

SUPREME COURT OF NIGERIA
22ND JANUARY, 2016. SC. 428/2015
CORAM:- S. GALADIMA, K. M. O. KEKERE-EKUN,
J. I. OKORO, C. C. NWEZE, A. SANUSI, JJSC

1. EJIOFOR APEH

2. UDE CELESTINE

..... APPELLANTS

3. OSSAI MOSES

(For themselves and on behalf of
other ward Delegates for Enugu
State on 1st November, 2014)

AND

1. PEOPLES DEMOCRATIC PARTY

2. NATIONAL CHAIRMAN, PDP

3. NATIONAL SECRETARY, PDP

..... RESPONDENTS

4. THE NATIONAL WORKING
COMMITTEE (PDP)

5. INDEPENDENT NATIONAL
ELECTORAL COMMISSION

APPEALS - Notice of - Importance of - It is the structure on which all subsequent processes in appellate court derive their support - As no such process can stand without subsistence of a valid notice (H1)

PARTIES - Joinder of - Application - Unnamed parties seeking to join proceedings - Must bring application in the existing proceeding - And duly serve all the parties (H2)

ACTIONS - Representative suit - Application - Persons suing or defending in a representative capacity - Must have common interest in the proceeding - Otherwise court will not grant the application (H3)

COURT PROCESSES - Hearing notice - Service of - The notice being the only legal means of getting a party to appear in court - Failure to issue and serve same is a denial of justice (H4)

FACTS

Before the Supreme Court of Nigeria, applicants (who were

never parties in the proceedings in the lower courts) brought a Motion on Notice seeking inter alia for leave to substitute names of parties in the matter with their names. The contention of applicants is that they were Ward delegates for Enugu State elected on the 1st of November 2014. One Barrister Orji Chinenye Godwin, Chief C. C. Akalusi and Chief Orji C. Orji represented the interests of applicants and other elected delegates at the Federal High Court and the Court of Appeal.

Applicants further argued that as their said representatives at the lower courts are no longer interested in pursuing the matter the need therefore arises to substitute their names with that of applicants. Applicants claim to have the mandate of the other ward delegates elected for Enugu State. Applicants have therefore through their learned counsel, formulated an issue for determination of the application to wit: whether the Supreme Court has power to grant their application in the circumstances of the case.

ISSUE FOR DETERMINATION

Whether this Honourable court has the power to grant this application in the circumstances of this case?

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

APPEALS - Notice of - Importance of

1. Now, as it is well known, the Notice of Appeal, as the spinal cord of an appeal, is the forensic structure on which all subsequent processes in an appellate court, such as this, derive their support. As such, no such subsequent process can stand without the subsistence of such a valid structure in the nature of valid court processes. (p. 521 B)

PARTIES - Joinder of - Application

2. In effect, while the title of the suit, both at the trial court and at the lower court, showed the plaintiffs as Barrister Orji Chinenye Godwin; Chief C. C. Akalusi and Chief Orji C. Orji (Suing for themselves and on behalf of all the delegates elected on the 1st November, 2014 at the Ward Congress held for

Enugu), the motion of the applicants, unilaterally, distorted the title of the suit.

In other words, the applicants herein usurped the prerogative of this court; that is, without the leave of this court, they imposed themselves as parties, effectively, altering the case which the named plaintiffs initiated at the trial court and defended at the lower court.

With due respect to the learned Senior Advocate for the applicants, that presumptuous approach dealt the ultimate coup de grace to the applicants' entitlement to the reliefs sought as it is violative of the well entrenched practice of this court.

It cannot be otherwise for the character of any case at its inception remains so sacrosanct that only leave of court can effect any alteration in the case of transfer, transmission of interest or any other form of alteration of the parties to the proceedings.

I, accordingly, endorse Dr. Ikpeazu, SAN's submission that a proper application must, necessarily, reflect the title of the case as it is in the proceeding leading to the appeal and the application. If the unnamed parties are thus seeking to have their names reflected as parties, they must bring a miscellaneous application in the existing proceeding and duly serve all the parties. (pp. 521 G/522 C/523A)

ACTIONS - Representative suit - Application

3. Turning to the issue of commonality of interests, it cannot even be gainsaid that the applicants, woefully, failed to bring themselves within the warm embrace of the requirements of the representative suits genre. From the capacity expressed on pages 323 - 327 of the record, that is, on the "Notice of Appeal," it is not in doubt that their application fell short of the fundamental requirement of representative suits principle.

What crystallises from the earlier exposition on the point is that the jurisprudential postulate underlying suits in representative capacity is that the person or persons suing or defending in a representative capacity must have the same interest in the proceeding. This means that the parties on record

and those they represent must have common interest.

From the above survey of binding authorities, it is obvious that similarity of interests would not suffice in the absence of a commonality of interests.

**Even then, the burden is on the plaintiff and with respect
B to this application, the applicants herein to establish a commonality of interests. In all, the applicants have a duty to satisfy this court of the commonality of their interests. This must be evidenced in the following twin prerequisites, common grievance and a relief or reliefs beneficial to all of them.
C In effect, the applicants have not succeeded in demonstrating a commonality of interests as required by the authorities.**

**Against the above background, therefore, the answer to the sole issue which learned senior counsel for the applicants
D framed for the determination of this application is that this court cannot grant this application in the circumstances of the muddled up processes of the applicants.
(pp. 523 D/524 B/525 C)**

**E COURT PROCESSES - Hearing notice - Service of
4. All parties to a proceeding are entitled, as of right, to be served with all the court processes. Clear proof that the applicants never had the named plaintiffs (named-respondents
F at the lower court) in contemplation is evident from page 3 of the Motion paper. They were never listed as those to be served with the said process.**

**Truth told, service of processes, including hearing notices from day to day, is so important that any dereliction in
G this regard is bound to vitiate the entire proceedings, no matter how well conducted.**

In the instant application, as in all such cases, the named plaintiffs were not only entitled to be served with the motion paper but also the hearing notice for hearing that was scheduled for October 27, 2015. This must be so for a hearing notice is the only legal means of getting a party to appear in court. Thus, failure to issue and serve hearing notice is a denial of justice. (pp. 525 F/526 A)

NOTABLE POINT OF INTEREST

NWEZE JSC

1. Representative action – Rules of

The rule was that, if the plaintiff sued or any of the defendants was sued in a representative character, this must be stated on the writ, and must also appear in the title or heading of the Statement of Claim. However, in such representative suits, both the named plaintiff and the un-named parties, that is, those they represent, are parties to the action; the only difference is that the named plaintiff, as it were, is in control of the suit (*dominus litis*) until the matter is disposed with at first instance. B C

Put differently, the named plaintiff is the sole plaintiff until judgment is given; as such he can discontinue, compromise, submit to dismissal and other things as he decides during the course of the proceedings. D

Where, however, he falls out with the un-named or represented parties for any reason, the court has power to add or substitute any person represented, though unnamed in the representative action, and to bring him in as at the date of the original writ. E

The powers that inhere on the named plaintiff are hedged around with limitations. For instance, he can only represent those who have given him authority to do so, and in respect of a claim in which his interest in the subject matter is common with that of those he represents. He cannot, without their authority and order of Court authorising him to do so, defend counter claims made against him in the principal action. F

After judgment, he cannot deprive other persons of the same class of the benefit of the judgment if they think fit to prosecute it. G (p. 520 A)

REPRESENTATION

Yusuf Olaolu Ali, SAN; Adebayo Adelodun, SAN; K. K. Eleja, SAN for the applicants with Ma'sud Alabelewe; S. A. Oke; A. O. Abdulkadir; Alex Akoja; K. O. Lawal; H. O. Sulaiman (Miss); A. O. Mohammed; Idris Suleiman; A. O. Usman; S. O. Aduagba; Ibrahim Jallow; Yunus Murtala; Abdulwahab Abayomi; Olukayode Ariwoola, Jnr. and K. C. H

Onyeke

Dr. Onyechi Ikpeazu, SAN for the first-fourth respondents with A. A. Ibrahim; Nnaemeka C. Ugha; Obiora Aduba and Julius Mba.

T. M. Inuwa, with Alhassan A. Umar and C. Nnamah (Miss), for the fifth respondent

B

CASES REFERRED TO

Otapo v. Sunmonu (1987) 2 NWLR (pt. 58) 587

Afolabi v. Adekunle (1983) NSCC 398

C Atanda v. Olanrewaju (1998) 4 NWLR (pt 88) 394

Abuakwa v. Adanse (1957) 3 All ER 559

Re Tottenham (1896) 1 Ch. 628

Oketie v. Olughor (1995) 5 SCNJ 217

Ekennia v. Nkpakara (1997) 5 SCNJ 70

D Otapo v. Sunmonu (1987) 2 NWLR (pt. 58) 587

Thor Ltd. v. First City Monument Bank Ltd (2002) 2 SCNJ 85

Ebokam v. Ekwenibe & Sons Trading Co. Ltd. (1999) 7 SCNJ 77

P.P.A. v. INEC (2012) 13 NWLR (pt 1317) 215

Ogamioba v. Ogene (1961) All NLR 59

E Nsima v. Nnaji (1961) NLR 441

Idise v. Williams Int. Ltd. (1995) 1 SCNJ 120

Akporue v. Okei (1973) 12 SC 137

RULES REFERRED TO

F Supreme Court Rules 1985 (as amended), O. 2 r. 8

BOOKS REFERRED TO

Civil Procedure in Nigeria 2nd ed., p. 110

G

LEAD JUDGMENT BY NWEZE JSC

By Motion on Notice dated and filed on October 2, 2015, the applicants herein beseeched this court with supplications for:

H “1. An order granting leave to substitute the names of Barrister Orji Chinenye Godwin, Chief C. C. Akalus and Chief Orji C. Orji who were the first to third respondents at the lower court with Ejiofor Apeh, Ude Celestine and Ossai Moses, appellants/applicants in this appeal;

2. An order deeming the already filed processes of the appel-

lants/applicants before this Honourable court as properly filed and served;

4. And for such further or other orders that this Honourable court may deem fit to make in the circumstance.”

In addition to the seven-paragraph “Grounds for the Application,” the first applicant (Ejiofor Apeh) deposed to a sixteen-paragraph affidavit on the same day, October 2, 2015. Their case may be summed up as follows. They were Ward delegates for Enugu State elected on November 1, 2014. Barrister Orji Chinenye Godwin; Chief C. C. Akalusi and Chief Orji C. Orji represented them (the said applicants) and other elected delegates at the Federal High Court (hereinafter, simply, referred to as “the trial court”) and the Court of Appeal (throughout this ruling to be called “the lower court”).

Barrister Orji Chinenye Godwin; Chief C. C. Akalusi and Chief Orji C. Orji, who were the first to the third respondents at the lower court, are no longer interested in pursuing the appeal to this court, hence the need to substitute their names with the applicants. They claim to have the mandate of the other ward delegates elected for Enugu State on November 1, 2014. The proximate impulsion to their application before this court could be found in the facts deposed to in paragraphs 3-13 of the Affidavit sworn to by Ajiofor Apeh as aforesaid.

When the application came up for hearing on October 27, 2015, Yusuf Ali, SAN, A. A. Adelodun, SAN and K. K. Eleja, SAN, who appeared with other counsel for the applicants, adopted the written address in support of the Motion. Only a sole issue was identified in the said address for the determination of the application. It was couched thus:

Whether this Honourable court has the power to grant this application in the circumstances of this case?

He pointed out that granting an application of this nature is within the unreserved power of this court. He explained that the appellants/applicants are among the delegates represented at the trial court and the lower court; hence, the case was instituted in a representative capacity and the representative plaintiffs are no longer interested in prosecuting the appeal.

He submitted that the withdrawal of the said plaintiffs from further prosecuting this appeal does not constitute a bar to the case

being continued with in a representative capacity by others having interest in the instant appeal. He cited *Otapo v Sunmonu* (1987) 2 NWLR (pt 58) 587, 604 as authority for the view that where an action is prosecuted in a representative capacity “*such an action is dommus litis with respect to the representative plaintiffs up to the point of Judgment after which the people so represented can then continue to enjoy the benefits that accrued to them.*” He, equally, prayed in aid this court’s decision in *Afolabi v Adekunle* (1983) NSCC 398 for the view that a person suing in a representative capacity does not do so for his benefit alone but also for the benefit of all those who authorised him in that regard.

In his submission, after judgment, a representative plaintiff has no power to deprive others with same interest of the benefit of the judgment if they think fit to prosecute it, citing *Atanda v Olanrewaju* (1998) 4 NWLR (pt 88) 394, 402. He maintained that, in that context, the applicants have the right to substitute the names of the parties who were the first-third respondents at the lower court.

SUBMISSIONS OF THE FIRST-FOURTH RESPONDENTS

On his part, Dr. Onyechi Ikpeazu, SAN, who appeared with other counsel for the first - fourth respondents, first drew attention to the ten-paragraph Counter Affidavit sworn to by Nanchang Ndam of the first respondent and exhibit 1 of March 15, 2015. He adopted and relied on the respondent’s written address filed on October 23, 2015.

In the said address, learned senior counsel raised three issues for the resolution of the divergent responses which this application has provoked. They were framed thus:

1. Whether there is a competent appeal before the court over which this application can be foisted?
2. Whether the applicants are properly before the Supreme Court?
3. Whether the applicants are entitled to the reliefs sought in this application?

On the first issue, learned senior counsel contended that there was no appeal which was initiated in due form over which an application, such as this, could be predicated. He pointed out that the suit number at the trial court as well as the appeal number before the lower court did not disclose the persons named as Ejiofor etc as par-

ties. He drew attention to the named plaintiffs at the trial court and the named respondents and the capacity in which they sued and responded to the appeal.

He contended that the three persons in the application were neither named parties in the suit and the ensuing appeal, nor were they designated representatives of the class of individuals who initiated the action. Above all, the class represented in the existing proceedings is not described in the same manner as in the appeal before this court, he cited Order 2 Rule 8 of the Rules of this court, 2005 (as amended).

He conceded that a person suing in a representative capacity does so for himself and that of others who authorised him, *Afoabi v Adekunle* (supra). However, he maintained that those represented could only be added or substituted with the prior leave of court. In effect, no person can, on his own, alter the parties and subsequently seek leave of court to correct a non-existent process. Put differently, a proper application must reflect the title of the case as it is in the proceedings leading to the appeal and application.

Thus, where the un-named parties desire to be reflected as named parties, they must bring a miscellaneous application in the existing proceeding and duly serve all the parties in the existing proceedings. Simply put, they cannot initiate an appeal in the manner they like and then seek leave to activate a void judicial process. *Otapo v Sunmonu* (supra) at page 591; *Atanda v Olarenwaju* (1988) 10 - 11 SC 1.

On issue two, learned senior counsel submitted that the relief sought for in this application does not seek to alter the processes filed in the lower court, the most important being the Notice of Appeal which was initiated in a defective state.

Turning to the third issue, the learned SAN contended that the applicants are not entitled to the reliefs sought because they have not presented the appeal in the same representative capacity in which the suit was initiated. What is more, the original plaintiffs at the trial court (who were respondents at the lower court) were not made parties to the application and as such were not served with the allegations which the applicants made against them, citing 36 (1) of the 1999 Constitution (as amended).

In passing, I note here that all other arguments in the respond-

ents’ written address verge on the substantive appeal and need not detain us here else, in addressing them, we may pre-empt the outcome of the substantive appeal.

Counsel for the fifth respondent, T. M. Inuwa, who appeared with Alhassan A. Umar and C. Nnamah (Miss), who did not file any written address, associated himself with the submissions of Dr. Onyechi Ikpeazu, SAN, for the other respondents.

RESOLUTION OF THE ISSUE

As indicated above, Dr. Onyechi Ikpeazu, Learned SAN, canvassed the view that an application, such as the present one which is to substitute the names of named parties with the names of three of the un-named parties, must be founded on the subsisting processes which the named parties initiated at the trial court and defended at the lower court.

Now, the appeal, which the said applicant referred to, is Appeal No SC 428/2015, initiated though the Notice of Appeal contained on pages 323 - 327 between:

1. Ejiofor Apeh
 2. Ude Celestine
 3. Ossai Moses
- (On behalf (sic) of other Unnamed Parties on Record) as appellants

- And
1. Peoples Democratic Party (PDP)
 2. The National Chairman (PDP)
 3. The National Secretary (PDP)
 4. The National Working Committee (PDP)
 5. Independent National Electoral Commission (INEC)

On the other hand, the processes at the trial court, pages 3 et seq show that the Originating Summons was taken out by Barrister Orji Chinenye Godwin, Chief C. C. Akalusi and Chief Orji C. Orji (Suing for themselves and on behalf of all the delegates elected on the 1st November, 2014 at the Ward Congress held for Enugu). That was, also, the capacity in which these named plaintiffs responded to the appeal at the lower court, pages 309 et seq.

Expectedly, Onyechi Ikpeazu, SAN, for the first to the fourth respondents, (paragraph 3. 04 of the Written Address) took the view that individuals are not allowed to unilaterally alter a case as consti-

tuted from the High Court.

He canvassed the further view that they are mandated to maintain the same character of the case as incepted or otherwise seek leave of the court to effect an alteration in the case of transfer, transmission of interest or any other form of alteration of parties to the proceedings. He prayed in aid Order 2 Rule 8 of the Rules of this court, 1985 (as amended). B

Before dealing with the effect of the Order 2 Rule 8 on the present application, it may be appropriate to dispose of the character of the representative suit of the named plaintiffs at the trial court (respondents at the lower court). C

CHARACTER OF REPRESENTATIVE SUITS

As with all rules which eventuated from equity's attenuation of the rigidity of the common law, the species of actions known as representative suits were evolved for the relaxation of the "Complete Joinder" rule under the common law, F. Nwadialo, Civil Procedure in Nigeria (Second Edition) (Lagos: University of Lagos Press, 2000) 110 et seq. D

Under the old common law practice, all parties, who were interested in a suit, were required to be present in court so that "a final end might be made of the controversy", per Lord McNaughton in *Duke of Bedford v. Ellis* A. C. 1, 8, (H.L.) (P.C.). Unarguably, the rules were too rigid for practical purposes when they had to be applied to societies or groups, *The Taff Vale Railway Company v. Amalgamated Society of Railway Servants* (1901) A.C. 426 (H.L.). F

Characteristically, equity, in response, evolved its own rules which were adapted to meet the difficulties presented by a multiplicity of persons interested in the subject matter of litigation. Accordingly, the rules of equity allowed some of such persons to sue on behalf of themselves and all others having the same interest. Understandably, this was done to prevent a failure of justice, *The Taff Vale Railway Company v. Amalgamated Society of Railway Servants* (1901) A.C. 426 (H.L.). G

In his notable reconstruction of principles akin to the above, which Lord Penzance had articulated in *Wytcherley v. Andrews* (1871) L. R. 2 P and D at 328, Lord Denning, in *Abuakwa v. Adanse* (1957) 3 All ER 559, 563 quipped that it was a rule H

...*'founded on justice and common-sense'* for all persons with

the same interest... to regard the party named on the Writ as their champion... if he wins they reap the fruit of victory. If he fails they fall with him and must take the consequences. These are the basic principles on which representative actions are founded.

B The rule was that, if the plaintiff sued or any of the defendants
was sued in a representative character, this must be stated on the writ, and must also appear in the title or heading of the Statement of Claim. *Re Tottenham* (1896) 1 Ch. 628. However, in such representative suits, both the named plaintiff and the un-named parties, C that is, those they represent, are parties to the action; the only difference is that the named plaintiff, as it were, is in control of the suit (dominus litis) until the matter is disposed with at first instance. *Oketie v Olughor* (1995) 5 SCNJ 217, 226; *Ekennia v Nkpakara* (1997) 5 SCNJ 70 88.

D Put differently, the named plaintiff is the sole plaintiff until judgment is given; as such he can discontinue, compromise, submit to dismissal and other things as he decides during the course of the proceedings. *Otapo v Sunmonu* (1987) 2 NWLR (pt 58) 587.

E Where, however, he falls out with the un-named or represented parties for any reason, the court has power to add or substitute any person represented, though unnamed in the representative action, and to bring him in as at the date of the original writ. *Otapo v Sunmonu*, (supra) approvingly, adopting *Moon v Atherton* (1972) 2 QB 435; (1972) 3 WLR 57; (1972) 3 All ER 145.

F The powers that inhere on the named plaintiff are hedged around with limitations. For instance, he can only represent those who have given him authority to do so, and in respect of a claim in which his interest in the subject matter is common with that of those G he represents. He cannot, without their authority and order of Court authorising him to do so, defend counter claims made against him in the principal action. *Smith and Ors v. Cardiff Corporation* (1953) 2 All ER 1373.

H After judgment, he cannot deprive other persons of the same class of the benefit of the judgment if they think fit to prosecute it. *Handford v. Storie* (1825) 2 Sim. and St. 196, *Re, Alpha Co* (1903) 1 Ch 203; *Re Calgary etc.* (1908) 2 Ch 652, *Watson v. Cave* (No.1) 17 Ch. D. 19 *Cotton L.J.* approvingly adopted in *Otapo v Sumonu* (supra).

However, the above presupposes the existence of a valid process before this court. Thus, before dealing with the question whether the applicants herein had a commonality of interests with the named plaintiffs at the trial court (named respondents at the lower court), the issue of the applicants' entitlement to the reliefs claimed [in the circumstances] has to be disposed of first. B

APPLICANTS' ENTITLEMENT TO THE RELIEF SOUGHT

Now, as it is well known, the Notice of Appeal, as the spinal cord of an appeal, is the forensic structure on which all subsequent processes in an appellate court, such as this, derive their support. Aderigbigbe and Anor v Abidoye (2009) LPELR -140 (SC). ***As such, no such subsequent process can stand without the subsistence of such a valid structure in the nature of valid court processes.*** Oketie v. Olughor (1995) 5 SCNJ 217; Thor Ltd. v. First City Monument Bank Ltd [2002] 2 SCNJ 85; Ebokam v. Ekwenibe & Sons Trading Co. Ltd. (1999) 7 SCNJ 77. C D

As shown above, the first applicant in this application (Ejiofor Apeh) in the Affidavit in support of the motion, deposed inter alia:

"6 That I know as a fact that the people that represented the appellants/applicants at the Federal High Court and the Court of Appeal are Barrister Orji Chinenye Godwin; Chief C. C. Akalusi and Chief Orji C. Orji." E

The processes at the trial court, pages 3 et seq of the record, show that the Originating Summons was taken out by Barrister Orji Chinenye Godwin; Chief C. C. Akalusi and Chief Orji C. Orji (Suing for themselves and on behalf of all the delegates elected on the 1st November, 2014 at the Ward Congress held for Enugu). That was, also, the capacity in which these named plaintiffs responded to the appeal at the lower court, pages 309 et seq. F G

In effect, while the title of the suit, both at the trial court and at the lower court, showed the plaintiffs as Barrister Orji Chinenye Godwin; Chief C. C. Akalusi and Chief Orji C. Orji (Suing for themselves and on behalf of all the delegates elected on the 1st November, 2014 at the Ward Congress held for Enugu), the motion of the applicants, unilaterally, distorted the title of the suit. H

Indeed, the said motion is predicated on a process which appears on page 323 - 327 of the record, and is titled "Notice of Ap-

peal.” The parties therein are described as:

4. Ejiofor Apeh
5. Ude Celestine
6. Ossai Moses

(On behalf (sic) of other Unnamed Parties on Record) as

B appellants

And

6. Peoples Democratic Party (PDP)
7. The National Chairman (PDP)
8. The National Secretary (PDP)

C

9. The National Working Committee (PDP)
10. Independent National Electoral Commission (INEC)

In other words, the applicants herein usurped the prerogative of this court; that is, without the leave of this court, they imposed themselves as parties, effectively, altering the case which the named plaintiffs initiated at the trial court and defended at the lower court.

With due respect to the learned Senior Advocate for the applicants, that presumptuous approach dealt the ultimate coup de grace to the applicants’ entitlement to the reliefs sought as it is violative of the well entrenched practice of this court.

It cannot be otherwise for the character of any case at its inception remains so sacrosanct that only leave of court can effect any alteration in the case of transfer, transmission of interest or any other form of alteration of the parties to the proceedings. PPP v INEC (2012) 13 NWLR (pt 1317) 215, 236 - 233, H-E.

G Now, Order 2 Rule 8 of the Rules of this court provides as follows: 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* H *obtained in the Court of trial.* (Italics supplied for emphasis)

In P.P.A. v. INEC (2012) 13 NWLR (pt 1317) 215, 237, this court held that, in a situation such as the present one, the “*proper thing to do is to leave the parties on record intact notwithstanding the decision of the trial [court] and state the name of the interested party*

and identify him as the applicant. .. “In other words, by virtue of Order 2 Rule 8 (supra), all the processes before this court must “reflect the same title as that which obtained in the trial [court].” This was not done here.

I, accordingly, endorse Dr. Ikpeazu, SAN’s submission that a proper application must, necessarily, reflect the title of the case as it is in the proceeding leading to the appeal and the application. If the unnamed parties are thus seeking to have their names reflected as parties, they must bring a miscellaneous application in the existing proceeding and duly serve all the parties. This submission is in consonance with the rationale of all binding authorities, P.P.A. v INEC (supra) at pages 236-237, paragraphs H-E; 252, paragraphs D-H; Otapo v. Sunmonu (supra). B
C

Turning to the issue of commonality of interests, it cannot even be gainsaid that the applicants, woefully, failed to bring themselves within the warm embrace of the requirements of the representative suits genre. From the capacity expressed on pages 323 - 327 of the record, that is, on the “Notice of Appeal,” it is not in doubt that their application fell short of the fundamental requirement of representative suits principle. D
E

What crystallises from the earlier exposition on the point is that the jurisprudential postulate underlying suits in representative capacity is that the person or persons suing or defending in a representative capacity must have the same interest in the proceeding. Ogamioba and Ors v. Chief Ogene and Ors (1961) All NLR 59 at 62; (1991) 1 SCNLR 115. ***This means that the parties on record and those they represent must have common interest.*** F
G

Put differently, the subject matter must evince a common interest as opposed to diverse interests, Ukpon and Anor v Commissioner for Finance and Economic Development 2006 LPELR -3349 SC; common grievance and the reliefs sought: must, in their nature, be beneficial to all the representatives and those represented. The cases on this point are many, Market and Co Ltd. v. Smith and Ors v. Cardiff Corporation (1954) 1 QB 210; Nsima v. Nnaji and Ors (1961) NLR 441; Amefideoau v. Ononaku (1988) 2 NWLR (pt. 78) 614; Idise v. Williams Int. Ltd. (1995) 1 SCNJ 120; (1995) 1 NWLR (pt. H

370) 142; Ukatta v. Ndinaeze (1997) 4 SCNJ 137, 139; (1997) 4 NWLR (pt. 499) 251.

Others include: Oreabaide v Onitiju (1962) 1 All NLR 32, 37 citing Mark and Co. Ltd v Knight 5.5. Co. Ltd. (1910) K.S. 1021, per Fletcher - Moulton L J; Charter v Rigby and Co (1896) QB 113; B Amachree v Newington 14 WACA 97; Ayinde and Ors v Akanji and Ors [1988] 1 NWLR (pt. 68) 70; Akporue v Okei (1973) 12 SC 137; Akpan and Anor v Commissioner for Finance and Economic Development and Anor (2006) LPELR -3349 (SC).

C ***From the above survey of binding authorities, it is obvious that similarity of interests would not suffice in the absence of a commonality of interests.*** Akpan and Anor Commissioner for Finance and Economic Development and Anor (supra); Obiode v Orewere (1982) 1-2 SC 170, 175 -177; Wiri v Wuche (1980)1-2 D SC, 42-43; Afolabi v Adekunle (1983) 2 SCNLR 141, 154; Atane v Amu (1974) 10 SC 237, 243-244.

Even then, the burden is on the plaintiff and with respect to this application, the applicants herein to establish a commonality of interests. Atane v Amu (supra); Ogamioba v E Oghene (1961) 1 All NLR 59, 60. ***In all, the applicants have a duty to satisfy this court of the commonality of their interests. This must be evidenced in the following twin prerequisites, common grievance and a relief or reliefs beneficial to all of them.*** Ayinde and Ors v Akanji and Ors (1988) 1 NSCC 43, approvingly, adopting Ogamioba and Ors v Oghene and Ors (1961) 1 All F N.L.R. 59,60.

As shown above, at the trial court, the named plaintiffs (who were the named respondents at the lower court) were shown as “suing for themselves and on behalf of all the Delegates elected on the 1st November, 2014 at the Ward Congress held in Enugu State.” G

On the other hand, the applicants, at pages 323 - 327 of the record, that is, in the process titled “Notice of Appeal,” were:

1. Ejiofor Apeh
- H 2. Ude Celestine
3. Ossai Moses

(On behalf (sic) of other Unnamed Parties on Record) as appellants.

As if that was not enough, in the application that yielded this

ruling, the same persons were expressed as suing “*for themselves and on behalf of other Ward Delegates elected for Enugu State on 1st November, 2014.*” **In effect, the applicants have not succeeded in demonstrating a commonality of interests as required by the authorities.** Akpan and Anor v Commissioner for Finance and Economic Development and Anor (supra); Obiode v Orewere (supra); Wiri v Wuche (supra); Afolabi v Adekunle (supra); Atane v Amu (supra).

Yet, as already shown above, the burden is on the applicants to establish a commonality of interests, Atane v Amu (supra); Ogamioba v Oghene (1961).

Against the above background, therefore, the answer to the sole issue which learned senior counsel for the applicants framed for the determination of this application is that this court cannot grant this application in the circumstances of the muddled up processes of the applicants. P.P.A. v. INEC (supra) at pages 236-237, paragraphs H-E; 252, paragraphs DH; Otapo v Sunmonu (supra).

There is even a more fundamental issue here. As, already, indicated earlier, the applicants entreated this court “*to substitute the names of Barrister Orji Chinenye Godwin, Chief C. C. Akalus and Chief Orji C. Orji, who were the 1st to 3rd respondents at the lower court with Ejiofor Apeh, Ude Celestine and Ossai Moses.*” Somewhat curiously, they were not served with this motion. This is rather strange.

All parties to a proceeding are entitled, as of right, to be served with all the court processes. Clear proof that the applicants never had the named plaintiffs (named-respondents at the lower court) in contemplation is evident from page 3 of the Motion paper. They were never listed as those to be served with the said process.

Truth told, service of processes, including hearing notices from day to day, is so important that any dereliction in this regard is bound to vitiate the entire proceedings, no matter how well conducted. Onwuka v Owolewa (2001) 28 WRN 89; (2001) 7 NWLR (Pt 713) 695, 710; Folorunsho v Shaloub (1994) 3 NWLR (pt 333) 413, 430; Mbadinuju and Ors v Ezuka and Ors (1994) 10 SCNJ 109; (1994) 8 NWLR (Pt 364) 535; Sken Consult Nig Ltd v Ukey (1981) JSC 6; Habib Nig Bank Ltd v Opemulero and Ors

(2000) 15 NWLR (pt 690) 315.

In the instant application, as in all such cases, the named plaintiffs were not only entitled to be served with the motion paper but also the hearing notice for hearing that was scheduled for October 27, 2015. This must be so for a hearing notice is the only legal means of getting a party to appear in court. Onwuka v Owolewa (supra). ***Thus, failure to issue and serve hearing notice is a denial of justice.***

The worrisome effect is that the applicants herein (by their application) most, disingenuously, attempted to goad this court into favouring them with reliefs, which, in effect, would have amounted to a denial of the named plaintiffs' right to fair hearing.

To say the least, this would have been a most sacrilegious judicial exercise of discretion, C.A.F.S, Ltd v Mafah (1998) 10 NWLR (pt 569) 16; Okafor v AG Anambra and Ors (1991) LPELR-SC.264/1998, 27-28; John A.S.C Ltd v Mfon (2007) 4 WRN 173, 188-189; Dawodu v Ofogundudu and Ors (1986) 4 NWLR (pt 33) 104, 114; Ariori v. Elemo (1983) 1 SCNLR I; Garba v. University of Maiduguri (1986) 1 NWLR (pt 18) 550.

All said and done, I find no scintilla of merit in this application. Accordingly, I find that it must be, and it is hereby, struck out as being not only, wantonly, frivolous; but, utterly, vexatious. Application struck out.

F —————

GALADIMA JSC

I have been obliged a draft of the Ruling of my learned brother NWEZE JSC just delivered. He has dealt with the real issue involved in this application. His reasoning leading to the conclusion that the application lacks merit and should be struck out is entirely unassailable.

There was no appeal duly initiated over which this application can be predicated. The suit at the trial court as well as the appeal before the court below did not disclose the persons named as "EJIOFOR" etc as parties. I refer to the named plaintiffs at the trial court and the named Respondents and the capacity in which they sued and accordingly responded to the appeal.

The Appellants cannot unilaterally substitute themselves as

parties for the said original named plaintiffs. The applicants did not help the matter when they failed to put the original plaintiffs, Respondents herein on notice. As carefully explained in the lead Ruling the Applicants have not shown in their title of this application and their proposed Notice of appeal that they have common interest as opposed to diverse interests. B

For the foregoing and the more full or reasons given in the lead Ruling, I too, do not find any merit in this Application and it is struck out. I make no order as to costs in the circumstances of this application. C

KEKERE-EKUN JSC

I have had the benefit of reading in draft the ruling of my learned brother, C.C. NWEZE, JSC just delivered, he has succinctly considered and resolved the issue for determination in this application. I agree entirely with the reasoning and conclusion that the application lacks merit and should be struck out. D

The applicants have not only altered the names of the parties as they appeared on the processes at the trial court and at the court below, they have, without seeking and obtaining leave of this court, unilaterally substituted themselves as parties for the original named plaintiffs at the trial court and respondents at the court below. To compound the matter further, they failed to put the original plaintiffs/respondents on notice. As illustrated in the lead ruling, they have shown by the title of this application and their proposed Notice of Appeal that they do not have the same interest as the original plaintiffs/respondents. E F

Having completely excluded the original plaintiffs/respondents from these proceedings there is no anchor upon which to hang the application for substitution. You cannot put something on nothing and expect it to stand. G

For these and the more illuminating reasons given in the lead ruling, I also find no merit in the application and it is hereby stuck out. H

OKORO JSC

I was obliged in advance a copy of the ruling just delivered by my learned brother, C. C. NWEZE, JSC. My learned brother has meticulously and quite efficiently resolved the issue for determination in this application. I am in total agreement with both the reasons
B marshalled to arrive at the conclusion that this application lacks merit and ought to be struck out.

I am surprised that the applicants who were neither parties at the trial court nor at the court of appeal could wake up one morning and file an application in this matter describing themselves as “Appel-
C lants/Applicants.” By this action, they have not only altered the names of the parties as they appeared on the proceeding at the two lower courts, they have also sacked the original parties without recourse to the court. This is unprecedented and does not find protection under
D any existing law or rule of court.

I agree with the submission of the learned counsel for the respondents that if the applicants, who are non named parties in the suit are seeking to have their names reflected as parties, they must bring an application in the existing proceedings and duly serve all the
E parties in the existing suit. It is not for them to incept the appeal in the manner they have done in this case only to seek leave to activate a void judicial process. The “*Appellants/Applicants*” failed to take this noble step. It is fatal to their application.

It is for the above reasons and the more elaborate ones in the
F lead ruling that I agree that this application lacks merit and is accordingly struck out.

SANUSI JSC

I had the advantage of reading in advance, copy of the draft ruling just rendered by my learned brother, C.C. Nweze JSC. His lordship has painstakingly addressed all the issues canvassed by the learned counsel of the parties in this application. I am at one with the
H reasoning and the conclusion arrived at, that this application is devoid of any merit and deserves to be refused and struck out.

It is discernible from the record of appeal that the present applicants have completely changed the character and names of the parties as they were portrayed at the trial court and the court below

too, without seeking and obtaining leave of the court. This, I am afraid, they have no power so to do. I must emphasise here, that character or identity of a suit should always remain the same right from the inception of the suit and also must be maintained throughout the duration or pendency of the case unless, leave was sought and obtained from the court, appellate or otherwise, to change it. In this instant application, there is no evidence that any such leave of court was sought and obtained earlier. B

To further buttress the point I am raising supra, it can be noted from pages 323 to 327 of the record, that the Notice of Appeal which is the originating process reflected the names of the appellants as below :- C

“1. *Ejiofor Apeh*
2. *Ude Celestine*
3. *Ossai Moses (On behalf (sic) of unnamed parties on Record)* as appellants.” D

But in the instant application, the names and nomenclature of the appellants as applicants in the motion, read thus:-

“1. *Ejiofor Apeh*
2. *Ude Celestine*
3. *Ossai Moses (For themselves and on behalf of other ward delegates elected for Enugu State on 1st November 2014)* “ E

To my mind, the two different features and characters given in the notice of appeal, vis a vis, the present motion, have no doubt portrayed dissimilarity of interest and representation. They are very vital and fundamental and were therefore, fresh introduction of characters and interests which can obviously not be introduced by the applicant without prior application for leave which said leave can only be grantable by the court. This is not the position in this instant application, especially if one considers the plain fact that there is disparity of interests. Again, the original plaintiffs/respondents have been totally excluded from these proceedings. The application for substitution is therefore left with no base to stand on. F

Thus, for these and the detailed reasons ably marshalled in the lead ruling, I do not find any merit in this application. I therefore have no option but to refuse and strike it out. I accordingly do same. H