

1. ALHAJI UMAR MUSA YAR'ADUA
 2. DR. GOODLUCK JONATHAN
- V
1. ALHAJI ATIKU ABUBAKAR, GCON
 2. SENATOR BEN OBI
 3. ACTION CONGRESS
 4. PEOPLES' DEMOCRATIC PARTY (P.D.P.) AND 819 ORS.

SUPREME COURT OF NIGERIA

IDRIS LEGBO KUTIGI CJN (Presided and Read the Lead Judgment)
ALOYSIUSIYORGYER KATSINA-ALU JSC
NIKITOBIJSC
DAHIRU MUSDAPHER JSC
GEORGE ADESOLA OGUNTADE JSC
ALOMAMARIAM MUKHTAR JSC
WALTER SAMUEL NKANU ONNOGHEN JSC

SC.274/2007

FRIDAY, 12 DECEMBER 2008

COURT - Abuse of court process - Re-litigation of identical issue decided against a party or issue unviable by subsequent event as an abuse of process of court

PRACTICE AND PROCEDURE - Identical issue decided against party or issue unviable by subsequent events - Relitigation of as abuse of court process

Issue:

Whether the appeal is competent when the final judgment of the trial court was delivered in favour of the appellant.

Facts:

Invoking the original jurisdiction of the Court of Appeal under section 239(1)(a) of the Constitution of the Federal Republic of Nigeria, 1999, the respondents herein filed a petition against the appellants.

The appellants in a preliminary objection challenged the competence of the petition. The objection was dismissed. Aggrieved, the appellants appealed to the Supreme Court.

While the appeal was pending at the Supreme Court, the petition went on to trial at the Court of Appeal. The appellants re-argued their objection therein and with this in view, the Court of Appeal dismissed the petition. The petitioner/respondent have thus filed a preliminary objection against the pi (-sent interlocutory appeal contending inter alia that the keeping alive of (he appeal and the act of re-arguing at the lower court, the issue which led to the ruling being appealed against, constituted and abuse of court process inline with the decision of the Supreme Court *Agwasim v. Ojichie* (20M) All FWLK (Pt. 212) 1600, (2004) 10 NWLR(Pt. 882) 613.

Held: (Dismissing the appeal)

Relitigation of identical issue decided against a party or issue made unviable by subsequent events as abuse of court process -

It is an abuse of process for a plaintiff to relitigate an identical issue which had been decided against him. So also is where proceedings which were viable when instituted have by reason of subsequent events become inescapably doomed to failure. In the instant case, the judgment of the

trial court was in favour of the appellant; therefore, the appeal had become academic and was rightly dismissed by the court. [Agwasim v. Ojichie (2004) All FWLR (Pt. 212) 1600, (2004) 10 NWLR (Pt. 882) 613; Onycabuchi v. I.N.E. C. (2002) FWLR (Pt. 103) 453, (2002) 8 NWLR (Pt. 769) 417; Union Bank of Nigeria v. Edionseri (1988) 2 NWLR (Pt. 74) 93; Olale v. Ekwelendu (1989) 4 NWLR (Pt. 115) 326 referred to] [P. 677, Paras. E-F]

Nigerian Cases Referred to in the Judgment:

Agwasim v. Ojichie (2004) All FWLR (Pt. 212) 1600, (2004) 10 NWLR (Pt. 882)613
Olale v. Ekwelendu (1989) 4 NWLR (Pt. 115) 326
Onyeabuchi v. I.N.E.C. (2002) FWLR (Pt. 103) 453, (2002) 8 NWLR (Pt. 769)417
Union Bank of Nigeria v. Edionseri (1988) 2 NWLR (Pt. 74) 93

Nigerian Statute Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria, 1999, section 239(1) (a)

Counsel:

Chief Wole Olampekun SAN (with him, Yusuf All SAN, Dr. Alex A Izmyon SAN, D. D. Dodo SAN, K.T. Turaki SAN, Prof. Fidelis Oditah SAN, Mohammed Adoke SAN, Maureen Onyuike (Miss), K. D. Eleja Esq., S. A. OkeEsq, Alex Akoja Esq., S. A. Babakebe Esq., Precilla O. Odita Esq., Kabir Akingbolu Esq., Waheed Gbadamosi Esq., Euben Amedu Esq., Abimbola Kayode Esq., D Abdulaziz Ibrahim Esq., Adamu Abbas Esq., F. O. Izinyon Esq., E. Oghojiafor Esq., Oluwasiji Alabi (Miss) KaunaPenzinEsq., Kalat Bagaiya Esq., Aihunegbe Malik Esq., Olugbenga Adeyemi Esq., Olusij ibomi Alabi, Chinedu Umeh Esq., Chief Nkereuwem U. Akpan, V. O. Awomolu (Miss) Bon. Nwakama) -for the Respondents/ g Appellants.

Prof. Nwabuze SAN (with him, Prof. A. B. Kasunmu SAN, Alhaji Abdullah: Ibrahim SAN, Rickey Tarfa SAN, Chief Adeniyi Akintola SAN, Chief Emeka Ngige SAN, Adetunji Oyeyipo SAN, Chief Titus Ashaolu SAN, Omar Shittien Esq., Dr. M. Ladan Esq., H. A. Nganjiwa Esq., Wole Iyamu Esq., A. J. Owonikoko Esq., I.O. Odubela Esq., I.O. Babayemi (Mrs.), Gabriel Tsenyen Esq., Rotimi Oguneso Esq., Bamidele Aturu Esq., Festus Keyamo Esq., Suleiman Usman Esq., Abiodun Dada Esq., R. Okotie-Eboh (Miss), Gbolahan Gbadamosi Esq., D. Bassi (Mrs.) O. Ampitan(Mrs), T. Osadare Esq., Y. Pitan Esq., E. Okodaso (Miss), T.J. Aondo Esq., C. Nwiyi Esq., G Abdul Oroh Esq.) - for the Petitioners/Respondents. Chief Gadzama SAN (with him, Chief Bolaji Ayormdc.SAN, Chief Duro Adeyele SAN, Paul Bokoro SAN, Prof. Bolaji Owosanye, Chief Oluwole Oke, R. A. Laurel Rabana Esq., Alhaji R. O. Yusuf, A. C. Uzioko, Esq., Chief Obi Nbakure, Z. E. Abdullahi Esq., Akuyibo H Owokori Esq., C. P. Ohi Esq., S. I. Bamgbose (Mrs.), C. O. Egbase (Ms.), D. H. Bwala Esq., Y. A. Yanla Esq., Maryam Kayan (Miss), A. H. Ringim Esq., Dayo Babalola Esq.) -for the 4th Respondent. Chief Kanu Agabi SAN (with him. A. B. Mahmoud SAN. Amaechi Nwaiwu SAN, O. O. Uzzi Esq., Wole Adebayo Esq. O. S. Obande Esq., Musa Elayo Esq., C. U. Ekomaru Esq., Okon Efui Esq.. O. O. Obono-Obla Esq., Irene Ideva (Mrs.), P. O. Ofikwu Esq., R. A. UmiornEsq., Ayo Akam Esq., Chuka Ugwu Esq., Patience Osasiede (Miss), Rita N. Oga (Mrs.) Darracott Osawe Esq., Adam Abdullahi Esq., Egang Agabi Esq., Ifunanya O. Obumselu (Mrs.) JolmOchogwu Esq., O. M. Enebeli (Mrs.), A. Ugar (Miss), A. Sadanki Esq.) - for the 5th to 808th Respondents.

Dr. Bello Fadile (with him, Ikechukwu Maledo) - for the 810th Respondent.

KUTIGI CJN (Delivering the Lead Judgment): This is an interlocutor' appeal against the ruling of the Court of Appeal, holden at Abuja, delivered on 20 September 2007 in exercise of its original jurisdiction under section D 239(l) (a) of the Constitution wherein the court dismissed

respondents' appellants: motion on notice objecting to the petitioners/respondents: petition and praying the court to either dismiss or strike it out.

The ruling of the lower court being appealed can be found on pages 2004 - 2005 of Volume 5 of the record. It is very short and reads thus:

"It is trite law that in interlocutory stage, issues that call for determination in the main case should be avoided. The issues of joinder and inconsistent claims are not jurisdictional matters but were irregularity which can be sorted at the hearing or the petition. I see no proper challenge of jurisdiction in the two applications. This court has full jurisdiction to entertain the petition to enable all parties to ventilate their cases on merit.

Accordingly, I dismiss both applications".

While this appeal is still pending in this court, the case proceeded to trial in the Court of Appeal and final judgment was entered against the petitioners/respondents on 2d February 2008.

It is clear from the final judgment that counsel on both sides as well as the court adverted their minds to the interlocutory ruling above, and that respondents/appellants' motion which was re-argued in fact finally succeed when the court below struck out the petitioners/respondents' alternative grounds in the petition.

I am quite aware of the fact that this aspect of the final judgment is still being challenged in an appeal against the final judgment of the Court of Appeal referred to above. That appeal is not the same as this appeal and I cannot therefore decide the matter here. That is enough by way of introduction. The petitioners/respondents had filed a notice of preliminary objection to this interlocutory appeal on the following grounds among others:

- (a) That appellants have re-argued the issue that arose in this interlocutory appeal before the lower court while this appeal was pending.
- (b) The decision upon the re-argument was in favour of the appellants.
- (c) The decision upon the re-arguing the issues were contained in the final judgment of the lower court on 26 February 2008.
- (d) The continued prosecution of this appeal after the favourable judgment to the appellants in the lower court is an abuse of judicial process.
- (e) The abuse constituted in keeping the appeal alive and re-arguing the same issue in the lower court warrants a dismissal of the appeal in line with the decision of this court in *Agwasim v. Ojichie* (2004) All FWLR (Pt. 212) 1600, (2004) 10 NWLR (Pt. 882) 613 at 622-624.

There is an affidavit in support of the notice of preliminary objection. It was sworn to by one Osatohanmwun Akpata, one of the counsels representing the petitioners/respondents herein. Paragraphs 3, 4, 5,6,7,9 and 10 read as follows:

- "3. That the appeal herein was filed on 20 September 2007, against the ruling of the court of appeal delivered on the same date, wherein the preliminary objection of the appellants/respondents as respondents to the Presidential election petition of the respondents/applicants was dismissed.
4. That briefs were duly exchanged in respect of the appeal ever before trial in the lower court was concluded and the appellants filed their brief on 10 October 2007 while the respondents'/ applicants filed respondents' brief on 22 October 2007.
5. That on 5 February 2008, despite the pendency of this appeal, the appellants re-argued the objection dismissed in the ruling herein appealed against in their final addresses before the Court of Appeal.

6. That the decision upon re-arguing the objection was in favour of the appellants/respondents.
7. That the decision upon re-arguing the issues was contained in the final judgment of the lower court delivered on 26 February 2008. Attached herewith and marked exhibit A1 is the judgment of the Court of Appeal, where at pages 66 - 72, the objections were considered and upheld.
9. That the continued prosecution of this appeal after the favourable judgment to the appellants in the lower court is calculated against the respondents/applicant and miscourt to vex, irritate and put the judicial machinery to needless labour and expense.
10. That in the light of the grounds in support of this preliminary objection of which I depose to this affidavit, it will be in the interest of justice to dismiss the appellant/respondents' appeal as an abuse of court process.

The appellants filed a counter-affidavit through one of their counsel, Oladele Gbadayan, in opposition virtually admitting that the issues for determination in the interlocutory appeal were extensively re-argued and determined by the Court of Appeal in the final judgment but interlocutory appeal.

I agree completely with the above submissions of counsel for the D petitioners/respondents. The continued prosecution of this appeal by the appellants in view of available undisputed facts is clearly academic having been overtaken by events and, therefore, constituted a gross abuse of judicial process: *Agwasim v. Ojichie* 2004 All FWLR (Pt. 212) 1600, (2004) 10 NWLR (Pt. 882) 613. One may ask - what kinds of order do the appellants want from this court, now that the trial has been wholly completed and judgment delivered? Nothing, if I may answer. It is an abuse of process of court for a plaintiff to re-litigate an identical issue which had been decided against him: *Onyeabuchi v. LN.E. C.* (2002) FWLR (Pt. 103) 453, (2002) 8 NWLR (Pt. 769) 417 at 443. So also, where proceedings which were viable when instituted have by reason of subsequent events become inescapably doomed to failure as in this case. Merely withdrawing the appeal would have saved the appellants from this situation.

The appeal is clearly lifeless, spent, academic, speculative and hypothetical: *Union Bank of Nigeria v. Alhaja Bisi Edionseri* (1988) 2 NWLR (Pt. 74) 93; *Ekwelendu* (1989) 4 NWLR (Pt. 115) 326.

The preliminary objection therefore succeeds. It is allowed.

The appeal is accordingly struck out. I make no order as to costs.

KATSINA-ALU JSC: I have had the advantage of reading in draft the judgment of my learned brother, Kutigi CJN. I agree entirely with it and for the reasons he has given; I too uphold the preliminary objection and in consequence strike out the appeal. I also make no order as to costs.

NIKI TOBI JSC: I have read in draft the judgment of Honourable Justice Kutigi CJN, and I entirely agree with him. The preliminary objection succeeds and the appeal is accordingly struck out. I make no orders as to costs.

MUSD APHER JSC: I have read the ruling of my lord, Kutigi CJN, and this interlocutory appeal before now and I entirely agree with him, that the objection raised by the petitioners/respondents is well founded. The appeal of the appellants clearly is an abuse of the process of the court. The ruling, the subject matter of the appeal, correctly held that there was "no proper challenge to the jurisdiction" of the tribunal to deal with the petition of the petitioners. "The issues of joinder and inconsistent" grounds of the petition could be properly dealt with at the hearing stage of the petition. It is common ground that the issues were later discussed and a

decision was reached. The issues are, as mentioned in the ruling of the Chief Justice of Nigeria, subject to a sister appeal now pending in this court.

This appeal is clearly futile and serves no purposes. It is merely-speculative and academic. The preliminary objection succeeds and is allowed. The appeal is therefore incompetent and is struck out. I make no order as to costs.

OGUNTADE JSC: I have had the advantage of reading in draft a copy of the lead judgment just delivered by my learned brother, Kutigi CJN.

I agree with his reasoning and conclusion. I do not intend to add anything thereto.

I would also strike out this appeal. I abide by the consequential orders made in the lead judgment of my learned brother, Kutigi CJN including the order on costs. Appeal struck out.

MUKHTAR JSC: I have had the opportunity of reading in advance the lead judgment delivered by my learned brother, Kutigi C'JN. I agree that the appeal deserves to be struck out, and I hereby strike it out.

ONNOGHEN JSC: I have had the benefit of reading in draft, the lead H judgment of my learned brother, Kutigi Chief Justice of Nigeria, just delivered. I agree with his reasoning and conclusion that there is no longer a live issue in interlocutor appeal, the issues giving rise to the appeal having been subsequently dealt with by the lower court in its final judgment delivered on 26 February 2008, which issues so resolved together with others now constitute issues to be resolved by this court in appeal No. SC/72/2008 arising from the said final judgment of the lower court. A resolution of the issues in this interlocutory appeal at this stage will surely serve no useful purpose: it will clearly be an exercise in futility.

This appeal is therefore struck out. I abide by the consequential orders made in the lead judgment of my learned brother, Kutigi CJN including the order as to costs.

Appeal dismissed