IN RE:

1. EJIOFOR APEH

2. UDE CELESTINE

3. OSSAI MOSES

(On behalf of other unnamed parties on record)

V.

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)

V.

1. BARRISTER ORJI CHINENYE GODWIN

2. CHIEF C.C.AKALUSI

3. CHIEF ORJI C. ORJI

(Suing for themselves and on behalf of delegates elected on the 1st November 2014 of the Ward Congress held for Enugu State)

SUPREME COURT OF NIGERIA

SC.428/2015

IBRAHIM TANKO MUHAMMAD. J.S.C. {Presided and Read the Leading Ruling)

MARY UKAEGO PETER ODILI, J.S.C

OLUKAYODE ARIWOOLA, J.S.C.

AMINA ADAMU AUGIE, J.S.C

EJEMBI EKO, J.S.C.

ACTION – Order striking out an action – Order dismissing an action- Distinction between – Effect of striking out – Effect of dismissal

ACTION - Parties to an appeal - Processes filed at the Supreme Court - Need to reflect the names of parties at trial court - Failure to so reflect – Effect Order 2 rule 8, Supreme Court Rules, 1985 (as amended) construed.

ACTION - Representative action - Nature of - How it arises.

ACTION - Representative action - Origin and nature of - Features and characteristics of representative action - Principles governing.

APPEAL - Leave to appeal as party interested - Application therefor - Grant of - Discretionary nature of - Principles guiding.

COURT - Order of court - Order striking out an action - Order dismissing an action - Distinction between - Effect.

COURT - Supreme Court - Processes filed at the Supreme Court -Need to reflect the names at trial court - Failure to so reflect - Effect - Order 2 rule 8, Supreme Court Rules, 1985 (as amended) construed.

ESTOPPEL - Estoppel by conduct - Operation of - Section 169, Evidence Act, 2011.

EVIDENCE - Estoppel - Estoppel by conduct- Operation of -Section 169, Evidence Act, 2011.

JUDGMENT AND ORDER - Order striking out an action - Order dismissing an action - Distinction between - Effect.

PRACTICE AND PROCEDURE - Appeal - Leave to appeal us party interested. - Application therefor - Grant of - Discretionary nature of - Principles guiding.

PRACTICE AND PROCEDURES - Appeal -Parties to an appeal , Processes filed at Supreme Court - Need to reflect the names of parties at trial court - Failure to so reflect - Effect - Order 2 rule 8, Supreme Court Rules, 1985 (as amended) construed

PRACTICE AND PROCEDURE – Representative action – Nature of - How it arises.

PRACTICE AND PROCEDURE - Representative-action - Origin and nature of - Features and characteristics of representative action - Principles governing.

WORDS AND PHRASES - "Substitute" - "Substitution" - Meaning of

Issue:

Whether the applicants have placed necessary materials before the honourable court that will entitle them to the reliefs sought.

Facts:

Pursuant to section 6(6) of the Constitution of the Federal Republic of Nigeria. 1999 (as amended) and Order 2 rule 28(1) and (2) and Order 3 rule 15 of Supreme Court Rules, the applicants by motion on notice sought, inter alia, an order granting leave to substitute their names for the 2nd set of respondents, who were the Ist - 3rd respondents at the Court of Appeal: extension of time to seek leave to appeal: leave to appeal, and; extension of time to appeal.

At all times material to the application, the applicants were ward delegates elected for Enugu State at the Ward Congress Election for the Peoples Democratic Party (PDP) on 1st November. 2014. They were among the delegates represented by Barrister Orji Chinenye Godwin, Chief C. C. Akalusi and Chief Orji C. Orji at the Federal High Court and Court of Appeal, Abuja in suit No. FHC/ABJ/CS/816/2014 and appeal No. CA/A/28/2015. The Court of Appeal gave judgment against the said respondents.

The second set of respondents had filed an action in representative capacity for themselves and on behalf of delegates elected on 1st November 2014 at the Ward Congresses for the Peoples Democratic Party for Enugu State before the Federal High Court, Abuja. The first set of respondents were dissatisfied with the judgment

of the trial court and appealed to the Court of Appeal, which allowed the appeal.

The applicants herein, and the second set of respondents at the Court of Appeal, had the same interest in the case, but the latter (1st - 3rd respondents at the Court of Appeal) were no longer Interested in pursuing the appeal on behalf of the Ward delegates, To that effect, the 2nd set of respondents wrote Exhibit CA2 to the Peoples Democratic Party. The applicants were, however, desirous of further pursuing the appeal in a representative capacity to the Supreme Court; and had been authorized by other delegates whose names were contained in Exhibit 1, as deposed to in the affidavit in support of the application.

The applicants had earlier sought for leave to substitute the names of the second set of respondents with their own names before the Supreme Court after the applicants had filed a notice of appeal and a brief of argument in their names. In a considered ruling, delivered on the 22nd January 2016, the said application for substitution was struck out on the ground that the order for substitution had to be granted first before filing other processes including notice and grounds of appeal.

The applicants were already out of time within which to appeal against the decision of the Court of Appeal.

The Supreme Court heard arguments from learned senior counsel for the parties for and against the application. In resolving the appeal, the Supreme Court considered the provisions of Order 2 Rule 8

of the Supreme Court Rules. 1985 (as amended), which states:

"Notices of appeal, Applications for leave to appeal, briefs and other documents whatsoever 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 (sic: are) contained in the Court of trial."

Held (Unanimously dismissing the application):

1. *On distinction between an order striking out an action and order dismissing an action –*

When an action is struck out, it is still alive and could be resuscitated by the plaintiff/appellant. It is however not so when a matter is dismissed. A dismissed matter comes to a final bus-stop, and the particular claim or relief suffers the vicissitude of death. It can hardly be revived. In the instant case since the applicants' earlier motion was only struck out, the applicants were at liberty to bring another one. (*P. 276, paras. A-C*)

2. *On Incidence and effect of an order of dismissal of an action -*

Where a suit/case/application/appeal has been considered on its merits to finality and found to be worthless, it is subject to a dismissal order. Equally, where a matter is dismissed on ground of abuse of court process, it is subject to be dismissed and it cannot be relisted. Where a matter is withdrawn with the consent of parties, it is to be dismissed and it cannot be re-listed. [*Jimoh v. Starco* (*Nig.*) Ltd. **(1998) 7 NWLR (Pt. 558) 523;** *Harriman* **v.** *Harriman* **(1989) 5 NWLR (Pt. 119) 6;** *Jadesimi v. Okotie-Eboh* **(1986) 1 NWLR (Pt. 16) 264 referred to.]**(*P. 2 76. paras. D-E)*

3. *On Effect of an order striking out an action –*

Where a matter is simply struck out for a reason such as non-compliance with a provision of law, rule or practice; w here a point of objection is raised (which point can be complied with thereafter), where a process is technically bad for a reason (which can be later rectified), the originator/initiator of that process is at liberty to re-file that process after same has been filed in compliance with the correct position of the law, rule or practice as may thereof be required. (*P. 276. paras. E-G*)

4. *On Origin and nature of representative action –*

Where a common factor unites some individuals or communities, who have equal claim in a thing subject matter, every member of the individuals, or community, or group, or association, or club, etc, is entitled to join a litigation which should be done by persons who have a common right which is invaded by a common enemy are entitled to join in attacking the common enemy in respect of that common right. Where such individuals, or communities, or groups are so many that all of them cannot conveniently sue in the suit involving that right, the Rules of court permit one or more of them to sue or be sued as representatives of the others. This is known as representative action. The few persons by or against whom the action is brought are the representatives of the others, and they prosecute or defend not in their personal capacity but in their representative capacity. (*P.292, paras. A-D*)

5. *On Features and consequences of a representative action -*

In a representative action, both the named plaintiff and/or defendant as the case may be, and those they represent are parties to the action. However, the law permits only the named representatives as plaintiffs or defendants, who are the *Dominus litis* **(the masters of the suit), to sue or be sued in a representative capacity until when the suit is determined. And for the purposes of initiating any process in representative action, such process must be by and in the name of the** *Dominus litis* **in the named plaintiffs or defendants, so long as their mandate from those they represent remains acceptable and not countermanded. Those represented, such as the applicants in the instant case, are deemed bound by whatever decision the court would give for or against their representatives.** [*Opebiyi v. Oshoboja* **(1976) 9-12 SC 195;** *In Re: Otuedon* **(1995) 4 NWLR (Pt. 392) 655;** *Atanda v. Olanrewaju* **(1988) 4 NWLR (Pt. 89) 394;** *In Re: Ugadu* **(1988) 5 NWLR (Pt. 93) 189;** *Ekennia v. Nkpakara* **(1997) 5 NWLR (Pt. 504) 152 referred to.]** (*P. 292. paras. D-G*)

Per Eko, J.S.C at pages 311-312 para. L-C:

"The named part in a representative action is submit to dismissal as he pleases.submit to dismissal as he pleases. See *Okonji v. Njokanma* **(1989) 20 NSCC** (Ft. **Ill) 138 at Up. (1989) 4 NWLR (Pt.114) 161 at 167. It is this legal authority of the** *dominus Litis* **exercised by the 2nd set of respondents that has irked or unsettled the applicants** and **thus prompting this application. But can the applicants contest this power of compromise inherent in the** dominus litis? **The agent, and this includes a named representative maintaining an action for himself and on behalf of other unnamed parties, can and has powers to, compromise, discontinue and even submit to dismissal of the suit. Unless these powers are expressly curtailed the**

named representative, being *dominus litis,* **can always in his power exercise them. See** *Otapo v. Sunmonn* **(1987) 2 NWLR (Pt.58) 587.**

When the 2nd set of respondents were empowered by the other unnamed parties, and subsequently granted leave by court, to maintain the action for themselves and on behalf of other delegates elected on 1st November, 2014 (including the applicants herein) the general authority inherent in them to discontinue, compromise and even submit to dismissal of the same suit was not expressly curtailed. There is no evidence of such curtailment. The compromise, in exhibit CA2, binds the applicants herein. See *Otapo* **v.** *Sunmonu* **(supra).**

I accept the proposition that the *dominus litis* **is like the counsel in relation to the conduct of the case he has been instructed. Counsel in conducting** a **civil case is, as a matter of law, practice and civil procedure, in complete control of the case, He is a master of his own house. Whatever his decisions there are in relation to the conduct of the proceeding in client. See** *Elike v. Nwankwoala* **(1984) ANLR 505."**

6. *On Features and consequences of a representative action* -

In a representative action, any decision given for or against the representative is a decision for or against those other persons, individuals, groups, etc, they represent. The members of the group represented are so bound by the outcome of the proceedings that when a court makes an order for a defendant to defend on his family's behalf and judgment is given against the family, a member of that family who did not join the resolution that the defendant should represent the family cannot say that the judgment does not bind him and claim

family property in his possession taken in execution of that judgment. If all the named parties in a representative action die, the action, provided it is still maintainable, subsists on behalf of and/or against those they represent and who have not been mentioned in the proceedings Nomine. But such action may not be prosecuted or continued until a living person(s) has been substituted for the named deceased party to carry on the representative action both at trial and also when the matter is on appeal. [*Otapo v. Sunmonu* **(1987) 2 NWLR (Pt. 58) 587;** *Pabiekun v. Ajayi* **(1966) 1 All NLR 197 that See:** *Attah v. Nnacho* **(1965) NMLR, 28; In Re: Otuedon (1995) 4 NWLR (Pt. 392) 655 referred to.]** (*Pp. 292-293. paras. H-D*)

Per I. T. MUHAMMAD, J.S.C. at pages 295-296, paras. F-B:

"My lords, exhibit CA2 speaks eloquently for itself. Need I say anything more? What I may add, perhaps, is that the reasons put forward by the applicants in reply to exhibit CA2 may appear contrary to the earlier position held out as per their depositions in their affidavit in support that the said set of respondents court below. Whatever the applicants mat say to convince this court that they are not bound by a decision that bound their representatives (2nd set of respondents) will certainly run counter to the earlier representation of all the delegates elected from the Ward Congress in Enugu State, whereat the delegates, including the applicants, stated that they had accepted the decision of the court below on the issues in dispute and as a matter of fact, did not have any reason to proceed further on appeal to this court. I thus, have no reason to disbelieve that the applicants were part of the decision in exhibit CA2. I already referred earlier to paragraph 8 of the applicants supporting

affidavit which confirms that the 2nd set of respondents are not interested in pursuing the matter to this court. That decision as I said earlier, still binds the applicants and they cannot resile. See: *A. - G., Nasarawa Stale v. A. - G., Plateau State* **(2012) 10 NWLR (Pt.1309) 419 at p. 450."**

Per EKO, J.S.C. at pages 312-313, paras. G-E:

The other point of interest, in this application, is the fact that the applicants and the 2nd set of respondents all belong to the class of delegates elected at the 1st November, 2014 Ward Congress Elections of Peoples Democratic Party (PDP) held in Enugu State. They should be seen to have commonality of interest. The applicants were among the unnamed delegates represented by the 2nd set of respondents to initiate the suit No. FHC/ABJ/CS/816/2014 and defend appeal No. CA/A/28/ 2015. It is a settled principle of law that persons who join up as plaintiffs in an action can not set up conflicting claims between themselves. In other words, in the same suit the plaintiffs must act together. See *Ejezie & Anor. v. Christopher Anuwu & Ors. (***2008) 4-5 SC (Pt 1) 31 (2008) 13 NWLR (Pt. 1101) 446. It is therefore, strange to see in this case that the "plaintiffs" who are seeking leave to appeal are, at the same time, among the respondents in the application and the proposed appeal. The applicants herein were among the unnamed delegates elected at the 1st November, 2014 Ward Congress Elections of the Peoples Democratic Party (PDP) held in Enugu who were represented by the 2nd set of respondents in the suit No. EHC/ABJ/ CS/816/2014 and the appeal No. CA/A/28/2015. They have split from the 2nd set of respondents. They have now risen against the 2nd set of respondents on one hand in the mutiny. They are also, on the other hand,**

proceeding against the persons sued originally by the 2nd set of respondents. The principle of law that no person can in the same suit be both plaintiff and defendant at the same time even in different capacities was re-stated by this court in Ejezie v. Anuwu (supra). **The factual situation in this case is that the essentials of representative action are not very much present in this case. The intra party conflict between the applicants and the 2nd set of respondents is a clear evidence that between them there is no commonality of interest nor a common grievance. If the applicants were seeking to appeal as interested parties; that application will be governed by different considerations."**

7. On Need for processes filed at Supreme Court to reflect the parties at the court of trial –

By virtue of Order 2 rule 8 of the Supreme Court Rules 1985 (as amended), notices of appeal, applications for leave to appeal, briefs and other documents whatsoever in pursuance of the appellate jurisdiction of the court for filing in accordance with the provisions of the rules shall reflect the same title as that which obtained in the court of trial. [*PPA v. INEC* **(2012) 13 NWLR (Pt. 1317) 215 referred to.**[*Pp. 293-294: paras. F-A*]

Per I.T. MUHAMMAD, J.S.C. at page 296 paras. B-H:

"Thirdly, even as the matter is now, and from the proposed notice of appeal, there is apparent no appellant(s). The persons designated as appellants are the applicants in this application. They can only succeed as appellants if their applications for substitution

scales through. Even then, whom are they going to substitute as there are visibly no appellants now on the proposed notice of appeal. The proper thing to do, usually, is to maintain the names of the parties on record. If, on appeal, the appeal is properly entered, and if for any reason, there arises need to substitute any of the named parties, or, where a person who has a real, genuine and cognate interest, applies to join the litigation (at any stage), the court may exercise its discretion in favour of such applicant. It is not open for a party to unilaterally effect a change in the names of parties who are on record of proceedings of any court.

Further, the interest of the applicants cannot in any way be higher than the interest of all the delegates (780) elected for the 260 Wards in Enugu State (Exh. CA 4). The claim of the applicants is that 113 delegates authorized them to appeal to this court, even if that is correct, majority of the elected delegates for Enugu State (667 of them), still remains bound by the decision taken in exhibit CA2. There is, therefore, no commonality of interest between the applicants and the vast majority (667) of the delegates in pursuit of the application on hand as divergent interests set in between the applicants, the 2nd set of respondents and the majority of the ward delegates. In a substitution, commonality of interests between persons to substitute and those to be substituted is paramount. See: *Ejiofor Apeh & Ors* v. *PDP* -SC.428/2015 of 22/1/2016, reported in

(2016) 7 NWER (Pt. 1510) 153.

The claim of exercise of constitutional right by the applicants, my lords, is not just a mere imagination of the phrase. It has to be founded on solid, substantial and valid legal claims."

8. On Need for processes filed at appellate court to reflect the parties at court of trial -

Individuals are not allowed to unilaterally alter a case as constituted from the trial court. The names of parties in that character must be maintained except as may otherwise be ordered by a court of law. The law, Rules of court and practice would not permit that. In the instant case, it was never shown anywhere that those who represented the applicants or anyone of them died, which would necessitate substitution. Also, none of the names of the representatives of the applicants got his name removed or replaced from the proceedings. *(P. 293, paras.* D-F)

9. On Principles guiding application to appeal as party interested -

The general principles which the court is enjoined to take into consideration for the grant of an application for leave to appeal as party interested are as follows:

(a) Are the applicants/appellants parties interested in this case whose interest need be protected?

(b) Do applicants have good reasons for not appealing within time?

(c) Is the proposed notice and grounds of appeal substantial and arguable grounds of appeal?

(d) Are the applicants not entitled to exercise the constitutionally guaranteed right of appeal?

The principles above set out cannot however exist *in vacuo,* **as the competence of the application must be present. That is to say, that there must be a foundation on which those principles would stand for the consideration of whether or not the application should be favourably looked at.** *(Pp* 302-303. paras. *H*-C)

Per ODILI, J.S.C at page 307. paras, B-H:

"Indeed, this application has strange facets h, that the 2nd set of respondents have not filed a notice of appeal and so there is no valid appe[a]| and as a follow up no appellant or appellant, to be substituted as after the court of appeal decision, the 2nd set of respondents rested and at that lower court the 2nd set of respondent, represented others including the applicants herein. The implication therefore is that there is no existing appellant who the applicants can substitute. This brings to memory the matter of not putting something on nothing and expecting it to stand. See *Macfoy v. UAC* **(1962) AC 152."**

It seems to me that this application is a non-starter having not scaled the fundamental hurdle which is the proper parties before court especially where the applicants intend to earn along unwilling partners. This is not a simple matter of a party having good reasons for not appealing within time or the proposed notice and grounds of appeal being substantial and arguable grounds of law or the guaranteeing of the applicants'

constitutional right of appeal and whose interest have to be protected. This situation is beyond the factors above as what is available show some willing and unwilling proposed appellants and the interests having no common ground and as this court had held in *Ngere v. Okwuket* **'XIV' (2014) 11 NWLR (Pt.1417) 147**1 **at 175 - 176 as follows:-**

"The grant of an application for extension[1] of time to appeal is a matter within the discretion of the court. That discretion is properly exercised if the judge considers the rules governing the particular application before granting it".

10. *On Meaning of "substitute"* -

" Substitute" means a person or thing that you use or have instead of the one you normally use or have. [*Peretu* ***v.*** *Ganga* **(2013) 5 NWLR (pt. 1348) 415 referred to.] (***Pp. 308. 300 paras. H-A)*

11. *On* Meani*ng of "substitution*" -

Substitution means a designation of a person or thing to take the place of another person or thing: the process by which one person or thing takes the place of another person or thing. [*Permit v. Gariga* **(2013) 5 NWLR (Pt. 1348) 415 referred to.]** *(Pp. 288 para.* A; *300. paras.* A-*B***)**

12. *On Operation* of *estoppel by* conduct -

By virtue of section 169 of the Evidence Act, 2011 a party who has. either by his declaration or act, caused or permitted another to believe a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceeding between himself and such person or such person's representative

in interest, to deny the truth of that thing. He must accept the new legal relationship as modified by his own words or action, whether or not it is supported by any point of law, or by any consideration but only by his word or conduct. In this case. Exhibit CA2 operated as estoppel **by conduct. Therefore, the applicants, represented by the 2nd set of respondents, could not be allow ed to approbate and reprobate at the same time,** (**A**.-G**..** *Rivers Stare v. A-G, Akwa Ibom State* **(2011) 8 NWLR (Pt. 1248) 31 referred to.) (***P. 312. paras. D-F)*

Nigerian Cases Referred to in the Ruling:

A.-G., Nasarawa State v. *A.-G***.,** Plateau State (2012) 10 NWLR (Pt. 1309) 419

A.-G., Rivers State v**.** A.-G., *Akwa-lbom State* (2011) 8 NWLR (Pt. 1248) 31

Adepoju v. Yinka 12012) 3 NWLR (Pt. 1288) 567

Agbaje v. INEC (2016) 4 NWLR (Pt.1501) 151

Anachebe v. *Ijeoma* (2014) 14 NWLR (Pt.1426) 168

ANPP v. Albishir (2010) 9 NWLR (Pt. l198) 118

Apeh v. PDP (2016)7 NWLR (Pt. 1510) 153

Atanda v. Olanrewaju (1988) 4 NWLR (Pt.89) 394

Allah v. Nnaeho (1965) NMLR 28

All

Badejo v. Federal Ministry of Education (1996) 8 NWLR (Pt. 464)15 *Ejezie v. Anuwu* (2008) 12 NWLR (Pt. l101) 446

Ekennia v. Nkpakara (1997) 5 NWLR (Pt. 504) 152

Elike v. Nwankwoala (1984) ANLR 505

Esesan v. Sanusi (1984) 1 SCNLR 353

Harriman v. Harriman (1989) 5 NWLR (Pt. l19) 6

*Idise v. Williams Int'l Ltd***.** (1995) 1 NWLR (Pt. 370) 142

In Re: Otuedon (1995) 4 NWLR (Pt. 392) 655

In Re: Ugadu (1988) 5 NWLR (Pt.93) 189

Jadesimi v. Okotie-Eboh (1986) 1 NWLR (Pt.l6) 264

Jimoh v. Starco (Nig.), Ltd. (1998) 7 NWLR (Pt.558) 523

Nqere v. Okuntket 'XIV" (2014) 11 NWLR (Pt. 417) 147

Swaogu v. Annua (No.2) (2013) 9 NWLR (Pt. 1358) 182

Okonjl v. Njokanma (1989) 4 NWLR (Pt. l 14) 161

Opehiyi v. bshoboja (1976) 9 - 10 SC 195

P.P.A. v. INEC (2012) 13 NWLR (Pt. l 317) 215

Pabiekun v. Afayi (1966) 1 All NLR 197

PDP v. Godwin (2016) 7 NWLR (Pt. 1510) 153

Peretu v. Ganga (2013) 5 NWLR (Pt. 1348) 415

Sapo v. Sunmonu (2010) 11 NWLR (Pt. 1205) 374

Vkatta v. Ndinaeze (1997) 4 NWLR (Pt. 499) 251

Williams v. Hope Rising Voluntary Funds Society (1982) 1 NLR (Pt. 1)1

Foreign Cases Referred to in the Ruling:

Duke of Bedford v. Ellis
(1901) AC 1

Macfoy v. UAC (1962) AC 152

Nigerian Statutes Referred to in the Ruling:

Constitution of the Federal Republic of Nigeria. 1999 (as amended). S. 6(6)

Evidence Act. 2011. S. 169

Nigerian Rules of Court Referred to in the Ruling:

Supreme Court Rules, 1985 (as amended),0.2rr.8,28(l)(2).0.3 r. 15

Application:

This was an application for, *inter alia*, leave to appeal as a party interested. The Supreme Court, in a unanimous decision, dismissed the application.

History of the case:

Supreme Court:
Names of Justices that sat on the application: Ibrahim Tanko Muhammad. J.S.C. (Presided and Read the Leading Riding): Mary Ukaego Peter-Odiii- J-S.C: Olukayode Ariwoola. J.S.C; Amina Adams Augie. J.S.C; Ejembi Eko, J.S.C.
Appeal No.: SC.428/2015
Date of Ruling: Friday, 10th February 2017
Names of Counsel: Yusuf Ali. SAN (with him. Adebayo Adelodun. SAN; S. A. Oke. Esq.; K. C. Onyeke; Alex Akoja, Esq.; K. T. Sulaiman-Hassan [Mrs.]; Patricia Ikpeabu [Mrs.]; K.O. Lawal, Esq.; M. A. Adelodun; Safinat lamidi [Miss]; A. O. Usman, Esq.; A. B. Eleburuike, Esq.; C. N. Akuneto, Esq.; C. C. Ibezim [Miss]- Applicants
Dr. O. Ikpeazu. SAN (with him, R. A. Anyata, Nwadawa (Miss); Tobechukwu Nweke, Esq-; Onya. Esq.; Julius Mba. Esq.; Chidinma Anawata [Mrs.]; A. A. Aka'ahs. Esq.: Okogbule Anyawata. Esq.; Nwamaka Ofeogbu [Miss.]) -for the 1st – 4th Respondents Chief W. Olanipekun, SAN (with him. Professor Agu Gab Agu; Christian C.Ani: Aisha Aliyu; Bolarinwa Awujoola; Vanessa Onyemauwa and Adebayo Majekolagbe) - for the 2nd Respondent
T. M. Inuwa (with him. Rahmatu Amin and Ahmed G. Ismail) - for the 5th Respondent

I.T. MUHAMMAD. J.S.C. (Delivering the Leading Ruling):

This is a motion on notice brought pursuant to section Constitution of the Federal Republic of Nigeria. 1999 (as amended): Order 2 rules 28 (1&2) and Order 3 rule 15 of this Court's Rules. 2009 (as amended).

The reliefs set out in this motion, are as follows:-

"1. An order granting leave to substitute the names of Ejiofor Apeh, Ude Celestine and Ossai Moses for the names of Bar. Orji Chinenye Godwin. Chief C. C. Akalusi and Chief Orji C Orji who were 1st to 3rd the respondents at the lower court with the names of the present applicants.

2. An order granting leave to the applicants to present, maintain and or prosecute this appeal in a representative capacity that is: for themselves and other delegacy elected at the 1st November. 2014 Ward Congress. Election of Peoples Democratic Party (PDP) held in Enugu State and who had given letter of authority by subscribing their names and signatures on exhibit in annexed to this application.

3. An order of this honourable court extending the time within which the applicants may seek leave to appeal against the judgment of the Court of Appeal. Abuja Division delivered on 30th day of April. 2015 in appeal No. CA/A/28/2015 Coram: Abubakar Jega Abdulkadir, Tani Yusuf Hassan and Muhammed Mustapha JJCA, as parties interested.

4. Leave to appeal against the said judgment.

5. Extension of time within which to appeal.

6. And for such further (orders.) as the Hon. court may deem fit to make in the circumstances of this case."

Motion on notice learned senior counsel for the applicants. Mr. Yusuf Ali. stated that the motion on notice was supported by grounds for the application, an affidavit (in support), further and better affidavits, replies to counter affidavits filed by the respondents and a written address. He adopted the written address and relied on the affidavits: the replies and the written address. He urged the court to grant the reliefs as prayed in the motion on notice.

Dr. Ikpeazu, SAN, for the 1st to 4th respondents stated that he filed a counter affidavit on 10/11/16 along with written address. He adopted the written address; relied on the counter affidavit and urged this court to dismiss the application as an abuse of process and having regard to the parties in appeal No. SC. 428/2015 in which briefs have already been exchanged. Mr. Inuwa, who is for the 5th respondent said that he filed a counter affidavit on 7/11/16 which is accompanied with a written address. He adopted the written address relied on the counter affidavit and urged this court to dismiss the application.

Chief Olanipekun, SAN; who appeared for the 2nd set of respondents said that he fried a counter affidavit on 14/11/16. It was accompanied by some exhibits and a written address. He also filed additional list of authorities. He adopted the written address: relied on the counter affidavit and urged this court to dismiss the application.

Learned SAN for the applicants submitted that the applicants have placed necessary materials before this court for the grant of the application. He stated further that the grant thereof is purely discretionary and urges the court to exercise its discretion in favour of the applicants. He cited among others, the cases *of Anachebe Esq. v. Kingslev ljeoma &* 2 *Qrs* (2014) 14 NWLR t Pt. 1426) 168 at 184 D-F: *ANPP v. Albishir* (2010) 9 NWLR (Pt. 1198) 118 at 145 D-E. In relying on the principle that a party should never be denied the right to appeal if he satisfies the conditions for appeal, the learned SAN cited and relied on the case of *Ngere* **v.** *Okuruket* 'XIV' (2014) 11 NWLR (Pt.1417) 147 at 177- 178 A-B. He submitted further that it has been deposed to in the affidavit in support (paras 2,3,4,5,7,9- 12 and 18) that the applicants are interested parties whose interest need to be protected.

Learned SAN for the 1st - 4th respondents. Dr. ikpeazu, SAN, filed his counter affidavit He annexed his written address in respect thereof. He annexed some exhibits as well. He adopted and relied on all the depositions in the counter affidavit, the exhibits and the written address. He urged this court to dismiss the application as an abuse of process having regard to the appeal on hand as parties have already filed and exchanged briefs of argument. Learned SAN, made further submissions that the application is not competent on multiple grounds. He mentioned that when the motion is called, it will be under SC.428/2015 - The parties in SC.428/2015 are different from the ones on the motion on notice. The law and

practice do not permit that. He supported his submission by citing and relying on for the Supreme Court Rules as per Order 2 rule 8 1995 (as amended) and the case of *CPA*. v. lNEC (2012**)** 13 NWLR (Pt. 1317**)** 215. The applicants learned SAN argued: have no pending appeal and they cannot bring the application within the precinct of SC.428/2015, which, he said further, is incompetent and non-existent.

The application is incurably defective and it cannot be foisted on a defective appeal which was initiated in total disregard of the named parties in FHC/ABJ/CS/816/2014 and CA/A/28/2015.

Learned senior counsel for the 2nd set of respondents, Chief Olanipekun SAN made his submissions in his written address, which 1 summaries, herein below, as follows:

i. He filed and relied upon a counter affidavit of 30 paragraphs sworn to by O. C. Godwin, accompanied by some exhibits and a written address.

ii. That this is the second time this same motion is brought before this court by the same applicant while similar applications to present the same set of persons contained in applicants' exhibit 1 have also been brought forward, with the previous application for substitution of 2nd October. 2015 struck out by this court on 22nd January. 2016.

iii. The ruling of this court striking out the said motion of 2/10/15 is attached to applicants' application as exhibit 2

iv. That the appeal number of the application of 2/10/15 was SC.428/2015 and the said application and the suit No. ceased to exist after being struck out.

v. That the applicants resurrected the said No. SC.428/15 which ceased to exist by reason of this court's ruling of 22/1/16.

vi. That from the result of actions/appeals before the trial court, tine court below and including the current application under consideration in this court, the interest of the 2nd set of respondents is not the same as that of the applicants herein. There is, thus, no commonality of interest between the 2nd set of respondents and the applicants.

vii. That the present application as constituted shows that the named applicants do not have an interest in the case as they have described their capacity as on behalf of other unnamed panics on record and by law. Only a party with interest in a suit can institutes a representative action. Cited the case of *Ejiofor Apeh & Ors. v. Peoples Democratic Party* - SC. 428/2015 of January. 22nd 2016, reported in (2016) 7 NWLR (Pt. 1510)153.

viii. That the above ruling of 22/01/2016 aptly covers the scenario in the instant application. The two capacities in the applicants and the 2nd set of respondents are poles apart and that the applicants are not seeking to represent the same set of persons the 2nd set of respondents represented at the two lower courts, no commonality of interest between the two.

ix. That the reference to relief No. 1 sought by the applicants in their motion on notice, other reliefs contained therein, cannot be grantable by this court. This is because same (i.e. relief 1) relates to the status of the respondents herein who were also respondents before the court below, meaning the applicants are not respondents before this court. It is trite that a court can only make orders in respect of persons who are parties before it.

x. That earlier representation of the delegates elected from the ward congresses in Enugu State, including the

applicants herein, stated that they had accepted the decision of the court below on the issues in dispute and did not have any reason to proceed further to this court with the matter.

xi. That this application in an abuse of process of court which should be dismissed.

Learned counsel for the 5th respondent, Mr. Inuwa, filed a counter affidavit of 7 paragraphs. He supported it with a written address. He relied on the depositions thereof sworn to by one Ibrahim S. Mohammed. Esq. The gist of learned counsel's address is as follows:

i. the application is grosslv unmeritorious and deserves to be dismissed for a number of reasons:

(a) The 2nd set of respondents herein were the respondents at the court below who are not interested in appealing against the judgment of the court below;

(b) The applicants herein, are not competent to file a notice of appeal as they were not parties to the appeal at the court below. Thus, there is no existing appellant whom the applicants can substitute. He relied on Macfoy v. UAC (1962) AC 152.

ii. He cited and relied on the case of *Agbaje v. INEC* (2016) 4 NWLR (Pt. 1501) 151 at 161 G - H and argued that the applicants have not shown any fact in their supporting affidavit why this court should depart from the decision in *Aqbaje's case (supra*).

iii. That the 2nd set of respondents by their act are satisfied with the judgment of the Court of Appeal and have decided not to appeal to this court against same, the applicants are bound by that decision and the rights of the applicants have been conclusively determined in the judgment of the Court of Appeal in appeal No. CA/A/28/2015 between *PDP & Ors.* v. *Orji Chinenye Godwin & Ors* delivered on 30th April, 2015.

iv. That the application is incompetent as the applicants failed to state bow the judgment of the Court of Appeal prejudicial]} affects their interests. He cited and relied on the case of *Nwaogu v. Atuma* (No. 2) (2013; 9 NWLR (Pt. 1358) 182.

Learned counsel urged this court to dismiss the application as it is devoid of merit.

A reply brief was tiled by the learned SAN for the applicants in answer to new issues and competence of the application as raised by the learned SAN for the 1st to 4th respondents. Learned SAN replied that the suit that gave birth to this appeal (application, 1 believe) both at the trial court and Court of Appeal were fought in a representative capacity and the present application belongs to the group represented, the withdrawal of some members from the representative action notwithstanding. They have individual interests to protect. Cases of *Ejezie v. Anuwu* (2008) 12 NWLR (Pt.110l) 446: *Sana v. Sunmonu* (2010) 11 NWLR (Pt. 1205) 374 were cited. Learned SAN replied further that the argument that SC.428/2015 has no viable basis of existence not having any relationship in terms of parties with the proceedings which gave rise to the appeal cannot hold water. He replied that representation and authority of the 2nd set of respondents came to an end at the end of the case after -which judgment was delivered. He replied further that the plaintiffs in representative capacity cannot deprive other persons of the same class of the benefits of the judgment, if they think fit to prosecute it. *Atanda v. Olanrewaju* (1988) 4

NWLR (Pt. 89) 394 at 402 was cited. Order 2 rule 8 of the Supreme Court rules is not applicable in this instance as the applicants are representing part of the ward delegates elected for Enugu State on 1/11/2014

1earned SAN responded further:

i. That applicants' application is in line with the ruling of this court in Exh.2 and the title of the case as it is in proceedings leading to the appeal and the application has been reflected and all parties had been duly served.

ii. That the application in Exh.2 was not dismissed but struck out and applicants were at liberty to bring their application over and over again.

iii. Issue of appeal number is entirely the duty of the registry of the court. Parties have no role to play in fixing or giving appeal number.

iv. That the case of *Apeh* v. *PDP* cited by the respondent, did not say that individualist interest cannot be pursued in the absence of the rest members) of the group. Respondents can only challenge the applicants' *locus* to sue on behalf of the 2nd set of respondent but cannot deny the applicant (s) and those they represent (as contained in exhibit 1) the authority to appeal on behalf of others who have common benefits or interest in the appeal.

v. That the withdrawal of the 2nd set of respondents will not change the representative nature of the appeal as long as there are other group who are interested in pursuing the appeal. *Ejezie v. Anuwu* (*supra)* and *sapo* v. *Sunmonu* (supra), cited.

vi. That exhibit 1 is authentic and it remains unchallenged by 1st set of respondents.

vii. That there is a commonality of interest amongst the applicants and the other unnamed parties in Exh.1 whose interest were mortgaged by the 2nd set of respondents by refusing to proceed on appeal against the wish of the applicant'(s) and other unnamed parties and all the authorities cited by the 2nd set of respondents relating to this issues are not relevant and are inapplicable.

viii. That in a representative action, there is nothing like the right of majority or minority. All the rights are equal individually, the action was fought on representative capacity for convenience and the individual's right as delegated has not been taken away.

ix. That exhibits CA3 and CA4 are of dubious origin and cannot be relied upon.

x. That the applicants' constitutional right of appeal is legal.

As observed above. My lords, and from the record placed before this court for the determination of this application, there are five main reliefs prayed by the applicants. 1 consider relief No. 1 to be fundamental and decisive of other reliefs. I will consider this issue first and foremost.

Before 1 do that, however, permit me to summarize the facts giving rise to this application as collected from the applicants" side. The applicants were ward delegates elected for Enugu State at the Ward Congress Election for the Peoples Democratic Party (PDP) on 1st November, 2014. They were among the delegates represented by Barrister Orji Chinenye Godwin. Chief C. C. Akalusi and Chief Orji

C. Orji at the Federal High Court and Court of Appeal, Abuja in suit No. FHC/ABJ/CS/816/2014and appeal No. CA/A/28/2015. The court below gave judgment against the said respondents.

The applicants herein, and the 1st - 3rd respondents at the court below, have the same interest in the case but the latter (1st - 3rd respondents at the court below) are no longer interested in pursuing the appeal on behalf of the ward delegates. The applicants are, however, desirous of further pursuing this appeal in a representative capacity to the Supreme Court and have been authorised by other delegates whose names are contained in exhibit 1 as deposed to in paragraph 14 of the affidavit in support.

The applicants earlier sought for leave to substitute the names of the 1st – 3rd respondents with their own names before this honourable court after the applicants have filed a notice of appeal and a brief of argument in their names. In a considered ruling, delivered on the l1th January, 2016. the said application for substitution was struck out on the ground that the order for substitution had to be granted first before filing other processes including notice and grounds of appeal.

The applicants are out of time within which to appeal against the decision of the lower court.

The applicants for themselves and on behalf of other delegates have the mandate of other ward delegates elected for Enugu State on 1st November, 2014. whose names are contained in exhibit 1 as Reposed to in paragraph 14 of the affidavit in support, to pursue this appeal on their behalf, since they are all aggrieved by the decision of the Court of Appeal. And, leave of this court is required to file an appeal.

An addition made on the facts by the learned SAN for the 1st - 4th respondents (1st set of respondents) is that there was an

appeal to this court against the decision of the court below in which it affirmed the Tribunal's judgment which upheld the result of the general election wherein the candidate of the P set of respondents won and was declared elected. The applicants herein, purportedly lodged that appeal to this court as appellants when they were never named parties in the Federal High Court or at the Court of Appeal. They filed grounds of appeal, transmitted records of appeal and filed appellants' brief of argument.

The 2nd set of respondents (i.e. Barrister Orji Chinenye Godwin: Chief C. C. Akalusi: Chief Orji C. Orji (suing for themselves and on behalf of the delegates elected on the 1st of November, 2014 at the Ward Congress held for Enugu State), filed a respondent's brief of argument which embodied a preliminary objection in which they prayed this court to strike out the appeal on the ground that the named parties to the appeal bore no relationship with suit No. FHC/ABJ/816/2014 and appeal No. CA/A/28/2015. Rather than proceed to argue the appeal, the applicants initiated an application seeking to remove the named parties representing the delegates and to implant theirs. This application was opposed and this court in its ruling of 224, 2016. (Exh.2) as deposed to in paragraph 16 of the affidavit in support, struck out the application on the ground, inter alia, that the applicants cannot unilaterally alter the parties to the proceedings in both courts below. hence this application was filed.

My noble lordships, my first reaction to this application, looking from my own vantage point was to simply dismiss the application *in limine* in view of the submissions of learned senior counsel for the 1st set of respondents that a similar application was earlier placed before this court and same was dismissed. Learned senior counsel for the 2nd set of respondents, as well, submitted that ; this is the second

time this same application is brought before this I court by same applicants which brings to bear the acute abusive nature of the application revealing its unsustainability. In the latters' case, he conceded that that same motion earlier filed was struck out by this court. When I had a terse look at the ruling of this court of 22/1/2016, attached to applicants' motion as Exh. 2. 1 observe that the motion, though treated elaborately, was only struck out and not dismissed. Thus, as the said motion was not dismissed by this court I find myself in agreement with the submission of learned counsel for the applicants in his reply brief that the applicants are at liberty, to bring the application over and over again. Unfortunately, the law ' has not set any time limit for presentation or representation of t process ordinarily struck out.

For the purpose of a reminder, I think I should re-state the well 'settled principle of the law and permanent feature of the practice of the courts that when action is struck out. it is still alive and could fit resuscitated by the plaintiff appellant. It is not so when a matter is dismissed. The matter comes to a final bus-stop and the particular claim or relief suffers the vicissitude of death and it can hardly be revived.

Thus, where a suit/case application/appeal has been considered on its merit to finality and found to be worthless, it is subject to a; dismissal order. Equally, where a matter is dismissed on ground of abuse of court process it is subject to be dismissed and it cannot be relisted. Where a matter is withdrawn with the consent of; parties, it is to be dismissed and it cannot be relisted. See: *Jimoh v. Starco* (Nig.); Ltd. (1998) 7 NWLR (Pt.558) 523: *Harriman v. Harriman* (1989) 5 NWLR (Pt.119) 6; *Jadesimi v. Okotie-Eboh* (1986) 1 NWLR (Pt. 16) 264. On the other hand, where a matter is simply struck out for a reason: non-compliance with a provision of law, rule and or practice;

where a point of objection is raised (which point can be complied with, thereafter), where a process; is technically bad for a reason (which can later be rectified; the originator, initiator of that process is at liberty to re-file that process after same has been brought in compliance with the correct position of the law, rule or practice as may thereof be required.

In the motion on hand, the fundamental relief, as I said earlier, is that of substitution of some named parties i.e. 1st - 3rd respondents (at the court below; and 2rd set of respondents herein. with the applicants. The essence of substitution, generally, is the putting/placing a thing, in place of another for a purpose. Permit me my noble lordships, to call in aid the affidavit evidence before this court, starting with the applicants' affidavit m support of the application sworn to by Mr Ejiofor Apeh (1st applicant). He swore to the following facts, amongst others:

"4. That 1 know as a fact that the three plaintiffs in the suit at the Federal High Court and the respondents at the Court of Appeal acted in a representative capacity for themselves and on behalf of the delegates ejected on the l st November, 2014 at the Ward Congress for die Peoples Democratic Party held for Enugu State.

5. That the 2nd set of respondents were dissatisfied with the judgment of the Federal High court in suit No. FHC/ABJ/CS/816/2014 and appealed to the Court of Appeal, Abuja in appeal No. CA/A/28/2015.

6. That the Court of Appeal in its judgment of 30th day of April, 2015 in appeal No. CA/A/28/2015 allowed the appeal and set aside the decision of the Federal High Court. Abuja of 24th day of November. 2014 in suit No. FHC/ABJ/CS/816/2014.

7. That I know as a fact that the people that represented the applicants at the Federal High Court and Court of appeal are Bar. Orji Chinenye Godwin. Chief C. C. Akalusi and Chief Orji C. Orji.

8. That I know as a fact that the said representatives are plaintiffs are no longer interested in prosecuting an appeal to the Supreme Court against the decision of the Court of Appeal of 30th April, 2015.

9. That when the original set of representatives were no longer interested in pursuing the appeal to Supreme Court, the applicants then instituted an appeal before this Honourable court and appeal was entered as SC.428/2015.

10. That an application was brought before this Hon. court for Ejiofor Apeh. Ude Celestine and Ossai Moses to appeal against the judgment of the Court of Appeal delivered 30th April. 2015.

11. That this Hon. court in a well considered ruling delivered on 22nd January. 2015 struck out the said application one of the reasons was that the names of the case has been unilaterally changed.

12. That 1 know as a fact that consequent upon the reason stated above, there is need for the applicants to seek leave to appeal against the said judgment Supreme Court as parties interested.

13. That 1 know as a fact that the applicants are desirous to further prosecute this appeal in a representative capacity on behalf of those whose names are contained in exhibit 1 who are also aggrieved with the decision of the Court of Appeal aforesaid and have mandated the applicants to appeal against same.

14. That I know as a fact that we the applicants have the mandate of other Ward Delegates elected at the 1st November, 2014 Ward Congress Election of the Peoples

Democratic Party held in Enugu State as contained in exhibit 1 to pursue this appeal on then behalf.

15. That 1 know as a fact that the applicants are anions the delegates elected on 1st November, 2014 and have common interest as they are all aggrieved with the court of appeal judgment.

16. That an earlier application for substitution via appeal No. SC.42812015 was struck out on 22nd January, 2016 on the ground that leave for substitution ought to have been had and obtained before the notice on grounds of appeal could be filed. The ruling of this Hon. court is hereby attached and marked as Exh. 2.

17. That the refusal of the 1st set of respondents to prosecute this appeal is without the consent of the applicants and the vast majority of others they represented.

18. That the 1st set of respondents and unnamed delegates parties in the case whom the said respondents represented are the same.

19. That there are no principal patties in this case as all the delegates including 1st set of respondents unnamed are parties on record have the same right. That this application was filed as a result of the induced refusal of the 1st set of respondents to further prosecute this case on appeal.

20. That I was informed by K. K. Eleja, SAN in the course of discussing this case on 3 rd October, 2016 at No. 4 Sakono Street. Wuse 2. Abuja at about 3:00pm and readily believe him as follows:

i. That our right to challenge the decision of the Court of Appeal is constitutional and cannot be taken away.

ii. Those parties on record representing a group of people cannot compromise the interest of people they purport to represent."

In the counter affidavit filed by the 1st - 4th (1st set of) respondents, sworn to by Chief Ikeje Asogwa, the following depositions *inter alia*, were made:

"5. While paragraphs 4, 6 and 7 of the affidavit in support are not disputed, paragraph 5 is not correct as the 2nd set of respondents did not appeal to the Court of Appeal in CA/A/28/2015.

6. Paragraphs 8, 9, 10. 11, 12, 13, 14 and 15 of the affidavit in support are not entirely correct. The correct position is as follows:

i. Appeal No. SC.428/2015 was instituted by the applicants purporting themselves to be appellants when the record at both the Court of Appeal and the Federal High Court did not reflect their names as parties to the proceeding.

ii. The 1st, 2nd, 3rd and 4th respondents in the 1st set of respondents herein in their brief of argument raised a preliminary objection in that regard, contending that the appeal was incompetent and should be struck out as by the rules of the Supreme Court the appeal shall reflect the same parties from the inception of the case at the High Court.

iii. The applicants then brought an application for leave to substitute the names of the 2nd set of respondents being the original plaintiffs at the Federal High Court and respondents at the Court of Appeal whose names the applicants unilaterally extracted from the proceedings.

iv. The Supreme Court in a Ruling delivered on 22nd January, 2016 and exhibited to the applicants' affidavit in support as exhibit 2 dismissed motion on the grounds, inter alia, that applicants cannot unilaterally alter the part, and appeal in that stead.

v. The applicants sponsored another application the substitution of the 2nd set of the responded who were not parties to SC.428/2015 , constituted with completely new

individual namely, Eloka Kingsley, Ugwu Fidellia, Amallunweze Isaac, Okeke Mathias, Ihedike Eze Christian And Ugwu Shedrack. This said application still brought within the context of SC.428/2015, is hereto delivered as exhibit CA 1.

vi. In exhibit CA1 the said individuals wet, purportedly authorized to represent the faceless delegates who are interested in pursuing tH appeal, which the proposed representatives are different from the applicants herein, equal claiming right of representation.

vii. With the foregoing in perspective, suit No. FHC/ABJ/CS/816/2014.' Chief *Orji Chinenye Godwin & 3 Ors v. Peoples Democratic Parties & Ors* was instituted at the Federal High Court Abuja Division, in the capacity disclosed or the originating summons which was filed on 5th November, 2014, that is to say "…on behalf of all delegates elected on the 1st November, 2014, at the Ward Congress held for Enugu State'".

viii. On 24th November, 2014 His Lordship. A. F A. Ademola J., delivered judgment, refusing reliefs 2. 3. 4. and 5 of the reliefs sought in tin originating summons, while granting relief 1 in a drastically and unilaterally modified form, without inviting the parties to address the court on the amendment eventually effected by His Lordship in the judgment.

ix. Dissatisfied with the judgment, the aforesaid 1st, 2nd, 3rd and 4th respondents in the 1st set of respondents herein initiated an appeal to the Court of Appeal. Abuja Division, which court on 30th April. 2015 allowed the appeal, set aside the judgment of the Federal High Court and struck out the originating summons.

x. So soon thereafter, the 1st respondent received a correspondence from the plaintiffs in the originating

summons, expressing that following a meeting held by them on 15th May, 2015, they resolved to accept the verdict of the Court of Appeal. The reason they assigned to this was that they were satisfied that the 1st respondent, in the process of the conduct of the primary election, compiled with the guidelines as the elected delegates were allowed to participate in the election together with the statutory delegates. Hereto delivered and marked exhibit CA2 is a copy of the said correspondents.

xi. The appellants in the substantive appeal who now describe themselves as "applicants/proposed appellants" in this application do not have the authority of all the delegates to initiate this appeal as they were clearly persons whose candidate failed to emerge at the primary election for the office of the Governor of Enugu State, which primary was duly conducted in accordance with the guideline of the l[st] respondent herein.

xii. Applicants claim to represent 113 delegates of the three man per ward delegates elected at the ward congresses which took place in Enugu on 1st November, 2014. It is not in this capacity that the originating summons was incepted.

xiii. If the 113 delegates whom the applicants claim to represent are removed from the votes scored by Hon. ifeanyi Ugwuanyi and credited to either his closest rival or any other person, the outcome of the primary election remains unaffected.

xiv. This application thus serves no utilitarian purpose and is indeed not only academic but constitutes an abuse of the process of tire court.

xv. The applicants do not have the authority of all the delegates who initiated the action to initiated this appeal. Additionally, the applicants do no: have common interest with all the three mar, delegates who duly participated at the

1st, 2nd 3rd and 4th respondents in the 1st respondent's primary election and the reliefs sought by the applicants are not beneficial to the others.

xvi. The applicants are by this application effective seeking an amendment of the capacity in which the suit was initiated and all orders of both courts below made.

xvii. Appeal No. SC. 428/2016 is an appeal instituted by the applicants/proposed appellants herein as "'appellants.'" The parties in the said appeal have again been reconfigured in this application by introducing the 2nd set of respondents herein who are not parties in the appeal and by describing the appellants in that appeal as "applicants: proposed appellants" herein.

9. Paragraphs 19,20,21,22,23,24,25,29,30,31 and 32 of the affidavit in support are not correct and 1 aver as follows:

i. It is misleading to allege as the applicants did that "the refusal of the I 5'1 set of respondents to prosecute this appeal is without the consent of the applicants and the vast majority of others they represented". The 1st set of respondents herein never appealed to this court and did not refuse to prosecute any appeal.

ii. The 1st, 2nd, 3rd and 4th respondents in the 1st set of respondents herein and the unnamed delegates' parties in the case at the trial court are not the same.

iii. The delegates were and have always been represented by those who were plaintiffs at the lower court and the decision to accept the outcome of the decision of the Court of Appeal was duly conveyed on behalf of all the said delegates as can be seen in exhibit CA2 attached to this affidavit.

iv. The 1st, 2nd, 3rd and 4th respondents in the 1st set of respondents were not induced by anybody and there was no compromise of any sort. Those who commenced the case as

plaintiffs before the primary election of the party decided not to pursue any appeal to this court being satisfied that the primary election eventually took care of their grievance which propelled the action at the trial court.

v. As presently informed by Dr. Onyechi lkpeazu OON, SAN, learned counsel for the 1st, 2nd, 3rd and 4th respondents in the 1st set of respondents on 18th September. 2016 at plot l0, Block IX David Dodo Street, at 7:30pm and I verily believe hint, this application as well as the record which the applicants seek to rely on is incurably defective and ought to be struck out. The application is equally of no tangible legal value and is thus an abuse of process of" this court."

The 2nd set of respondents (1st – 3rd). in their counter affidavit sworn So by Orji Chinenye Godwin, the following facts, *inter alia***,** were deposed to:

4. That at the Federal High Court in Suit No. FHC ABJ/CS/816/2014, 1 and the 2nd and 3rd respondents sued as plaintiffs, for ourselves and on behalf of delegates elected on the 1st of November, 2014 at the Ward Congress of the PDP held for Enugu State. The originating process in suit No. FHC/ABJ/CS/816/2014 is hereby attached and marked as exhibit 1.

5. That it was also in this capacity we prosecuted the appeal at the Court of Appeal.

6. That we have, to the knowledge of the 1st – 3rd applicants, and with the consent of the vast majority of the delegates we represent, stated in clear terms that we shall not be prosecuting this appeal any longer at the Supreme Court.

13. That paragraphs 3. 4. 5. 6, 7 and 23 are true, while paragraphs 12. 13. 14. 5. 19. 21, 22, 24(vi);. 25. 29. 30. 31. 32 and 33 are false and are hereby denied.

14. That further to paragraph 12 and 13 of the support affidavit. 1 know as a fact that the 1st, 2nd

and 3rd respondents herein were not just the plaintiffs in traction at the Federal High Court, but also the principal parties to the action.

15. The 1st - 3rd applicants herein have not discussed tip, application with the respondents.

16. Further to paragraph (15) *supra,* the respondents do not support and do not consent to the filing of this application.

17. Applicants' earlier application referred to in paragraph (17) of the supporting affidavit was struck out on the ground that the consent of the respondents was not sought, amongst other reasons.

18. I have read through the 113 names of the delegate, who purportedly instructed the 1st – 3rd applicants to file this application as stated in exhibit 1 attached to the motion, and 1 know as a fact that:

i. The said people do not represent the delegates who authorised the respondents to initiate this action at the Federal High Court in the first instance.

ii. The said delegates do not represent the delegates on behalf of whom the respondents sued for themselves and represented in the first instance.

iii. 893 delegates referred to in (i) *supra,* instructed and authorized the respondents to initiate this action at the court of first instance.

iv. It was the consensus of those delegates that the

respondents herein withdrew the prosecution of the appeal earlier on.

v. It is not in the interest of the delegates and the people of Enugu State to continue the prosecution of this application/appeal.

19. Further to paragraph (18) *supra***.** I know as a fact that:

v. This present application is meant to destabilize the smooth running of the governance of the state.

vi. Further to (v) *supra***,** respondents do not support the application and distance themselves therefrom.

vii. There is no common interest between the 1st -3rdapplicants on one hand, and the respondents as well as the majority of the delegates they represent on the other hand in this application.

20. I know as a fact that:

(i) While 113 delegates purportedly instructed applicants to file this application. 424 delegates have appended their names and signatures in opposition to this applications appeal. Now shown to me attached hereto and marked as exhibit 2 is a list of the said delegates.

(ii) On 15th May. 2015. respondents wrote a letter for themselves and on behalf of all the delegates elected on the 1st November. 2014 at the ward congress held for Enugu Stale to the State Chairman of the PDP informing him/the party that they were on longer aggrieved with the decision of the party in respect of the primary election and that the need for their going to court in the first instance did no longer arise. Attached hereto and marked as exhibit 3 is a copy of the said letter.

(iii) Exhibit 3 was written by the respondents on behalf of all the delegates elected on the 1st November, 2014. including the 1st - 3rd applicants herein.

22. That the respondents and the delegates they represent agree with the Court of Appeal judgment of 1st November. 2014 and also believe that this matter should not be a do or die affair.

23. That I have seen the notice of appeal exhibited to the application, as well as the grounds of appeal.

24. That the proposed grounds 1,2,3 and 4 refer to me and the 2nd and 3rd respondents to this application.

25. That we have not authorized the said grounds of appeal to be filed on our behalf, and that we do- not wish to ventilate them.

26. I have also seen the proposed reliefs sought from the Supreme Court, including the restoration of the judgment of the trial Federal High court.

27. That the judgment of the trial Federal High Court was in my favour as well as the 2nd and 3rd respondents.

28. That the respondents are not interested in the restoration of the said judgment in their favour any longer.

29. That it is in the interest of justice to dismiss this application."

From the affidavit evidence available, I make the following findings:

i. The 1st set of respondents herein held primary election for the election three (3) delegates per ward for the election of candidates to represent the party at the 2015 Governorship election for Enugu State.

ii. At the end of general election the candidate of the 1st set of respondents won and was declared duly elected. Both the Tribunal and court below affirmed the election.

iii. Some persons were disgruntled and lodged an action at the Federal High Court with suit No. FHC/ABJ/CS/816/2014.

iv. Most of the reliefs were dismissed by the Federal High Court (trial court).

v. The first set of respondents (i.e. 1st, 2nd, **3rd** and 4th respondents) herein appealed to the court below in appeal No. CA/A/28/2015 with that court allowing the appeal by setting aside the decision of the trial court and striking out the originating summons.

vi. The T' respondent received a correspondence (Exh. CA2) from the 2nd set of respondents that they resolved at a meeting held on 15 05 15. to accept the verdict of the Court of Appeal of 30/04/15 and no need a proceed with the matter on further appeal.

vii. The applicants herein, lodged an appeal to this court as appellants. They transmitted record of appeal and filed appellant's brief of argument.

ix. The 2nd set of respondents filed a respondent's brief in which they embeded a preliminary objection on the ground that the named parties to the appeal bore no relationship with suit N0. FRC/ABJ/CS/816/2014 and appeal No. CA/A/28/2015.

x. Before hearing of the appeal, the applicants initiated an application seeking to remove/substitute the named parties representing the delegates and implant their names.

xi. This court, after hearing the said application, struck out same on the ground that the applicants cannot unilaterally

alter the parties to the proceedings at both the trial court and the court below.

xii. The application on hand is brought under appeal No. SC.428/2015.

xiii. The proposed notice of appeal, exhibit 5 (paragraph 18 of the affidavit in support) bore only the names of the first set of respondents as respondents (to the proposed appeal) and the applicants (as appellants in the proposed appeal). The second set of respondents (who sued for themselves and on behalf of other delegates both at the trial court and the court below) did not feature in any capacity-status in the proposed appeal.

xiii. There is alteration of parties from the trial court, Court of Appeal, to this court. Applicants were not parties at the trial court and the Court of Appeal.

xiv. From their application on hand, applicants have no pending appeal as they prayed, *inter alia***,** for extension of time to seek leave to appeal, etc. That is the import of applicants' reliefs 3 - 5 of the application on hand.

xv. There is no appeal to this court by the 2nd set of respondents.

xvi. There is no commonality of interest between the applicants and the parties they seek to substitute which is the foundation upon which representation is based.

1 think it is apt for me at this stage, to remind my noble lords in a concise manner the general principles of the law relations to substitution. When one puts something by way of replacement or change of another,

whether a person or a thing, that would amount to substitution.

The law may permit a person to substitute another in a law suit (including appeal) where there is a genuine case of death, bankruptcy, assignment, transmission or devolution

of interest or liability of a party to the suit or appeal, where the need to substitute is obvious in fact and in law. Where a party is dead, he cannot physically take part any more in the proceedings. His position must necessarily be taken over by the beneficiary who inherits him and who subsequently, inherits the litigation. Otherwise, the action for or against the deceased will abate unless appropriate steps are taken to substitute a living person for the deceased. See: *Eyeson v. Sanusi* (1984) 4 SC 115 at p.137. (1984) 1 SCNLR 353. Bankruptcy of one of the parties to a suit while the suit is pending, may also abate except where a trustee! si takes over. Comprehensive rules are made by the various (now unified) High Court Rules which take care of such circumstances**.**

Status of the applicants vis-a-vis suit No. FHC/ABJ/CS/816/2014 at the trial court: appeal No.CA/A/282/20I5 at the court below and the application under consideration in this court

Permit me to restate (at the risk of repetition), my lords, that the applicants w ere some of the ward delegates elected for Enugu State at the Ward Congress Election for PDP held on the lst of November. 2014.

The applicants were among the delegates represented by the 2^{a}- set of respondents at the trial court in suit No. FHC/ABJ/CS/816/2014 which was determined by that court on 24th November, 2014 and in appeal No. CA. A/28/2015 which the court below determined on 30th of April, 2015. In this court, the applicants prayed for three fundamental reliefs: (i) leave to substitute the names of the applicants for the names of the 2nd set of respondents (who were Ist, 2nd and 3rd respondents at court below for themselves and on behalf of delegates elected on the 1st of November. 2014 at ward congress held for Enugu State, including the applicants) (ii)

the 2nd relief is the tripod prayer, i.e. for extension of time to seek leave to appeal, leave to appeal and extension of time within which to appeal: (iii) (Third relief) is for leave to the applicants to present, maintain and or prosecute the appeal in a representative capacity i.e. presumably for themselves and other delegates elected at the 1st November, 2014. Ward Congress Election of PDP held in Enugu State (as per exhibit 1 annexed to the application). So in cases at the trial court and the court below , the applicants were unnamed parties who were fully represented by the 2nd set of respondents.

Applicants' reasons for the substitution sought

It is to be noted that there was no substitution or attempt to substitute any of the parties at the trial court or at the court below. The issue of substitution became apparent after the delivery of judgment by the court below. It is in evidence by the applicants that 2nd set of respondents are no longer interested in prosecuting an appeal to the Supreme Court against the decision of the court below of 30th April, 2015. As a result, the applicants instituted an appeal before this court with appeal No. SC. 428/2015 which was follows by an application by the applicants to appeal against the said judgment of the court below. The said application was struck out by this court as the names of the parties in the case were unilaterally changed by the applicants.

That the applicants yet found there was need to seek leave to appeal against the judgment of the court below. Applicants stated that they are desirous to prosecute the appeal in a representative capacity on behalf of those names as in Exh. 1 whose mandate the applicants deposed to have. Applicants deposed further that their right to challenge the court below decision is constitutional and parties on record representing a group of people cannot compromise the interest of people they represent.

Is substitution at this level possible?

The proposed record of appeal, the affidavit evidence and the exhibits available before this court clearly reveal that:

A. At the trial court, the parties were as follows:

Suit No. FHCABJ/CS/816/2014

Between.:

Barrister Orji Chinenye Godwin

Chief C.C.Akalusi

Chief Orji C. Orji

(Suing for themselves and on behalf of all delegates elected on the lst November. 2014 as the Ward Congress held for Enugu State.

Plaintiff Applicants And

Peoples Democratic Party (PDP)

National Chairman (PDP)

National Secretary (PDP)

National Working Committee (PDP)

Independent National Electoral Commission ([NEC) - Defendants/Respondents

B. The parties at the Court of Appeal were as follows:

Appeal No. CA/A/28/2015

Between

Peoples Democratic Party (PDP)

National Chairman (PDP)

National Secretary (PDP)

National Working Committee (PDP)- Appellants

And

Barrister Orji Chinenye Godwin

Chief C. C. Akalusi

Chief Orji C.Orji
(Suing for themselves and on behalf of all delegates elected on the 1st November, 2014 as the Ward Congress held for Enugu State.
Independent National Electoral Commission (INEC)- Respondents

C. The parties in the application before this court are as follows:

"Appeal No. SC. 428/2016

(i) Between

1. Peoples Democratic Party (PDP)
2. National Chairman (PDP)
3. National Secretary (PDP)
4. National Working Committee (PDP)
5. Independent National Electoral Commission (l.NEC) - 1s set of Respondents

And

1. Barrister Orji Chinenye Godwin
2. Chief C.C. Akalusi
3. Chief Orji C. Orji

(themselves and on behalf of delegates elected on the 1st of November, 2014
as the Ward Congress held for Enugu State - 2nd set of Respondents

In Re: Application of:

1. Ejiofor Apeh
2. Ude Celestine
3. Ossai Moses
(On behalf of other unnamed parties on record

-

Applicants/Proposed Appellants

(ii) Parties on the proposed notice of appeal (Exh. 5. paragraph 18 of applicants' affidavit in support are shown as follow s:

Appeal No .....

Between

1. EjioforApeh
2. Ude Celestine
3. Ossai Moses
(On behalf of other unnamed parties on record

- Appellants

And

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

Respondents

Proposed Notice of Appeal

My lords, it is quite clear from the situations in 'A' and 'B" above that the applicants were pan of those represented by

the "plaintiffs/ applicants" at the trial court and by the "respondents" at the court below. As seen above also, the proposed appellants in the proposed notice of appeal did not feature any where as named parties in either the trial court or at the court below. This, to say least, is incredible and unprecedented! My lords, there is ample affidavit evidence why the applicants took such steps in presenting their application. In my humble view, the law of representation, comes into the scene here. Mr. Barrister Orji Chinenye Godwin. Chief C. C. Akalusi and Chief Orji C. Orji who prosecuted the suit at the trial court as plaintiffs applicants and as respondents at the Court of Appeal, claimed, unequivocally, that they were suing or responding on the matter "for themselves and on behalf of ail delegates elected On the 1st November. 2014 at the Ward Congress held for Enugu State." This fact has not been denied or controverted at any stage of the proceedings. The law is very certain that where a common factor unites some individuals or communities who have equal claim in a thing/subject matter, every member of that individuals, community, group, association, club etc, is entitled to join litigation where it arises. The situation is even more eloquently typified in the case of Duke of Bedford v. Ellis (1901) AC 1. that all persons who have a common right which is invaded by a common enemy are entitled to join in attacking the common enemy in respect of that common right. Where such individuals, communities, groups are so many that all of them cannot conveniently sue in the suit involving that right, the rules of court permit one or more of them to sue or be sued as representatives of the others. This is known as a representative action. The few persons by or against whom the action is brought are the representatives of the others and

they prosecute or defend not in their personal capacity but in their representative capacity.

Consequence of a Representative Action

It is to be noted again that in a representative action both the named plaintiff and/or defendant, as the case may be. and those they represent are parties to the action. However, the law permits only the named representatives as plaintiffs or defendants who are the *Dominus Litis* (the masters of the suit) to sue or be sued in a representative capacity until when the suit is determined. And. for the purposes of initiating any process in representative action, such process must be by and in the name of the *Dominus Litis* in the named plaintiffs or defendants so long as their mandate from those they represent remains acceptable and uncountermanded. Those represented, such as the applicants in this matter, are deemed bound by whatever decision the court would give for or against their representatives. See: *Tesi Opebivi* v. *Shittu Oshoboia & Anor* (1976) 9 - 10 SC 195 at p.200; *Oketie v. Oluphor* (1995) 5 SCNJ 21" at 226. (reported as *In Re: Otuedon* (1995) 4 NWLR (Ft. 392) 655): *Atanda v. Olanrewaju* (1988) 4 NWLR (Pt. 89) 394: *Ede v. Nwidenyi, In Re Ugadu* (1988) 5 NWLR (Pt.93) 189; *Ekemna v. Nkpakara* (1997) 5 SCNJ 70 at p.88. (1997) 5 NWLR (Pt. 504) 152.

To clarify the matter further, any decision given for or against the representative is a decision for or against those other persons, individuals groups etc, they represent. See: *Otapo r. Sunmonu* (1987) 2 NWLR (Pt.58) 587. By way of further elucidation, it was held in *pabiekun & Ors v. Ajayi* (1966) 1 All NLR 197 that the members of the group represented are so bound by the outcome of the proceedings that where a court makes an order for a defendant defend on his family's behalf and judgment is given against the family,

a member of that farnily who did not join me resolution that the defendant should represent the family cannot say that the judgment does not bind him and claim family property in his possession taken in execution of that judgment, if all the named parties in a representative action die. the action, provided it still maintainable, subsists on behalf of and/ or against those they represent and who have not been mentioned in the proceeding *Nomine*. But suck action may not be prosecuted or continued until a living person has been substituted for the named deceased party to carryon tire representative action both on trial and also when the matter is on appeal. See: *Attah & Ors v. Nnacho & Ors* (1965) NMLR, 28; *Oketie v. Olughor (supra).* (reported as *In Re: Otuedun* in (Pt. 392) of NWLR (4995).

In the application on hand, it is never shown, anywhere, that those who represented the applicants, or anyone of them died which would necessitate substitution. Further, none of the names of the representatives of the applicants has got his name legally removed or replaced from the proceedings as m situations (A) and (B) above. 1 agree with the learned SAN for the 1st set of respondents in his submission that the applicants initiated an application "seeking to remove the named parties representing the delegates and to impact theirs". The law,rules of court and practice would not permit that. it is settled law" that individuals are not allowed to unilaterally alter a case as constituted from the trial court and the names of parties in that character must be maintained except as may otherwise be ordered by a court of law. Our order 2 rule 8 of this Court's Rules, 1985 as amended: provides:

“Notices of appeal, applications tor 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 previsions of these rules, shall reflect

the same title as that as that which (sic: are) contained in the court of trial."

(Italic for emphasis)

This was what this court harped on to strike out a similar application filed earlier by the applicants. See: PPA v. INEC (2012) 13 NWLR (Pt. 1317) 215.

Secondly, after the judgment of the court below, a letter was said to have been written, addressed and delivered to the stat-Secretary. PDP, Enugu State which was acknowledged by the said Secretary on 15/05/2015 (paragraph 6(x) of 1st to 4th respondents' counter affidavit filed on 10/11/2016: paragraphs 20(ii), (iii) and 22 of the 2nd set of respondents' counter affidavit filed on 14/11/16; 5th respondent's (among the 1st set of respondents) counter affidavit (paragraph 4(f) filed on 7/1l/16). The referred letter, exhibit CA2, reads as follows:

"Barrister Orji Chinenye Godwin
Chief C. C. Akalusi,
Chief Orji C. Orji
For ourselves and on behalf of all
the delegates elected on the
1st November. 2014 at the Ward
Congress held for Enugu State.
15th May, 2015.
The State Secretary,
Peoples Democratic Party (PDP)
State Secretariat,
Enugu.
Dear Sir,

1. Suit No: FHC'ABJ'CS/816''2014: Barrister Orii Chinenxe Godwin & Ors v. PDP & Ors

2. Appeal No:- CA;/A/28/2015: PDP v. Barrister Orji Chinenye

Godwin.

Re: Notice Of Acceptance Of Verdit Of The Court Of Appeal

We write on behalf of ourselves and all the delegates who authorized us to initiate the above mentioned proceeding at the Federal High Court, Abuja Division which eventually culminated in the decision of the Court of Appeal rendered on 30th April, 2015. We notify you that for the reason that primary election was eventually conducted with the elected 3 man delegates participating, we are not aggrieved with the actions of the party nor is there a need for us to further proceed with the matters.

It is hoped that you will appreciate that our decision to so to court in the first instance was based on our apprehension that the proper thing was not going to be done. We thank you for your understanding and assure you of our loyalty on all affairs of our great party.

thank you for your co-operation

Your faithfully,

Signed.

Barrister Orji Chinenye Godwin.

Sgnd. Chief C. C. Akalusi

Sgnd. Chief Orji C. Orji

For ourselves and on behalf of all the delegates erected on the 1st November, 2014 at the ward congress held for Enugu State."

In a sharp reply, the applicants, in a further and better further affidavit filed on 14/11/16 by the 1st -4th respondents, deposed to by the one Ejiofor Apeh (1st respondents herein) stated as follows:

"15. That 1 know as a fact that exhibit CA2 to the counter affidavit does not exist nut was merely concocted in furtherance of the Illegality intended by the respondents and

in the unlikely event it exists they did not have our authority and those of the other persons the represented to write the letters. They wrote the letter in their personal capacity alone and cannot bind us without our consent.

6. That the author of exhibit CA2 did not inform me about the appeal which culminated in this present appeal before the Court of Appeal neither did they report to us about the outcome of the appeal before the Court of Appeal.
"

My lords, exhibit CA2 speaks eloquently for itself. Need 1 say anything more? What I may add, perhaps, is that the reasons put forward by the applicants in reply to- exhibit CA2 may appear contrary to the earlier position held out as per their depositions in their affidavit m support that the said set of respondents represented them at the that court and the court below. Whatever the applicants may say to convince this court that they are not bound by a decision that bound their representatives (2nd set of respondents) will certainly run counter to the earlier representation of all the delegates elected from the Ward Congress in Enugu State, whereat the delegates, including the applicants, stated that stated accepted the decision of the court below on the issues in dispute and as a matter of fact, did not have any reason to proceed further on appeal to this Court, I thus, have no reason to disbelieve that the applicants were part of the decision in exhibit CA 2. I already referred earlier to paragraph 8 of the applicants supporting affidavit which confirms that the 2nd set of respondents are not interested in pursuing the matter to this court. That decision as I said earlier, still binds the applicants and they can not resile, See; A.-G. Nasarawa State **v**, A.-G. Plateau State **(**2012), 10 NWLR (Pt.1309) 419 at p. 450. Thirdly, even as the matter is now and from the

proposed notice of appeal. There is apparently no appellant's of The persons designated as appellants are the applicants in this application. They can only succeed as appellants if their applications for substitution scales through, Even, then, whom are they going to substitute as there are vision no appellant now on the proposed notice of appeal. The proper thing to do. usually, is to maintain the names of the parties I on record, if, on appeal, the appeal is properly entered, and if for any reason, there arises need to substitute any of the named parties, I or where a person who has a real, genuine and cognate interest, applies to join the litigation (at any stage), the court may exercise : its discretion in favour of such applicant, it is not open for a party to unilaterally effect a change in the names of parties who are on record of proceedings of any court.

Further, the interest of the applicants cannot in any way be higher than the interest of all the delegates (780) elected for the 260 Wards in Enugu State (Exit. CA4). The claim of the applicants is that 113 delegates authorized them to appeal to this court. Even if that is correct, majority of the elected delegates for Enugu State **(**667 of them) still remains bound by the decision taken in exhibit CA2 There is therefore, no commonality of interest between the applicants and the vast majority (667) of the delegates in pursuit of the application on hand as divergent interests set in between the applicants, the 2nd set of respondents and the majority of the ward delegates, in a substitution, commonality of

interests between persons to substitute and those to be substituted is paramount. See: *Ejiofor Apeh & Ors* **v.** *PDP* SC.428/2015 of 22/1/2016. (Reported in (2016) NWLR (Pt. 1510) 153).

The claim, of exercise of constitutional right by the applicants. My lords, is not just a mere imagination of the phrase. It has to be funded or sidle, substantial and valid legal claims.

I find no merit in this relief which is bound to far In relation to other reliefs where there is no legal person who is competent to file an appeal, an aspirant wishing to join the proposed appeal**,** must flatly fail as one cannot build something on nothing and expect it to stand**,** it will collapse. *Macfoy v. UAC* (1961) 3 All ER 1169.

There is no foundation for reliefs 3, 4, 5 which are hereby struck out.

Reliefs 1 and 2 for leave to substitute 2nd set of respondents sin this application) and for leave to present, maintain and prosecute (this appeal**)** or. better, an appeal in a representative capacity on behalf of other unnamed parties on record; nave no scintilla of merit. They are hereby dismissed along with the application, in the interest of justice.I shall allow each party to this application to bear its own costs.

PETER-ODIL1, J.S.C: I agree with the ruling just delivered by my learned brother**,** Ibrahim Tanko Muhammad JSC and to register my support for the reasonings, I shall make some remarks.

The motion filed on the 2nd day of October, 2016 brought by Ejiofor Apeh, Ude Celestine, Ossai Moses

(on behalf of other unnamed parties on record), praying for the following reliefs,

Viz:-

1. An order granting leave to substitute the names of Ejiofor Apeh, Ude Celestine and Ossai Moses for the names of Barrister Orji Chinenye Godwin, Chief C.C. Akalusi and Chief Orji C. Orji who were the 1st – 3rd respondents at the lower court with tire names of the present applicants.

2. An order granting leave to the applicants to present, maintain, and or prosecute this appeal in a representative capacity that is: for themselves and other delegates elected at the 1st November, 2014 Ward Congress Election of Peoples Democratic Party (PDP) held in Enugu State and who had given letter of authority by subscribing their names and signatures on exhibit 1 annexed to this application.

3. An order of this court extending the time within which the applicant may seek leave to appeal against the judgment of the Court of Appeal, Abuja Division delivered on 30th day of April, 2015 in appeal No CA/A/28/2015 Coram; Abubakar Jega Abdulkadir Tani yusuf Hassan and Muhammed Mustapha JJCA as parties interested.

4. Leave to appeal against the said judgment

5. Extension of time within which to appeal.

6. And for such further (orders) as the court may deem fit to make in the circumstances of this case.

Grounds for the Application

i. The applicants were ward delegates elected for Enugu State at the ward Congress Election for the Peoples Democratic Party (PDP) on 1st November, 2014.

ii. The appellant were among the Delegates represented by Barrister Orji Chinenye Godwin, Chief C.C. Akalusi. Chief Orji C. Orji at Federal High Court and Court of Appeal, Abuja in suit No. FHC/ABJ/CS/816/2014 and CA./A/28/2015. The court below gave judgment against the said respondents

iii. The said Barrister Ors Chinenye Godwin, Chief C.C. Akalusi, Chief Orji C. Orji who were the 1st to 3rd respondents at the tower court are no longer interested in pursuing the case in the Supreme Court.

iv. The appellant; and Barrister Qrji Chinenye Godwin, Chief C. C Akalusi and Chief Orji C. Orji rare the same interest in the case but the latter are no longer interested in pursuing the appeal on behalf of the ward delegate.

v. The applicant are desirous of further pursuing this appeal in a representative capacity to the Suprem Court and have been, authorized by other delegates whose names me contained in exhibit 1.

vi. The applicants earner sought Or leave to substitute the names of the 1st to 3rd respondents with their own names before this court after the applicants have filed notice of appeal and brief of argument in their names.

vii. That in a considered ruling of this court delivered on the 22nd January, 2016, the said application for substitution was struck out on the ground that the order for substitution had to be granted first before filing other processes including notice and grounds of appeal.

viii. The applicants are out of time within which to appeal against the decision of the lower court.

ix. The applicants for themselves and on behalf of ether delegates nave the mandate of other Ward Delegates elected for Enugu State on 1st November 2014 whose names are contained in exhibit 1 to pursue this appeal on their behalf,

since they are all aggrieved by the decision of the Court of Appeal.

x. Leave of this court is required to file an appeal.

Learned counsel for the applicants, Yusuf Ali SAN adopted the written address filed along the motion and the supporting affidavit of thirty -three –(33) paragraphs. He also relied on a further and better affidavit filed on 14/11/2016.

Dr. Onyechi Ikpeazu SAN of counsel for the respondents 1st – 4th also set about moving their own motion filed on 29/4/2016 for the following order thus:-

Dr. Ikpeazu SAN referred to the supporting affidavit of seven (7) paragraphs. Also a counter affidavit filed on 10/11/2016 in which was attached a written address in contention of the application of 21/10/2016 which learned senior counsel adopted and relied on.

Mr. T. M. Inuwa of counsel for the 5th respondent adopted their written address filed on the 7th November 2016. Chief Wale Olanipekun SAN for the second set of respondents adopted their counter affidavit filed on 3(1/9.2016 and in it the written address.

In the written address pushing for the granting, of the reliefs in the motion of 21/10/2016. Yusuf Ali SAN raised a single issue which is thus:-

Whether the applicants have placed necessary materials before this Honourable Court that will entitle them to the reliefs sought?

Dr. Onyechi Ikpeazu SAN for 1st – 4th respondents in his written address in opposition to the application on ground identified two issues for determination which are as follow s:-

1. Whether this, application is competent having regard to the nature of SC.428/2015?

2. Whether the applicants are entitled to be substituted having regard to the fact before the supreme Court as disclosed in the depositions of the parties?

T.M. Inuwa Esq. for the 5th respondent in his written address adopted the said issue as crafted by the applicant though he urged the court to dismiss the application as lacking in merit.

This single issue of the application I see as good enough for me in the determination of this application and I shall make use of it.

Single Issue:

Whether the applicants have placed necessary materials before this Honourable Court that will entitle them to the reliefs sought?

Learned Senior Advocate, Yusuf Ali urged the court to exercise its discretion in favour of the applicants as what they had set forth in supporting affidavit and the further and better affidavit show that prima facie there is good cause why the appeal should be heard. That what is in issue at this stage is not whether the appeal would succeed. He cited numerous judicial authorities such as *Anaechebe v. Kinsley ijeoma* & Ors (2014) 14 NWLR (Pt.I426) 168 at 184; *Chukwu v. Omehia*,(2013) 7 NWLR (Pt.1354) 463 at 479; Ngere v. Okuruket 'XIV' (2014) 11 NWLR (Pt.1417) 147 at 174.

He stated further that the proposed notice and grounds of appeal attached to the application as exhibit 5 are arguable, substantial and has prima facie shown good cause why the appeal should be heard. That by paragraphs 2.3.4.5,7,9.10.1**1.** 12 and 18 of the affidavit in support of the

application, the applicants are interested parties whose interest need to be protected and subsequently gave rise to this application. That an action in a representative capacity binds both the parties w hose names appear in the case and those on whose behalf the case was instituted. That the decision of the Court of Appeal is binding on the present applicants and persons whom they are representing notwithstanding the fact that the respondents in persons of Bans Orji Chinenye Godwin, Chief C. O. Akalusi and Chief Orji C. Orji decided not to pursue the case to the Supreme Court.

Mr. Yusuf Ali, senior counsel concluded by stating that the applicants being interested parties whose interest is at stake in this case, they ought to be brought in, in the interest of justice.

In response, learned counsel for to 1st - 4th - respondents. Dr. Ikpeazu Senior Advocate contended that the application is not competent on two major grounds. Viz:-

(i) SC.428C015 has no viable basis of existence, not having any relationship in terms of parties with the proceeding which gave rise to the appeal,

(ii) This application cannot exist under a heading different

from that on which SC.428/2015 was brought.

That in respect to the first condition, no person is allowed to unilaterally alter a case as constituted from the High Court, as the character of the case from inception has to be maintained and if there is to be a change, it must be with leave of court

which leave has not been sought for or obtained from the Supreme Court. He referred to order 2 Rule 8 of the rules of this court: P.P.A. v. INEC (2012) 13 NWLR (Pt.1317) 215 at 236 - 237.

Learned senior counsel submitted that the Supreme Court in exhibit 2 to applicants' application gave a decision on what should be the appropriate procedure by way of guidance on what should be done. That exhibit 5, proposed notice of appeal shows the deficiency in this application.

On the second condition. Dr. Ikpeazu stated that the heading of the application does not have the same parties in SC.428 2015. He cited exhibits 2, 3. 4 and said the applicants are seeking to "substitute" the individuals in the earlier appeal in a different capacity, "on behalf of other unnamed parties on record". He stated that the effect if application is granted. the judgment of the Court of Appeal cannot be enforced against the named individuals, as they would have been renamed from the incidents of the matter.

Learned senior counsel contended that the applicants have not established that they were properly authorized to represent the other delegates whose names are not stated. That the cause of action has become spent and ceased to exist. He cited *Badejo v. Fed Ministry of Education* (1996) 8 NWLR (Pt.464) 15 at 40 – 41; *Adepoju v. Yinka* (2012)3 NWLR. (Pt. 1288) 567 at 584.

Mr. T. M. Inuwa of counsel for the 5th respondent, submitted that this application jacks merit as applicants are seeking to substitute the 2nd set of respondents who were respondents at the Court of Appeal and who are not interested in appealing

against the judgment of the Court of Appeal, subject matter of this application and so they have not filed an appeal. That there is really no existing appellant who the applicant can substitute. He cited *Macfoy* ***v.*** *U.A.C.* (1962) AC 152: *Agbaje v. INEC* (2016) 4 NWLR (Pt.150), 151 at 161.

That the applicants have not shown how the judgment in the court below has prejudicially affected their interests. He cited *Nwaogu* ***v.*** *Atuma* (No.2) (2013) 9 NWLR (Pt.1358) 182.

Learned counsel for the 2nd set of respondents submitted that the applicants have not shown which interest they want to protect. Also that the applicants cannot step in to act in a representative capacity for persons who have no link with them or want them to be so represented. That the synergy between the representative and the represented is absent. He cited *Idise v. Williams Intl. Ltd* **(**1995) 1 NWLR (Pt. 370) 142 at 152 - 153; *Ukatta v. Ndinaeze* (1997) 4 NWLR (Pt.499) 251 at 275.

That the applicants have not established why the discretion they seen should be granted in their favour. He relied on *William v. Hope Rising Voluntary Funds Society* (1982) 1 All NLR(Pt.1) 1 at 5.

The lone issue set out by the applicant is sufficient for use in the determination of this application and it is as foliows:-

Sole Issue:

Whether the applicants have placed necessary materials before this Honourable Court that will entitle them to sought.

The stand of the applicants in a nutshell is that they being interested parties whose interest is at stake in this case, the court's discretion should be exercised in their favour and the application granted in the interest of justice.

The 1st – 4th respondents are of an opposing view contending that there is no competent appeal before the Supreme Court on which this application can be hinged as the applicants are not properly before the Supreme Court not having initiated their process duty. Also that the reliefs, they seek are anchored on the right which is stale and spent.

For the 5th respondent, its angle is that the application is devoid of merit and liabie to be dismissed.

The 2nd set of respondents contends that the application has no leg on which the discretion should be exercised in their favour.

The general principles upon which the court is enjoined to take into consideration for the grant of an application such as the present one are well set out by learned counsel for the applicants

Yusuf Ali SAN' and in reiteration the) are thus:-

(a) Are the applicants; appellants parties interested in this case whose interest need be protected?

(b) Do applicants nave good reasons for not appealing within time?

(c) Is the proposed notice and grounds of appeal substantial and arguable grounds of appeal?

(d) Are the applicants not entitled to exercise this constitutional:}- guaranteed right of appeal?

The principles above set out cannot how ever exist in *vacuo* as the competence of the application must be present That is to say that there must be a foundation -in winch those

principles would stand for the consideration of whether or not the application should be favorably looked at.

For a starter this motion has been brought under the number, SC.428/2015 which has the following parties, viz:-

1 Ejiofor Apeh

2. Ude Celestine

3. Ossai Moses

For themselves and on behalf of other Delegates elected for Enugu State on 1st November, 2014 - Appellants

And

1. Peoples Democratic Party (PDP)

2. National Chairman (PDP)

3. National Secretary (PDP).

4. The National Working Committee (PDP)

5. Independent National Electoral Commission (INEC)

- Respondents

In this application the title of the parties are as follows:-

1. Peoples Democratic Party (PDP)

2. National Chairman (PDP)

3. National Secretary (PDP)

4 The National Working Committee (PDP)

5. Independent National Electoral Commission (INEC) - *1st* Set of Respondents

And

I. Barrister Orji Chinenye Godwin

2 Chief C. C Akalusi

3. Chief Orji C. Orji

(Suing for themselves and on behalf
of all delegates elected on the 1st
November, 2014 as the ward congress
held for Enugu State. – 2nd *Set of Respondents*

In Re: Application of:

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

(On behalf of other unnamed parties on record

– *Appellants/Proposed Appellants*

In view of the titling above, a poser arises as to what happens with Order 2 rule 8 of the Supreme Court Rules 1985 (as amended; which has prescribed the way to go- in an application such as the present which is one of leave to appeal. For clarity. I shall quote the said relevant rule of court which is thus:-

"Order 2 rule 8:-

Nonce of appeal, application for leave to appeal briefs and all other documents whatsoever prepared in pursuance of the appellate jurisdiction of the court for filing in accordance with the provisions of these rules, shall reflect the same title as that which obtained in the court of trial".

The hurdle that has presented is not one that can be wished off and treated lightly, as this court has made pronouncements on similar occurrences and there is no way out of the obstacle that has reared its head. An example of what this court has stated should obtain is well captured in *PPA* v. *INEC* (2012) 13 NWLR (Pt.1317) 215 at which order 2 Rule 8 of the Supreme Court Rules 1985 was in focus in relation to the competence of the application.

At the Federal High Court where the matter before us now incepted, the parties are thus in suit No. FHO/ABJ/CS/816/2014 as follows:-

"Barrister Orji Chineye Godwin

Chief C. C. Akaiusi

Chief Orji C. Orji

(Suing for themselves and behalf of all

Delegates elected on the 1st November, 2014

At the Ward Congress held for Enugu State)"

- Plaintiffs/Applicants

I align with the submission of the 2nd set of respondents are being sought to be substituted and with the intention or presenting this application on behalf of other unnamed parties on record. Definitely the situation evokes the following conclusions:-

1. The interest of the 2nd- set of respondents as disclosed in the action at the Federal High Court of trial, appealed to the Court of Appeal is different from what the applicants are seeking to substitute them for.
2. There is therefore no commonality of interest on which the applicants can seek to step into the shoes of the 2nd set of respondents.
3. The present application shows that the named applicants do not have an interest as those of the unnamed parties on record.
4. Seeing that only a party with interest in a sun can institute a representative action, one wonders under which head the unnamed parties would be situated.

What seems clear from the submissions, documents including the ; affidavits and counters thereof is that the 2nd- set of respondents are strongly maintaining that the persons who present themselves as appellants applicants in

this appeal do not have the authority of all the delegates to initiate this appeal. One cannot explain the nomenclature of named and unnamed applicants particularly w here i some of those the applicants claim to represent are not interested in the appeal the applicants seek. A situation akin to shaving a "man's hair" in his absence. This court in the exhibit 2 of the applicants which is the decision of this court in Apeh v. PDP (2016) 7 NWLR (Pt. 1510) 153 at 174 – 175 paras B-H stated thus:-

"1. Ejiofor Apeh

2 Ude Celestine

3. Ossai Moses

(Unbehalf (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 word delegates elected for Enugu State on 1st November, 2014". In effect, the applicants have not succeeded in demonstrating a commonality of interest as required by the authorities ..."

“Turning to the issue of commonality of interest. It cannot even be gainsaid that the applicants, woefully, failed to bring themselves within the embrace o: me requirements of the representatives' suits genre. From the capacity expressed on pages 323-32" 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 representatives' 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. *Ogamioba and* ***O***rs v**.** Chief

Ogene and Ors (1961) All NLR 59 at 62: (1961) **1** SCNLR 115: This means that the parties on record and those they represent) must have common interest.

Put differently, the subject matter must esmte a common interest as opposed to diverse interests. *Ukpong and anor v. Commissioner far* Finance and Economic Development (2006**)** LPELR 334 (SC); (2006; 19 NWLR (Pt. 1013) 187".

The Supreme Court at pages 176 - 177 paras. E-A in the same *Apeh* ***v.*** *PDP (supra)* stated thus:-

"Even then, the burden is on the plaintiff (and with respect to this application, the applicants herein! to establish a commonality of interest. *Atane* v. *Amu (supra); Ogamioba* v. *Oghene* (1961) 1 All NLR 59, 60, (1961)1 SCNLR 115. 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 reiiefs beneficial to all of them. *Ayinde and Ors v. Akanji and Ors* **(**1988) 1 NSCC 43. (1988) 1 NWLR (Pt. 68**) 70.** approvingly, adopting *Ogamioba and Ors* v. *Oghene and Ors* (1961) 1 All NLR 59, 60: (1961) 1 SCNLR 115.

As shown above, at the trial court, the named plaintiffs (who were the named respondents at the lower court) were shown as "suing few themselves and on behalf of all the delegates elected on the 1st November. 2014 at the ward Congress held in Enugu State". On the other hand, the applicants, at pages 323-32" of the record, that is. in the process titled "Notice of Appeal," were:

1. Ejiofor Apeh
2. Ude Ceiestine
3. Ossai Moses

(Unbehalf (sic) of the Unnamed Parties on record) as appellants".

Indeed, this application has strange facets in that the 2nd set of respondents have not filed a notice of appeal and so there is no valid appeal and as a follow up no appellant or appellants to be substituted as after the court of appeal decision, the 2nd- set of respondents rested and at that lower court the 2nd- set of respondents represented others including the applicants herein. The implication therefore is that there is no existing appellant who the applicants can substitute. This brings to memory the matter of not putting something on nothing and expecting it to stand. See *Mac*foy *v. UAC* (1962) AC 152.

It seems to me that this application is a non-starter having not scaled the fundamental hurdle which is the proper parties before court especially where the applicants intend to carry along unwilling partners.

This is not a simple matter of a party having good reasons for not appealing within time or the proposed notice and grounds of appeal being substantial and arguable grounds of law or the guaranteeing of the applicants' constitutional right of appeal and whose interest have to be protected. This situation is beyond the factors above as what is available show some willing and unwilling proposed appellants and the interests having no common ground and as this court had held in

Ngere **v.** *Okwuket* 'XIV' (2014) 11 NWLR f (Pt.**1**41-) 147 at 175 - 176 as follows:-

"The grant of an application for extension of time to appeal is a matter within the discretion of the court. That discretion is properly exercised if the judge considers the rules governing the particular application before granting it".

In concluding, I see no basis upon which a favourable consideration can be accorded the present application and from the foregoing and the better reasoning in the lead ruling. I dismiss the application, I do by the consequence order made.

ARIW'OOLA, J.S.C.: I was obliged before now with a copy 0f the lead ruling of my learned brother. Tanko Muhammad, JSC just delivered. I am in complete agreement with the reasoning and conclusion that the application lacks merit and should be dismissed. It is accordingly dismissed by me.

1 abide by the consequential orders in the said lead ruling**.**

AUGIE, J.S.C.: I have had a preview of the lead ruling just delivered by my learned brother - I. T. Muhammad. JSC, and I agree with his reasoning and conclusion that reliefs sought by the applicants cannot be granted.

The applicants were not parties in the suit filed by the 2nd set of respondents at the Federal High Court and the court below.

They were ward delegates elected on 1/11/2014 at the ward congresses held for Enugu State by PDP, and were represented by the 2nd set of respondents in Suit No. FHC/ABJ/CS/816/2014 at the trial court and appeal No. CA/A/28/2015, at the court below- The 2nd set of

respondents are not interested in pursuing the appeal to this court, and the applicants filed this application for -

An order granting leave to substitute the names of Ejiofor Apeh Ude Celestine and Ossai Moses for the names of for the names of Barrister Orji Chinenye Godwin, Chief C. C. Akalusi and Chief Orji C. Orji who were the 1st - 3rd respondents at the lower court with the names of the present applicants.

They also pray for an order (Relief No. 2) granting them leave to –

Present, maintain and/or prosecute this appeal in a representative capacity that is: for themselves and other delegates elected at the 1/11/2014 Ward Congress.

The other prayers are for extension of time to seek leave to appeal [Relief No. 3]. leave to appeal (Relief No.4), as extension of time within which to appeal (Relief No.5). As my learned brother said, the first relief is fundamental, and decisive of other reliefs sought.

Substitute means "a person or thing that you use or ha- e instead of the one you normally use or have" see Peretu & Ors v. Gariga & Ors(2012} LPELR-15534 (SQ: (20I3) 5 NWLR (Pt. 1348) 415 at 436. paras. A-B where Ngwuta, JSC, Added –

Black's Law Dictionary, 9th Ed., defines the word, substitution, a derivative of the word, substitute, as a designation of a person or thing to take the place of another person or thing; the process by which one person or thing takes the place of another person or thing."

Order 2, rule 8 of the rules of this court 1995 (as amended) read,

Notices of appeal, applications for leave to appeal, briefs(etc.) prepared in pursuance of the appellate jurisdiction of the court for tiling in accordance with the

provisions of these rules, shall reflect the same title as that which obtained in the court of trial.

In this case, the suit filed at the Federal High Court had the 2nd set of respondents, "suing for themselves and behalf of ail delegates elected on 1/11/2014 at Ward Congresses held for Enugu State", which includes the applicants herein, as plaintiffs, and the 1st set of respondents as the defendants. On appeal to the Court of Appeal the l[st] set of respondents, excluding INEC, were the appellants and the 2nd set of respondents (and INEC) were respondents therein.

The point of departure came when the 2nd set of respondents, i satisfied with the decision of the court below, refused to pursue an appeal to this court against the said decision. The applicants then took it upon themselves to file a notice of appeal in this court as appellants on behalf of other unnamed parties on record'.

They have filed this application to regularize their position as self-appointed appellants, taking the matter up from where the 2nd set of respondents that represented them up to this point, stopped,

The 1st to 4th respondents submitted that there are two major problems with presenting this application under this appeal No.-

1. This appeal No. SC/428/2015 has no viable basis of existence, not having any relationship in terms of Parties with the proceeding, which gave rise to the appeal.

2. This application cannot exist under a heading different from that on which appeal No. SC.428/2015, was brought.

They further argued, citing order 2, rule 8 of the rules of this court and *P.P.A. v. INEC* (2012)13 NWLR (Pt.13 17) 215 that individuals are not allowed to unilaterally alter a case as constituted from the High Court, and are mandated to

maintain the same character of the case as incepted or seek leave of court to effect an alteration.

The 5th respondent [INEC] and the 2nd set of respondents, argued along the same lines, and I agree with the respondents that from whatever angle this application is considered: it lacks merit. Order 2, rule 8 of the rules of this court leaves no room for any other conclusion. This court considered the stud rule 8 in the case of *P.P.A. v. INEC* {supra) page 23". paras. A-D and held as follows

[per Ngwuta, JSC]:

"An appeal is an invitation to a higher court to review tire decision of a lower court to find out whether on a proper consideration of the facts placed before it and the applicable law, the court arrived at a correct decision". See *Oredoyin v. Arowolo* (1989) 4 NWLR (Pt. 114) 172 at 211 per Oputa, JSC... The facts the appellate court will review in an appeal are facts presented by or elicited from the parties at the trial court. If any party is displaced and a stranger to the proceedings at the trial court has usurped his place the appeal will be incompetent and the appellate court will lack jurisdiction to hear it. This applies equally to an application for leave to appeal."

In this case, the applicants, who were not parties at the trial court, are not just substituting names of the extant parties therein: they are seeking to delete their names from the suit and judgments of the lower courts, which as the l[st] to 4th respondents submitted, goes beyond amending the capacity m which the said suit was filed since the said judgments had already attached to the persons in the capacity in which the suit was tiled, and the judgments delivered.

It is for this and the other detailed reasons in the lead ruling that I also dismiss the application. Each party to bear its own costs.

EKO, J.S.C.: 1 read in draft the ruling just delivered by my Learned brother. Ibrahim Tanko Muhammad. JSC, It represents my view and stance in the application. I hereby adopt it.

Let me, however, add a few comments of mine. The factual situation that prompted the applicants herein to seek, among other reliefs, "an order granting leave to the applicants to represent, maintain and or prosecute this appeal in a representative capacity that is: for themselves and other delegates elected at the 1st November. 2014 Ward Congress Election of Peoples Democratic Party (PDP) held in Enugu State and who had given their names and signatures on exhibit I. annexed to this application, is that the 2nd set of respondents, herein, who had sued for themselves on behalf of other delegates elected on l st November. 2014 (including these applicants) have compromised and are no longer u filing to proceed further after the decision of the Court of Appeal. They wrote a letter, exhibit CA2, dated 15th May ,2015, to intimidate their original foes, the PDP, that they "are no longer aggrieved with the actions of the party nor is there a need for us to further proceed with the matters", their original grievance having been addressed cy the PDP with the "primary (having) eventually conducted with the elected 3 man delegates participating". The 2nd set of respondents wrote the letter, exhibit CA2. "on behalf of ourselves and all the delegates who authorised us to intiate" the suits No. FHC ABJ/CS/816/2014: *Barrister Orji Chinenye Godwin & Ors. v. PDP & Ors*, and appeal No. CA/A/28/2015: PDP v. Barrisier Orji Chinenye Godwin & Ors. It is this letter, exhibit CA21 that has caused the mutiny of applicants herein against the 2nd set of

respondents who hitherto were their representatives in interest.

The named party in a representative action is *dominus* litis and because he is dominus litis: he remains so and could discontinue, compromise, submit to dismissal as he pleases. See *Okonji v.Njokanma* (1989) 20 NSCC (Pt. I11) 138 at 141: (1989) 4 NWLR (Pt.114) 16! at 167. It is tins legal authority of the *dominus Litis* exercised by the 2nd set of respondents that has irked or unsettled the applicants and thus prompting this application. But can the applicants contest this power of compromise inherent in the *dominus litis'*: The agent, and this includes a named representative maintaining an action for himself and on behalf of other unnamed parties, can and has powers to. Compromise, discontinue and even submit to dismissal of the suit. Unless these powers are expressly curtailed the named representative, being *dominus litis*. can always in his power exercise them. See *Otapo v. Sunmomu* (1987) 2 NWLR (Pt.58) 587.

When the 2nd set of respondents were empowered by the maintain the action for themselves and on behalf of other delegates elected on 1st November. 2014 (including the applicants herein) the general authority inherent in them to discontinue, compromise and even submit to dismissal of the same suit was not expressly curtailed. There is no evidence of such curtailment. The compromise, in exhibit CA2. binds the applicants herein. See *Otapo* **v.** *Sunmonu* (supra).

I accept the proposition that the *dominus litis* is like the counsel in relation to the conduct of the case he has been instructed. Counsel in conducting a cavil case is, as a matter of law, practice and civil procedure, in complete control of the case. He is a master of his own house. Whatever his decisions there are in relation to the conduct of the

proceedings in the action, the decisions are binding on the client. See *Elike v. Nwankwoala* (1984) ANLR 505.

The effect of exhibit CA2, in my view, is that it operates as estoppel by conduct, the type of estoppel contemplated by section 169. Evidence Act, 2011. That is; a party who has either by his declaration or act caused or permitted another to believe a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceeding between himself and such person or such person's representative in interest, to deny the truth of that thing. He must accept the new legal relationship as modified by his own words or action, whether or not it is supported by any point of law, or by any consideration but only by his word or conduct. See A.-C. *Rivers State v. A.-G. Akwa-Ibom State* (2011) 8 NWLR (Pt.1248) 31 SC. These applicants herein, represented by the 2m- set of respondents, in view of exhibit CA2, can not be allowed to approbate and reprobate at the same time. They are estopped by operation of exhibit CA2.

The other point of interest, in this application, is the fact that the applicants and the 2nd set of respondents all belong to the class of delegates elected at the 1st November, 2014 Ward Congress Elections of Peoples Democratic Party (PDP) held in Enugu State. They should be seen to have commonality of interest. The applicants were among the unnamed delegates represented by the 2nd set of respondents to initiate the suit No. FHC/ABJ/CS/816/2014 and defend appeal No. CA/A/28/2015. It is a settled principle of law that persons who join up as plaintiffs in an action can not set conflicting claims between themselves. In other words, in the same suit the plaintiffs must act together. See *Ejezie & Anor. v. Christopher Anuwu* & Ors. (2008) 4-5 SC (Pt.1) 31, (2008) 12 NWLR (Pt. 1101: 446. It is therefore, strange to see in this case that the "plaintiffs" who are seeking leave to

appeal are, at the same time, among the respondents in the application and the proposed appeal. The applicants herein were among me unnamed delegates elected at the 1st November, 2014 Ward Congress Elections of the Peoples Democratic Party (PDP) held in Enugu who were represented by the 2nd set of respondents in the suit No. FHC/ABJ/CS/816/2014 and the appeal No. CA/A 28/2015.

They have split from the 2nd of respondents. They have now risen against the 2nd set of respondents on one nana m the mutiny". They are also, on the other hand, proceeding against the persons sued originally by the 2nd set of respondents. The principle of Law that no person can in the same suit be both plaintiff and defendant at the same time even in different capacities was re-stated by tins court in *Ejezie v. Anuwu* (supra).

The factual situation in this case is that the essentials of representative action are not very much present in this case. The intra party conflict between the applicants and the 2nd set of respondents is a clear evidence that between them there is no commonality of interest nor a common grievance. If the applicants w ere seeking to appeal as interested parties; that application will be governed by different considerations.

This application cannot be granted in the circumstances, it is accordingly refused.

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This application cannot be granted in the circumstances. It is accordingly refused.

Application dismissed