

SUPREME COURT OF NIGERIA
FRIDAY 7TH OCTOBER, 2016. SC. 735/2015(R)
CORAM:- O. RHODES-VIVOUR, M. D. MUHAMMAD,
C. B. OGUNBIYI, C. C. NWEZE, A. SANUSI, JJSC

1. PEOPLES DEMOCRATIC PARTY
2. THE NATIONAL WORKING COMMITTEE
OF PEOPLES DEMOCRATIC PARTY APPELLANTS
AND
1. HON. DR. PATRICK O. ASADU
2. ENGR. NEWTON I. UGWUEGEDE RESPONDENTS
3. INDEPENDENT NATIONAL
ELECTORAL COMMISSION

MOTIONS - Supreme Court- Discretionary application - Revisiting of - Applicant whose application is dismissed - Can apply to set aside the dismissal order - But same must be vacated before his latter application can be heard (H1)

ACTIONS - Striking out - Reenlistment - Appellant whose case was struck out - Can reapply to same Court - To have the case reenlisted - Provided he satisfies Court to exercise discretion in his favour (H2)

FACTS

Before the Supreme Court, appellants/applicants brought a Motion on Notice filed on 19th April 2016, seeking, inter alia, for an Order extending time for appellants to seek leave of the Court to appeal on grounds of mixed law and facts and an Order granting leave to appellants to appeal on grounds of mixed law and facts against the said judgment of the Court of Appeal delivered on 1st July 2015. In support of the motion is a 23-paragraph affidavit deposed to by Chinedu Ezeh, Esq., a legal practitioner in chambers of learned counsel for applicants.

Annexed to the motion are documents marked exhibits A, B, C, D, E. 1st respondent filed a 9-paragraph counter affidavit deposed to by Victor Emenike Esq. a legal practitioner in chambers of learned counsel for 1st respondent. Annexed thereto is a Ruling of

the Supreme Court rendered on 11th April, 2016. No counter affidavits were filed for 2nd and 3rd respondents. At the hearing of the application learned counsel for applicants adopted his written address and urged the Court to grant his six reliefs. Opposing the application, learned counsel for 1st respondent observed that the Motion was heard on the merits and dismissed, submitting that the Court cannot go back to it as dismissal is dismissal.

HELD (Unanimously striking out the application per **RHODES-VIVOUR JSC**)

MOTIONS - Filing - Identical applications

1. After an application which can only be granted at the discretion of the Court is dismissed, that ought to be the end of the matter, but this being the top Court, an applicant should file an application seeking an order of Court setting aside the order of dismissal. Such an application calls on this Court to exercise its discretion in the applicants' favour, and under the inherent jurisdiction of this Court. This is so because the order of this Court dismissing an identical application on 11/4/2016 still subsists. The order of dismissal must be set aside before an identical application can be heard. In the circumstances, it is premature to file this application when order of dismissal has not been vacated. (p. 4558 A)

ACTIONS - Striking out - Reenlistment

2. Explaining the above, this Court held that the rules supra, empower the appellant whose case was struck out to re-apply to the same Court to have their case relisted, heard and determined. This is a case where the applicants' application was dismissed. This being the top Court, final in all respects, has wide discretionary and inherent powers to consider applications that are dismissed, but this would only be done if the applicant is able to satisfy this Court to exercise its discretion in his favour and set aside its Order of dismissal. It is only after that is done that the application can be heard. (p. 4558 G)

NOTABLE POINT OF INTEREST

RHODES-VIVOUR JSC

1. Depositions in affidavits – Extent of

I now consider the cases relied on by learned counsel for the appellants, *Yahaya v. F.R.N.* (2008) ALL FWLR (Pt. 439) P. 478 p. 489 Para E. The leading Judgment was written by me. Page 489 paragraph E referred to, highlights the position of the law that depositions in affidavits must address or explain crucial and material issues and that a counter affidavit is unnecessary if depositions in affidavit in support of the motion are moonshine.

The same position was explained in *Oloye v. C.P.M.B. Ltd.* (2008) 15 NWLR (PT. 1110) P. 335, 362 para C-D. Where the Supreme Court observed that affidavit evidence is not sacrosanct. (p. 4558 D)

REPRESENTATION

P. I. N. Ikweto, SAN with G. C. Igbokwe (SAN), C. Ogonofi, C. D. Ezeh, O. D. Soyabo and C. C. Emekekwe, for the Appellants
P. Ozoilesike with E. Adaeze and Nwachkwu Ada Doris for 1st Respondent

S. I. Ameh, SAN with him, A. Ugwanyi, D. M. Idoko, R. O. Mohammed, A. J. Shuaibu, L. Korabe and A. S. Yusuf for 2nd Respondent

A. A. Umar with A.G. Ismail for 3rd Respondent

CASES REFERRED TO

Alor v. Ngene (2007) 17 NWLR (pt. 1062) 163

Okoye v. Centre Point Merchant Bank Ltd (2008) 15 NWLR (pt. 1110) 335

Yahaya v. F.R.N. (2008) All FWLR (pt. 439) 478

Oloye v. C.P.M.B. Ltd. (2008) 15 NWLR (pt. 1110) 335

STATUTE & RULES REFERRED TO

Electoral Act 2010 (as amended), s. 87(9)

High Court Rules of Anambra State 1988, O. 24 r. 16

LEAD JUDGMENT BY RHODES-VIVOUR JSC

The appellants/applicants' motion on Notice filed on 19 April 2016 is for the following six reliefs.

1. An Order extending time for the Appellants to seek leave of the Supreme Court to appeal on grounds of mixed law and facts against the judgment of the Court of Appeal Abuja delivered on 1st July, 2015.

2. An Order granting leave to the Appellants to appeal on grounds of mixed law and facts against the said judgment of the Court of Appeal delivered on 1st July 2015.

3. An Order extending time for the Appellants to appeal on grounds of mixed law and facts against the said judgment of the Court of Appeal delivered on 1st July 2015.

4. An Order deeming the Notice of Appeal dated 15th September 2015 and filed on 16th September, 2015 as it concerns Grounds 2 - 9, as properly filed and served.

5. Leave to adduce additional documentary evidence which were not tendered at the trial Court and the Court of Appeal to wit:

The Extract of the Minute of Meeting of the National Working Committee (NWC) of the People Democratic Party held on Wednesday, 17th December, 2014 at which the report of the Electoral Panel and Appeal Committee on the Primaries in Enugu State were considered and decision taken to approve the nomination of Engr. Ikechukwu Ugwuegede as the Official candidate of the PDP for the Igbo-Eze South/Nsukka Federal Constituency, Enugu State.

6. Leave to raise/argue an issue of jurisdiction not argued in the Courts below, which said issue of jurisdiction is that the 1st Respondent is not competent to maintain/institute this suit thereby robbing the Honourable Court for the jurisdiction to entertain same on the grounds that:

(a) Section 87 (9) of the Electoral Act 2010 (as amended) merely confers locus standi on an aggrieved aspirant to approach a Court of Law for redress in respect of issues arising from the nomination/primary election exercise of his or her Political Party.

Section 87 (9) does not derogate from the prerogative right and final authority of a Political Party on the issue of its choice of candidates for elective officers not even in the face of breaching its

rules and regulations.

(b) By the doctrine of estoppels, the 1st Respondent having unequivocally agreed to be bound by and not to challenge any decision of the National Working Committee (2nd appellant) is estopped from instituting this suit.

In support of the motion on Notice is a 23-paragraph affidavit B
deposed to by Chinedu Ezeh, Esq., a legal practitioner in chambers of learned counsel for the appellant/applicants'. Annexed to the Motion are documents marked exhibits A, B, C, D, E.

The 1st Respondent filed a 9-paragraph counter affidavit C
deposed to by Victor Emenike, Esq, a legal practitioner in chambers of learned counsel for the 1st Respondent. Annexed thereto is a Ruling of this Court rendered on 11th April, 2016. No counter affidavits were filed for the 2nd and 3rd Respondents.

At the hearing of the application on 29th September 2016 D
learned counsel for the appellants/applicants, Mr. P.I.N. Ikweto SAN., adopted his written address, relied on *Alor v. Ngene* (2007) 17 NWLR (Pt. 1062) p. 163; *Okoye v. Centre Point Merchant Bank Ltd* (2008) 15 NWLR (pt. 1110) p. 335; *Yahaya v. F.R.N.* (2008) ALL FWLR (Pt. 439) p. 478 and urged us to grant his six reliefs. Opposing the E
application Miss P. Ozoilesike observed that the Motion was heard on the merits and dismissed, submitting that this Court cannot go back to it as dismissal is dismissal.

Learned counsel for the 2nd respondent, Mr. S.I. Ameh, SAN F
and learned counsel for the 3rd respondent A. A. Umar did not oppose the application.

On 11th April, 2016 this Court heard an identical application G
filed by the appellants/applicants' learned counsel. The application also had the same suit number as this suit, i.e. SC.735/2015. After an interpartes hearing on 11th April, 2016 this Court, Onnoghen, JSC delivered a Ruling which runs as follows:

"Motion filed on 28/10/2015 is dismissed for being incompetent as same is not in conformity with the provisions of Order 6 Rule 2 of the Supreme Court Rules...." H

The application was dismissed because the applicant did not attach the judgments of the lower Court to his application.

All that learned counsel for the appellant has done is to file

an identical motion as that dismissed on 11/4/2016 with the same Appeal number and annexures which were not attached to the application that was heard on 11/4/2016. This is a wrong approach.

After an application which can only be granted at the discretion of the Court is dismissed, that ought to be the end of the matter, but this being the top Court, an applicant should file an application seeking an order of Court setting aside the order of dismissal. Such an application calls on this Court to exercise its discretion in the applicants' favour, and under the inherent jurisdiction of this Court. This is so because the order of this Court dismissing an identical application on 11/4/2016 still subsists. The order of dismissal must be set aside before an identical application can be heard. In the circumstances, it is premature to file this application when order of dismissal has not been vacated.

I now consider the cases relied on by learned counsel for the appellants'. Yahaya v. F.R.N. (2008) ALL FWLR (Pt. 439) P. 478 p. 489 Para E. The leading Judgment was written by me. Page 489 paragraph E referred to, highlights the position of the law that depositions in affidavits must address or explain crucial and material issues and that a counter affidavit is unnecessary if depositions in affidavit in support of the motion are moonshine.

The same position was explained in Oloye v. C.P.M.B. Ltd. (2008) 15 NWLR (PT. 1110) P. 335, 362 para C-D. Where the Supreme Court observed that affidavit evidence is not sacrosanct. Both decisions are irrelevant in deciding whether an application that has been dismissed can be revived and heard by the Court. Alor v. Ngene (2007) 17 NWLR (PT. 1062) P. 163, 177 para E, explained Order 24 Rule 16 of the High Court of Anambra State, 1988 which provides that:

"Any cause or matter struck out may, by leave of the Court be relisted on such terms as the Court may seem fit."

Explaining the above, this Court held that the rules supra, empower the appellant whose case was struck out to re-apply to the same Court to have their case relisted, heard and determined. This is a case where the applicants' application was dismissed. This being the top Court, final in all re-

spects, has wide discretionary and inherent powers to consider applications that are dismissed, but this would only be done if the applicant is able to satisfy this Court to exercise its discretion in his favour and set aside its Order of dismissal. It is only after that is done that the application can be heard.

In the light of all that I have been saying, this application is premature and it is hereby struck out.

MUHAMMAD JSC

I read in draft the lead ruling of my learned brother Rhodes-Vivour JSC, and adopt same as mine. I abide by the consequential orders made in the very ruling.

OGUNBIYI JSC

I read in draft the lead Ruling of my learned brother Rhodes-Vivour, JSC just delivered. I agree that the application is premature and should be struck out.

I just wish to say briefly that without an application to set aside the dismissal order made by this Court on the 11/4/16, the applicant cannot by law access the exercise of any discretion from the Court. In other words, the application filed on 19th April, 2016 is tantamount to putting the cart before the horse. An order of Court will remain extant always until set aside. The applicant in this case has failed to invoke the jurisdiction of this Court to entertain his application. He cannot be obliged as a matter of course. The application is hereby struck out also by me.

NWEZE JSC

I had the advantage of reading the draft of the lead Ruling which my Lord, Rhodes-Vivour, JSC just delivered now. I agree with the reasoning and abide by the consequential order therein.

SANUSI JSC

A draft copy of the Ruling just delivered by my learned brother Olabode Rhodes-Vivour JSC was made available to me before now. I am in entire agreement with the reasoning and conclusion arrived at by learned brother in the lead Ruling and adopt same as mine.

B I shall only add by way of emphasis, that where an application is struck out, the applicant is at liberty to re-apply to the Court for the hearing and determination of his fresh application seeking the same reliefs and the Court has discretion not to hear the fresh application and use its discretionary power to grant or refuse same.

C In this instant application, a similar application was made to this Court either and this Court dismissed it. The present applicant is now bringing the same application with same prayers/reliefs. In my humbly view, as it is now, this Court can entertain this fresh applica-
D tion because a similar one had been filed, argued and dismissed. It could have been otherwise, if the earlier application was merely struck out. The learned senior counsel for the applicant did not urge this Court to exercise its discretion to set aside the dismissal order it handed down in the first or earlier application. That would have been the
E ideal thing he should have done, which he unfortunately failed to do. For these reasons I also will refuse to grant application as such I accordingly refuse it.

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