IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT APO –ABUJA

BEFORE HIS LORDSHIP: HON.JUSTICE D.Z. SENCHI

COURT CLERKS: – T. P. SALLAH & ORS

COURT NUMBER: 19

DATE: 15/12/2015

FCT/HC/CV/932/2015

MOTION NO. M/8047/2015

MOTION NO. M/8171/2015

BETWEEN:

BARR. FRANC FAGAH UTOO---------- RESPONDENT PLAINTIFF

AND

1. **ALL PROGRESSIVE CONGRESS (APC)**
2. **DICKSON DOMINIC TAKIGHIR** — **RESPONDENTS /APPLICANTS**
3. **INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)** — **RESPONDENT**

JUDGMENT

On the 25th May, 2015 the service of the originating summons and other processes on the 2nd Defendant was set aside by the order of this Court. This was pursuant to the notice of preliminary objection filed on the 17th March, 2015 by the 2nd Defendant. The 1st Defendant also filed a notice of preliminary objection on the 20th March, 2015. Then on the 26th March, 2015, the Court had this to say:-

" This suit being a pre- election matter, it is time sensitive and therefore the preliminary objections will be incorporated in the main suit and where it succeeds, appropriate order would be made and where it does not the Court shall proceed to deliver its judgment."

The two notices of preliminary objections of the 1st and 2nd Defendants were determined. And judgment could not be delivered on the main suit in view of the setting aside of the service of Court process on the 2nd Defendant. The 2nd Defendant have now been served with the originating processes in this suit. And pursuant to the service of the originating process the 1st and 2nd Defendants filed three motions.

The 1st Defendant on the 12th June, 2015 filed motion No. M/8171/ 2015 and dated same 12th June, 2015. The 2nd Defendant, according to his Counsel, S.E Irabor filed two motions on the 9th June, 2015 and 17th June, 2015. Then on the 11th November, 2015, both the 2 sets of Defendants and the Plaintiffs Counsel adopted their respective written addresses in support or against the applications. The matter was then adjourned to the 23rd November, 2015 for ruling. Ruling could not be delivered on 23rd November, 2015 due to the following:-

(1) The second motion purportedly filed on the 17th June, 2015 by the 2nd Defendant was not brought to this Court;
(2) The Nigeria Bar Association stamp and seal not affixed to some processes filed by Counsel;

In view of the above obvious reasons, I ordered the Court Registrar to write a letter to all Counsel in the matter to come forward and affix their Nigeria Bar Association stamp and seal which was done on 7th December,2015. However,

the most disturbing issue in all the applications before me is the application filed on the 17th June, 2015 and Counsel to the 2nd Defendant, S.E Irabor held unto the motion and refused for reasons best know to him to bring the Court's copy. Indeed I have to instruct the Court Registrar to reach out to him in respect of the Court's copy but he could not submit it until the 7th December, 2015 when the ruling was to be delivered.

However for the timely intervention of S.T HON. SAN, on behalf of S.E Irabor, I accepted the original Court's copy and the ruling was then further adjourned.

Be it as it may, the motion No. M/8047/2015 filed on the 9th June, 2015 by the Appellant/ Applicant, (hereinafter called the 2nd Applicant) prays the Court for the following orders:-

(1) An order of this Hounourable Court staying proceedings in this suit pending the hearing and determination of the appeal filed against its decision of May, 25th, 2015.
(2) Any further or other orders(s) as the Court may deem fit to make in the interest of justice.

The grounds upon which this application is brought:-

(a) A notice of appeal against the judgment/ decision of this Honourable Court made on 25th May, 2015 has been filed in the Court of Appeal, Abuja.
(b) The notice of appeal discloses robust and arguable grounds of Appeal and stands a good chance of success.
(c) The Appeals is hinged on jurisdiction.
(d) A stay of proceedings of the Honourbale Court is essential to preserve the "res' in the Appeal.

In support of application of the 2nd Applicant is an affidavit of Five (5) paragraphs duly deposed to by one Ibrahim Musa, a litigation secretary in the law firm of S.E Irabor and Associates. Exhibited to the affidavit in support are three exhibits marked A-C respectively. A further and better affidavit of 17 paragraphs was filed with exhibit C and C1 respectively. In compliance with the Rules of Court, the Counsel for the 2nd Applicant filed a written address.

The 1st Defendant/Applicant (hereinafter referred to as the 1st Applicant) filed the motion No. 8171/2015 praying the Court for the following:-

(1) An order of this Honourable Court staying or suspending further proceedings in this case pending the determination of the Appeal before the Court of Appeal.
(2) Such further orders (s) as this Honourable Court may deem fit to make in the circumstances of this case.

The grounds of the 1st Applicant's application are as follows:-

1. The appeal before the Court of Appeal is challenging the decision of this Honourable Court to order the continuation of this case only between the Plaintiff, 1st Defendant and 3rd Defendant when the service of originating summons on the 2nd Defendant who is the necessary party had been set aside.
2. The appeal before the Court of Appeal is challenging the decision of this Honourable Court for refusing to strike out or dismiss this suit when it was heard on merit and having set aside the originating summons on the 2nd Defendant who is the necessary party in the suit.

3. The appeal will also challenge the decision of this Honourable Court on the issue one of the 1st Defendant preliminary objection on the issue of the proper service on the 1st Defendant.
4. The appeal will settle the issue whether the remaining two issues raised by the 1st Defendant in the preliminary objection which were not considered by the Court for the justice of the case merit consideration.
5. An order staying or suspending the proceedings in this case will ensure that the pending appeal is not rendered nugatory.
6. The grounds of appeal of the Appellant are very substantial and arguable.

In support of application is an affidavit of 14 paragraphs sworn to by one Olukayode Ariwoolajnr, one of the solicitors in the Chambers of Olukayode Ariwoola and Company. Attached to the affidavit in support is one exhibit marked exhibit 'A'. The 1st Applicant's Counsel filed a written address.

In response to the motion of the 2nd Applicant filed on the 9th June, 2015, the Plaintiff/Respondent (hereinafter referred to as the Respondent) filed a counter affidavit of 39 paragraphs with two exhibits marked F1 and F2 respectively.

The counter affidavit was deposed to by one Oghenekaro Rugbere, a legal practitioner of Okon N,Efut (SAN) and Associates of Trinity House, Plot 943 Cadastral Zone B06, Mabushi Abuja. The counter affidavit was filed on the 17th June, 2015.

Counsel for the Respondent also filed a written address.

The Respondent's Counsel also filed a counter affidavit in opposition to the 1st Applicant's Motion No. M.8171/ 2015 on the 19th June, 2015. The counter affidavit is of 25 paragraphs deposed to by Oghenekaro Rugbere of Okon N

Efut (SAN) and Associates. Attached to the counter affidavit are two exhibit marked A and B respectively. Counsel for the Respondent also filed a written address.

As I said before, on the 11th November, 2015, Counsel for the respective parties adopted their written addresses.

The first Applicant did not formulate any issue for the determination by this Court.

The 2nd Applicant distilled the issue for determination thus:-

"Whether having regards to the circumstances of this case, the Appellant/Applicant warrant the exercise of the Honourable Court's discretion in his favour."

In the written address of the 1st Applicant, at paragraph 2.1, he submitted that the law is settled that an application of this nature, the discretion of the Court is not usually exercised as a matter of routine but exercised judicially and judiciously based on special circumstances shown to exist. Counsel for the 1st Applicant relied on the case of ***YOUNG SHALL GROW LTD V AFOLABI*, (2002) FWLR (pt 135) page 785.**

Then at paragraphs 2.2 - 2.6 of the written address of 1st Applicant, Counsel referred to paragraphs 4-13 of the affidavit in support to the effect that the 1st Applicant has put sufficient materials before the Court to justify the grant of stay or suspension of the continuation of the case.

Counsel for the 1st Applicant further submitted that by section 241 of the 1999 Constitution (as amended) the right of appeal is a right guaranteed by the Constitution. He then argued that it is settled law that the Court from which an

appeal lies as well as the Court to which an appeal lies have duty to preserve the 'res' for the purpose of ensuring that the appeal if successful is not rendered nugatory. He relied on the case of ***KIGO V HOLMAN, (1980) 5-7 SC 60.***

Counsel for the 1st Applicant further contended that a stay of proceedings can be granted where it is shown that there is a valid and competent notice of appeal and grounds of appeal. He relied on the cases of ***OGUNREMI V DADA, (1962) 2 SCNLR 417 AND SHODEINDE AND ORS V REGD TRUSTEE OF THE AHMADIYYA MOVEMENT IN ISLAM, (1980) (2-3) SCNJ 163.***

In conclusion, 1st Applicant' Counsel urged me to grant the application.

The 2nd Applicant in his written address submitted that it is settled beyond argument that a Court will not grant an application for stay of its proceedings lightly, even in the face of an appeal.

He then submitted however that where there is a pendency of an appeal with a valid and arguable grounds of appeal, the Court is enjoined to grant the application. He cited and relied on the case of ***HALIRU V FRN,(2008) ALL FWLR (pt 356) page 425 at 1697.***

In conclusion, Counsel for the 2nd Applicant urged me to grant the application.

The Respondent in response to the application of the 1st Applicant Counsel set out the following for determination:-

"Whether having regards to circumstances of this case, a stay of proceedings will not occasion hardship on the Plaintiff/Respondent."

In his submission in support of the sole issue for determination, Counsel for the Respondent at paragraphs 2.01 – 2.04 of his written address stated that

the grant or refusal of stay of proceedings pending appeal cannot be granted as a matter of course except there are compelling reasons that the proceedings be stayed in the interest of justice and in order to preserve the "res". He relied on the case of ***REGD TRUSTEE F.G.C V ADEYINKA (2010) 8 NWLR (pt 115) page 33 at 45.***

In the instant case the Respondent's Counsel submitted that there is nothing inevitable about the application for stay of proceedings. Counsel submitted that the 1st Applicant in the instant case has not shown how the case at the trial Court will succeed; the Applicant is not the 2nd Defendant, and the 2nd Defendant in this case has not filed a defence. Counsel for the Respondent then contended that the possibility of the Respondent succeeding at the trial is quite high.

At paragraphs 2.05 - 2.08 of the written address of the Respondent, Counsel set out the major facts to guide the Court in granting an application for stay of proceedings thus:-

(a) There must be a valid appeal;
(b) There must be valid cause or right of action;
(c) The pending appeal must be arguable and recondite;
(d) Competing rights of the parties
(e) Hardship
(f) The Applicant must establish that there are special and exceptional circumstances to warrant the grant of the application.
(g) Preservation of the 'res'.

He relied on case of ***NIKA FISHING CO. LTD V LAVINA CORPORATION, (2008) 6-7 SC (Pt 11) page 223.***

At paragraphs 2.11 – 2.14, Counsel for the Respondent submitted in his written address to the effect that granting this application the Respondent would suffer hardship and the subject matter of this suit is a pre- election matter and the appeal is on an interlocutory ruling. Counsel contended that the 1st Applicant has filed a defence and had adopted its final written address in this suit. According to Counsel nothing stopped the 1st Applicant to wait for the outcome of the suit, and if need be, appeal on both the interlocutory issue he is dissatisfied with and the substantive suit so that they could be taken together at the Court of Appeal at the conclusion of the substantive suit.

Counsel for the Respondent further stated that the 1st Applicant is only interested in seeing that the proceedings and the likely judgment in this suit is suspended. He relied on the case of ***MOBIL OIL (NIGERIA) PLC V KEMA ENERGY LTD, (2004) 8 NWLR (pt 874) page 113 at 127 -128*** Counsel for the Respondent also contended at paragraphs 2.16 – 2.20 that the decision of this Court made on 25th May, 2015 is an interlocutory decision which has not finally disposed of the matter. He also submitted that in fact the notice of Appeal filed by the 1st Applicant is incompetent because it is predicated on mixed law and facts and no leave was sought and obtained before the notice of appeal was filed. He relied on the cases of ***MOBIL OIL (NIG) PLC SUPRA AND OKOYEKWU V OKOYE (2009) 6 NWLR (pt1137) page 350 at 379-380 .***

In conclusion, Counsel for the Respondent submitted that the 1st Applicant's application is an attempt to arrest the judgment of this Court as parties had adopted their final written address and the 2nd Defendant, whom was served on the 3rd June, 2015 is now out of time to file his defence. He relied on the case of **NEWSWATCH COMM. LTD V ATTAH, (2006) 12 NWLR (pt 993) page 144.**

Finally, Counsel submitted that the 1st Applicant did not show any special or exceptional circumstances to warrant a stay of proceedings. He therefore urged me to dismiss the application as lacking in merit.

The Respondent's Counsel also filed a written address in support of his counter affidavit in opposition to the 2nd Applicant's motion No. M/8047/15. The arguments in support of the issue formulated by the Respondent's Counsel are virtually the same as canvassed in the written address in opposition to the application of the 1st Applicant. To therefore carry out a summary of the submissions of the Respondent's Counsel in the written address in opposition to that of the 2nd Applicant will amount to repetition. I will therefore refer to it in the course of this ruling where necessary.

The 2nd Applicant as stated earlier filed a further and better affidavit of 17 paragraphs with two exhibits in reaction to the counter affidavit of the Respondent. Counsel for the 2nd Applicant also filed a written reply on points of law.

Hence, at paragraphs 3.01 – 3.06 of the reply on points of law, Counsel submitted to the effect that the right of appeal is a right inures on all citizen inclusive of the 2nd Applicant. He relied on the case of ***OBASANJO BELLO V FRN, (2010) ALL FWLR (pt 535) at 398.***

Counsel for the 2nd Applicant also contended that where the ground(s) of appeal are of law, the Appellant need not seek leave of Court before filing a notice of Appeal. He cited plethora of judicial decisions to buttress his argument on this point.

In conclusion Counsel for the 2nd Applicant urged me to grant the application.

After perusing the affidavits of the 2 sets of Applicants, the further and better affidavit of the 2nd Applicant and their respective written addresses and reply on points of law; and having also perused the counter affidavits of the Respondent in opposition of affidavits of the 2 sets of Applicants and written addresses, in order to determine the applications of the 2 sets of Applicants, I will adopt the issue distilled for determination by the 2nd Applicant in his reply on points of law which is the same with that of the Respondent.

The issue is hereunder reproduced as follows:-

"Whether having regards to circumstances of this case, a stay of proceedings will not occasioned hardship on the Plaintiff/Respondent,"

Now in the instant applications, both the 2 sets of Applicants and the Respondent agreed that to grant or not to grant this type of application, the Court has discretion but the discretion must not be exercised arbitrarily. In other words, the exercise of discretion in favour of an Applicant must depend on the circumstances of the case and facts deposed in the affidavit in support. To therefore convince the Court to stay its proceedings pending the hearing and determination of appeal, the affidavit evidence must be cogent and material. Therefore, before I consider the affidavits and counter affidavits of the 2 sets of Applicants and the Respondent, in the case of ***NIKA FISHING CO. LTD V LAVINA CORPORATION (Supra)***, the Supreme Court of Nigeria said thus:

"Stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation in the trial on the basis of the merits of his case, consequently, the Courts general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not be allowed to continue".

See also ***CHIEF FAWEHINMI V COL. AKILU, (1988) 4 NWLR (pt 88) page 367***.

The Supreme Court in NIKA FISHING CO. LTD (Supra) then outline the factors or principles to be consider in an application for stay of proceedings thus: -

(a) Valid cause or right of appeal;
(b) Pending appeal;
(c) Pending appeal arguable;
(d) Competing rights of the parties;
(e) Hardships
(f) Preservation of the 'res';
(g) Special and exceptional circumstances.

I will now consider the factors one after another vis-a-vis the affidavits of the 2 sets of Applicants and the further and better affidavit of the 2nd Applicant and the counter affidavits of the Respondent.

(a) Valid cause or right of appeal

Valid cause or right of appeal signifies whether the Applicant has a valid cause or right of action. The Applicant must establish that he has a prima facie claim in law.

The 1st Applicant in his application predicated the grounds upon which the instant motion on notice is based. The grounds are;

1. The appeal before the Court of appeal is challenging the decision of this Honourable Court to Order the continuation of this case only between the Plaintiff, 1st Defendant and the 3rd Defendant when the service of originating summons on the 2nd Defendant who is the necessary party had been set aside.

2. The appeal before the Court of Appeal is challenging the decision of this Honourable Court for refusing to strike out or dismiss this suit when it was heard on merit and having set aside the originating summons on the 2nd Defendant who is the necessary party in this suit.

In support of the above grounds, the 1st Applicant deposed at paragraph 7 of its affidavit as follows: -

"(7) That the appeal filed by the 1st Defendant/Applicant is challenging the decision of this Honourable Court for refusing to strike out or dismiss this suit when it was heard on merit and having set aside the originating summons on the 2nd Defendant who is the necessary party in this suit".

The 2nd Applicant also set out grounds upon which this application is brought to the effect that;

(a) A notice of Appeal against the judgment/decision of the Honourable Court made on 25th May, 2015 has been filed in the Court of Appeal, Abuja.
(b) The motion of Appeal discloses robust and arguable grounds of appeal and stands a good chance of success;
(c) The Appeal is hinged on jurisdiction.

Then the 2nd Applicant deposed at paragraph 4(b), (c), (d) (f) and (h) of the affidavit in support of the grounds listed above by the 2nd Applicant.

The above grounds and affidavit evidence appears to be the basis on which the two sets of Applicants want an order of stay of proceedings in this case.

Now in respect of the 1st Applicant I have seen the notice of appeal filed at the Court of Appeal and the grounds of appeal therein. The 1st Applicant completely misdirected itself on the decision of this Court held on the 25th

May, 2015. This Court on the 25th May, 2015 never heard or determine this case on the merit neither did this Court ordered the continuation of this case between the Respondent /Plaintiff and the 1st Applicant and the 3rd Defendant.

Secondly, what this Court did on the 25th May, 2015 was to consider only the preliminary objection of the 1st and 2nd Defendants herein the 1st and 2nd Applicants without going or dwelling into the affidavit evidence of the case that borders on the substantive suit. Hence, a holistic look at the grounds of objection the affidavit evidence of the 1st Applicant and indeed the notice of appeal and the grounds therein, is not predicated on the decision of this Court held on the 25th May, 2015. In other words, there is no evidence deposed in the affidavit of the 1st Applicant that they have a valid cause or right of action. And in contrast, the Respondent in his counter affidavit filed on the 19th June, 2015 at paragraphs 9, 10, 11, 12 and 17 captured the facts as they appear on record leading to the decision of 25th May, 2015. The decision of 25th May, 2015 is an interlocutory decision that did not finally disposed of the substantive matter.

And the submissions of Counsel for the Respondent at paragraphs 2.12 and 2.13 of his written address is apt on this point to the effect that nothing stopped the 1st Applicant to wait for the outcome of the suit, and if need be, appeal on both the interlocutory issue dissatisfied and the substantive suit so that they can be taken together at the Court of Appeal at the conclusion of the case.

In the same breath, the 2nd Applicant did not file any process in opposition to the originating processes. Indeed on the 11th February, 2015, I ordered parties in this suit to file their processes including written addresses so that both the objections and the substantive matter would be considered and determined.

All parties complied except the 2nd Applicant who only filed a notice of preliminary objection. In fact on the 18th March, 2015, S. E. Irabor, Counsel for the 2nd Applicant blatantly submitted that they shall not be filing any process on the main application filed by the Plaintiff.

From the records and the basis of the 2nd Applicant's notice of preliminary objection which principally centers on service of Court process, on the 25th May, 2015, the service was set aside. The 2nd Applicant did not aver facts in his affidavit that led to the decision of 25th May, 2015 by this Court. However, the Respondent in his counter affidavit at paragraphs 5 – 11 deposed to facts that are consonant with the facts on record. Thus, from the affidavit of the 2nd Applicant, what valid cause or right of action does the 2nd Applicant have? The complaint of the 2nd Applicant in relation to service of Court process have been set aside and by paragraph 14 of the counter affidavit and paragraphs 6, 7 and 8 of the further and better affidavit of the 2nd Applicant are issues to be determined later in the course of this ruling.

Now in relationship to the 1st and 2nd Applicants valid cause or right of action, I am unable to establish, from the affidavit evidence of both Applicants a prima facie claim in law that would warrant me exercise my discretion to stay proceedings in this matter. And that being the case, I hold the view that the Applicants have not shown in their respective affidavits that they have a valid cause or right of action and I so hold.

The next consideration for stay of proceedings pending appeal is that the Applicant must have valid appeal pending. The pending appeal must be borne out from the grounds of appeal whether it is arguable in law. These two factors are important.

The Respondent's Counsel have at paragraphs 2.17 – 2.20 of his written address submitted that there is no valid notice of appeal and that the grounds of appeal does not fall within the ambit of Section 241 of the 1999 Constitution (as amended) as to have made the appeal such that could be made as of right and not with leave.

The 2nd Applicant's Counsel in his reply on points of law submitted that the notice of appeal filed raises fundamental issues of jurisdiction that would effectively determine the matter. Counsel relied on the case of ***OBASANJO BELLO V FRN (Supra)***.

I have looked at Section 241 of the 1999 Constitution of the Federal Republic of Nigeria (as amended). The relevant provision applicable in the instant case is Section 24 (1) (b) and it provides: -

"An appeal shall lie from decisions of the Federal High Court or a High Court to the Court of Appeal as of right in the following cases: -

(b) Where the grounds of appeal involves questions of law alone, decisions in any civil or criminal proceedings".

The Respondent's Counsel had submitted that the notice of appeal is an interlocutory appeal predicated on mixed law and facts and leave of this Court was not sought. However, both Counsels for the two sets of Applicants relied on Section 241(b) of the 1999 Constitution.

The law is trite that issue of service is both that of fact and law. And this can been seen from grounds 3 of the 1st Applicant's notice of appeal and grounds 1 and 2 of the 2nd Applicant's notice of appeal.

Base on the above, it is crystal clear that the interlocutory appeal is not solely on grounds of law that fall within the ambit of Section 241 (I) (b) of the 1999 Constitution. And the Court of Appeal in the case of ***ARMAFORD (NIGERIA) LTD V NDIC, (2014) LPELR in appeal No. CA/L/926/201****1* delivered on Tuesday 15th April, 2014, (Lagos Division) held that matters of facts or mixed law and facts require leave. In the instant case, the Applicants did not complied with Section 242 of the 1999 Constitution of the Federal Republic of Nigeria. And the Court of Appeal further held that where an appeal requires leave of Court to be obtained, and leave was not sought and obtained, such appeal is incompetent and would be struck out. Further, in the case of N.I.C V ACEM OMS CO. LTD, (2007) 6 NWLR (pt 1031), the Court of Appeal held: -

"The position of the law is that once grounds of appeal against an interlocutory decision are of facts, or mixed law and fact, it can only be filed in this Court with leave of either the High Court or this Court".

See ***NWADIKE V IBEKWE, (1987) 4 NWLR (pt 67) page 718, LEKWOT V JUDICIAL TRIBUNAL, (1993) 2 NWLR (pt 276) page 410***.

Although the learned Counsel in his reply on points of law referred me to the case of ***OBASANJO BELLO V FRN (Supra)*** to the effect that where the grounds raises an issue of law based on accepted, undisputed or admitted facts, it is a ground of law.

It appears the facts and circumstances in this case are distinguishable. The reason is that the interlocutory decision of 25th May, 2015 was not based on accepted, undisputed or admitted facts. The learned Counsel for the 2nd Applicant did not draw my attention to the accepted, undisputed or admitted facts by any of the parties in the instant suit. And that is why I hold the view

that the facts of this case may not be the same with the facts *of OBASANJO BELLO's case.*

Thus, based on the above, the notice of appeal being incompetent or invalid, this application cannot be entertained.

In respect of competing rights of parties as well as hardship to be occasioned. The 1st Applicant, in its affidavit did not depose to facts as to the competing interest or hardship that would be occasioned to the 1st Applicant if the application is granted. All that the 1st Applicant is saying in his affidavit evidence is the refusal of this Court to strike out the suit, which issue I have earlier addressed.

On the other hand, the 2nd Applicant's complaint is that the interlocutory decision of 25th May, 2015 up hold its preliminary objection but refused to also strike out the suit. Counsel for the 2nd Applicant at conclusion of arguments on the applications promised to supply me with a judicial authority that says where service of process is set aside, the proper order to make is that of striking out. Counsel did not supply that judicial authority but supplied a Supreme Court decision of ***INEGBEDION V SELO OJEME, (2013) LPELR 19769***, which principally consider the jurisdiction of the Federal High Court as provided by section 251 of the 1999 Constitution. This authority has no relevance in the instant matters. However, the law as stated in the case of ***ODUA INVESTMENT CO LTD V TALABI, (1991) 7 SCNJ 600***, the Supreme Court of Nigeria held that non compliance with Sections 97 and or 99 of the Sheriffs and Civil Process Act and Rule of Court requiring leave of the Court or for a writ to be served out of jurisdiction renders the writ and or service of it voidable. The writ and service by the interlocutory ruling of 25th May, 2015 was set aside and by paragraph 14 of the counter affidavit of the Respondent, the 2nd

Applicant have now been duly served within jurisdiction and have an opportunity to defend the suit of the Respondent on its merit.

In any case, the competing rights of parties connotes competing rights of both the Applicants and the Respondent to justice. It is an equitable consideration. And in the instant case, service of the writ on the 2nd Applicant have been set aside and the justice of the case demands that the case be heard on its merit and granting a stay of proceedings would invariably caused injustice to the Respondent.

Further, on the question of hardship, it is trite that the Court can only arrived at a decision by looking at the competing affidavits. The 2nd Applicant at paragraph 4(I) of the affidavit deposed that the Appellant would suffer untold and irreparable hardship if proceedings is allowed till judgment pari pasu the appeal already filed. Then a close look at the averments of the Respondent at paragraphs 14 – 19 of the Counter affidavit, the Respondent avers facts to show that if a stay of proceedings is granted, the aim of the Applicants is to frustrate the hearing of the suit.

I have perused the records in this case and in fact the submission of Counsel for the 2nd Applicant that they shall not be filing any process in response to the main application. The facts deposed to by the Respondent tallies in all material particulars with the records or proceedings in this case.

The conclusion I therefore arrived at is that the 2nd Applicant is not interested in fighting this suit on its merit but wants to employ all necessary technicalities to frustrate the substantive matter. Hence therefore, the hardship to suffer in granting a stay of proceedings in this matter will surely be on the Respondent and not the Applicants.

In other words, granting the application will do more harm than good. See ***KIGO (NIG) LTD V HOLMAN BROS (NIG) LTD, (2001) 46 WRN 1.***

In a nutshell, I have perused the affidavits of the 2 sets of Applicants, the Applicants did not depose to material facts satisfying the factors for grant of a stay of proceedings. And as I said earlier my conclusion of the case of the 2 sets of Applicants and even the body language of Counsel for the respective Applicants, the aim is to prevent hearing of the main case.

The action of the Applicants is contrary to the principles of fair hearing guaranteed by the 1999 Constitution of the Federal Republic of Nigeria (as amended).

It is therefore, my considered view based on the available affidavit evidence and counter affidavit that the applications of the two sets of Applicants be refused. Accordingly, the two applications have no merit, misconceived both in fact and law and it is accordingly dismissed.

On the notice of preliminary objection dated 16th June, 2015 and filed on 17th June, 2015 with motion No. M/8280/15 prays this Court for the following:-

(1) An order of this Honourable Court striking out the suit in its entirety for being incompetent on the grounds that the Honourable Court lacks the requisite jurisdiction to entertain same for reason of non service on the 2nd Defendant/2nd Applicant.

(2) Any further or other order(s) as the Court may deem fit to make in the interest of justice.

The grounds upon which the application is brought are :-

1. That the 2nd Defendant/Applicant's address is at Makurdi, Benue State, outside the jurisdiction of this Honourable Court, a fact acknowledge by the Plaintiff who by an earlier motion No. M/1058/2015 dated 12th February, 2015 and filed same day, sought leave of the Honourable Court to serve the originating summons and other processes on the 2nd Defendant/Applicant out of jurisdiction in Benue State, particularly at District 4, Kashim Ibrahim Way, Old G.R.A Makurdi, Benue State, which was granted by the Honourable Court on the same 12th February, 2015.

2. That save for a hearing notice served on the law office of S.T. Hon. and &Co. at Utako District, Abuja, slated the substantive suit for hearing, no other process has been served on the 2nd Defendant/Applicant at District 4, Kashim Ibrahim way, Old G.R.A., Makurdi, Benue State,

3. That these fundamental issues of service deprives the Honourable Court of Competence and requisite jurisdiction to hear or entertain the suit.

In support of notice of preliminary objection is a 12 paragraph affidavit with two exhibits marked as exhibits A and B respectively. In compliance with the Rules of Court, Counsel for the 2nd Applicant filed a written address. In the written address, the issue for determination is set out as follows:-

"Whether or not the Court can hear this suit when service has not been effect on the 2nd Defendant/Applicant at his acknowledged address out of jurisdiction to wit: District 4, Kashim Ibrahim Way, Old G.R.A, Makurdi, Benue State."

In arguing the sole issue for determination, Counsel submitted on behalf of the 2nd Applicant that by the documents annexed to the supporting affidavit, it is beyond contention that the acknowledged address of the

Applicant is at District 4, Kashim Ibrahim Road, Old G.R.A, Makurdi, Benue State. According to Counsel these documentary evidence are the best evidence as they are hangers upon which oral evidence are hung. He relied on ***PROF OSARHEIMEN OSUNBOR V COMRADE ADAMS OSHIOMHOLE, (2009) ALL FWLR (pt 463) page 1363, AKINBISADE V STATE, (2006) 17 NWLR (pt 1007) page 184 and AIKI V IDOWU, (2006) ALL FWLR (pt 188) page 361.***

Counsel contended that there is no evidence to show that the 2nd Applicant was ever served at this acknowledged address with the originating process thereby making this suit unripe for hearing as the only basis upon which the Applicant, out of respect, before the Honourable Court is the hearing notice served against 17th June, 2015.

Counsel therefore urged me to refuse jurisdiction in this matter.

The Respondent, in reaction to the notice of preliminary objection of the 2nd Applicant, the Respondent filed a counter affidavit of 25 paragraphs with one exhibit attached and marked exhibit B. The Respondent's Counsel also filed a written address.

The 2nd Applicant on receipt of the Respondent's counter affidavit filed a further and better affidavit of 14 paragraphs with two exhibits marked exhibits C and C1 respectively. Counsel also filed a written reply on points of law.

The Respondent in his written address formulated an issue for determination which issue appears to be adopted by the 2nd Applicant's Counsel in his written reply on points of law. The issue is "whether the 2nd

Defendant has placed material before this Honourable Court sufficient to entitle him to the relief sought in the preliminary objection."

I adopt the above issue of the Respondent to determine this preliminary objection.

To resolve the adopted issue, I have perused the affidavit of the 2nd Applicant and his further and better affidavit of 14 paragraphs as well as the counter affidavit of the Respondent. I will also refer to the written address of the Respondent in support of the counter affidavit and the reply on points of law of the 2nd Applicant's Counsel where necessary.

Now both parties have placed before the Court affidavit evidence and exhibited documents in this matter. And the summary of the grounds upon which this preliminary objection is predicated is that the acknowledged address of the 2nd Defendant is at District 4, Kashim Ibrahim Way, old G.R.A Makurdi, Benue State. The 2nd Applicant support this assertion at paragraphs 5, 7 of the affidavit in support and exhibits A and B respectively. I have also seen the averments of the 2nd Applicant at paragraphs 4 and 9 of the further and better affidavit. This, essentially, is the case of the 2nd Applicant and the evidence as aver in the affidavit is to the effected that the address of service of the 2nd Defendant is at District 4, Kashim Ibrahim Way, Old G.R.A Makurdi, Benue State.

While on the other hand, by paragraphs 14, 15 and 16 of the Respondent's counter affidavit, the case of the Respondent is that the 2nd Applicant was effectively served personally with the originating process within jurisdiction. For purposes of clarity, the paragraphs of the counter affidavit are hereunder reproduced:-

"(14) That contrary to paragraph 7 of the Applicant's affidavit, personal service has been duly effect on the 2nd Defendant by the Bailiff of this Court within the jurisdiction of this Court on the 3rd day of June, 2015 at about 9:37 am. The proof of service signed by the Bailiff of this Court is here shown to me and marked exhibit B."

(15)That I know as a fact that proper and valid service has now been effected on the 2nd Defendant as was sought by the Plaintiff/Respondent on the 25th May, 2015 when the Court set aside initial service on the 2nd Defendant for being defective.

(16) That I know as a fact that the notice of appeal, application for stay of proceedings and notice of preliminary objection were later filed by the Applicant after proper service of the originating summons was effected on the 2nd Defendant within the jurisdiction of this Court on the 3rd of June, 2015."

The above affidavit evidence is the case of the Respondent to the effect that pursuant to the order setting aside the service of the originating summons on the 2nd Applicant on 25th May, 2015 as being defective, personal service of the originating processes has now been effected on the 2nd Applicant within jurisdiction.

Now I have perused paragraph 2.03 of the written address of the Respondent's Counsel to the effect that the 2nd Applicant/Defendant was effectively served with the originating processes at Transcorp Hilton Hotel, Maitama, Abuja personally. I have seen the affidavit of service filed by the Court Bailiff, Hamisu Attahiru. And at paragraphs 2, 3 and 4 of the affidavit of service, the Court Bailiff deposed to facts as to how he effected personal

service of originating processes on the 2nd Applicant. The Court Bailiff described vividly where he met the 2nd Defendant and effected the personal service but the 2nd Defendant after receiving the originating processes from the Court Bailiff refused to endorse the return copy.

The law or rule of procedure governing service of Court process in the FCT High Court is order 11, FCT High Court (Civil Procedure) Rules, 2004. Order 11 Rules 1, 2 and 3 provides thus:-

11(1) Service of writs of summons, notices, petitions, pleadings, orders, summons, warrants, all other Court processes, and written communications of which service is required, shall be made by the :-

(a) Bailiff or other officer of Court authorized by the Court or

(b) A person appointed (either specially or generally) by a Court or Judge in chambers;

(c) A solicitor who gives an undertaking to a Registrar receiving the process, at the time of filing, that his chambers shall serve the process on the party or his solicitor, and would also file with the Registrar a proof of the service effected, signed by the other party or his solicitor;

(d) Order of a Judge in chambers of the mode of service.

(2). Where a party is represented by a legal practitioner and personal service is not required, service of notices may be made by or on such legal practitioner or his clerk under his control.

2. Subject to these Rules, an originating process shall be served personally by delivering to the person to be served a copy of the document, duly certified by the Registrar as being a true copy of the original process filed.

3. No service of a writ of summons or other process on the Defendant shall be necessary when the Defendant by his legal practitioner undertakes in writing to accept service."

Furthermore, by order 11 Rule 28, Rules of this Court, it provides:-

"28. Where the service of a document has been effected by a Bailiff or other officer of Court, an affidavit of service sworn to, by that Bailiff or other officer shall on production, without proof of signature, be prima facie evidence of service. "

From the above provisions of order 11(1), (2), (3) and (28) of the Civil procedure Rules, 2004, and by the affidavit evidence of the Respondent and more importantly the affidavit of service deposed to by the Court Bailiff, it is clear that the 2nd Applicant was duly served with the originating summons and other processes in this suit within jurisdiction.

In other words, by the affidavit evidence of the Respondent and the depositions of the Court Bailiff in his affidavit of service, the 2nd Applicant was found or was within jurisdiction of this Honourable Court and was effectively and duly served with the Court processes. The fact that the 2nd Applicant refused to indorse the processes is of no fundamental effect in view of order 11 Rule 28, Rules of this Court. After all, the Court Bailiff would not be in a position to force the 2nd Applicant to indorse or affix his signature as having received same as long as sufficient facts and circumstances exist to prove such personal service.

Now I have seen the depositions of one Ricardo Ebikade, One of the Counsels to the 2nd Applicant. He deposed at paragraphs 7 and 8 of the further and better affidavit to the effect that he knows as a fact that the 2nd Applicant has a

history of high blood Pressure and persistent malaria and that he also knows as a fact that on the 1st, 2nd and 3rd and 4th of June, 2015 the Applicant was on admission at Queens Clinic, Railway Bye – Pass, Makurdi. The mere reading of paragraphs 7 and 8 of the further and better affidavit and what strikes my mind is how did Counsel became aware of this information? The Counsel i.e. the Deponent is not the 2nd Applicant and he did not deposed that he received the information from the 2nd Applicant or any other relevant source. Is the deponent therefore competent to depose to information as contained in paragraphs 7 and 8? Section 115 of the Evidence Act (2011) (as amended) provides:-

(1) Every affidavit used in Court shall contain only a statement of facts and circumstances to which the witness deposed, either of his own personal knowledge or from information which he believes to be true.
(2) An affidavit shall not contain extraneous matter, by way of objection, prayer or legal argument or conclusion.
(3) When a person deposed to his belief in any matter of fact, and his belief is derived from any source other than his own personal Knowledge he shall set fourth explicitly the facts and circumstances forming the ground of his belief.
(4) When such belief is derived from information received from another person, the name of his informant shall be stated, and reasonable particulars shall be given respecting the informant, and the time, place and circumstances of the information."

Certainly, the information deposed to by Ricardo Ebikade, one of the Counsels to the 2nd Applicant are not information within his personal knowledge and if it

was derived from another person then he did not also give particulars of the information and circumstances of such information.

Secondly, I have looked at exhibits C and C1, the Hospital receipts dated 1st June, 2015 and 4th June, 2015. Receipts, exhibits C and C1, is not a medical report duly issued and signed by Medical Doctor. Further, a close look at the content of exhibits C and C1 did not reveal or suggest that the 2nd Applicant was on admission from the 1st – 4th June, 2015 in order to controvert the averment of the Court Bailiff at paragraphs 2, 3 and 4 of the affidavit of service. In fact at the hearing of this application, Counsel for the 2nd Applicant S.E Irabor admitted himself he cannot explain the words "Rx" on exhibit C1. Furthermore, by exhibit C, it shows "final payment on discharge".

This exhibit does not suggest that the 2nd Applicant was admitted from the 1st - 4th June, 2015. And the only logical conclusion to arrived at in respect of exhibit c is that the 2nd Applicant was seen (if ever he was) at the clinic on 4th June, 2015 and on final payment, he was discharged. Thus, there is absolutely no averment to controvert the averments of the Court Bailiff at paragraphs 2, 3 and 4 of his affidavit of service. In any event, the deponent having contravened Section 115 of the Evidence Act, 2015 (as mended) paragraphs 7 and 8 of the further and better affidavit are hereby expunged.

As stated earlier, the case of the 2nd Applicant as shown on grounds 1 and 2 of his notice of preliminary objection, paragraphs 5, 7 of the affidavit in support and paragraph 4 of the further and better affidavit of the 2nd Applicant, the 2nd Applicant is not responding to the fact of service of Court processes within jurisdiction of this Court but that his address is at District 4, Kashim Ibrahim Way, Old G.R.A. Makurdi, Benue State.

The law is trite that the 2nd Applicant need not be served at district 4, Kashim Ibrahim Way, Old G.R.A. Makurdi, Benue State as long as he has been found within jurisdiction of this Court. The Supreme Court of Nigeria, in the case of ***NIGERIAN BOTTLING COMPANY PLC V CHIEF UZOMA UBANI, (2014) ALL FWLR page 803 at 807,*** in interpreting the provisions of order 12 rule 8 of the Cross River State High Court (Civil Procedure) Rules 1987 held:-

"By giving same to any Director, Secretary or other principal officer not necessarily at the registered or head office of the company but in a place any of them is found within jurisdiction. This latter method has all the features of personal service on a party at any place he is found within jurisdiction that is to say, as is the case in ordinarily suit. "

The 2nd Applicant even though by his particulars given to INEC, the 3rd Respondent as to his address for service, which address, is District 4, Kashim Ibrahim Way, Old G.R.A. Makurdi, Benue State, the fact that the 2nd Applicant was found within jurisdiction and the Court Bailiff effected service on him, I am of the view that such personal service is proper and good in law. Accordingly I hold the view that the service of originating summons and other processes effected on the 2nd Applicant on the 3rd day of June, 2015 by the Court Bailiff at Transcorp Hilton Hotel Wing C 5th Floor in Room 569, Abuja within jurisdiction is good and proper in law and I so hold. The objection of the 2nd Applicant is misconceived both in fact and law and it is accordingly dismissed with cost assessed at N100, 000.00 against the 2nd Applicant.

Having resolved the objections of the 2 sets of Defendants and having found that the 2nd Defendant have now been duly served with the originating processes and the 2nd Defendant have not file any processes in opposition and time to do so had also elapsed. And it would be recalled that on the 11th

February, 2015, I ordered the Defendants to file whatever processes they want to file in this suit in opposition to the originating processes. And on the 18th March, 2015, the 2nd Defendant's Counsel S.E Irabor did not mince words when he submitted thus:-

"We shall not be filing any processes on the main application filed by the Plaintiff."

In other words, the 2nd Defendant did not file any defence in this suit even when he was served on the 3rd June, 2015 and time to file having also elapsed.

Be it as it may, on the 26th March, 2015 the Plaintiff and the 1st Defendant adopted their written addresses for and against the originating summons filed on 27th January, 2015.

On the 25th May, 2015, I did set out the questions for determination and the reliefs sought. I do not intend to repeat same. Further, the proceedings of 26th March, 2015 of this Court is crystal Clear and at page 8 this Court said as follows:-

"This suit being a pre-election matter, it is time sensitive and therefore the preliminary objections will be incorporated in the determination of the main suit and where it succeeds, appropriate order would be made and where it does not the Court shall proceed to deliver its judgment"

This Court further held on 25th May, 2015 as follows:-

"I will now consider the two preliminary objections of the 1st and 2nd Defendants because it borders on competence of this suit and jurisdiction of this Court to entertain the suit as well."

And at the end of the Court's decision delivered on 25th may, 2015, the service of the originating summons was set aside as being voidable. Thereafter, the 2nd Defendant was effectively and properly served personally on the 3rd June, 2015.

As a recap, the questions for determination presented to this Court by the Plaintiff for resolution are:-

1. Whether the 1st Defendant acted in accordance with sections 31 (1) and 87 (4) (c) (ii) of the Electoral Act, 2010 (as amended) to have forwarded the name of the 2nd Defendant to the 3rd Defendant as candidate in the forthcoming 2015 general election in Makurdi/Guma Federal Constituency of Benue State when the 2nd Defendant neither participated nor emerged as winner of the primary election conducted on the 7th day of December, 2014 in Makudi.
2. Whether having regard to section 31 (2) of the Electoral Act 2010 (as amended) the 2nd Defendant who did not take part in the Makurdi/Guma Federal Constituency primary election of the 1st Defendant held at the Haf Haven Hotel premises on the 7th of December, 2014 complied with the requirement of the law regarding the information and affidavit of personal particulars submitted to the 3rd Defendant when he was not the one who stood and won the primary election.
3. Whether having regard to sections 31 (1) and (5), 87 (4) (c) (ii) (7), (9) and (10) of the Electoral Act, 2010 (as amended), the 1st Defendant was right to have failed, refused and or neglected to submit to the 3rd Defendant the name of the Plaintiff who participated in the primary election and was declared winner and candidate of the 1st Defendant, All Progressives

Congress (APC) for the forthcoming 2015 general election for the Makurdi/Guma Federal Constituency of Benue State.

4. Whether having regard to the provision of the 1999 Constitution of the Federal republic of Nigeria (as amended) and the Electoral Act 2010 (as amended) the 1st Defendant having screened and cleared the Plaintiff to participate in the 1st Defendant's House of representatives primary election and the Plaintiff having participated and won the said primary election and the report of the National Assembly Primaries Election Appeal Committee of the 1st Defendant, affirming the Plaintiff as the winner of the primary election and the candidate of the 1st Defendant, the 1st Defendant had any discretion to have refused to submit the name of the Plaintiff as the candidate of the 1st Defendant for the 2015 general election of Makurdi/Guma Federal Constituency of Benue State to the 3rd Defendant.
5. If the question in 4 above is answered in the negative especially against the 1st Defendant, whether the Plaintiff is not entitled to be accorded all the rights of a nominated candidate of the 1st Defendant for the forthcoming 2015 general election into the house of represent Makurdi/Guma Federal Constituency of Benue State.

And as a recap also, the reliefs claimed after determining the questions are as follows:

1. A declaration that it is mandatory for the 1st Defendant to forward the name of the Plaintiff who won the primary election conducted by the 1st Defendant in the Makurdi Guma Federal Constituency of Benue State on the 7th of December, 2014 to the 3rd Defendant in accordance with the Electoral Act (as amended)

2. A declaration that the purported selection and submission of the name of the 2nd Defendant who did not participate in the 1st Defendant's primary election as its candidate for the forthcoming 2015 general election into the National Assembly for Makurdi/Guma Federal Constituency of Benue State to INEC is unlawful unconstitutional, null and void and of no effect whatsoever.
3. A declaration that the Plaintiff who participated and won the party primary election and was declared the candidate of the 1st Defendant is the authentic, rightful and lawful candidate of the 1st constituency of Benue State.
4. A declaration that the 1st Defendant cannot by arbitrary fiat or through any illegal or unlawful means adopt and submit the name of the 2nd Defendant to the 3dr Defendant as its House of representatives candidate for the 2015 general election for Makurdi/Guma Federal Constituency of Benue.
5. An order directing the 1st Defendant to take all steps, actions including forwarding or submitting the name of the Plaintiff to the 3rd Defendant as its candidate for Makurdi/Guma Federal Constituency of Benue State who got the highest number of votes at the 1st Defendant's House of representatives primary election held on 7th day of December,2014 in respect of the 2015 forthcoming general election into the National Assembly and to allow the Plaintiff to contest the forthcoming 2015 general election on the platform of the 1st Defendant.
6. An order directing the 3rd Defendant to publish by displaying or causing to be displayed at the relevant office (s) of the 3rd Defendant and on its website, the name and address of the Plaintiff pursuant to section 34 of the Electoral Act 2010 (as amended).

7. An order directing the Defendants to recognize, accept and deal with the Plaintiff as the candidate of the 1st Defendant in the Makurdi/Guma Federal Constituency of Benue State having emerged as the winner of the 1st Defendant's primary election held on the 7th of December, 2014 in accordance with the Electoral Act 2010 (as amended)
8. An order of perpetual injunction restraining the 1st Defendant from recognizing, presenting, campaigning for, or in other way dealing with the 2nd Defendant as its candidate for the Makurdi/Guma Federal Constituency of Benue State in respect of the forthcoming 2015 general election to the National Assembly.
9. An order of perpetual injunction restraining the 2nd Defendant from parading himself as the 1st Defendant's candidate in respect of the forthcoming 2015 general election in the Makurdi/Guma Federal Constituency of Benue State.

Then the 1st Defendant in its written address formulated the following issues for determination:-

(1) Whether the 1st Defendant has complied with requirement of the Electoral Act 2011 (as amended) in the conduct of the primary election of Makurdi/Guma Federal Constituency of Benue State?
(2) Whether Buluma Peter T. can validly withdraw his candidature after he had been declared winner of the primary election?
(3) Whether the Plaintiff had placed sufficient material before this Honourable Court to entitle him to reliefs sought?

In order to resolve the questions for determination, I have perused them closely and the issues for determination as formulated by the 1st Defendant, questions numbers 1 – 5, appears to be the same issues raised at numbers 1

and 2 for determination by the 1st Defendant. I will therefore adopt the issues as distilled by the 1st Defendant's Counsel to determine the questions and the reliefs sought by the Plaintiff in this originating summons.

ISSUES ONE AND TWO

Now in the written address of the Plaintiff's Counsel, at paragraphs 1.01 – 1.05 in a brief introduction stated that sequel to the timetable issued by the 3rd Defendant on the 2015 General Election, the 1st Defendant, All Progressive Congress (APC) on the 7th December, 2014 conducted an indirect Primary Election to choose its candidate who will contest the 2015 Election for the House of Representatives Makurdi/Guma Federal Constituency of Benue State. The Plaintiff and one Hon. Conrad Terhide Utaan were the only aspirants who purchased and obtained the expression of interest and nomination forms from the 1st Defendant for the Makurdi/Guma Federal Constituency of Benue State. The Plaintiff and Honourable Conrad Terhide Utaan were duly screened certified worthy to contest by the 1st Defendant.

Then on the 7th December, 2014, the primary election of Makurdi/GUMA Federal Constituency of Benue State of the 1st Defendant was held at HAF HAVEN Hotel. Premises, Kwarafa Quarters, Makurdi wherein the Plaintiff emerged as the winner with the highest number of votes of 295 against that of his rival, Honourable Conrad Terhide Utaan who scored 279 votes. The Plaintiff was then declared winner in the presence of party faithful, delegates and pressmen. Learned Senior Counsel for the Plaintiff then submitted that instead of the 1st Defendant forwarding the name of the Plaintiff to the 3rd Defendant as its candidate, the 1st Defendant deposed to an affidavit that one Bulaun Peters T. was its candidate for Makurdi/Guma Federal Constituency at the general election of Benue State. According to learned Senior Counsel for the

Plaintiff that the said Bulaun Peters T neither purchased nor obtained nomination form and did not participate in the Makudi/Guma Federal Constituency primary election of 7th December, 2014 conducted by the 1st Defendant.

The learned silk for the Plaintiff then Stated that the Plaintiff then stated that the Plaintiff petitioned the National Assembly primaries Appeal Committee of the 1st Defendant and after due consideration of the petition, they declared him the authentic winner of the primary election of the 1st Defendant. However, the 1st Defendant substituted the name of Buluan Peters T. with the name of the 2nd Defendant on the ground that the said Buluan Peters T. is now deceased. Learned Silk then stated that the 2nd Defendant neither purchased or obtained the expression of interest and nomination forms; and did not participate in the Makurdi Guma Federal Constituency Primary Election of 7th December, 2014 conducted by the 1st Defendant.

Then at paragraphs 4.02 – 4.04 of the written address on behalf of the Plaintiff, learned Silk submitted to the effect that political parties including the 1st Defendant are mandated by the Electoral Act, to conduct primary elections for its aspirants before nominating, presenting and or sponsoring candidates for the general elections. He referred me to Section 87 (1) of the Electoral Act, 2010 (as amended).

He then submitted that although nomination and sponsorship of a candidate for an election is the exclusive preserve of a political party and therefore within domestic affairs of a political party; the learned Silk however contended that by Section 87 (4) (c) (ii) and 87 (9) of the Electoral Act, 2010 (as amended) an aspirant may avail himself of the provisions where a political party breached the provisions of the Electoral Act and its party Electoral guidelines. He further

argued that it is mandatory for political parties to forward the name of the aspirant who, at the end of the party primary conducted in accordance with the Electoral Act and party's guidelines, emerged as the winner of the said primary to the Independent National Electoral Commission (INEC) as the party's candidate for the general election.

At paragraphs 4.05 – 4 – 5 of the written address of the Plaintiff, Senior Counsel submitted to the effect by the facts at paragraphs 1.01 – 1.06 of pages 13 and 14 of the written address, the Plaintiff won the primary election conducted by the 1st Defendant on 7th December, 2014 of Makurdi/Guma Federal Constituency of Benue State. The learned Silk referred me to **GBILEVE V ADDINGI, (2014) 16 NWLR (pt 1433) 395 at 422 – 423, and Section 87 (4) (c**) (ii) of the Electoral Act 2010 (as amended).

The learned Silk then contended that the Plaintiff having participated in the primary election of the 1st Defendant held on the 7th December, 2014 having scored the highest number of votes in the primary election conducted at the Makurdi/Guma Federal Constituency the 1st Defendant is bound and has no option than to present the winner of the primary election. He cited **LABO V CPC, (2011) 18 NWLR (pt 1279) page 689 at 736.**

In conclusion, the learned Silk urged me to declare as wrong and unconstitutional for the 1st Defendant to present and submit the name of the 2nd Defendant instead of the name of the Plaintiff who participated in the primary election and emerged as winner and that the 1st Defendant to forward the name of the Plaintiff to the 3rd Defendant and the 3rd Defendant to accord the Plaintiff all the rights attached thereto.

The 1st Defendant on the other hand submitted that the conduct of primary election in Federal House of Representative is governed by Section 87 (1) – (3) and 4 (c) (i) & (ii) and the respective party guideline for the conduct of the primary election. The 1st Defendant submitted that by section 87 of the Electoral Act, (2011) (as amended) the following procedure for nomination of candidate by political parties is deducible: -

(a) Conduct of primary elections which may be either direct or indirect;
(b) Where a party adopt indirect election, special congresses will be held where delegates will vote for each candidates;
(c) After the counting of the votes the candidate with the highest vote will be declared winner of the primaries.
(d) The name of the winner will be forwarded to by the party to the Independent National Electoral Commission (INEC).

Counsel for the 1st Defendant then submitted that the 1st Defendant has complied with the provision of Section 87 of the Electoral Act, 2011 (as amended) as it affects the conduct of primary election of Makurdi/Guma Federal Constituency on the 7th December, 2014 and declared Bulaun Peter T as the winner of the primary election being the candidate with highest votes casted by the delegates.

Furthermore, Counsel for the 1st Defendant submitted that by Section 35 of the Electoral Act 2011 (as amended) Bulaun Peter T withdrew as a candidate and the 1st Defendant was notified and the 1st Defendant subsequently conveyed the withdrawal to the 3rd Defendant. In conclusion, Counsel for the 1st Defendant urged me to dismiss the suit of the Plaintiff.

Before I resolved the first two issues, I want to refer to the written address of the learned Counsel for the 1st Defendant where he refers to Section 87 (1) – (3) and 4 (c) (i) & (ii) of the Electoral Act, 2011 (as amended) and in fact throughout his submissions, he refers to this Act as Electoral Act 2011 (as amended). I am not aware of this Act or law. I believe the learned Counsel is referring to the Electoral Act, 2010 (as amended) because the Electoral Act 2011 (as amended) is non-existent and unknown. In any case citing of wrong law or Act cannot defeat the course of justice required in this case. See ***NOFIU SARAKATU V NIGERIAN HOUSING DEV. SOCIETY LTD, (1981) 4 SC 26, EKWERE V STATE, (1981) NSCC 298 and SETRACO (NIGERIA) LTD V JOSEPH KPAJI, (2013) LPELR 20839 (CA) MAKURDI JUDICIAL DIVISION)*.**

Having said the above, I have perused affidavit evidence of both the Plaintiff and the 1st Defendant. The Plaintiff at paragraphs 3, 4, 6, 10 – 18 of the affidavit in support of originating summons deposed to facts to the effect that he is a card carrying member and financial member of the 1st Defendant. And that he expressed interest to contest and indeed paid and obtained from the 1st Defendant, the expression of interest and nomination forms for the Makurdi/Guma Federal Constituency of Benue State. The expression of interest and nomination forms are exhibit B and screening committee of the 1st Defendant that found him qualified issued to the Plaintiff a certificate, exhibit C. By the affidavit evidence of the Plaintiff, only the Plaintiff and One Honourable Conrad Terhide Utaan qualified for the primary election and the Plaintiff emerged as winner with the highest votes of 295 against his opponent Conrad Terhide Utaar who scored 279 votes.

On the other hand, the 1st Defendant in its affidavit in opposition to the originating summons avers at paragraphs 4 (ii) – (iv) to the effect that four (4)

persons viz Buluan Peter T, Dickson Dominic Tarkigir, Franc Fagah Utoo and Conrad Terhide Utaan that purchased the expression of interest and nomination forms for Makurdi/Guma Federal Constituency of Benue State. According to the affidavit evidence of the 1st Defendant, the 1st Defendant conducted the primary election and Bulaun Peter T was the winner. The result of the primary election is exhibit APC1.

Pursuant to the above affidavit evidence, it is important to refer to the nature or essence of originating summons procedure. In the case of **ASOR V INECT & ORS, (2013) LPELR CA/C/89/2011**, the Court of Appeal relying on the case of **DAPIANLONG V DARIYE, (2007) 8 MJSC 140,** the Supreme Court of Nigeria said:-

"The originating summons procedure is a means of commencement of action adopted in cases where the facts are not in dispute or there is no likelihood, of their being in dispute and when the sole or principal question in issue is or is likely to be one directed at the construction of a written law, Constitution or any instrument or of any deed, will, contract or other document or other question of law or in a circumstance where there is not likely to be any dispute as to the facts. In general terms, it is used for non-contentions actions or matters ….."

See also ***DIRECTOR, STATE SECURITY SERVICE V AGBAKOBA, (1999) 3 NWLR (pt 595) page 314, FAMFA OIL LTD V ATT. GEN OF THE FED (2003) 18 NWLR (pt 852) page 453*.**

Thus, in originating summons procedure, it is affidavit evidence that is employed to determine the questions or construction of any written law, constitution or any instrument. In the instant case, the Plaintiff's questions

centered on the construction and interpretation of Sections 31 (1) and 87 (4) (c) (ii) of the Electoral Act, 2010 (as amended) to the effect that the 2nd Defendant did not take part in the Makurdi/Guma Federal Constituency primary election of the 1st Defendant held on the 7th December, 2014.

Section 31 (1) of the Electoral Act, 2010 (as amended) provides: -

"Every political party shall, not later than 60 days before the date appointed for a general election under the provisions of this Act, submit to the Commission, in the prescribed forms, the list of the candidates the party proposes to sponsor at the Elections, provided that the Commission shall not reject or disqualify candidate(s) for any reason whatsoever".

While Section 87 of the same Act provides: -

(1) A political party seeking to nominate candidates for elections under this Act shall hold primaries for aspirants to all elective positions.

(2) The procedure for the nomination of candidates by political parties for the various elective positions shall be by direct or indirect primaries.

(3) A political party that adopts the direct primaries procedure shall ensure that all aspirants are given equal opportunity of being voted for by members of the party.

(4) A political party that adopts the system of indirect primaries for the choice of its candidate shall adopt the procedure outlined below: -

(ii) The aspirant with the highest number of votes at the end of voting shall be declared the winner of the primaries of the political party and the aspirant name shall be forwarded to the Independent National Electoral Commission as the candidate of the party".

Now in the instant case, I have carefully perused the affidavit evidence of the Plaintiff and the documents exhibited. There is no dispute that the Plaintiff is a

registered and a financial card carrying member of the 1st Defendant. It is also not in dispute that the Plaintiff participated in 1st Defendant's primary election of Makurdi/Guma Federal Constituency of Benue State. While the Plaintiff canvassed the position that only two of them i.e. the Plaintiff and one Honourable Conrad Terhide Utaan that participated in the primary election conducted by the 1st Defendant; the 1st Defendant on the other hand avers that four persons as earlier mentioned participated in the 1st Defendant's primary election. This is the crux of the matter and the first leg of this controversy.

As I said earlier, the matter is commenced by originating summons. My duty therefore is to look at the documents and the position of the law vis-a-vis the affidavit evidence to resolve the controversy that ordinarily, ought not be contentions.

Firstly, the Plaintiff attached exhibits B and C, the expression of interest and nomination forms and the certificate of the screening committee of the 1st Defendant to establish the fact that he participated in the primary election of the 1st Defendant of Makurdi/Guma Federal Constituency of Benue State. The 1st Defendant also at paragraphs 4 (xii) – (xv) of their counter affidavit attached exhibits APC 5, APC 6, APC 7and APC 8 as express of interest and nomination forms and certificate of Screening Committee of the 1st Defendant in respect of Bulaun Peter T. The 1st Defendant also attached as APC 4 the membership card of Bulaun Peter T. Thus, by exhibit 4 there is no doubt that Bulaun Peter T is a member of the 1st Defendant.

Thus, based on the affidavit evidence and exhibited documents by both the Plaintiff and the 1st Defendant, it is crystal clear and I hold the view that both the Plaintiff and One Bulaun Peter T did obtained the expression of interest

and nomination forms of the 1st Defendant to participate in the conduct of primary election of the 1st Defendant of Federal Constituency of Makurdi/Guma of Benue State and I so hold.

The Plaintiff in his affidavit at paragraphs 16 and 17 avers that at the primary election of the 1st Defendant, he emerged as the winner of the primary election with 295 votes against his opponent Conrad Terhide Utaan who scored 279 votes. The Plaintiff did not attach the result of the primary election nor did he attach the certificate of return as the person that won the primary election.

However, at paragraphs 19 – 22 of the affidavit in support of originating summons, the Plaintiff avers that the Chairman of the Election Committee invalidated some votes on the ground that improvised ballot papers were used to complete the election and that the Chairman was not satisfied with him being the winner.

The position of the Plaintiff is contrary to that of the 1st Defendant. The 1st Defendant at paragraph 4 (ii) – (vi) of their counter affidavit aver that 4 persons participated in the primary election. Exhibit APC 1 is the result of the primary election declared by 1st Defendant's Election Committee. And the scores show that Bulaun Peter T had the highest number of votes of 223 against the Plaintiff's 31 votes. And by APC 1, the said Bulaun Peter T was declared winner and the Chairman and Secretary of the Election Committee signed the result sheet.

In the instant case therefore, the role of the Court here is to give effect to the contents of the documents submitted by the parties for construction or interpretation. And from exhibit APC 1 and having found that Bulaun Peter T,

being a member of the 1st Defendant and by exhibits APC 7 and 8 also participated in the primary election and by exhibit APC 1, had the highest number of votes and was declared winner, I hold the view that the primary election conducted by the 1st Defendant on 7th December, 2014 into Makurdi/Guma Federal Constituency of Benue State, Bulaun Peter T was the winner and had the highest number of votes of 223 and I so hold.

Now I am not unmindful of the Plaintiff's averments at paragraphs 23 and 24 of his supporting affidavit and exhibits D and E attached thereto. Exhibits D and E cannot alter the result of exhibit APC 1 in view of the averments of the Plaintiff himself at paragraphs 19 – 22 of the Affidavit in support of the originating summons. These are matters that are within the domestic purview of political parties and I am therefore not competent to direct the political parties i.e. the 1st Defendant in this case how to conduct its primary election.

Further, I have seen the averments of the Plaintiff at paragraphs 26, 27 and 28 of the affidavit in support of the originating summons. Based on the evidential value of paragraphs 4 (ii), (vi) (xii) (xiii) (xiv) (xv) (xix) and exhibits APC 1 – APC 8, I am persuaded to believe the case of the 1st Defendant in particular, the documentary evidence exhibited contrary to the averments of the Plaintiff at paragraphs 26 – 28 of his affidavit in support of originating summons.

Furthermore, I have perused the averments of the 1st Defendant at paragraphs 4 (xx) – (xxviii) of the counter affidavit, Buluan Peter T later filed a notice of withdrawal to the 3rd Defendant. A certified true copy (exhibit APC 9) duly issued by the Director Legal Services of the 3rd Defendant, Ibrahim Bawa SAN was attached by the 1st Defendant. Hence, exhibit APC 9 being a public document and duly certified, I have no option than to believe the fact that Bulaun Peter T duly withdrawn his candidature in accordance with Sections 33

and 35 of the Electoral Act, 2010 (as amended). Consequently, Bulaun Peter T having withdrawn and the 3rd Defendant duly notified the law empowers the 1st Defendant to substitute the withdrawn candidate. Thus, by Section 33 of the Electoral Act 2010 (as amended) it provides: -

"A political party shall not be allowed to change or substitute its candidate whose name has been submitted pursuant to Section 31 of this Act, except in the case of death or withdrawal by the candidate".

The Plaintiff has relied on the case of **GBILEVE V ADDINGI & ANOR** (Supra) where the Apex Court of the land clearly stated that the political party has the right to substitute its candidate but where a party abides by the Electoral Act and party guidelines to conduct its primaries and a candidate emerges as the winner of the said primaries, the party or any of its officials cannot whimsically substitute the candidate who emerged winner of the primaries.

In the instant case however, from evidence presented before me by the parties, the Plaintiff did not emerged as the winner at the primary election of 7th December, 2014 into Makurdi/Guma Federal Constituency of Benue State. The person, based on documentary evidence presented before me that emerged winner of the primary election was Bulaun Peter T who later withdrawn as a candidate.

Hence therefore, from the affidavit evidence of the Plaintiff and the counter affidavit of the 1st Defendant and the exhibited documents, I have come to the position and conclude that the 1st Defendant have not contravened sections 31 and 87 of the Electoral Act, 2010 (as amended). Consequently, the questions for determination in the originating summons are hereby answered in the negative and the reliefs claimed are hereby dismissed.

Signed
Judge
15/12/2015

Parties:- Plaintiff present in Court.

Defendants:- Absent

O.K Rugbere:- For the Plaintiff.

O.A. Olawoyi :- For the 1st Defendant.

T.Azon:- For the 2nd Defendant.

Tracy Ukpebor:- For the 3rd Defendant.

Signed
Judge
15/12/2015