



E-ISSN: 2790-068
P-ISSN: 2790-0673
IJLJJ 2023; 3(1): 19-23
Received: 22-11-2022
Accepted: 05-01-2023

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A review of the Supreme Court's decision in *George T.A Nduul V. Benjamin wayo, all progressives congress & independent national electoral commission*

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Abstract

Every election in Nigeria has been characterized with one form of litigation or another; it is either pre-election litigation, post-election litigation or both. The case under review is no exception as it began as a pre-election litigation from a party primary election and continued even after the general election. The main bone of contention was whether the 1st respondent was qualified to contest the party primary election in accordance with the prescribed guidelines. The court was faced with the herculean task of analysing the 2nd respondent's election guidelines in determining whether or not the 1st respondent was rightly elected as the candidate of the 2nd respondent. Of the three issues resolved by the Supreme Court, the 1st issue – whether the Court of Appeal had the jurisdiction to entertain a fresh issue of appeal that did not arise from the issues formulated at the lower court – is the subject of this review. The Court of Appeal Act 2010 (as amended) and Court of Appeal Rules 2016 formed the basis of the Supreme Court's resolution of this issue.

Keywords: Primary election, pre-election litigation, APC election guidelines, fair hearing, fresh issues on appeal

Introduction

Election litigation is a familiar process at the Nigerian court system, many of which go up to the Supreme Court on appeal. The instant case under review is no different, only that the jurisdiction of the Court of Appeal to sit as a court of first instance in respect of a fresh issue was challenged. The Court of Appeal had to determine whether the 1st respondent was accorded fair hearing at the Appeal Committee of the 2nd respondent when he was not served a copy of nor notified of a petition against his emergence as winner of the primary election, which was filed by the appellant.

The issues raised by the appellant Supreme courts centred on whether the 1st respondent was qualified as a contestant at the primary election being a dismissed magistrate on allegations of improper behaviour; whether the 1st respondent was qualified to contest at the primary election having been unable to show proof that he had complied with the requisite election guidelines and whether the Court of Appeal could entertain a fresh issue on appeal. Of these issues, the focus of this review will be on the legality of the appellate court to hear a fresh issue which did not arise from the trial court.

The case was first filed at the Federal High Court, Makurdi division where it was dismissed and judgement was given in favour of the 1st respondent. An appeal at the Court of Appeal, Makurdi division failed as it was also dismissed. A final appeal was filed at the Supreme Court where it was also unanimously dismissed.

Facts of the Case

The appellant and the first respondent were both contestants under the All Progressives Congress, which was the second respondent of the appeal. On 10th December 2014, at the primary elections conducted by the 2nd respondent for the slot of the House of Representatives for the Kwande/Ushongo Federal constituency of Benue State, there were discrepancies about the qualification of the 1st respondent to participate in the primary elections. The discrepancies were centred on the fact that the All Progressive Congress (APC) Election Guidelines ^[1] dictating the process for the conduct of the primary election had not been complied with. The guidelines alleged to have been breached were the fact that the 1st respondent did not tender proof that he had paid the required nomination fee and that he did not possess the screening certificate which was issued by the screening committee.

Despite all of these allegations, the primary elections were still conducted producing the 1st respondent as the winner of the election polling the highest number of votes while the appellant polled the second highest votes. Following the emergence of the 1st respondent as the winner of the election, the 2nd respondent forwarded his name to the 3rd respondent as the party's representative at the general election [2].

In line with the All Progressive Congress (APC) Election Guidelines for the Nomination of Candidates for Public Office 2014, the appellant then aired his grievances in an appeal to the APC Appeal Committee for the National Assembly Primary Elections for Benue State. The Appeal Committee determined that the 1st respondent did not meet the qualification and that among the qualified candidates at the primary election, the appellant scored the highest number of votes and should be the party's (APC) candidate. It then recommended that the appellant's name be forwarded to the 3rd respondent as the party's candidate. Notwithstanding this decision, the 1st respondent's name was forwarded to the 3rd respondent as the party's candidate. This initiated the suit filed at the Federal High Court, Makurdi Division. At the trial, the 1st respondent tendered proof that National Working Committee (NWC), which was the final decision-making body on election appeals of the 2nd respondent [3], reversed the decision of the Appeal Committee [4]. The learned trial judge dismissed the suit in his judgement of 10th December 2015. Dissatisfied with the decision of the trial Court, the appellant proceeded to the Court of Appeal where the decision of the trial Court was upheld on 27th November 2018. Still not satisfied with the Court of Appeal's decision, he filed a further appeal at the Supreme Court [5]. On 20th July 2018, the Supreme Court upheld the decisions of the lower court and unanimously dismissed the appeal. The appeal was heard by their Lordships Walter Samuel Nkanu Onnoghen, JSC, Musa Dattijo

Muhammad, JSC, Chima Centus Nweze, JSC, Ejembi Eko JSC and Kudir at Motonmori Olato kunbo Kekere-Ekun, JSC, who read the leading judgement.

Case Review

Following a dismissal by the Court of Appeal, the appellant filed a notice of appeal at the Supreme containing eleven issues of appeal which are as follows:

1. Whether in the light of Section 240 of the 1999 Constitution (as amended) the Learned Justices of the Court of Appeal were not wrong in law when they assumed Jurisdiction and determined the 1st Respondent's fresh issue which was a direct complaint against the National Assembly Primaries Appeal Committee of the 2nd Respondent (Ground 10).
2. Whether the Lower Court was not wrong in law when it assumed Jurisdiction and gave effect to the arguments of the 1st Respondent as contained in paragraphs 13.0.4 to 14.0.5 of the 1st Respondent's brief of argument which did not arise from any the grounds of appeal filed before the Lower Court (Ground 11).
3. Whether the Lower Court did not breach the Appellant's right to fair hearing when it failed to consider the submissions of Appellant's Counsel on the fresh issue raised by the 1st Respondent in paragraphs 13.0.4. to 14.0.5 of the 1st Respondents brief of argument (Ground 14).

4. Whether the Lower Court was not wrong in law when it failed to give effect to Exhibit GN7E on the ground that the 1st Respondent is not affected by the recommendation contained therein. (Ground 12 and 13).
5. Whether the Learned Justices of the Court of Appeal were not wrong in law when they failed to uphold the Appellant's complaint that the 1st Respondent was not qualified to have participated in the primary elections of the 2nd Respondent by reason of his failure to pay for the mandatory nomination fee as required by the Guidelines of the 2nd Respondent (Ground 4, 5, 6 and 7).
6. Whether the Lower Court was not wrong in law when it dismissed the Appellants complaint that the 1st Respondent was not qualified to have participated in the primary elections of the 2nd Respondent by reason of his failure to possess a payment advise Slip as provided by the Guidelines of the 2nd Respondent (Ground 8 and 9).
7. Whether the Lower Court was not wrong in law when it treated the 2nd Respondent as a neutral party in resolving the complaint of the Appellant that the 1st Respondent did not pay for a nomination form as provided by the Guidelines of the 2nd Respondent (Ground 16).
8. Whether the Lower Court was not wrong when it relied heavily on Exhibit B2 determining the question of the qualification or otherwise of the 1st Respondent (Ground 17)
9. Whether the Lower Court was not wrong when it held that the Appellant was not issued INEC forms as the duly nominated candidate of the 2nd respondent (Ground 15)
10. Whether the Learned Justices of the Court Appeal were not wrong in law when they failed to invoke the provisions of Section 31 (6) of the Electoral Act, 2010 (amended) and disqualify the 1st Respondent for giving false information in his form CF001. (Ground 1, 2, and 3).
11. Whether the judgment of the Lower Courts were not against the weight of evidence and therefore perverse (Ground 18) [6].

In response the 1st respondent raised three issues which are as follows:

1. In view of the extant provisions of Section 240 of the 1999 Constitution of the Federal Republic of Nigeria, Section 15 of the Court Appeal Act (2010 as amended and Order 4 Rules 3 and 4 of the Court Appeal Rules 2016, can it be said that the lower Court erred when it considered before it the new issue of the breach of fair hearing of the 1st respondent? (Ground 10, 11, 12, 13 and 14).
2. Whether the Learned Justice of the Court Appeal were not right when they rejected the contention of the appellant that, he was by the decision of the NEC of the 2nd respondent issued with INEC forms as the 2nd respondent candidate for the House of Representatives election for Kwande/Ushongo Federal Constituency but instead upheld the judgment of the trial Court that "The 1st respondent is a competent person to contest election. And having scored the highest number of votes casts at the primaries is eligible to have his name sent to the 3rd respondent as the candidate for the 2nd

- respondent." (Grounds 4, 5, 6, 7, 8, 9, 15, 16, 17 and 18).
3. Whether or not the Court of Appeal was right when it held that Section 31(5) &(6) of the Electoral Act, 2010 (as amended) can only be invoked against a candidate who gives false information in the relevant affidavit or a document submitted by him and the same relates to any of the qualifying or disqualifying factors in Section 65(1) and 66 of the Constitution of Nigeria, 1999 (as amended) and that the appellant failed to prove the criminal allegation of forgery and perjury against the 1st respondent, (Grounds 1, 2, & 3) ^[7].

The Supreme Court frowns at proliferation of issues ^[8] and thus considered the eleven issues raised by the appellant unnecessary ^[9]. The issues formulated by the 1st respondent were considered more precise and were adopted with slight modifications. The issues which were then resolved by the Supreme Court are as follows ^[10]:

1. In view of the extant provisions of Section 240 of the 1999 Constitution of the Federal Republic of Nigeria, Section 15 of the Court of Appeal Act (2010 as amended) and Order 4 Rules 3 and 4 of the Court of Appeal Rules 2016, can it be said that the lower Court erred when it considered before it the new issue of the breach of fair hearing of the respondent? ^[11]
2. Whether the Learned Justices of the Court of Appeal were right when they upheld the judgment of the trial Court to the effect that the 1st respondent was competent to contest the election and having scored the highest number of votes casts at the primaries, was eligible to have his name sent to the 3rd respondent as the candidate for the 2nd respondent in the general election ^[12].
3. Whether the Court of Appeal was right when it held that Section 31 (5) & (6) of the Electoral Act, 2010 (as amended) can only be invoked against a candidate who gives false information in the relevant affidavit or a document submitted by him and the same relates to any of the qualifying or disqualifying factors in Section 65 (1) and 66 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and that the appellant failed to prove the criminal allegation of forgery and perjury against the 1st respondent ^[13].

As earlier mentioned, the focus of this review is on the first issue where the Court of Appeal's jurisdiction to sit as though it were a court of first instance over a fresh issue that was not raised at the trial court would be examined. Under the first issue, the appellant argued that the Court of Appeal erred when it considered a fresh issue of fair hearing contrary to the provisions of s. 240 of the Constitution ^[14]. The basis of this argument is that the issue of fair hearing raised by the 1st respondent arose from the National Assembly Primaries Appeal Panel of the 2nd respondent ^[15], which was not one of the Courts from which the Court of Appeal was authorised to allow appeals from ^[16]. Section 240 of the 1999 Nigerian Constitution stipulates thus:

Subject to the provisions of this Constitution, the Court of Appeal shall have jurisdiction to the exclusion of any other Court of law in Nigeria, to hear and determine appeals from the Federal High Court, the National Industrial Court, the Federal High Court of the Federal Capital Territory, Abuja, High Court of a State, Sharia Court of Appeal of the Federal

Capital Territory, Abuja, Sharia Court Appeal of a State, Customary Court of Appeal of a State and from decisions of a Court martial or other tribunal as may be prescribed by an Act of the National Assembly.

It was based on this provision of the constitution that the appellant argued that the Court of Appeal had no jurisdiction to allow the fresh issue of fair hearing which was not one of the issues formulated at the trial court. It is common knowledge in law that jurisdiction is one of the critical elements of a fair trial; ^[17] it is so crucial that it can be raised at any point in time during the trial and even on appeal ^[18] and the Supreme Court has held in several of its decisions that any court proceeding conducted without jurisdiction can be set aside ^[19].

Despite the provisions of section 240 of the constitution, the Court of Appeal had the jurisdiction to consider the fresh issue. The 1st respondent responded to the argument raised by the appellant citing section 15 of the Court of Appeal Act 2010 (as amended) ^[20] and order 4 rules 3 & 4 of the Court of Appeal Rules (2016).

Section 15 of the Court of Appeal Act states that: The Court of appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the Court below to inquire into and certify findings on any question which the Court of Appeal think fit to determine before final judgment in the appeal, and may make an interim order or grant any injunction which the Court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken, and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as a Court of first instance and may re-hear the case in whole or in part or may remit it to the Court below for the purpose of such re-hearing or may give such other directions as to the manner in which the Court below shall deal with the case in accordance with the powers of that Court, or, in the case of an appeal from the Court below, in that Court's appellate jurisdiction, order the case to be re-heard by a Court of competent jurisdiction.

Order 4 Rules 3-4 Court of Appeal Rules 2016

3. The Court shall have power to draw inference of fact and to give any judgement and make any order, which ought to have been given or made, and to make such further or other order(s) as the case may require, including any order as to Costs.

4. The powers of the Court under the foregoing provisions of this Rule may be exercised notwithstanding that no notice of appeal or Respondent's notice has been given in respect of any particular part of the decision of the court below, or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the Court may make any order, on such terms as the Court thinks just, to ensure the determination of the merits of the real question in controversy between the parties ^[21].

Drawing from these provisions of the regulatory framework of the Court of Appeal, it can be deduced that the learned justices of the Court of Appeal did not act in error by allowing a fresh issue. Jurisdiction has been conferred on the Court of Appeal to hear fresh issues as though it were the Court of first instance. Moreover, the 1st respondent

applied for leave to make an application for the hearing of the breach of his fundamental right of fair hearing, to which the appellant did not oppose. The move by the appellant to challenge the appellate court's jurisdiction to allow the issue of fair hearing could be tagged as an attempt to waste the court's precious time as he could have done so when the application was first made. Having watched the Court of Appeal make a decision in favour of the 1st respondent, the appellant then awoke from his slumber and decided to add it to his already numerous grounds of appeal.

As the Supreme Court rightly noted ^[22], grounds of appeal would ordinarily arise from the judgement of the lower court being complained against; however, that does not preclude the appellate Court from granting leave to a party to file an application raising a fresh ground of appeal that did not arise from the lower court.

In the 1st respondent's argument on the issue of fair hearing, he filed a document which showed that the decision of the Appeal Committee was reversed by the NWC. However, the exhibit was undated and unsigned. The appellant refused to acknowledge this document on the grounds that it was undated and unsigned. His argument did not deny the fact that the NWC had indeed reversed the decision of the Appeal Committee and instead upheld the candidacy of the 1st respondent but rather stated that the document was certified by the legal officer and not by a member of the National Executive Council of the 2nd respondent. By the appellant's argument and as provided by paragraph 16(d) of the APC Election Guidelines, the decision of the NWC is final and since the NWC had reversed the decision of the Appeal Committee, it should be considered by the appellant as final whether or not it was signed and dated. The appellant's grievance with this was that an undated and unsigned document purportedly reversing the Appeal Committee's decision was inferior to the original document tendered to show the Appeal Committee's initial decision. This raises the question as to whether the unsigned document from the NWC could be considered as less original than the document from the Appeal Committee. The Court observed that even though the document was unsigned, it was certified by the Legal Officer of the 2nd respondent which the Court considered sufficient to prove its validity ^[23]. The appellant's argument in the contrary that the legal officer was not a member of the National Executive Council authorised to certify documents does not hold water as the document is not a public document. The provision of the Evidence Act 2011 as regards the certification of documents is applicable only to public documents. A document issued by the 2nd respondent cannot be considered a public document as the 2nd respondent is itself not an institution listed under section 102 of the Evidence Act, and according to section 103 of the Evidence act, it qualifies as a private document.

The Court of Appeal relied on this Exhibit, discountenanced the appellant's argument and held that the 1st respondent had been denied fair hearing at the Appeal Committee. This was upheld by the Supreme Court and resolved against the appellant.

Conclusion and Recommendation

The entirety of this case review bordered on the jurisprudence of pre-election litigation. Pre-election litigations are very important, perhaps more important than post-election litigation. While the latter is usually between

candidates of two different parties, the former is between members of the same party who contested at the party's primary elections. The implication of a pre-election litigation held in favour of the appellant is that he automatically becomes the candidate of his party and even if the general elections have held, he takes over from whosoever won the elections provided that his party was declared the winner by INEC.

Kekere-Ekun, JSC rightly held that 'It is settled law that the selection and nomination of candidates for elective office is the sole preserve of the political parties and the Courts would not usually interfere in the domestic affairs. See: P.D.P. Vs. Sylva (2012) 13 NWLR (Pt.1315) 85 @ 146 A-E; Gwede Vs. INEC (2014) 18 NWLR (Pt.1438) 56 @ 148 - 149 H: Onuoha Vs Okafor (1983) 2 SCNLR 244 ^[24].' Although the courts do not interfere in the domestic affairs of political parties, the courts can be approached to settle disputes when they arise among members of political parties. This exactly is what played out in the instant case. The common saying that 'the court is the final hope of the common man' is not limited to the poor; it is also applicable to anyone of any class of the society who feels aggrieved and cheated of his rights. In settling such disputes, the courts have a responsibility to ensure that both parties are accorded fair hearing notwithstanding what any decision-making body of the political parties may have ruled beforehand.

Although, the focus of this review is on the 1st issue of fair hearing, it is important to note that the 2nd and 3rd issues were also resolved against the appellant ^[25]. It is also important to note that it was proven in Court by the 1st and 2nd respondents and held by the Court that the 1st respondent paid the requisite nomination fees and was given a screening certificate before the primaries. The 2nd respondent informed the Court that contestants at the Primary elections were not required by the APC Election Guidelines to tender the proof of payment and screening certificate on the day of the primaries and that the fact that the 1st respondent's name was called out as a contestant by the election committee was enough proof that he had undergone the required process beforehand. The Court held that the 1st respondent's name would not have been called out as a contestant if he was not deemed qualified by the election committee.

References

1. (INEC)SC 1093/2017; (2019) 2 NPLR; (2018) LPELR-45151(SC).
2. The guidelines alleged to as having been not complied with are stipulated under paragraphs 4, 6 and 12 of the Election Guidelines.
3. Law Pavilion, 'Engr. George T.A Nduul v. Barr. Benjamin Wayo & Ors'; c2018. <https://lawpavilionplus.com/summary/judgements/?suitno=SC.1093%2F2017> accessed 21 December 2021.
4. Paragraph 16(d) of the APC Election Guidelines stipulates that appeals from the Appeal Committee could be forwarded to the National Working Committee (NWC) and the decision of the NWC is final.
5. Nduul v Wayo. LPELR-45151(SC); c2018. p. 70.
6. Ibid.
7. Nduul v Wayo. LPELR-45151(SC); c2018. p. 37-39.
8. Ibid. p. 40-41.
9. Ogbuanyinya v Okudo (No. 2) (1990) 4 NWLR (146) 551 @ 567; Clay Industries (Nig.) Ltd vs. Aina & Ors

- (1997) 8 NWLR (pt. 516) 208; *Ogunyade v. Oshunkeye* (2007) 15 NWLR (Pt.1057) 218.
10. *Nduul v Wayo*. LPELR-45151(SC); c2018. p. 43.
 11. *Nduul v Wayo*. LPELR-45151(SC); c2018. p. 24.
 12. The 1st issue covers issues 1, 2, 3 and 4 of the appellant's appeal.
 13. This 2nd issue covers issues 5, 6, 7, 8, 9 and 11 of the appellant's appeal.
 14. The third issue covers the appellant's issue 10.
 15. The issue of fair hearing arose from the failure of the Appeal Committee to notify the 1st respondent of the appellant's petition and failing to invite him to respond to the petition.
 16. The Appeal Panel was the first point of call for the appellant after the elections and it was the basis of the Panel's recommendation that the appellant felt wronged having being ignored as the recommended party candidate.
 17. S. 240, 1999 Nigerian Constitution.
 18. Eboibi FE. Jurisdiction of the International Criminal Court: Analysis, Loopholes and Challenges [2012] NAUJILJ28.
 19. Misbau Alamu Lateef. Jurisdiction of Courts in Nigeria [2019] Legal Framework for Corporate Governance in Nigeria 1.
 20. *Madukolu v. Nkemdil* (1962) 2 SCLR 341; (1962) 2 ALL NLR 587 @ 594.
 21. An Act of the National Assembly which created and provided for the jurisdiction of the Court of Appeal.
 22. Order 4 Rule 4 of The Court of Appeal Rules is titled Powers not limited by Notice of Appeal.
 23. Per Kekere-Ekun, JSC.
 24. The appellant argued that the certification done by the Legal Officer was not sufficient as the rules providing for certification applied only to public officers, which the legal officer was not.
 25. *Nduul v Wayo*. LPELR-45151(SC); c2018. p. 78.
 26. *Nduul v Wayo*. LPELR-45151(SC); c2018. p. 99 &109.