SENATOR USMAN ALBISHIR

V.

1. **INDEPENDENT NATIONAL ELECTORAL COMMISSION**
2. **RESIDENT ELECTORAL COMMISSIONER/RETURNING OFEICER, YOBE STATE**
3. **SENATOR MAMMAN ALI**
4. **ALL NIGERIA PEOPLES PARTY**

COURT OF APPEAL (JOS DIVISION)

CA/J/EP/GOV./268/2007

ISA AYO SALAMI. J.C.A. (Presided and Read the Leading Judgment)

RABIU DANLAMI MUHAMMAD, J.C.A.

MONICA DONGBAN-MENSEM. J.C.A.

NWALI SYLVESTER NGWUTA. J.C.A.

MOHAMMED LAWAL GARB A, J.C.A.

THURSDAY. 5TH JUNE, 2008

COURT - Decision of court - Where court is competent - When decision may amount to nullity

COURT- Issue before court - Where decided by a court - Propriety of party relitigating same issue before another court.

COURT- Void act - Effect of- Whether requires order of court to set same aside.

ELECTION - Election petition - Wrongful exclusion from election -Petitioner alleging - Whether can challenge declaration of result and return by returning officer.

ELECTION - Returning Officer - Decisions of- Effect - Section 69 Electoral Act, 2006.

ELECTION PETITION - Wrongful exclusion from election -Petitioner alleging - Whether can challenge declaration of result and return by returning officer.

ESTOPEL – Estopel per rem judiscatam – Basis and application of.

PRACTICE AND PROCEDURE - Decision of court - Where court is competent - When decision may amount to nullity.

PRACTICE AND PROCEDURE - Void act - Effect of - Whether requires order of court to set same aside.

RES JURICATA – Doctrine of res juricata – Basis and application of.

Issue:

Whether all the issues in the appeal had not been resolved in appeal No. A/J/EP/GOV/249/07: Waziri v. Ali.

Facts:

The appellant and the 3rd respondent are members of the 4th respondent, All Nigeria Peoples' Party (ANPP). The appellant alleged that the 4th respondent removed his name and substituted it with that of the 3rd respondent as candidate for the office of the Governor of Yobe State. Being dissatisfied, the appellant instituted a civil suit at the federal High court, Kaduna which nullified the substitution of the appellant.

Subsequently, the appellant proceeded to the Governorship and Legislative Houses Election Tribunal, Yobe State at Damaturu and field a petition wherein he prayed amongst others: that he was validly nomination as the 4th respondent's governorship candidate for the 14th April, 2007 Governorship election but was unlawfully excluded from the said election by 1st respondent, an order nullifying the election and order for fresh election or in the alternative, that he was validly elected and ought to have been returned.

The tribunal after hearing the petition held that the appellant had no locus stand, to present his petition which was anchored in non compliance with section 34 of the Electoral Act, 2006 in relation to the substitution of candidates nominated for elections under the Act

The Tribunal therefore struck out the petition.

The appellant being dissatisfied proceeded'to the Court of Appeal.

Held (Unanimously dismissing the appeal):

1. On Basis and application of estoppel per rem juricata

   Where an issue has been settled in a court a party is no longer entitled to pray another court to determine the propriety or otherwise of the same issue. The issue having been agitated and determined is closed. In the instant case, the question of the appellant's exclusion from contesting election had been settled at the Federal High Court, Kaduna. the appellant was no longer entitled to pray the election tribunal to determine the propriety or otherwise of his exclusion. (P. 9, paras. D-E)

2. On Effect of decision of returning officer under section 69, Electoral Act, 2006 -

   Section 69 of the Electoral Act, 2006 provides that the decision of the returning officer on any question arising from or relating to

   (a) unmarked ballot paper;
   (b) rejected ballot paper; and
   (c) declaration of scores of candidates and the return of a candidate, shall be final subject to review by a tribunal or court in an election petition proceedings under the Act.
   (P. 9, paras. E-G)

3. On Whether petitioner wrongly excluded from election can challenge declaration of result -A **petitioner in an election petition who on his own admitted that he was wrongly excluded from an election cannot be in position to the challenge the declaration of result and return by the retiring officer.(**P. 10,paras. C-D)

4. On the decision of court may be a nullity where court is competent -

Where a trial court is properly constituted as regards number and qualification of member; the action comes before the court initiated by due process of law and upon fulfillment of the condition precedent to the exercise of jurisdiction but court lacks jurisdiction to entertain the case because it had initially refused to entertain the action. The decision the court may arrive at is a nullity and not an irregularity. This is because apart from it not having jurisdiction to entertain the question in dispute, it is not entitled to constitute itself into an appellate court over its own decision. In the instant case, the Court of Appeal having declared the judgment obtained by the appellant from the Federal High Court to be invalid and validated the nomination of the 3rd respondent, the same nomination cannot be invalidated in the absence of any extenuating circumstance. (Pp. 10, paras. E-G; 11, paras. G-H)

5. On Effect of void act -

If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. (P. 11, paras. A-C)

Nigerian Cases Referred to in the Judgment:

M.D.J. v. Obasanjo) (Unreported) Appeal No: SC 222/2005 & 2006 delivered on 21Sl September. 2006 v. AH (2009) 4 NWLR (Pt. 1130) 178 Yerokun v. Adeleke (1960) SCNLR 267

Nigerian Statutes Referred to in the Judgment:

Electoral Act, 2006, Ss.32, 34 and 69 Constitution of the Federal Republic of Nigeria, 1999, S. 180(2)

Appeal:

This was an appeal against the decision of Election Tribunal, which struck out the petition of the appellant. The Court of Appeal, in a unanimous decision, dismissed the appeal.

History of the Case:

Court of Appeal:
Division of the Court of Appeal to which the appeal was brought: Court of Appeal, Jos
Names of Justices that sat on the appeal: Isa Ayo Salami, J.C.A. (Presided and Read the Leading Judgjiient); Rabm Danlami Muhammad J.C.A.; Monica Dongban-Mensem J.C.A.; Nwali Sylvester Ngwuta, J.C.A.; Mohammed Lawal Garba J.C.A.
Appeal No: CA/J/EP/GOV./268/2007
Date of Judgment: Thursday, 5th June, 2008
Names of Counsel: Dr. A. A. Izinyon, SAN (with him, D.D. Dodo, SAN; M.S. Shiaibu: P.M. Ayam; F.O. Izinyon;
Jovi Oghujafor; Jumbo Festus; S. A. Yelwa; M. Bulama and H. Aibishir) -for the Appellant
Wole Adebayo (with him, Kato Halita [Miss]) -for the 1" and 2nd Respondents
Yusuf Ali, SAN (with him, Ado Adamu; Etuk Onah; S.A Oke: A. 0. Kotoh, Jnr. and A. M. Iman) - for the 3rd Respondent.
A. O. Adelodun, SAN (with him, Bassey Offiong; Isidere Udenko. Soji Toki and Y. L. Akambi) - for the 4th Respondent
Tribunal:

Name of the Tribunal: Governorship and Legislative

Houses Election Petition Tribunal, Yobe State
Date of Judgment: Thursday, 26"' July, 2007.

Counsel:
Dr. A. A. Izinyon, SAN (with him, D. D. Dodo, SAN; M.S. Shiaibu; PM. Ayam; FO. Izinyon; Jovi Oghujafor; Jumbo | Festus; S. A. Yelwa; M. Bulama and H. Aibishir) -for the Appellant A. O. Adelodun, SAN (with him, Bassey Offiong; Isidere Udenko; Soji Toki and Y.L Akanbi)- for the 4th respondent.

SALAMI, J.C.A (Delivering the Leading Judgment): When this appeal was called up for hearing on 30"'April, 2008. learned counsel representing the parties were invited to address the court on whether all the issues in the instant appeal had not been resolved in appeal No CA/J/EP/GOV./249/07: Alhaji Maina Waziri and Peoples Democratic Party on one side and Senator Mamman B. Ali and Independent National Electoral Commission on the other delivered on 26"' day of February, 2008.

In this connection, learned senior counsel for appellant contended that the petition was predicated on sections 32 and 69 of the Electoral Act. 2006. He conceded that while the issue arising from section 32 of the Act had been disposed of, the question emanating from section 69 is yet to be determined. It is on this basis that he urged the court not to dismiss but hear the appeal because the issue arising from section 69 is exclusively within the competence of the tribunal. Learned counsel for the respondents disagreed with the position taken by learned senior counsel for appellant.

It is the contention of the learned counsel for first and second respondents that the position now taken by the petitioner/appellant was an after thought. He contended further that the appellant's position was not that he be restored as a candidate but that he was wrongly substituted and had sought and obtained a remedy from the Federal High Court sitting in Kaduna. The remedy he got was that the court had restored him. Learned counsel went ahead to submit that he could not raise the fresh issue here when the trial court did not have the opportunity to consider, determine and pronounce on it.

Learned senior counsel for third respondent. Mr. Ali, after adopting the submissions of learned counsel for first and second respondents' referred to pages 35 and 36 of his brief wherein he alluded to the belated raising of the issue under section 69 of the Electoral Act. He then concluded his argument by reference to the case of Mama Waziri v. Mamman Ali & Ors in CA/J/EP/GOV./249/ 2007; now reported in (2009) 4 NWLR (Pt. 1130) 178 and submitted that it completely answers all the issues being agitated in this appeal. Mr. Adelodun learned senior counsel for fourth respondent also adopted the submission of learned counsel for first and second respondents. Mr. Adebayo and contended that the issue involved seemed settled by the tribunal when it held that the appellant having invoked the jurisdiction of the regular court should return to it.

When learned senior counsel for the appellant replied, he was ominously silent on the issue of restoration of his candidature. He also failed to direct the court to the relevant paragraphs of the petition where the issue of restoration by the tribunal was raised.

The submissions set out above are made in support or against the dismissal of the appeal without hearing it on the merit.

It is unthinkable or unimaginable that a party who had a judgment from the Federal High Court restoring his nomination would still go to the tribunal to seek the relief he had already obtained. Consequently. I agree with the learned counsel for the respondents that armed by the decision of the Federal High Court. Kaduna nullifying his substitution, he approached the tribunal solely on the ground that he had been wrongly excluded. If he had asked for both reliefs together as being postulated by learned counsel for appellant, the probability is that he would have been challenged on the ground that he had no reasonable cause of action. It will be unreasonable for appellant to approbate and reprobate: to contend in one breathe that his exclusion has been nullified by the Federal High Court and at the same time request the tribunal to restore him to the ballot. The latter suit would have been caught by the principle of res judicata. I am strengthened in this view by two factors. Firstly, in the introduction to the appellant's brief, learned senior counsel stated

thus -

"This appeal is brought by the petitioner/appellant against the decision of the Governorship

and Legislative Houses Election Tribunal Yobe State at Damaturu delivered on the 26th day of July, 2007. In the said decision, the Tribunal held that the petitioner/appellant had no locus standing to present his petition which was anchored on non-compliance with section 34 of the Electoral Act, 2006 in relation to the substitution of candidates nominated for elections under the Act. The Tribunal therefore struck out the petition." (Italics mine)

The above statement predicated the petition on section 34 of the Electoral Act. Its correctness or otherwise is no where challenged by the appellant who set it out throughout the brief.

The second factor can be gleaned from the relief sought before : the tribunal. In this regard appellant prayed the tribunal as follows:

Wherefore the petitioner prays:

(a) That it be determined that the petitioner were validly nominated as the ANPP Governorship candidates in Yobe State for the 14th April 2007 Governorship elections, but was unlawfully excluded from the said election by the first respondent.

(b) An order nullifying the Governorship elections held in Yobe State on the J4lh April, 2007 including the returns made therein

(c) An order that fresh elections be held in Yobe State on the date to be appointed by the 2nd respondent and that the petitioner shall be the candidate of the ANPP in the said elections.

(d) That the term of office of the petitioner or whosoever wins the election shall, for the

(e) purpose of section 180(2) of the Constitution of the Federal Republic of Nigeria, 1999 be reckoned from the date that he takes the oath of allegiance and oath of office. In tlie alternative, the petitioner prays: -

(a) That it be determined that your petitioner was validly elected and ought to have been returned and it be so declared that the petitioner is the duly elected Governor of Yobe State pursuant to the elections held on 14lhday of April, 2007.

(b) That the term of office of the petitioner shall, for the purpose of section 180(2) of the Constitution of the Federal Republic of Nigeria, 1999 be reckoned from the date that he takes the oath of allegiance and the oath of office."

As it was observed earlier in this judgment, the question of his exclusion had been settled at the Federal High Court. Kaduna Appellant is no longer entitled in his election to pay the tribunal to determine the proprietary or otherwise of his exclusion, that issue having been agitated and determined is closed.

There is nothing in the two sets of reliefs which are pleaded in alternative touching upon the provisions of section 69 of the Electoral Act. 2006. It is recited immediately hereunder - 69. The decision of the returning officer on any question arising from or relating to:

(a) unmarked ballot paper.

(b) rejected ballot paper, and

(c) declaration of scores of candidates and the return of a candidate, shall be final, subject to review by a tribunal or court in an election petition proceedings under this Act."

I am unable to see the relevance of this section to the issue in dispute. 1 had wondered if the learned senior counsel was correctly recorded in view of this obvious disparity between the prayers and the provisions of the law to which the court was referred. But my doubt is gradually eroded by references of learned counsel for the three sets of respondents without resistance from the learned counsel for appellant. When called upon to respond he, at least, ought to have corrected the apparent misconception. But he did not. It therefore seems to me that he was correctly recorded. I am further strengthened in the view of his reference to the section and reciting same in his brief of argument.

The issue arising from section 69 which is already read in this f judgment is most irrelevant to the question of substitution. I am, | with the greatest respect to the learned senior counsel unable to f fathom the relevance of unmarked and rejected ballot papers to the J question of wrongful exclusion or substitution. There is substance in the submission of the learned senior counsel for third respondent that the latching upon the provisions of section 69 of the Electoral Act by the appellant is a desperate bid by a drowning person which should be taken with a pinch of salt. Surely, a party, who on his own showing admitted that he was wrongly excluded from the election cannot be in a position to challenge the declaration of result and return by the returning officer! This is merely drawing red herring across the track.

In the circumstance, all the live issues in this appeal as rightly conceded by learned counsel for appellant had been thrashed out. In Alhaji Maina Waziri & Another v. Mammon B. Alt & Another (supra), an unreported decision of this court, now reported in (2009) 4 NWLR (Pt. 1130) 178, per Garba, JCA, held as follows -

"In the instant appeal, the Federal High Court Kaduna was properly constituted as regards number and qualification of member, The action came before the court initiated by due process of law and upon fulfillment of the condition precedent to the exercise of jurisdiction. But the court lacks jurisdiction to entertain the case after it had initially refused to entertain the action al Maiduguri. Apart from its not having jurisdiction to entertain the question in dispute, it is not entitled to constitute itself into an appellate court over its own decision. In the circumstance, the decision herein is a nullity and not an irregularity.

The consequences of a judgment being declared a nullity was enunciated in the case of Macfoy v. United Africa Co. Ltd (1961) 3 All E.R 1169 per Lord Denning while delivering the decision of the Advisory Judicial Committee of the Privy Council at pi 172 when he stated thus –

The defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.' (italics mine)

The Latin expression exhibit fit (meaning out of nothing, nothing comes) comprehensively sums up or captures the issue. The judgment of Kaduna Federal High Court, being a nullity does not ves Al'Bishir with any right to contest the election because it's a product of forum shopping. If Senator Usman Al'Bishir derived any benefitfrom the null and void judgment whatever he gained from it is a nullity which inures to no one and could therefore not have been the basis for disqualifying the first respondent herein. And if it were, the same is "bad and incurably bad." That being the case, first respondent was never disqualified, and was a qualified candidate on the day of the election. He was on that day qualified to contest the election. The decision in Yerokun v. Adeleke (1960) SCNLR 267 is inapplicable to this case."

First respondent in the judgment just recited is the third respondent in the instant appeal. The judgment of the Federal High Court touted at the tribunal by the appellant in the other appeal wasobtained by the present appellant after doing forum shopping. Havingdeclared that judgment invalid and validated the nomination of the first respondent in that case, it is my opinion that the same nominationcannot be invalidated in the absence of any extenuating circumstance.The appeal is overtaken by event. It is no longer necessary to gointo this appeal.The appeal is dismissed. See Supreme Court unreported decision in SC 222/2005 & 2006 Movement for Democracy and Justice v. Chief Olusegun Aremu Obasanjo & 20 others delivered on 21SI day of September. 2006,

The appeal fails and is dismissed. The decision of the Governorship and legislative Houses Election Petition Tribunal, Yobe State, sitting at Damaturu is hereby affirmed. There is order as to costs assessed at N40.000.00 against the appellant and in favour of each set of respondents.

MUHAMMAD, J.C.A.: I agree.

DONGBAN-MENSEM, J.C.A.: I agree.

NGWUTA, J.C.A.: I agree.

GARBA, J.C.A.: I agree.

Appeal dismissed.