**SENATOR ALPHONSUS UBA IGBEKE**

**V**

1. **LADY MARGERY OKADIGBO**
2. **INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)**
3. **PRINCE JOHN OKECHUKWU EMLKA**
4. **PEOPLES' DEMOCRATIC PARTY (PDF)**

*SUPREME COURT OF NIGERIA*

IBRAHIM TANKO MUHAMMAD JSC *(Presided)*

CHRISTOPHER MITCHELL CHUKWUMA – ENEH JSC
SULEIMAN GALADIMA JSC(*Read Lead Judgment)*

CLARA BATA OGUNB1Y1 JSC
STANLEY SHENKO ALAGOA JSC

SC. 179/2012

FRIDAY, 31 MAY 2013

*APPEAL- Preliminary objection - Nature of - Determination of – Effect of on appeal*

*APPEAL - Preliminary objection - Proper procedure for raising*

*COURT - Abuse of judicial process - Concept of - Impreciseness of- Multiplicity of actions on same issues as - Where established -Proper order to make*

*ESTOPPEL - Res judicata - Plea of - Nature of*

*ESTOPPEL - Res judicata - Doctrine of - Applicability of - Conditions precedent to - Successful plea of - Effect of*

*PRACTICE AND PROCEDURE - Litigation - Propriety of bringing an end to*

Issues:

1. Whether having regard to the facts and circumstances of this case, this appeal has not been caught by *estoppel per rem judicata* and issues involved have not become academic.
2. Whether as presently constituted, this appeal has not become an abuse of court process.

Facts:

The appellant was the plaintiff in the Federal High Court, Abuja. He had commenced an action against the respondents, praying the court to determine the rightful candidate of the 4th respondent for Anambra North Senatorial district. The trial court found in his favour. The 1st respondent being aggrieved filed an appeal to the Court of Appeal, where the appeal was allowed and the court declared her the rightful candidate, not satisfied, the appellant filed an appeal to the Supreme Court challenging the lower court's decision. He contended that it erred by holding that the trial court erroneously ignored the 1st respondent's counter affidavit and that it failed to make proper use of the affidavit evidence before it. The 1st respondent filed a motion seeking order of court dismissing and/or striking out the appeal on grounds that it had become academic, caught by *res judicata* and constitutes abuse of court process. The application was grounded on facts that a similar appeal arising from the judgment of the Court of Appeal had earlier been filed by the 3rd respondent and was determined by the Supreme Court.

**Held:** (Dismissing the appeal)

**1.** *Nature of preliminary objection and effect of determination of on appeal* -

**The preliminary objection raised by a party to the hearing of a matter or appeal is a threshold issue. It is that the appeal ought not be heard as it has no basis. The success of the objection to the hearing of an appeal is a preemptive step which has the effect of bringing the litigation to an end. On the other hand, if the objection is dismissed, the appeal will be determined on the merit.** [Mohammed v. Olawunmi **(1990) 4 SC 40, (1990) 2 NWLR (Pt.133) 458, (1990) 4 SCNJ 23 referred to]** [P. **1311,** paras. C - D]

**2.** *Prayer procedure for raising a preliminary objection to appeal* -

**The normal practice and procedure is to tile a notice of preliminary objection and incorporate arguments thereto in the respondent's brief of argument and hear both together as this makes for easier adjudication, but this practice is not exactly sacrosanct.** [P. 1319. paras. A - B]

**3.** *Nature of plea of res judicata* -

A plea of *res judicata* is a jurisdictional issue by which a court of law is being asked not to assume jurisdiction.

**[**P**.** 1317. para. E**]**

**4.** *Applicability of doctrine of res judicata, conditions precedent to and effect of successful plea of-*

**Where a final judicial decision has been pronounced by either an English or with certain exceptions, a foreign judicial tribunal of competent jurisdiction over the parties to and the subject-matter of the litigation, any party or privy to such litigation, as against any other party or privy thereto and in the case of a decision in rem, any person whatsoever, as against any**

**other person is** *estopped* **in any subsequent litigation from disputing** or **questioning such decision on the merits whether it be used as the foundation of an action or relied upon as a bar to any claim, indictment or complaint or to any-affirmative defence, case or allegation if but not less, the party interest raises the point of** estoppel **at the proper time and in the proper manner. For the doctrine of** *res judicata* **to apply, it must be shown that:**

**(i) The parties;**

**(ii) The issues; and**

**(iii) The subject matter in the previous action were the same as those in the action in which the plea was raised.**

**Once these ingredients of** *res judicata* **are established, the previous judgment** *estopps* **the party From making any claim contrary to the decision in the previous case. A plaintiff cannot bring an action based on an issue that has been competently and conclusively determined by a court of competent jurisdiction with certainty and solemnity. This is because, that will suggest that the action he has brought is abuse of the process of the court. A successful plea of** *estoppel pa rem judicata* **ousts the jurisdiction of the court before « bich it is raised. In the instant case, where there existed a judgment on same issues and same parties as the appeal filed by the appellant, the Supreme Court dismissed same.** [*Oduola v. Coker (1981.) 5 SC 197; Fadiora v. Gbadebo (1978) 3 SC 219, (1978) Afi NLR 42; Odjevwedje v. Echanokpe (1987) 3 SC 47. (1987) 1 NWLR (Pt. 52) 633; Adigun v. Governor of Osun Stair (1995) 3 NWLR (Pt. 385) 513, (1995) 3 SCNJ 1 referred to] [P. 1320, paras. F - H, P. 1312, paras. C - F. P. 1321, para. A]*

**5 .** *Propriety of there being an end to litigation –*

**There must be an end to litigation. In the instant case, where the appellant did not seek a consolidation of his appeal with a similar appeal when being earlier determined. Supreme Court dismissed the later appeal with same facts on same issues.** [*Omoiva v Macaulay* **(2009) 7 NWLR (Pt.113) 597;** *Santos v. Ikosi Industrial Ltd* **(1942) 8 WACA 29 referred to]** [P.1316, para F]

**6.** *Impreciseness of concept of abuse of judicial process, multiplicity actions on same matter as and proper order to make when established -*

**The concept of abuse of judicial process is not precise. It can be of infinite varieties and conditions. Multiplication of actions on the same matter can constitute an abuse of the process of the court as long as parties to the actions and the subject matter are the same. Where an action (including appeal) is or becomes an abuse of process of court, the process is liable to dismissal. In the instant case, where the parties and the issues are the same as the appeal earlier determined, the Supreme Conn dismissed the appeal.** [Ogoejeofo v. Ogoejeofo (2006) All FWLR (Pt. 301) 1792, (2006) 3 NWLR **(Pt.** 966) 205; Ikine v. Edjerode (2002) FWLR (Pt. 92) 1775, (2001) 12 SCNJ 184, (2001) 18 NWLR (Pt. 745) 446 referred to**]** [Pp. 1317 -1318, paras. F - B]

**Nigerian Cases Referred to in the Judgment:**

*7up Bottling Co. Ltd. v. Abioia & Sons (Nig.) Ltd (1995) 3 NWLR (Pt. 383) 257*

*Abalogu v. S.P.D.C. Ltd. (2003) FWLR (Pt. 171) 1627, (2003) 13 NWLR (Pt. 837) 308, (2003) Vbl. 10 MJSC 60, (2003) 6 SC (Pi. 1) 19*

*Achiakpa v. Nduka (2001) FWLR (Pt. 71)1804, (2001) 14 NWLR (Pt. 734) 623, (2001) 7 SCNJ 585, (2001) 7 SC (Pt. 1 i 1) 126*

*Adefulu v. Oyesile (1989) 5 NWLR (Pt. 122) 377*

*Adigun v. Governor of Osun State (1995) 3 NWLR (Pt. 385) 5 13, (1995) 3 SCNJ 1*

*Ajiboye v. Ishola (2006) All FWLR (Pt. 331)1209, (2006) 6 - 7 SC 1*

*Abide v Alemuloke (1988) 1 NWLR (Pt. 69) 207. (1988)2 SC (Pt.1)1*

*Amaefule v. State (1988) 2 NWLR (Pt. 75) 156*

*Arubo v. Aiyeleru (1993) 1 NSCC (vol. 24) 255, (1993) 3 NWLR (Pt.280) 126*

*Attorney-General, Ondo State v. Attorney-General, Ekiti State (2001) FWLR (Pt. 79) 1431, (2001) 9 - 10 SC 116. (2001) Vol. 50 WRN 1.(2001) 10SCNJ 117, (2001) 17 NWLR (Pt. 743) 706*

*Ayuva v. Yonrin (2011) All FWLR (Pt. 583) 1842. (2011) 10 NWLR (Pt 1254) 135*

*Balogun v. Ode (2007) All FWLR (Pt. 358) 1050, (2007) 1 - 2 SC 230*

*Buhari v. INEC (2008) 12 SCNJ (Pt. 1)91. (2008) 19 NWLR (Pt. 1120) 246. (2009) All FWLR (Pt. 459) 419*

*Central Bank of Nigeria v. Ahmed (2001) FWLR (Pt. 56) 670, (2001) 11 NWLR (Pt. 724) 369. (2001) 6 NSCQR 859, (2001) 5 SC (Pt. 11) 146*

*Dingyadi v. 1NEC (2011) All FWLR (Pt. 581) 1426, (2011) 10 NWLR (Pt. 1255)347*

*Ebba v. Ogodo (2000) FWLR (Pt. 27) 2094, (2000) 6 SC. (Pt. 1) 133*

*Eliochin v. Mbadiwc (1986) 1 NWLR (Pt. 141) 47*

*Emeka v. Okadigbo ( 2012) All FWLR (Pt. 651) 1426*

*Fadiora v. Gbadebo (1978) 3 SC 219, (1978) All NLR42*

*Harriman v. Harriman (1989) 5 NWLR (Pt. 119) 6*

*Igwego v. Ezeugo (1992) 6 NWLR (Pt. 249) 561*

*Ikine v. Edjerode (2002) FWLR (Pt. 92) 1775, (2001) 12 SCNJ 184, (2001)18 NWLR (Pt. 745) 446*

*Iyaji v. Eyigebe (1987) 3 NWLR (Pt. 61) 523*

Kwari v. Rago (2000) FWLR (Pt. 22) 1129

*Long-John v. Blakk (2005) 17 NWLR (Pt. 953) 1, (20051 All FWLR (Pt. 289) 1219 (2005) 10 SC 1*

*Maigoro v. Garb a (1999) 10 NWLR (Pt. 624) 555*

*Mohammed v. Olawwimi (1990) 4 SC 40. (1990) 2 N WLR (Pt. 133) 458 (1990)4 SCNJ 23*

*Nigerian Army v. lyela (2008) 7 - 12 SC 35. (2008) 18 NWLR (Pt. 1118)115, (2009) All FWLR (Pt. 452) 1012*

*Odjevwedje v. Echanokpe (1987) 3 SC 47, (1987) 1 NWLR (Pt. 52)633*

*Oduola v. Coker (1981) 5 SC 197*

*Ogbogu v. Ndirihe (1992) 6 SCNJ 301,(1992) 6 NWLR (Pt. 906) I*

*Ogoejeofo v. Ogoejeofo (2006) All FWLR (Pi. 301) 1792, (2006) 3NWLR(Pt. 966)205*

*Omnia Nig. Ltd. r. Dyk Trading (2000) FWLR (Pt. II)! 785. (2001) 7 SC 44*

*Omoiya v. Macaulay (2009) 7 NWLR (Pt. 1! 3) 597*

*Santos v. Ikosi Industrial Ltd. (1942) 8 WACA 29*

*Saraki r. Kotove (1992) 11/12 SCNJ 26. (1992) 9 NWLR (Pt. 264) 156*

*Ukaegbuv. Uguji (1991)6 NWLR (Pt. 196) 127*

*Umeh v. Iwu (2008»All FWLR (Pt. 418)362. 1 2008) 8 NWLR (Pt. 1089)225*

**Nigerian Statute Referred to in the Judgment:**

Court of Appeal Act, 2004, section 15

**Nigerian Rules of Court Referred to in the Judgment:**

Supreme Court Rules, Order 2, rule 9

**Counsel:**

Chief Wole Olanipekun. SAN [*with him,* Olugbenga Adeyemi, Esq. Paulyn Abhulimen, Esq. and AishaAli (Miss)] - for the Appellant/ Respondent.

Yusuf O. Ali, SAN (with him, Prof. W. Egbewole, Esq., A. O. Ojo. Esq., K. K. Eleja. Esq., R. O. Balogun, S. **A.** Oke, Esq., K.T. Sulyman (Miss), T. E. Akintunde (Miss), Esq.. K. O. Lawal. Esq., O. Ademiyiwa (Miss), KayodeEso, Esq., N. Aniesonam. Esq., E. A. Anehaver. Esq., S. Lamidi (Miss) and S. O. Giwa. Esq.) - for the 1st Respondent.

Ibrahim K. Rawa, Esq. [withhim,Tanimu Inuwa, Esq., Alhassan A. Umar, Esq., Rahima Aminu, Esq., Abdula/iz Sani, Esq., Ruth Nelson-Ndu (Mrs.) and Linda Etuk (Miss)] - for the 2nd Respondent.

J. K. Mbanefo - Ikwegbue, Esq. [with him, C. J. Chinwuba, Esq., and Uchenna Ogunedo (Miss)] - for the 3rd Respondent.

Chief OlajideAjana, Esq. (with him, Chief Olusola Oke, Esq., Prince John OlaMafo, Esq., Owukori Akuyibo, Esq., Promise Ogbadu. Esq., Gbadebo Ikuesan, Esq. and Mulikat Kiiani, Esq.) - for the 4th Respondent.

**GALADIMA JSC (Delivering the Lead Judgment):** This is an appeal against the decision of the Court of Appeal, Abuja Division delivered on 16 December 2011 in the consolidated appeals

CA/A/166/2011 (lady Margery Okadigbo v. Senator Alphonsus Uba Igbeke & Ors.) **CA/A/243/2011:** *(Prince John Okcclutkwu Emeka v. Senator Alphonsus Uba Igbeke & Ors.) and CA/A/28 1/2011 (Peoples' Democratic Party (PDF) v. Independent National Electoral Commission INEC & Ors.).* The said Court of Appeal had allowed the appeal which was filed by the 1st respondent herein based upon her appeal against the judgment of the Federal High Court. Abuja. In the said judgment which was delivered on 17 March 2012, the trial court found in favour of the plaintiff/appellant.

The appellant herein who was the respondent before the court below has brought this appeal to challenge the decision of the Court of Appeal which set aside the00trial court's decision, which recognized the appellant as the 4th respondent's candidate and the consequential order of the court below declaring the 1st respondent as the rightful candidate of the 4th respondent for the Anambra North Senatorial seat at the April 2011 general election.

From the 13 grounds of appeal contained in the amended notice of appeal, tire appellant formulated the following 3 issues for determination:

1. Having regard to the clear provisions of section 15 of the Court of Appeal Act, *vis-a-vis* the reliefs sought by the appellant at the trial court, whether the lower court was not in grave error and so acted without jurisdiction when it declared the 1st respondent as the candidate of the PDP for the Anambra North Senatorial District in the April, 2011 general elections. (Grounds 7,10,12, and 13)
2. Whether the lower court was not in grave error when it considered and countenanced the incompetent undated and unsworn counter-affidavits of the 1st respondent as well as the exhibits attached thereto and consequently declared the 1st respondent as the candidate of the PDP for the Anambra North

Senatorial District in the April, 2011 general elections**.** (Grounds 1,2,3,4,5,6 and 8).

3. Considering the questions presented for determination as well as the reliefs sought by the appellant at the trial court, whether the lower court was not in grave error when it discountenanced exhibits C-Cl and D-D 164 and placed undue reliance on exhibits PDP 3 in declaring the 1st respondent as the candidate of the PDP for the Anambra North Senatorial District in the April, 2011 general elections. (Grounds 9 and 11).

"On the other hand, the 1st respondent in her amended brief of argument submitted the following 3 issues for determination:

"1. Whether the Court of Appeal was not right in its decision that the trial court erroneously ignored the counter-affidavit filed by the 1st respondent and whether that decision of the Court of Appeal has occasioned any miscarriage of justice having regard to the totality of the facts and circumstances of this case?

2. Whether the Court of Appeal was not correct in upturning the decision n of the trial court that it failed to make proper use of the affidavit evidence before it to come to the decision that the appellant was a candidate of the 4th respondent for Anambra North Senatorial district when all the facts and circumstances of the ease is taken into consideration?

3. Whether the Court of Appeal in the circumstances was not right by invoking the provisions of section 15 of the Court of Appeal Act. 2004 to declare the 1st respondent at the April. 2011 general elections having regard to the totality of all available evidence in the record of the appeal?"

The 2nd respondent herein did not deem it necessary to file any brief of argument, hence, no issue was raised by them for the determination of the appeal.

On behalf of the 3rd respondent, his learned counsel in a brief filed originally on 5 March 2013 but deemed filed on 7 March 2013 has raised the following 3 issues for determination of the appeal:

"3. 1 Whether the Court of Appeal was right in setting aside (he-judgment of the lower court having regards to the court processes before it. (Grounds. 1, 2,3,4,5, and 6)

3.2 Whether the Court of Appeal properly invoked its power under section 15 of the Court of Appeal Act, 2004 to condone abuse of its processes by conferring jurisdiction on itself in declaring the 1st respondent candidate of 4th respondent. (Grounds 7, 8,9,10 and 11).

3.3 Whether the trial court, Court of Appeal and Supreme Court have the jurisdiction *ab initio* to declare any of the parties to the instant appeal candidates to the 4th respondent, having regards to the Electoral Act, 2011. (Grounds 12 and 13)."

The 4th respondent, on page 45 of their brief of argument filed on 28 February 2013 but deemed validly filed on 7 March 201.3, considers it necessary to adopt the issues set out by the appellant at page 11 of the appellant's brief of argument and as reproduced above for determination.

At the hearing of the appeal on 7 March 2013, learned counsel for the parties adopted their respective briefs of argument. It will be recalled that it was there and then that the learned senior silk Yusuf O. Ali, SAN drew our attention to the 1st respondent's, motion on notice dated 2 November 2012 but filed on 6 November 2012 together with the written address in respect of the said motion on notice. Having been satisfied that the motion and accompanying written address was duly served on all the parties and it was for all intents and purpose, a preliminary objection to the hearing of the appellant's appeal, the learned senior silk for the 1st respondent was allowed to move the motion. The argument and submissions of respective counsel are set out and will be considered soon**.**

The said 1st respondent's motion on notice is seeking the following reliefs;

"1. An order of this honourable court dismissing and/or striking out this appeal on the following grounds, among others:

i. The appeal has become academic and hypothetical having regard to the decision of this honourable court in appeal No. SC 69/2012 delivered on 6 July 2012.

ii. The appeal herein is caught by the principles of estoppel per rem judicata, issue estoppel and/or estoppel by standing by, having regard to the final pronouncement of this court in SC 69/2012 between the same parties

iii. The appeal herein is an abuse of court process and will not achieve any legal or useful purpose, having regard to the final judgment of this court in appeal No. SC 69/ 2012.

iv. The appeal No. SC 179/2012 is at all events, unmaintainable and a futile exercise court process so long as parties to the actions and the subject matter are the A same.

It is finally submitted that even though this appeal, at the lime offline was properly constituted, but as from 6 July 2012 when the decision in SC. 69/2012 was delivered, it has become spent and an abuse of process of court and as such, the appellant is bound by the decision of this court in SC. 69/2012.

In response to the 1st respondent's application, appellant has filed a counter-affidavit of 27 paragraphs. Attached to the said affidavit are 3 exhibits marked as exhibits A. B and C. A written address in opposition to 1st respondent's motion on notice was also filed on 13 November 2012. At the hearing of the appeal, the learned silk for the appellant, Chief Wole Olanipekun, SAN adopted (he written address as his argument in opposition to the motion on notice. The appellant submits

that the issue that arises for determination in the light of the respondent's application is as follows:

"Considering the facts and circumstances of this appeal, whether this honorable court would not refuse the respondent's application dated 2 November 2012."

The learned silk has argued die lone issue for determination under two sub-heads namely: firstly, that the appellant's appeal is not an abuse of court process: secondly, that the appellant's appeal is not academic or hypothetical. It is argued (under the first sub-head) that if the description of what constitutes the term "abuse of court process" as given in a number of authorities is applied to this ease at hand, then the respondent has failed to terminate this appeal *in limine* just on that ground. Reliance was placed on the cases of Saraki v. Koioyc (1992) 9 NWLR (Pt. 264) 156; Dingyadi v. /A'£C(2011 (All FWLR f Pt. 581) 1426.(2011) 10 NWLR (Pt. 1255)347; 7up Bottling Co**.** Ltd. v. Abiola & Sons (Nig.)Ltd. (1995) 3 NWLR (Pt. 383) 257; Ambo r. Aiyckru (1993) 1 NSCC (vol. 24) 255, (1993) 3 NWLR (Pt. 280) 126 and Umeh v. Iwu (2008) All FWLR(Pt.418) 362.(2008) 8 NWLR (Pt. 1089) 225 at 246. That if the element of "intention to in Tun.. harass and annoy and mala fide" are not shown to exist in this appeal, then the appellant must be allowed to exercise his constitutional right of appeal. G That it cannot be said categorically that the appellant abused or is abusing the process of this court when he had duly and timeously exercised his right of appeal before the decision of this court delivered on 6 July 2011 in SC 69/ 2012.

On the second subhead of the issue, the learned silk for the appellant has submitted that if this appeal is successful and the reliefs are granted, the outcome will confer practical utilitarian benefit on the appellant. That in this wise, it cannot be said that the appeal has become mere academic exercise. It is urged on us to note the nature oil be complaints embodied in the grounds of appeal in exhibit 'B' (the amended notice of appeal to this court) attached to the appellant's counter-affidavit which bordered on the fundamental issue

of the jurisdiction of the Court of Appeal *vis -a -vis* the provisions of section 15 of the Court of Appeal Act and also the sacrosanct issue of the breach of the appellant's constitutional right to fair hearing

Above is the summary of the objections raised to the hearing of the appeal by the 1st respondent and the submissions of learned counsel for the parties. In his brief the learned silk for the appellant has urged this court to note that this application alleging abuse of court process, is in itself an abuse of the process of this court, relying on Order 2, rule 9 of the Rules of this court. With due respect. The interpretation given to rule 9 of Order 2 of this rules of this court is preposterous, weak and tenuous. The preliminary object son raised by a party to the hearing of a matter or appeal is a threshold issue. It is that the appeal ought not to be heard as it has no basis. For the success or the objection to the hearing of an appeal is a pre-emptive step winch has the effect of bringing the litigation to an end. On the other hand if the objection dismissed, die appeal will be determined on the merit. This court has in a plethora of decisions considered the preliminary objection along with the hearing of tire substantive appeal. *See Suleiman Mohammed & Anor. v. Lasisi Sanusi Olawunmi* (1990) 4 SC 40, (1990) 2 NWLR ( Pt. 133) 458, (1990) 4 SCNJ 23; Maigoro v. Garba (1999) 10 NWLR (Pt. 624) 555. However, in an appropriate case and depending on the circumstance. the step taken by the 1st respondent in this matter is prone" in the light of the foregoing, before considering the two issues raised the 1st respondent in this application, I shall be brief in stating the facts of this application. It is a fact that this appeal SC 179/2012 arose from the decision of the Court of Appeal, Abuja which set aside the decision of the trial. Federal High Court in which the 3rd respondent's suit was dismissed. Earlier this year, this court heard and determined appeal No. SC. 69/2012 between *Prince John Okechukwu Emeka v. Lady Margeiy Okadigbo & 4 Ors*. (2012) All FWLR (Pt. 651) 1426, in respect of the same judgment of the Court of Appeal. Enugu. in this matter and tire judgment was affirmed by this court. That appeal was brought by the 3rd respondent herein, that is Prince John Okechukwu Emeka against

all other parties including the appellant/respondent as 1st respondent/applicant herein.

The judgment in the said appeal SC.69/2012 was delivered on 6 July 2012, where tire instant appeal was pending before this court. The two appeals arose from tire same judgment. Appellant here actively participated in appeal SC. 69/ 2012. He never thought it necessary to ask the court to consolidate the two appeals, both of which have the same facts, substance and issues. It would appear that the grounds of appeal as contained in the two notices of appeal with which the two appeals were initialed arc substantially the same. The issues distilled from the grounds of appeals are also substantially the same. Hence, the similarities in the two appeals, to my mind are substantial and have added piquancy that urged the respondent to file this application in opposition to the hearing of this appeal SC. 179/2012

Now to the two issues formulated by the respondent which I shall consider *seriatim***.** The first issue borders on whether the question involved in this appeal having been completely and conclusively de-alt in SC. 69/2012 are still live issue and/or triable before this court. The respondent has argued that the decision of this court in SC/69/2012 constitutes *estoppel pet rem judicata***,** issue *estoppel* by standing by. Generally, this principle of law has long been settled in a plethora of divisions of this court notably *Fadiora v. Gbadebo; Ebba v. Ogodo*

For the doctrine to apply, it must be shown that.

(i) The parties.

(ii) The issues: and

(iii) The subject matter in the previous action were the same as those in the action in which the plea was raised.

Once these ingredients of *res judicata* are established, the previous judgment *estopps* the party from making any claim contrary

10 the decision in the previous case*: Long-John r. Blakk (2005) 17 NWLR (Pt. 953) 1. 12005) All FWLR (Pt. 289) 1219 (2005) 10 SC Ajiboye v. Ishola i2006j Ail FWLR (Pt. 331) 1209. (2006)6-7 SC :Balogun v. Ode (2007) All FWLR (Pt. 358) 1050. (2007; 1 - 2 SC. 230: Omnia Nig. Ltd. v. Dyk Trading (2000) FWLR (Pt. 11)1785 (2001) 7 SC 44*. A plaintiff cannot bring an action based on an issue that has been competently and conclusively determined by a court of competent jurisdiction with certainty and solemnity. This is because, that will suggest that the ac tion he has brought is abuse of the process of the court: *Achiakpa v. Nduka (2001) FWLR (Pt. 71)1804. (2001) 14 NWLR (Pt. 734) 623, (2001) 7 SCNJ 585, (2001) 7 SC (Pt. Ill) 126, Abalogu v. S.P.D.C. Ltd. (2003) FWLR (Pt. 171) 1627, (2003) 13 NWLR (Pt. 837) 308, (2003) Vol. 10 MJSC 60, (2003) 6 SC (Pt. 1)19; Iyaji v. Eyigebe (1987)3 NWLR (Pt. 61) 523 at 533.*

It is clear that appeal SC. 179/2012 and appeal No. SC 69/2012 both arose from the same judgment of the Court of Appeal which has been affirmed in its judgment delivered on 6 July 2012 in respect of the said appeal No. SC 69/2012.

Paragraphs 4 - 12 of the affidavit in support of the 1st respondent's motion make interesting reading and positively supports the said motion. These are reproduced as follows:

4. That I know as a fact that this honourable court delivered its judgment in SC 09/2012 between Prince John Okechukwu Emeka v. Lady Margery Okadigbo & 4 Ors. On 6 July 2012. A certified true copy of same is herewith attached as exhibit ‘1’.

5. That I know as a fact that all the issues in content between the parties to that appeal were finally revolted by this honourable court in the said judgment.

6. That I know as a fact that the appellant herein v. as the 4th respondent in the said appeal No. SC. 69/2012 which was decided by this honourable court in the applicant's favour on 6 July 2012.

7. That I know as a fact that the present appellant took very active part in the suit that culminated in this appeal at the trial court in the court below and in appeal No. SC.69/2012. in which judgment was delivered on 6 July 2012

8. Thai I know as a fact that both appeals No. SC.69/2012 and this appeal. SC/179/2012 arose from the same judgment of the Court of Appeal which has been affirmed by this honorable court in appeal No. SC. 69/2012.

9. That I know as a fact that the appellant and in fact, all the parties to this appeal herein are bound by the decision of this honorable court in SC. 69/2012 being parties who also took active part therein.

10. That I was informed by Oke Sikiru, Esq. on 2 November 2012 at 2pm at our office Ghalib House No. 4, Sakono Street. Off Adetokunbo Ademola Crescent, Wuse II, Abuja and I verily believed same as follows:

(a) That this appeal is a gross abuse of the process of tins court having regard to the judgment of this honourable court of 6 July 2012 in SC. 69/2012.

(b) That the issues in this appeal are the same as the issues resolved by this court in SC. 69/2012 on 6 July 2012.

(c) That since the issues have been resolved in the earlier appeal, this appeal has become an academic exercise and very hypothetical.

(d) That this appeal is a waste of the precious time and resources of this honourable court.

That this appeal is an attempt to draw this honourable court into sitting on appeal over its judgment of 6 July 2012 in SC. 69/2012

11. That I know as a fact that the 2nd respondent herein had issued the 1st respondent with the certificate of return and that she was sworn in as a Senator of the Federal Republic of Nigeria on 17 July

2012 and has been representing the people of Anambra North Senatorial District in the Senate since then.

12. That I know as a fact that it is in the interest of justice to strike g out or dismiss this appeal.

I have equally taken some pain to consider the appellants/respondent's counter-affidavit paragraphs 5-21, which are equally reproduced thus:

"5. 1 know that most of the grounds of the said application as well as the paragraphs of the affidavit of the said Alex Akeja are not coined and do not reflect accurately the facts of this appeal.

6. The appellant was the 4th respondent in suit number: SC. 69/ 2012 in which judgment was delivered on 6 July 2012.

*7.* Specifically, I know that paragraphs 5, 7, 10, 12 and 13 are not correct and do not reflect accurately the facts of this appeal.

*8.* The 1st respondent was the 4th respondent in appeal number: D CA/A/243/2011 - Prince John Okechukwu Emeka v. Senator Alp'nonsus Uba Igbeke and Others before the lower court.

*9.* The 1st respondent was the appellant in appeal number CA/cA/166/2011 - Lady Margery Okadigbo *v.* Senator *g* Alphonsus Uba Igheke and Others.

10. I know that appeal number: CA/A24 3/2011 was consolidated with appeal number: CA/A/166/2011 and appeal number: CA/ A/281/2011 - PDP v. IN EC & Ors. at the lower court.

11. On 16 December 2011, the lower court delivered its judgment in respect of the consolidated appeals, wherein it gave a separate decision in respect of appeal number: CA/A/243/ 2011 identified as appeal 2 by the lower court and in which the 1st respondent was the 4th respondent.

12. Being dissatisfied with the decision of the lone; court, die 3rd respondent to this appeal filed a notice of appeal in No. SC.69/2012 containing a narrow complaint against the decision of the lower court.

Attached herewith and marked as exhibit A is the notice of appeal in SC. 69/2012.

13. I know that the appellant has filed its amended notice of appeal in this appeal which contains a complaint mainly against the decision of the lower court in CA/A166/2011 - Lady Margery Okadigbo v. Senator Alphonsus Uba Igbeke and Others which the low e; court identified as appeal 1. Attached herewith and marked as exhibit B is a copy of the appellant's amended notice of appeal.

14. I know that prior to the filing of exhibit 'B', the appellant had filed within time, a notice of appeal dated 14 March 2012. Attached herewith and nm-ked exhibit C is a copy of the said notice of appeal.

15. I know now that exhibit B was filed in exercise of the appellant's right of appeal.

16. I know that exhibit 'B' raises fundamental jurisdictional issues as well as constitutional issues bordering on fair hearing.

17. I know as a fact that exhibit A and exhibit *B* contain different complaints.

18. I know as a fact i hat the record of appeal in this appeal was only served on appellant on or about 30 May 2012.

19. I know as the fact that the appellant has filed his brief of argument in this appeal since 6 June 2012.

20. I know that in his brief of argument filed on 6 June 2012. the appellant formulated three issues for determination from the thirteen ground- of appeal contained in exhibit 'B'

21. 1 have read the judgment o: this court in SC. 69/2012. delivered on 6 July 2012, and I knew that the issues decided by this honourable court in the said judgment are different and distinct from the issues formulated for determination by the appellant in this appeal.

The 1st respondent has for the umpteenth time argued that the decision of this court in SC/69/2012 constitutes *estoppel per rem judicata,* and as a jurisdictional issue, this court is hung asked not to assume jurisdiction by

virtue of r. previous judgment. The appellant on the other hand has submitted that his appeal is not caught by the principles of estoppel per rem judicata. It is not in dispute that this court delivered its judgment in SC.69/2012 on 6 July 2012 and resolved all the issues therein as it affects all the parties in that appeal finally.

The 3 issues winch this court considered in determination of that appeal are as follows:

*"1.* Whether the Court of Appeal and/or the trial conn had jurisdiction to determine who is the Peoples' Democratic Party's candidate for the Anambra North Senatorial District in the .April, 2011 general election from two parallel primary elections held on 8 January 2011 and 10 January 2011 respectively having regards to the provisions of the Electoral Act, 2010 (as amended).

2. Who among die following:

(a) Prince John Okechukwu Emeka

(b) Lady Margery Okadigbo

(c) Senator Alphonsus Uba Igbeke emerged as the winner of the PDP primaries conducted for the Senatorial g Seat for Anambra North in the general elections held in April, 2011.

.3. Whether the Court of Appeal was right in regarding the failure of the trial judge to determine appellants pending motion filed on 16 March 2011 as fresh issue that requires leave of Court of Appeal and it do not amount to denial of appellant's right to fair hearing for the Court of Appeal to deliver judgment in die appellant' appeal without determining the said motion."

In the instant appeal SC.179/2012, appellants issues set out in paragraph 30.0 PP. 11 -12 of his brief distilled from the grounds of appeal are identical to those in appeal SC. 09/2012 and are therefore substantially D the same. The suit which culminated into both appeal SC. 69/2012 and this appeal SC. 179/2012 begun at the trial of the Federal High Court and the subject matter, parties as well as the cause of action were the same right

from the Federal High Court through to the Court of Appeal up to this court. I do not agree with the contention of the appellant that he (as 1st respondent g in SC. 69/2012) was not heard in the matter. From the records, he had all the opportunities of bringing up any point he had wished or apply for consolidation of the appeals, since both are complaining against just decision as well as knowing fully well dun those issues raised in that appeal are the same as in his own appeal but would appear that the appellant herein decided to stand by and watch the 3rd respondent herein who was the appellant in that appeal to fight his battle for him. The appellant herein did exactly that and he should be bound by the outcome of the case and cannot be allowed to reopen the case. There must be an end to litigation. See *Omoiya v. Macmday* (2009) 7 NWLR (Pt. 113) 597 at 61***8;*** *Amenco Sunios v. Ikosi Industrial Ltd. & Ana: {*1942) 8 WACA 29.

By this appeal SC 179/2012, the appellant seeks to set aside the judgment of the Court of Appeal and in its stead, restore the judgment of tire Federal High Court, Abuja. This issue had been decided and the principle of issue *estoppel* clearly applies to this appeal against the appellant having regard to the decision of this court in SC/69/20! 2 delivered on 6 July 2012, H in which the present appellant, as a respondent canvassed similar issues to the ones he has been urging this court in this appeal.

Learned counsel for the 1st respondent has made some plausible suggestions as avenues opened to the appellant in the quagmire he (the appellant) has created himself. He pointed that there was neither cross-appeal nor respondent's notice filed in SC.69/2012 by the appellant herein and as such, he must be taken as having defended the judgment of the Court of Appeal in that appeal. He rightly submitted that the appellant herein will be and he is in the circumstance, actually *estopped* from raising any issue against the 1st respondent conclusively in that appeal. See *Eliocbin* v. *Mbadiwe* (1986)1 NWLR (Pt. 141) 47 at 68; *Adefulu* v: *Oyesile* (1989) 5 NWLR (Pt. 122) 377 at 417..

In view of the foregoing, it is my humble view that hearing of this appeal will have the effect of uniting this court to sit on its own decision having become *functus officio* on site issue submitted and conclusively dealt with it: SC 69/2912, which art on all fours as those in the present appeal. See *Nigerian Army v.Iyela* (2008) 7- 12 SC35, (2008) 18 NWLR (Pt. 1118) 115 (2019) All FWLR (Pt. 452) 1012: *Buhari v. INEC* (2008) 12 SCNJ (Pt. l) 91.(2008) 19 NWLR (Pt. 1120) 246 at 375- 375, (2009) All FWLR (Pt.459) 419.

The determination of the first issue in favour of the 1st respondent/ applicant leads us to his second issue which borders on whether or not this appeal as presently constituted is not an abuse of court process.

As I have, stated before, the success of objection to the hearing of an appeal is a pre-emptive step which in effect will bring the litigation to an end. A plea of *res judicata* is a jurisdictional issue by which a court of law is being asked not to assume jurisdiction. A preliminary objection when successfully utilized is capable of dew-nitiing the proceedings *in limine.* See *Ayuya v. Yonrin* (2011) All FWLR (Pt. 583)1842, (.2011)10 NWLR (Pi.; 1254) 135 m 160- 161: *Ukaeghu v. Ugoji* (1991) 6 NWLR (Pt. 196) 127 at 44 and Kwori r. Rago (2000) FWLR (Pt. 22) 1129 at 1142. The respondent has contended that this appeal, once found to be caught up by *res judicata*, it has become academic and hypothetical and an abuse of the process of court. The appeal will now bear endless appellations such as "lifeless", "spent" etc, that have made it a non-starter. The concept of abuse of judicial process is not precise. It involves some circumstances and situations such as in the instant case but that can be of infinite varieties and conditions. See *Ogoejeofo* v. *Ogoejofo.* However, its common feature is the improper use of judicial process (as in this case) by the appellant/ respondent herein. This court has said in a plethora of decisions that multiplication of actions on the same matter can constitute an abuse of the process of the court as long as parties to the actions and the subject matter are the same. In the instant case, the parties to this appeal are the same as in SC 69/2012. The issues submitted

for determination in this appeal are substantially and materially the same and the subject matter has always remained the same. For this, I am of the firm view that the appellant has not used the process of this court *bona fide* and properly. This constitutes abuse of process of court See *Ikine v. Edjerode* (2002) FWLR (Pt. 92) 1775,(2001) 12SCNJ 184,(2001) 18 NWLR (Pt. 745) 44b; *Central Bank of Nigeria v. Saidu Ahmed & Ors.* (2001) FWLR (Pt. 56) 670. (2001) 11 NWLR (Pt. 724)369, (2001) 6 NSCQR 859. (2001)5 SC (Pt. 11) 146.

Where an action (including appeal) is or becomes an abuse of process of court, this court in numerous authorities has held that the process is liable to dismissal.

In the light of the foregoing, I have arrived at an inevitable conclusion that the preliminary objection of the 1st respondent brought by way of motion on notice is sustainable, same is accordingly sustained. Consequently, the appeals No. 179/2012 having been found to be abuse of process of court is adjudged unmaintainable and has become academic, spent, speculative and hypothetical. It is accordingly dismissed. I award costs of N 100.000.00 (one hundred thousand naira) to the 1st respondent.

**MUHAMMAD JSC**: My learned brother, Galadima, JSC sustained the preliminary objections raised by the 1st respondent and the appeal has been found to be an abuse of process of court academic, and speculative. It has been dismissed by my learned brother, Galadima, JSC. I adopt his consequential orders given in the lead judgment including one on costs.

**CHUKWUMA-ENEH JSC**: I read in advance in draft the lead judgment prepared and delivered by my learned brother, Galadima, JSC and having dealt with all the issues raised for determination in the appeal satisfactorily, I agree with him that the appeal is immeritorious and should be dismissed. I endorse all the orders contained therein.

**OGUNBIYI JSC:** I read in draft the lead judgment just delivered by my learned brother, Suleiman Galadima, JSC and concur that the appeal ought to be dismissed for the comprehensive reasons and. conclusions arrived therein. I therefore adopt his judgment as mine and also dismiss the appeal in the like terms inclusive of the order made as to costs

ALAGOA JSC: When this appeal came up to be heard on 7 March 2013 learned counsel for the 1st respondent, Yusuf Ali. SAN drew the attention of this court to a pending motion which in essence was in the nature of a preliminary objection seeking to stop the appeal horn being heard.

The normal practice and procedure is to file a notice of preliminary objection and incorporate arguments thereto in the respondent's brief of argument and hear both together as this makes for easier adjudication but this practice is not exactly sacrosanct. In the present case, a written address accompanying the motion had not only been filed but also served on all the parties and this court found no reason not to hear the motion dated November 2012 but filed on 6 November 2012 which sought the following reliefs:

> "An order of this honourable court dismissing and/or striking out this appeal on the following grounds among others
>
> i. The appeal has become academic and hypothetical having regard to the decision of this honorable court in appeal No. SC.69/2012 delivered on 6 July 2012
>
> ii. The appeal herein is caught by the principle of *estoppel per rem judicata,* issue *estoppel* and/or *estoppel* by standing by, having regard to the final pronouncement of this court in SC.69/2012 between the same patties.
>
> iii. The appeal herein is an abuse of court process and will not achieve any legal or useful purpose having regard to the final judgment of this court in appeal No SC.69/2012.
>
> iv. The appeal No. SC.179/2012 is al all events unmaintainable and a futile exercise.

And for such further or other order(s) as this honorable court may deem fit to make in the circumstances of this case. The application was predicated upon the following grounds:

1. This honourable court delivered its judgment in SC.69/2012 on 6 July 2012 and resolved all the issues therein as u al lei is all the parties in that appeal finally.
2. The issues resolved in SC.179/2012 are the same with the issues in this as the parties to the two appeals are the same the subject matter the same and the questions for determination the same.
3. The appellant herein was the 4th respondent in appeal No SC. 69/2012 and proffered arguments in *tandem* with those contained in his appellant's brief of arguments in this case in the earlier appeal.
4. The appeal of the appellant herein is an invitation to this honourable court to review its judgment in suit No.SC. 69/2012 with a view to upturning same.
5. This appeal constitutes a gross abuse of the process of this honourable court in the circumstances.
6. The appeal has become an academic exercise and a waste of precious judicial time and resources of this honorable court.
7. The present appeal is caught by the principles of issue *estoppel per rem judicata* and *estoppel* by standing by.
8. It is in the interest of justice to strike out and/or dismiss this appeal.
9. The appeal will not serve any useful legal or factual purpose.
10. The applicant has been issued with certificate of return by the 2nd respondent and was sworn in as a Senator of the federal Republic of Nigeria on 17 July 2012.

The respondent countered these allegations.

There is a long line up of judicial authorities showing the applicability of *estoppel per rem judicata*

In Nwopara Ogbogu & Ors. v. Nwonuma Ndiribe & Ors. (1992) 6 SCNJ 301, (1992) 6 NWLR (Pt.906) 1, this court per Kabiri-Whyte JSC stated the principle that:

> "for a party to successfully invoke res judicata or the cause of action *estoppel* namely *estoppel per rem judicata*, it must be shown that the parties, the cause of action and *res* (subject matter) are the same in the earlier as well as the case before the court in which the plea is raised"

On this same principle, this court per Uwais, JSC (as he then was) in Prince Yaya Adigun & Ors. v. The Governor of Osun State & Ors. (1995) 3 NWLR (Pt.385) 513, (1995) 3 SCNJ 1 stated that:

"where a final judicial decision has been pronounced by either an English or (with certain exceptions) a foreign judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of the litigation, any party or privy to such litigation, as against any other party or privy thereto and in the case of a decision in rem, any person whatsoever, as against any other person is *estopped* in any subsequent litigation from disputing or questioning such decision on the merits whether it be used as the foundation of an action, or relied upon as a bar to any claim, indictment or complaint or to any affirmative defense, case, or allegation if but not less, the party interest raises the point of estoppel at the proper time and in the proper manner;' In Igwepo v. Ezeugo (1992) 6 NWLR (Pt. 249) 561, Ogundare JSC stated that:

> "a successful plea of *estoppel per rem judicata*" ousts the jurisdiction of the court before which it is raised." See generally Odutola v. Coker 0981) 5 SC 197: Fadiora v. Gbodebo & Anor. (1978) 3 SC 219. O 978) All NCR 42: Odjevwedje & Anor. v. Echonokpe (1987) 3 SC 47, (1987) 1 NWLR (Pt. 52) 633. It is being contended by learned senior counsel for the 1st respondent that appeal No. SC. 69/2012 and this appeal No. SC/179/2012 arose from the same judgment of the Court of Appeal which said judgment was affirmed in this court 's judgment

delivered on 6 July 2012 as it pertains to appeal No. SC. 69/2012. Were this correct, this court would unwittingly be sitting on appeal over its own judgment, it can be gleaned from the records that the two appeals earlier referred to emanated from the same judgment of the Court of Appeal. A close look at the grounds of appeal and the issues distilled front the grounds in both appeals show that they are substantially the same and all the parties to this appeal are bound by the decision of this court in SC.69/2012. Learned senior counsel for 1st respondent contends that this constitutes an abuse of process.

In Mrs. F.M. Saraki v. NAB. Kotoye (1992) 11/12 SCNJ 26, this court in considering what constitutes an abuse of court process held that "the multiplicity of actions on the same matter between the same parties even where there exists a tight to bring the action is regarded as an abuse."

See also Harriman v. Harriman (1989) 5 NWLR (Pt. 119)6: Central Bank of Nigeria v. Ahmed & Ors.. (2001) FWLR (Pt. 56)670, (2001) 11 NWLR (Pt. 724) 369. (2001! b NSCQR 859, (2001) 5 SC (Pt. 11) 146: Alade v. Alemuloke (1988) 1 NW LR (Pt. 69) 207, (1988) 2 SC (Pt. 1) 1 Ishmael Amaefule & Anor. V. The State (1988) 2 NWLR (Pt. 75) 156 where this court considered that even the reckless exercise of the very wide powers of die Attorney-General of a State could be an abuse of court process.

It is for this and the fuller reasons given by my learned brother, Suleiman Galadima, JSC in his lead judgment which I had the advantage of G reading before now and which I completely agree with that I too dismiss the appeal while abiding by the order on costs made in the said lead judgment.

Appeal dismissed