adediwura* (1976) 6 Sc. 143 at 146. In the present application, the time within which to appeal against the decision of the Court of Appeal being appealed against is 14 days by the Practice Directions (Election Appeals to the Supreme Court) S. 133 of 19<sup>th</sup> October, 2011. Taking into consideration that this application was not filed, heard and determined within the 14 days time allowed by the rules for appealing, the application becomes incompetent in the absence of the three trinity prayers asking for extension of time to seek leave and extension of time to file notice of appeal and therefore liable to be struck out. This is because where the statutory period in which to exercise a right of appeal has expired, the court cannot entertain an application for leave to appeal, unless the application contains a prayer for extension of time within which the appellant may seek leave to appeal and also a prayer for extension of time within which to file such appeal. See the decision of this court in *Iroegbu v. Okwordu* (1990) 6 NWLR (Pt. 159) 643. E F G H

Finally even on the face of the application itself which sought in

relief 1 for the following order-

*“An order granting leave to the applicant (as a person having an interest in the matter) to appeal against the decision of the Court of Appeal, Benin Division given on the 3<sup>rd</sup> day of November, 2011”* pursuant to the provisions of Section 243(a) of the Constitution which exclusively deals with the exercise of right of appeal from the Federal High Court or High Court in civil and criminal matters, this court lacks jurisdiction to hear and determine the relief sought. The jurisdiction of this court to hear and determine any application for leave to appeal by a person having an interest in the matter, is exercisable only under Section 233(1)(5) of the 1999 Constitution. Consequently, the applicant’s application not having been predicated under Section 233(1)(5) of the Constitution, is incompetent and must be struck out.

Accordingly, I agree with my learned brother Ngwuta, J.S.C. in his leading ruling that the preliminary objection ought to succeed. Accordingly, this application shall be and is hereby struck out with no order on costs.

### **ADEKEYE JSC**

The appeal registered on the Supreme Cause List as SC.423/2011 is quite unique in its features - in that-

(a) There is no appellant properly so called. The Record of Appeal transmitted to this court on 17/11/11 indicate as parties (Person having an interest in the matter) applicant/appellant And

1. Independent National Electoral Commission (INEC)
2. Dr. Emmanuel Uduaghan - Respondents

(b) There is no appeal properly filed before this court.

On the face of the record, proper parties are not before the court. The names of the appellants are not reflected. The applicant/appellant is shown as (Person having an interest in the matter). He filed an application on 17/11/11 praying for the condition precedent - that is leave to enable him to properly appeal to this court. That application also failed to reflect the names of the parties properly. The appellants were not shown at all at the rightful place, while the name of the applicant who is seeking leave to appeal as a person having interest was placed in the column for an appellant. For ease of reference in an application of this nature, the name of an applicant - as a party having an interest in any matter ought to be under that of the respondent.

It is therefore imperative to go into the history of the matter



relying on the Record of Appeal. The applicant, Peoples Progressive Party and Chief Samuel Nkire presented their joint petition as 1<sup>st</sup> and 2<sup>nd</sup> petitioners at the Governorship Election Tribunal sitting in Asaba on the 1<sup>st</sup> day of May 2011. Peoples Progressive Party was described as a registered political party which took part in the Delta State Governorship Election of 26<sup>th</sup> April 2011. Chief Sam Nkire, the 1<sup>st</sup> Petitioner, was described as the Chairman of the 2<sup>nd</sup> Petitioner. There was an objection to the locus of both parties as the 1<sup>st</sup> petitioner though Chairman of 2<sup>nd</sup> petitioner was not a candidate at the Governorship election held on the 26<sup>th</sup> of April 2011. The 2<sup>nd</sup> petitioner, Peoples Progressive Alliance was not known to law, is a juristic person and not a registered political party. The 2<sup>nd</sup> petitioner made an approach to the trial tribunal to rectify the name on the petition to reflect the proper name of the party as Progressive Peoples Alliance. The application was opposed by the respondents. In the ruling delivered on the 7<sup>th</sup> of September 2011, the lower Tribunal refused the application and struck it out for incompetence. The petition was also struck out for incompetence. The applicant sought leave of the tribunal to appeal, when this was not granted, he appealed to the Court of Appeal on 25/10/11. The required leave was sought under Section 243 (a) of the Constitution. The Court of Appeal dismissed the application as it will be impossible for that court to hear and determine the appeal within the time stipulated by law. The ruling was read on the 30<sup>th</sup> day of November 2011 whereas the time for hearing and determination of the appeal was to expire on the 6<sup>th</sup> of November 2011. The applicant filed a further appeal in this court against the ruling of the Court of Appeal.

The processes before the court filed by Progressive Peoples Alliance (Person having an interest in the matter) as applicant are -

(a) Motion on notice with an affidavit of 63 paragraphs, eleven annexure which include:

- (1) A copy of the proposed notice of appeal.
- (2) A certified copy of the ruling sought to be appealed against.
- (3) The bundle of papers constituting the Record.
- (4) The notice of appeal.
- (5) Certified copy of the judgment of the trial tribunal.
- (6) A written address in support of the motion.

In this application, the under mentioned prayers were requested -

- (1) An order granting leave to the applicant (as a person

having interest in the matter) to appeal against the decision of the Court of Appeal. Benin Division given on 3<sup>rd</sup> day of November 2011.

(2) An order for a departure from the rules allowing the Supreme Court

(a) To hear the present appeal on the bundle of papers titled  
B “*election petition record from Court of Appeal Benin Judicial Division to Supreme Court of Nigeria*” compiled by the applicant.

(b) To accelerate the time for hearing the application and the appeal to give timelines for the hearing of any applications and the appeal to enable the court comply with the 60 day period allowed it  
C by law which ends on January 2, 2012.

(c) To abridge the time allowed for the parties to file their briefs of argument in this appeal.

(3) An order deeming the notice of appeal already filed and served as having been duly filed and served.

D (4) An order for leave to appeal on grounds of fact and mixed law and fact.

In opposition to the said application, the 1<sup>st</sup> respondent filed a preliminary objection on 7/12/11 .

The learned senior counsel for the 2<sup>nd</sup> respondent/objector.  
E Dr. Alex Izinyon who got notice of the application on 7/12/11 applied to raise a preliminary objection to the application filed on 17/11/11 orally, which application was granted.

In the preliminary objection of the 1<sup>st</sup> respondent, the under mentioned legal issues were raised as follows:

F 1. Whether having regard to the provisions of Section 285 (7) of the Constitution of the Federal Republic of Nigeria the application has not become an academic exercise.

2. Whether the court can extend the time within which to appeal the decision of an election Tribunal beyond the mandatory  
G twenty-one days.

3. Whether the application is not incompetent as the title and parties in the decision appealed against have not been duly reflected.

4. The application is incompetent as it ought to be an application for *leave to appeal* against the Ruling of the trial tribunal the Court of Appeal having not granted the leave to appeal.  
H

The learned senior counsel predicated the preliminary objection on three principal grounds:

1. That by virtue of Section 285 (1) 7 of the 1999 Constitution (as amended) an appeal arising from the decision of a tribunal or court shall be heard and determined within sixty (60) days.

2. The ruling of the trial tribunal the subject-matter of the appeal to the Court of Appeal was delivered on 7<sup>th</sup> September 2011.

3. The names of the other parties to the matter to wit Chief Sam Nkire (1<sup>st</sup> petitioner) and Peoples Progressive Alliance (2<sup>nd</sup> Petitioner) are not reflected in this appeal.

In the oral submission before this court at the hearing of the application, the learned senior counsel, for the 1<sup>st</sup> respondent/objector Dr. Ikpeazu, elaborated on the foregoing issues. He mentioned that as at the 17<sup>th</sup> of November 2011, when the ruling was delivered on the leave of applicant seeking leave to appeal as a person having an interest in the matter, the trial tribunal had held that applicant was not a party and the Court of Appeal made no decision as to whether or not the applicant was a party. The applicant did not file a competent appeal as it did not do so within 21 days from the date the tribunal delivered the Ruling. Neither the Court of Appeal nor this court can extend the time to appeal. The application of the 1<sup>st</sup> respondent was brought pursuant to Section 243 (a) of the 1999 Constitution (as amended), Order 2 rules 28 (1) (2) and (3). Order 6 rule 2 (1), Order 10 rules 1 (1) (2) (4) and (5) Supreme Court Rules. The 1<sup>st</sup> respondent cited cases SC.272/2011 and SC.276/2011 (consolidated) unreported decision of the Supreme Court delivered on 31<sup>st</sup> October 2011. Tunji Bowaje v. Moses Adediwura (1976) 6 SC 143 at 146.

The learned senior counsel for the 2<sup>nd</sup> respondent/objector, Dr. Alex Izinyon adopted the submission of the learned senior counsel for the 1<sup>st</sup> respondent. In addition, he submitted that by the practice direction of this court issued on 17/10/11 a notice of appeal shall be filed in this court within 14 days by an aggrieved party but not by an interested party. The applicant is not a party contemplated by the practice direction of this court. This court refused to invoke section 22 of the Supreme Court Act to hear appeals in an election matter where the time to hear the appeal had lapsed. The leave for the Court of Appeal to hear and determine this appeal had lapsed. He urged this court to dismiss the application.

The learned counsel for the applicant filed the applicant's response to the 1<sup>st</sup> respondent's preliminary objection on 8/12/2011. Mr. Ananaba learned counsel for the applicant ably argued the legal issues raised in the response to the objection. He replied to the submission of the learned counsel to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. He urged this court to dismiss the preliminary objection on the grounds that the 1<sup>st</sup> respondent, INEC, has constituted itself into a partial umpire by descending into the arena based on its role in the matter.

The application has not become an academic exercise as the Supreme Court can still exercise its powers to determine the application, the appeal and the petition. The court is to look at the mischief Rule to hold that the omission in this case is a mere technicality which would not be allowed to defeat the end of justice. There is substantial compliance with Order 2 rule 8 of the Supreme Court Rules. He cited the case *Bello v. INEC & 2 Ors.* (2010) 8 NWLR (Pt. 1196) 342 pgs. 387 - 388.

Where a preliminary objection is raised to the competence of an appeal, the jurisdiction of the court to entertain the appeal becomes an issue and it becomes fundamental for the court to consider, determine or resolve the objection first before going into the merits or the main issues in the appeal. *UBA Plc. v. A.CB. (Nig.) Ltd.* (2005) 12 NWLR (Pt.939) pg.232. *N.P.A. v. Eyamba* (2005) 12 NWLR (Pt.939) pg.409. *N.N.B. Plc. V. Imonikhe* (2002) 5 NWLR (Pt.760) pg. 294.

The issues in this application are straightforward and within narrow limit. The applicant is not disputing some salient facts like

(1) That the 60 days allowed by Section 285 (7) of the Constitution (as amended) to the Court of Appeal to hear and determine the appeal expired on Sunday the 6<sup>th</sup> of November 2011.

(2) The 180 days granted to the Governorship Tribunal in Asaba to hear and determine the petition had expired on November 16<sup>th</sup> 2011.

(3) That the petition filed before the Election Petition Tribunal in Asaba was struck out for being incompetent for lack of proper parties.

The contention of the applicant in asking for leave to appeal to this court as a party having an interest in the matter is predicated on the opinion that this court is the only court today in the circumstance of this case that has jurisdiction to hear and determine the matter. This court in compliance with Section 22 of the Supreme Court Act can assume full jurisdiction over the whole proceedings as if the proceedings had been instituted and presented in the Supreme Court as a court of first instance. The applicant however admitted that taking such step in the circumstance of this case may appear to be an innovation but the fact remains that the power enures to the Supreme Court. Before this court can invoke Section 22 of the Supreme Court Act to entertain any matter like the court of first instance - there must be a proper appeal before it. Moreover Section 22 of the Supreme Court Act is not devised to revive dead issues. The period to hear

and determine an appeal that was supposed to come before the Court of Appeal stipulated as sixty days by Section 285 (7) of the 1999 Constitution (as amended) expired on the 6<sup>th</sup> of November 2011. The applicant failed to appeal to the Court of Appeal against the ruling of the Election Petition Tribunal striking out the petition within the 21 days from the day the ruling was delivered as stipulated in Section 143 (1) and (2) of the Electoral Act 2010 (as amended). B

At the inception of the petition - the name of the applicant portrayed as the 2<sup>nd</sup> petitioner was wrong in the heading of the petition - and that rendered it incompetent for non-compliance with Section 137 (1) (a) & (b) of the Electoral Act 2010 which stipulates that C

An election petition may be presented by one or more of the following persons -

- a. a candidate in an election;
- b. a political party which participated in the election.

The bottom line is that section 22 of the Supreme Court Act cannot be invoked unless an appeal has been entered at the Supreme Court. Right now notice of appeal has not even been filed. One of the applications before the court is for leave to appeal by a person having an interest in the matter, to appeal against the decision of the Court of Appeal, Benin Division given on the 3<sup>rd</sup> day of November 2011. The Court of Appeal dismissed the application then because it was statute barred'. The applicant did not see reason that tripod prayers for leave must first be obtained as an interested person. He was of the impression that the practice direction did not provide for that act. I wish to draw attention to the provision of paragraph 55 of the 1<sup>st</sup> Schedule of the Electoral Act 2010 (as amended) which provides in respect of application to the Rules of court that: D E F

*"Subject to the provisions of this Act, an appeal to the Court of Appeal or to the Supreme Court shall be determined in accordance with the practice and procedure relating to civil appeals in the Court of Appeal or the Supreme Court, as the case may be regard being had to the need for urgency on electoral matters."* G

The constitutional provision for leave to appeal to the Supreme Court by an interested person is Section 233 (1)(5) of the 1999 Constitution. H

Order 2 rule 8 of the Supreme Court Rules as amended, reads

- *"Notices of appeal, applications for leave to appeal, briefs and all*

*other documents whatsoever prepared in pursuance of the appellate jurisdiction of the court for filing in accordance with the provisions of these Rules, shall reflect the same title as that which obtained in the Court of trial”*

The applicant has never reflected the names of the proper parties on the processes filed since the presentation of his petition before the Election Petition Tribunal and even here in this court. Section 285 (7) of the Constitution (as amended), Section 233 (1) (5) of the Constitution (as amended), Section 137 (1) (a) & (b) of the Electoral Act 2010 (as amended), Rules of the Supreme Court and the Practice Direction, Court of Appeal Rules and the Practice Direction are the applicable laws and statutes at the instance of this case. It is the duty of the courts in accordance with the power vested in them by Section 6 (6) of the Constitution to interpret these laws in their simple, unambiguous and literary meaning to reveal the intention of the lawmakers. Under no circumstance shall any provision of the law be construed in a manner that may result in the breach of a constitutional provision like in this case where the constitution and other laws make provision for the period of time to hear and determine election matters. *Awolowo v. Shagari* (1979) 6-9 SC pg. 51, *Fawehinmi v. I.G.P.* (2000) 7 NWLR (Pt.665) pg. 481; *A.-G., Ondo State v. A.-G., Ekiti State* (2001) 17 NWLR (Pt. 743) pg. 706, *Ibrahim v. Barde* (1996) 9 NWLR (Pt. 474) pg. 513.

On the issue of the status of the applicant in describing himself as a person having interest, raised by the learned senior counsel, such person is synonymous with a person aggrieved, which means a person who has suffered a legal grievance, a person whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something. We can in the circumstance of this case concede this to the applicant. *Mobil Producing (Nig.) Unlimited v. Monokpo* (2003) 18 NWLR (Pt.852) pg.346, *Ikonne v. C.O.P.* (1986) 4 NWLR (Pt.36) pg.473. *Mbanu v. Mbanu* (1961) All NLR pg.652; (1961) 2 SCNLR 305, *Ojukwu v. Gov. Lagos State (No.1)* (1985) 2 NWLR (Pt.10) pg. 806.

I agree with the submission of the respondent/objector that hearing and determination of this matter at this stage has become an academic exercise - as there is no longer any live issue in it. The petition itself and any appeal to the Court of Appeal had lapsed due to

effluxion of time. This court as a creature of statute has no power to extend time in electoral proceedings. This application is ridden A with fundamental defects which have rendered it incompetent. In view of failure to institute the action by due process of law and upon fulfilment of all those steps which amount to condition precedent to the exercise of its jurisdiction, this court is not competent to hear the matter. B

With fuller reasons given by my learned brother, N.S. Ngwuta, JSC in the lead ruling, I also uphold the preliminary objection and abide with the consequential orders including order of costs.

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### **PETER-ODILI JSC**

Upon a motion on notice brought before this court, filed on 17/11/2011 by the applicant, Progressive Peoples Alliance seeking the following reliefs:

1. An order granting leave to the applicant (as a person having interest in the matter) to appeal against the decision of the Court of Appeal, Benin Division given on the 3<sup>rd</sup> day of November, 2011. D

2. An order for a departure from the rules allowing the Supreme Court.

(a) To hear the present appeal on the bundles of papers titled *“election petition record from Court of Appeal Benin Judicial Division to Supreme Court Nigeria Abuja”* compiled by applicant. E

(b) To accelerate the time for hearing the application and the appeal.

(c) To give timelines for the hearing of any applications and the appeal to enable the court comply with the 60 day period allowed it by law which ends on January 2, 2011. F

(d) To abridge the time allowed the parties to file their briefs of argument in this appeal.

3. An order deeming the notice of appeal already filed and served as having been duly filed and served.

4. An order for leave to appeal on grounds of fact and mixed law and fact. G

Dr. Onyechi Ikpeazu SAN, learned counsel for the 1<sup>st</sup> respondent in moving the objection stated that the objection was accompanied by three grounds, an affidavit and a written address. He said the motion on notice of the applicant should not be entertained as it and the possible appeal had abated by effluxion of time. That the ruling of the tribunal dismissing the petition for a lack of interest of the petitioner was made on the 7<sup>th</sup> September 2011 and the appeal thereby dismissed. That the present application is an academic exercise as the ultimate objective is to set aside the decision H

of the election petition tribunal delivered on 7<sup>th</sup> September 2011 about 120 days ago. That the appeal to the Court of Appeal which was dismissed on 3<sup>rd</sup> November, 2011 had 60 days to be heard and determined. That assuming this incompetent application is granted and the appeal heard there would be nothing for the trial tribunal to do since from 26<sup>th</sup> April 2011 when the election took place, applicant has had more than 180 days as provided for by the constitution, section 285 (7). He referred to this court's recent decision in the consolidated appeals Sc. 272/2011 and Sc.276/2011, PDP v. CPC delivered on 31<sup>st</sup> October 2011 where this court held that judgment in a final process and an interlocutory procedure decisions were both interim the 60 days time limit for appeal as covered by S. 285 (7) of the constitution. That the applicant herein was not a party at the trial tribunal and so this application should be struck out.

For the 2<sup>nd</sup> respondent, learned counsel on his behalf, Dr. Alex Izinyon SAN stating that he had not filed either an objection or an address was adopting the submissions of the 1<sup>st</sup> respondent. He added that the Practice Direction of this court issued on 17<sup>th</sup> October, 2011 provides that any party dissatisfied with a decision of the Court of Appeal should appeal within 14 days. That the applicant is seeking leave to appeal and is not a party and so the purported notice of appeal filed on the 15/11/11 is incompetent and that single prayer of leave to appeal cannot salvage the incompetence.

Also that in the unreported case of this court Alhaji Mohammed Goni v. Alhaji Shettima & Ors consolidated appeals in SC.332/2011, delivered on 31<sup>st</sup> October, 2011, this court refused the invitation to invoke section 22 of the Supreme Court Act to hear the merits of the Court of Appeal matter. That the time to hear and determine the appeals having expired at the Court of Appeal, this court lacks the jurisdiction to entertain this appeal.

Responding, Mr. Ananaba learned counsel for the applicant referred to their response filed on 8/12/11 which he adopted. He said they were asking for a deeming order of their notice of appeal on the day of filing which would bring it within time and not a deeming to today, 8/12/11 of hearing. That they were anchoring on the court's duty to do substantive justice and they should not be struck out on the technical grounds of the wrong titling of the petitioner in that, it was Peoples Progressive Alliance (PPA) while the proper party should have been Progressive Peoples Alliance (PPA) INEC & Ors. That it is not true that the time allowed to appeal has expired. That the



preliminary objection should be set aside and the application granted.

What I can gather from the addresses of counsel is akin to a comedy of errors playing out and in substance it is like this, the applicant filed a petition at the trial tribunal which threw it out for misnomer in that the proper title of the petition was all wrong, that is the so-called Political Party sought as petitioner did not exist. The applicant sought leave from the same tribunal to appeal and was refused having not attached the earlier decision. Applicant then proceeded to the Court of Appeal for leave to appeal again without a complete motion in that the decision complained of was not attached. The Court of Appeal at this time taking a look at the incompetent motion which that court felt was irredeemable and within the context of passage of time, if it asked the applicant to go back and rectify the process would not within the time allowed by S. 285(7) of the Constitution being 60 days, was not possible and that court dismissed the application hence this attempt to this court with applicant asking for the invocation of section 22 of the Supreme Court Act and proceed not only to grant the leave to appeal but also to deem the notice of appeal which is clearly outside the 14 days provided for by the Practice Direction of this court on election appeals and hear the appeal on the merit.

The situation above summarised can only be described as unfortunate because what seems to jump out is the applicant pleading for the sentiments of this court to go so far a field to indulge the applicant not backed by law. The applicant had on his Own filed what he called a notice of appeal and now calling on this court to validate it without scaling the necessary hurdle of seeking and obtaining leave to appeal. How what he wants can be done is not within the vision of this court since this court at various occasions and as clearly put across in *Tunji Bowaje v. Moses Adediwura* (1976) 6 SC. 143 at 146 thus:

*"...in a case where leave to appeal is required to be obtained, a party must not only file his application for leave to appeal within the period prescribed by the sub-section but must also file his notice and grounds of appeal, after having obtained the leave, within the same period."*

The above showing what should first be done and putting it side by side what applicant had done is a jumping of the gun. As if the problems besetting the position of the applicant are not bad enough, the matter runs contrary to Order 2 rule 8 of the Supreme Court rules which provides as follows where as in this case the title of applicant is

different from that at the tribunal, which is the origin and so I refer to the Order 2 rule 8:

*“Notices of appeal, applications for leave to appeal, briefs and all other documents whatsoever prepared in pursuance of the appellate jurisdiction of the court for filing in accordance with the provisions of these Rules, shall reflect the same title as that which obtained in the court of trial.”*

As I alluded to earlier, the application of the hopeful applicant was jinxed by Murphy’s Law and from inception was bedevilled by failure no matter what effort was put in by the applicant.

For these reasons aforesaid and the more detailed reasoning of my learned brother, N.S. Ngwuta JSC, I uphold the preliminary objection of the respondent and strike out the application of the applicant.

I make no order as to costs.

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### **ARIWOOLA JSC**

This is a preliminary objection by the 1<sup>st</sup> respondent, the Independent National Electoral Commission (INEC) to the application by the Progressive Peoples Alliance (PPA) for the following reliefs:

*“1. An order granting leave to the applicant (as a person having an interest in the matter) to appeal against the decision of the Court of Appeal, Benin Division given on the 3<sup>rd</sup> day of November, 2011.*

*2. An order for departure from the Rules allowing the Supreme Court:*

*(a) to hear the present appeal on the bundle of papers titled, “Election petition record from Court of Appeal Benin Judicial Division to Supreme court of Nigeria Abuja” compiled by applicant.*

*(b) to accelerate the time for hearing the application and the appeal.*

*(c) to give timelines for the hearing of any application and the appeal to enable the court comply with the 60 day period allowed it by law which ends on January 2, 2012.*

*3. An order deeming the notice of appeal already filed and served as having been duly filed and served.*

*4. An order for leave to appeal on grounds of fact and mixed law and fact.”*

The application dated 17/11/2011 was filed on the same day.

The preliminary objection raised by the 1<sup>st</sup> respondent to the application was filed on 7/12/2011 on the following grounds:

1. The application has become an academic exercise as no useful purpose shall be served even if it is granted.

2. No competent appeal was filed within the twenty one (21) days from the date the trial tribunal delivered the ruling sought to be appealed against and neither the Court of Appeal nor this court can extend the time to appeal. B

3. The application is incompetent as the title and parties in the decision appealed against have not been duly reflected.

4. The application is incompetent as it ought to be an application for leave to appeal against the ruling of the trial tribunal, the Court of Appeal having not granted the leave to appeal. C

5. By virtue of Section 285(7) of the 1999 Constitution (as amended), an appeal arising from the decision of a tribunal or court shall be heard and determined within sixty (60) days. D

6. The ruling of the trial tribunal the subject matter of the appeal to the Court of Appeal was delivered on 7<sup>th</sup> September, 2011.

7. The names of the other parties to the matter, to wit Chief Sam Nkire (1<sup>st</sup> Petitioner) and Peoples Progressive Alliance (2<sup>nd</sup> Petitioner) are not reflected in this appeal. E

In support of the objection was an affidavit of 7 paragraphs which was deposed to by Prisca Ozoilesike, Esq., a counsel in Ikpeazu Chambers, counsel to the 1<sup>st</sup> respondent. Also in support is a written address signed by Dr. Ikpeazu, as senior counsel.

In moving the objection, learned senior counsel to the 1<sup>st</sup> respondent gave the following as the issues which called for determination by this court. F

1. Whether having regard to the provisions of Section 287(7) of the Constitution of the Federal Republic of Nigeria, the application has not become an academic exercise. G

2. Whether the court can extend the time within which to appeal the decision of an election Tribunal beyond the mandatory twenty one days.

3. Whether the application is not incompetent as the title and parties in the decision appealed against have not been duly reflected. H

Learned senior counsel later took the above issues *seriatim*. On issue No. 1, he referred to Section 285(7) of the Constitution and contended that the applicant had not sought leave to lodge an appeal against the decisions of the court below when they were rendered on 7/9/2011, hence by the 7<sup>th</sup> November 2011 the appeals had lapsed

and cannot be resuscitated.

Learned senior counsel contended further that for the reason that Election Petition is *sui generis* and there are no provisions for extension of the time for the exercise of the constitutional right of appeal, no discretion may be exercised in favour of extending the time.

On issue No. 2, learned senior counsel contended that for the reason that the ruling of the Tribunal was delivered on 7/9/2011, any competent appeal against it must be lodged within 21 days. He referred to Section 143 (1) and (2) of the Electoral Act, 2010 (as amended). It was contended further that the applicant herein seeking leave to appeal as a person having an interest in the matter did not seek and obtain leave to appeal within the time prescribed for appealing, which, as stated earlier, is twenty-one (21) days from the day the ruling was delivered. Instead, a proposed notice and grounds of appeal was filed by the applicant hence the application to regularize. Learned senior counsel submitted that the law is clear, that where leave to appeal is required, the application for leave, the

Grant of leave as well as the filing of the appeal must be within the time stipulated for appealing. He cited, *Bowaje v. Adediwura* (1976) 6 SC 143 at 146. He submitted further that granting leave will mean extending the statutory time of appealing under Section 143 (1) and (2) of the Electoral Act.

On issue 3, the learned senior counsel submitted that the application is incompetent as the title does not reflect the title and parties to the petition at the trial tribunal and accordingly urged the court to so hold. Learned senior counsel contended that the title of this application as presently constituted does not reflect the names of the other parties to the Petition at the lower tribunal, C to wit Chief Sam Nkire. (1<sup>st</sup> Petitioner) and Peoples Progressive Alliance (2<sup>nd</sup> Petitioner). He urged the Court to strike out or dismiss the application.

Dr. Alex Izinyon, SAN of counsel to the 2<sup>nd</sup> respondent stated that he was served with all the processes in the application only yesterday the day before the application was to be moved, hence he was unable to file any paper. He however sought leave of court to associate himself with the submissions of the learned senior counsel to the 1<sup>st</sup> respondent and add two more points in support. He referred to the Practice Direction of this court which was issued on 17<sup>th</sup> October 2011 that any party who is dissatisfied with decision of the court below shall appeal within 14 days.

Learned senior counsel contended that, the applicant herein seeking leave to appeal as an interested party is not a party contemplated by the Practice Direction. He therefore submitted that the purported notice and Grounds of Appeal filed by the applicant is incompetent. He urged the court to dismiss the application relying on an unreported consolidated cases of this court, *Alhaji Mohammed B Goni & Ors v. Alhaji Shetima & Ors*; Appeal Nos. SC.332/2011, SC.333/20 11 and SC.352/20 11 delivered on 31/10/2011.

Learned senior counsel submitted that the time within which to hear the appeal and determine same having lapsed, the application has become an academic exercise hence he urged the court to dismiss C it.

Mr. Ananaba of counsel to the applicant in his reply referred to the response he filed to the preliminary objection. He adopted and relied on same to urge the court to overrule the objection.

He argued issues 1 & 2 of the objection together. Learned D counsel contended that there was no intention to have applied for leave in the Supreme Court. The applicant had applied for leave before the tribunal within time and when the tribunal would not hear her, she made similar application to the Court of Appeal, also within time, according to counsel. All the applicant sought before this court E now is the exercise of its powers under Section 22 of the Supreme Court Act in favour of the applicant to entertain the petition.

On whether or not the application has become an academic exercise, learned counsel referred to the reliefs sought in the proposed appeal, in particular, reliefs 3 and 4, He referred to the case of F *Bowaje v. Adediwura* (1976) 6 SC 143, cited by the 1<sup>st</sup> respondent and submitted that it was not relevant to the instant case as the judgment was delivered before Order 7 rule 6 of the Court of Appeal Rules came into force. Learned counsel further submitted that it was the failure of the Court of Appeal to enquire into the merits of the G applicant's Motion that led to the present application to this court. He submitted that the application cannot be an academic exercise and there is no application before this court for extension of time to appeal against the decision of the Election Tribunal or that of the Court of H Appeal.

On the third issue whether the application is incompetent for failure to state the title as it was in the court of trial, learned counsel submitted that Order 2 rule 8 of the rules of this court will not apply to the instant case in that the trial tribunal had held that the two

petitioners on record are not parties known to Law and that the applicant was not a party to the petition.

Learned counsel however conceded that at worst the application could be defective but not incompetent. He urged the court to ensure that substantial justice is achieved rather than technical justice, which would lead to miscarriage of justice. He finally urged the court to dismiss the 1<sup>st</sup> respondent's objection after relying on Chief E. Bello v. INEC & Ors (2010) 8 NWLR (Pt.1196) 342 at 387 - 388 & 413.

From the records, the 2<sup>nd</sup> respondent after the Governorship Election sometime in April 2011, was declared by the 1<sup>st</sup> respondent as winner of the said election. The declaration was challenged by two aggrieved parties in their petition. The said petitioners were:

1. Chief Sam Nkire
2. Peoples Progressive Alliance (PPA); against the Independent National Electoral Commission (INEC) and 6 others. The petition was presented before the Governorship Election Tribunal, Holden at Asaba, Delta State. Sometime on 7<sup>th</sup> September, 2011 in its ruling on couple of applications brought by the parties, the tribunal held that the petitioners were not persons competent to present the petition under Section 137 (1) of the Electoral Act 2010 (as amended). The petition was adjudged incompetent and accordingly struck out.

The present applicant consequently filed an application dated 17/10/2011 on 15/11/2011 at the Court of Appeal, Benin. The applicant sought the following orders:

1. An order extending the time allowed the applicant to seek leave to appeal.
2. An order for leave to appeal
3. An order extending the time allowed the applicant to appeal against the decision of the Governorship Election Tribunal sitting in Asaba, Delta State striking out petition No. *EPT/DT/GOV/01/2011* which decision and order were given by the said tribunal on Wednesday September 7, 2011.
4. An order deeming as duly filed and served the notice of appeal filed and served on the 27<sup>th</sup> day of September, 2011.
5. An order extending the time allowed the applicant to file and serve her brief of argument in the present appeal.
6. An order deeming as duly filed and served the brief of argument already filed and served.

As clearly shown on the records, the applicant who proposed

to appeal against the order of the tribunal, to the court below was not a party before the Tribunal. (See page 339 of the record). Hence, as it describes itself, it is a person having interest in the matter.

On 25/10/2011 when the above application came up for hearing, the applicant withdrew prayers 5 & 6 and same were accordingly struck out by the court. The remaining prayers were later taken B by the Court below on 3/11/2011. In its ruling, the court below dismissed the application, *inter alia*, in its own words as follows:

*“That to us is impracticable, particularly in the absence of the 1<sup>st</sup> respondent who should have had notice of the prayer to depart C from the rules and be given an opportunity to be heard. It is clearly impossible to allow this application and hear the appeal before we lose competence and fall foul of S. 285(7) of the Constitution. This application is dismissed.”*

It is noteworthy however that the application being objected D to by the respondents was filed on 17/11/2011 .

There is no doubt and it is clear from the rules that not been a party before the trial tribunal, the applicant needs leave to appeal, first to the court below, and from the court below to this court. That leave has not been obtained until today 8/12/2011. E

It is trite law that in a case where leave to appeal is required to be obtained, a party must not only file his application for leave to appeal within the period prescribed by the law, but must also file his notice and grounds of appeal, after having obtained the leave, within the same period. See Tunji Bowaje v. Moses Adediwura (1976) 6 SC F 143 at 146.

As earlier noted in this ruling and as stated in the ruling of the court below, the ruling of the trial tribunal which struck out the petition and which was being sought to appeal against was delivered on 7/09/ G 2011.

The law is clear now, that an appeal from a decision of an election tribunal or Court of Appeal in an election matter shall be heard and disposed of within sixty (60) days from the date of the delivery of judgment of the tribunal or Court of Appeal. See Section H 285 (7) of the 1999 Constitution (as amended).

There is no doubt that the sixty (60) days within which the law requires that the appeal must be heard and disposed of expired on the 6<sup>th</sup> November, 2011 which was a Sunday. It should be borne in

mind that this is an election matter different from other ordinary civil matters.

Ordinarily, one may have thought that since there were still few days available on the 3<sup>rd</sup> of November, 2011 when the court below took the application, and before the sixty days lapsed, the court could have taken the appeal and delivered its judgment in accordance with subsection 8 of Section 285 of the Constitution which permits the court to give reasons of its decision at a later date. But there seems to be more to it than meets the naked eyes, so to speak.

When the application before the court below was argued on 3/11/2011, the court then had only three (3) days left to have considered the application, if allowed, then taken the appeal and then given judgment latest on Sunday 6<sup>th</sup> November, 2011. But assuming that it was practically humanly possible so to do, the court thought, and rightly too, that if the court would depart from its rules in taking the appeal, then the 1<sup>st</sup> respondent in particular who was absent and not represented would have needed to be put on notice of the prayer to depart from the rules and given an opportunity to be heard. As a result, it clearly became practically impossible to allow the application, hear the appeal and deliver judgment before the expiration of the time prescribed by the law. Therefore, as the applicant was not granted leave to appeal and there was no appeal until the time so to do lapsed, there was practically nothing left to be pursued by the applicant in the instant circumstance. There is no doubt, that no useful purpose will be served, and it will amount to mere academic exercise in considering at this stage an application for leave to appeal.

What is more, a cursory look at all the processes filed in this court shows that they do not reflect the same title as that which obtained in the trial tribunal. The parties are completely and radically different. As shown earlier, the petitioners before the Election Tribunal were “Chief Sam Nkire and Peoples Progressive Alliance (PPA) as 1<sup>st</sup> and 2<sup>nd</sup> Petitioners respectively, whereas the applicant seeking leave to appeal against the decision of the trial tribunal is “Progressive Peoples Alliance (PPA)”. Order 2 rule 8 of the Rules of this court provides thus:

*“Notices of appeal, applications for leave to appeal, briefs and all other documents whatsoever prepared in pursuance of the appellate jurisdiction of the court for filing in accordance with the provi-*



*sions of these Rules, shall reflect the same title as that which obtained in the court of trial."*

It is not in dispute that rules of court are meant to be obeyed and duly observed. Otherwise, the court may be robbed of the required competence to adjudicate on the matter. For a court to have jurisdiction, one of the conditions to be satisfied is that the proper parties are before the court. Where proper parties are not before the court, the court will be lacking in competence. Hence the case is liable to striking out.

Without any further ado on this matter, it is clear that the preliminary objection argued by the 1<sup>st</sup> respondent and supported by 2<sup>nd</sup> respondent counsel has merit. It should be allowed as it succeeds.

As a result, it will be share waste of the precious time of this court to embark on hearing the applicant's application for leave to appeal etc. It is liable to striking out.

In the light of the above brief comments, and the fuller reasons given by my learned brother, Ngwuta, JSC, in the lead ruling, I am in total agreement with his reasoning and conclusion.

Accordingly, the application dated and filed on 17/11/2011 by which the applicant is seeking, inter alia, leave to appeal is struck out.

Even though costs follow events, I shall make no order as to costs.

Application struck out.

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