

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**  
**IN THE ABUJA JUDICIAL DIVISION**  
**HOLDEN AT GUDU, ABUJA**  
**BEFORE THE HIS LORDSHIP HON. JUSTICE A. B. MOHAMMED**  
**THIS MONDAY, THE 25<sup>TH</sup> DAY OF MARCH, 2014.**

**SUIT NO. FCT/HC/CV/341/18**

**BETWEEN**

HON. MOSES ITANJAH

CLAIMANT

**AND**

- |   |   |            |
|---|---|------------|
| 1. INDEPENDENT NATIONAL ELECTORAL COMMISSION<br>2. PEOPLES DEMOCRATIC PARTY (PDP)<br>3. HON. CHARLES EKPE | } | DEFENDANTS |
|---|---|------------|

**JUDGMENT**

**DELIVERED BY HON. JUSTICE A. B. MOHAMMED**

The Claimant herein brought this Concurrent Originating Summons dated and filed on the 12<sup>th</sup> of December, 2018, seeking for the determination of the following questions against the Defendants:

1. Whether the Plaintiff's due nomination in compliance with Section 87 of the Electoral Act, 2010 (as amended) and the 2<sup>nd</sup> Defendant's Guidelines For The Nomination Of Candidates For the 2019 General Elections – Direct Primaries as the 2<sup>nd</sup> Defendant's Candidate for the Akamkpa State House of Assembly Constituency II of Cross River

State in the 2<sup>nd</sup> Defendant can be interfered with by the 2<sup>nd</sup> Defendant in the absence of the fulfillment of the conditions precedent as laid down in the provisions of Sections 33 and 35 of the Electoral Act.

2. Whether after the due nomination of the Claimant as the 2<sup>nd</sup> Defendant's candidate for the Akamkpa State House of Assembly Constituency II of Cross River State in compliance with the provisions of Section 87 of the Electoral Act, the name of the Claimant can be substituted with the name of the 3<sup>rd</sup> Defendant in the absence of strict compliance with the conditions precedent as laid down in the provisions of Sections 33 and 35 of the Electoral Act.
3. Whether the 1<sup>st</sup> Defendant is entitled to act upon the 2<sup>nd</sup> Defendant's Letter dated 30<sup>th</sup> November, 2018 or any other letter requesting the substitution of the Plaintiff with the 3<sup>rd</sup> Defendant as the 2<sup>nd</sup> Defendant's candidate for the Akamkpa State House of Assembly Constituency II of Cross River State in the absence of strict compliance with the conditions precedent as laid down in the provisions of Sections 33 and 35 of the Electoral Act.

Upon the determination of the above three questions, the Claimant sought for the following reliefs against the Defendants:

- A: A declaration of this Honourable Court that the Claimant is the duly nominated candidate of the 2<sup>nd</sup> Defendant for the Akamkpa State House of Assembly Constituency II of Cross River State.
- B: An Order of this Honourable Court restraining the 1<sup>st</sup> Defendant its agents and or privies from carrying on with, acting on, giving effect to, and processing of the 2<sup>nd</sup> Defendant's letter in any manner whatsoever howsoever described requesting the substitution of the Plaintiff with the 3<sup>rd</sup> Defendant as the 2<sup>nd</sup> Defendant's candidate for the Akamkpa State House of Assembly Constituency II of Cross River State in the absence of strict compliance with the conditions precedent as laid down in the provisions of Sections 33 and 35 of the Electoral Act.
- C: An Order of this Honourable Court setting aside the purported substitution of the Plaintiff with the 3<sup>rd</sup> Defendant as the 2<sup>nd</sup> Defendant's candidate for the Akamkpa State House of Assembly Constituency II of Cross River State in the absence of Strict compliance with the conditions precedent as laid down in the provisions of Sections 33 and 35 of the Electoral Act.
- D: And for such further or other orders as this Honourable Court may deem fit to make in order to give effect to the reliefs sought herein.

In support of the Originating Summons, the Claimant deposed to and filed an eighteen (18) paragraph affidavit, attached to which were five (5) documents labeled Exhibits Akamkpa 1 to Akamkpa 5. A written address dated 12<sup>th</sup> December, 2018 was also filed and adopted in support of the Summons by Abdul Mohammed Esq, the learned Counsel for the Claimant.

In response to the Originating Summons, the 1<sup>st</sup> Defendant filed a six (6) paragraph counter affidavit deposed to by Chioma Obioha, a litigation secretary in the law firm of Rotimi Ojo & Co, the law firm representing the 1<sup>st</sup> Defendant. The learned Counsel for the 1<sup>st</sup> Defendant, Joseph Oluwarotimi Ojo Esq, also filed and adopted a written address dated 6<sup>th</sup> February, 2019 in support of the application.

The 2<sup>nd</sup> Defendant filed a Notice of Preliminary Objection challenging the competence of this suit and the jurisdiction of this Court to entertain same with a Notice of Preliminary Objection to the competence of the suit which was dated 21<sup>st</sup> January, 2019 and filed on 5<sup>th</sup> February, 2019. The objection was supported with a written address dated 21<sup>st</sup> January, 2019. The 2<sup>nd</sup> Defendant also responded to the Originating Summons with a 25 paragraph counter affidavit deposed to by Nanchang Ndam, an employee of the 2<sup>nd</sup> Defendant. A written address dated 4<sup>th</sup> February, 2019 was also adopted by Adedamola Fanokun Esq, the learned Counsel for the 2<sup>nd</sup> Defendant.

On his part, the 3<sup>rd</sup> Defendant also challenged the competence of the suit vide a Notice of Preliminary Objection dated 5<sup>th</sup> February, 2019 challenging the competence of the suit. The 3<sup>rd</sup> Defendant also opposed the Originating Summons

with a twenty (20) paragraph counter affidavit deposed to by him. His Counsel, M. O. Onyilokwu Esq also filed and adopted a written address in opposition to the summons.

The learned Counsel for the Claimant joined issues with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on their respective preliminary objections by filing opposing addresses dated 8<sup>th</sup> February, 2019 and 15<sup>th</sup> February, 2019, respectively.

On the 18<sup>th</sup> of February, 2019 when the matter came up for the first time, the Court suo motu also directed parties to address it on whether the Court has jurisdiction to entertain the suit. Since the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have already raised issues of jurisdiction in their separate preliminary objections, the parties adopted their respective addresses on 11<sup>th</sup> of March, 2019, after which the Court proceeded to hear the substantive suit brought vide the Originating Summons, in line with the extant position of the law.

In line with the settled position of the law as enunciated in several judicial decisions, [See: **DAPIALONG v DARIYE (2007) LPELR-928(SC), per Onnoghen, JSC (as he then was) at page 47, paras. G – B; GARUBA & ORS v OMOKHODION & ORS (2011) LPERL-1309(SC), per Chukwuma-Eneh, JSC at pages 39-40, paras. E – A; and SENATE PRESIDENT v NZERIBE (2004) 9 NWLR (Pt. 878) 251**], the Court shall proceed to first consider the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' preliminary objections to the competence of the originating summons and the Court's jurisdiction to entertain this suit before delving into the substantive originating summons.

THE 2<sup>ND</sup> DEFENDANT'S PRELIMINARY OBJECTION:

The 2<sup>nd</sup> Defendant's Objection to the competence of this suit No. M/2901/19 dated 21<sup>st</sup> January, 2019 and filed on the 5<sup>th</sup> of February, 2019 was on the following grounds:

1. The suit was filed sixty-nine (69) days in clear violation of Section 285(9) of the Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration No. 21) Act, 2017.
2. The cause of action giving rise to this suit arose in Calabar, Cross River State within Cross River Judicial Division and the filing of this suit at the Abuja Judicial Division of the High Court of the Federal Capital Territory amounts to forum shopping by the Claimant.
3. This Honourable Court lacks the requisite jurisdiction to hear and determine this suit.

The Objection was supported by a Written Address dated 21<sup>st</sup> January, 2019 which was adopted by the learned Counsel for the 2<sup>nd</sup> Defendant, Emmanuel Enoidem Esq.

In opposition to this Objection, the learned Counsel for the Plaintiff, Abdul Mohammed Esq, filed and adopted a written address dated and filed on the 8<sup>th</sup> of February, 2019. The learned Counsel also adopted his submissions on page 4 of the address in response to the Court's directive to address it on jurisdiction.

The learned Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants did not file any response to the 2<sup>nd</sup> Defendant's preliminary objection. But the 3<sup>rd</sup> Defendant filed and adopted an address dated and filed on 25<sup>th</sup> February, 2019 in response to the Court's directive for parties to address it on jurisdiction.

In his adopted written address in support of the objection, learned Counsel for the 2<sup>nd</sup> Defendant, Emmanuel Enoidem Esq, raised the following two issues for determination:

1. Whether in the light and circumstances of this suit, this suit can be sustained by the Plaintiff after being filed outside the 14 days prescribed by law.
2. Whether the filing of this suit at the High Court of the Federal Capital Territory, Abuja Judicial Division does not amount to forum shopping.

On his part, learned Counsel for the 3<sup>rd</sup> Defendant, M. O Onyilokwu Esq, raised the sole issue of:

Whether the Honourable Court has the jurisdiction to entertain this suit.

Learned Counsel for the Plaintiff however tailored his submissions in response to the above two issues raised by the 2<sup>nd</sup> Defendant.

I shall adopt the two issues raised by the 2<sup>nd</sup> Defendant in resolving this objection.

On the first issue of whether this suit is statute barred having been filed outside the 14 days prescribed by law, learned Counsel for the 2<sup>nd</sup> Defendant submitted that the 2<sup>nd</sup> Defendant's primary election for the nomination for House of Assembly Candidates for 2019 General Elections took place all over Nigeria, including in Cross River State on the 4<sup>th</sup> of October, 2018 and this much had been admitted all through the Originating Summons. Counsel then posited that this suit which was filed on the 13<sup>th</sup> of December, 2018 was a clear 69 days outside the 14 days prescribed by Section 285(9) of the Constitution of the Federal Republic of Nigeria, 1999 (Fourth Alteration) Act, 2017. Relying on **MADUKOLU v NKEMDILIM (1962) 2 NSCC 37; OBIKA v OBIKA (2018) LPELR- 43965(CA)**, Counsel submitted that this suit is statute barred and this Court lacks the jurisdiction to hear same.

Learned Counsel contended that by Section 284(14) of the Constitution of the Federal Republic of Nigeria, 1999 (Fourth Alteration) Act, 2017, this suit is a pre-election matter. He cited **FAROUK SALIM v APC & ORS (2013) LPELR-19928(SC)**, **per Peter-Odili, JSC at page 22, paras. D - E; and AKPAMGBO-OKADIGBO & ORS v CHIDI & ORS (2015) LPELR-24564(SC)**, **per Muhammad, JSC at page 23, paras. C – D**. He submitted that being a pre-election matter, it shall be filed within 14 days of the occurrence of the event, decision or action complained of. He cited **PDP v CPC (2011) 17 NWLR (Pt. 1277) 485 at 506 (SC); OCHECHUKWU v INEC (2014) 17 NWLR (Pt. 1436) 255; and PDP v INEC (2014) 17 NWLR (Pt. 1437) 325**, to the effect that the Interpretation Act does not apply to computation of time in electoral matters as it includes Saturdays and Sundays. He argued that the phrase



“from the date of occurrence” as used in Section 285(9) of the Constitution (Fourth Alteration) Act has been interpreted to include the date of the event. He cited **ADO ADESULE v MAYOWA & ORS (2011) LPELR-3691(CA); and AMB. PAST UBONG IKPE & ORS v OLATUNJI OLAKUNDE & ORS (2011) LPERL-4734(CA).**

Learned Counsel argued that based on the calculation of 14 days after the date of the primary election which was 4<sup>th</sup> October, 2018 the suit had run out its course on Wednesday 17<sup>th</sup> October, 2018 and was 69 days late. Citing **AKANDE v INEC & ORS (2011) LPELR-3680(CA)**, Counsel urged the Court to hold that this suit is statute barred.

Arguing per contra, learned Counsel for the Plaintiff contended that in determining whether an action is statute barred the Court is enjoined to look at the originating processes only to determine whether or not the cause of action is alive. He cited **EGBE v ADEFARASIN (1987) NWLR (Pt. 47) 1 at 20; WOHEREM v EMERUWA (2004) 13 NWLR (Pt. 890) 398 at 416.** Counsel added that in an action initiated by originating summons it is the affidavits that take the place of pleadings. He cited **AGBAKOBA v INEC (2008) 18 NWLR (Pt. 1119) 489 at 549.** He submitted that by the depositions in paragraphs 6 and 7 of the affidavit in support of the originating summons and Exhibits Akpamkpa 1 and Akpamkpa 2, the Plaintiff was duly nominated after the outcome of the primaries and the 3<sup>rd</sup> Defendant was also nominated as the Member of the Cross River State House of Assembly representing Akpamkpa 1 on Exhibit Akpamkpa 2.

Learned Counsel further submitted that paragraphs 8 and 16 contain the cause of action of the Claimant which at best can be computed to have arisen on the 30<sup>th</sup> of November, 2018 and this suit was filed on 13<sup>th</sup> December, 2018. He argued that by Section 285(9) of the 1999 Constitution (as amended) an action of this nature must be filed not later than 14 days from the date of occurrence of the action complained of. He submitted that however the days are computed, whether with or without the 30<sup>th</sup> of November, 2018, the Claimant is still within the time provided. He urged the Court to so hold.

The 1<sup>st</sup> and 3<sup>rd</sup> Defendants did not make any submission on this issue.

I have considered the submissions made in relation to this issue. It is settled law that to determine whether a suit is statute barred, the Court is enjoined to examine only the Writ of Summons and Statement of Claim filed by the Claimant, so as to see the period between when the cause of action arose and when the suit was filed and determine whether or not it is beyond the period prescribed by the relevant limitation statute. See: **AJAYI v ADEBIYI & ORS (2012) LPELR-7811(SC), per Adekeye, JSC at page 32, paras E – F; MRS. O. ADEKOYA v FEDERAL HOUSING AUTHORITY (2008) LPELR-105(SC), per Tabai, JSC at page 8, paras. C – E; and A.G. OF ADAMAWA STATE & ORS v A.G. OF THE FEDERATION (2014) LPELR-23221(SC), per Peter-Odili, JSC at pages 27 – 28, paras. F – B.**

For a suit commenced by way of originating summons such as this one, it is the affidavit in support of the summons that takes the place of the Statement of Claim. See: **DAPIANLONG v DARIYE (2007) LPELR-928(SC), per Onnoghen, JSC (as**

**he then was) at page 46, para. D; and AGBAKOBA v INEC (2008) 18 NWLR (Pt. 1119) 489 at 549.**

I have examined the affidavit in support of the Originating Summons in this case. I observe that the learned Counsel for the 2<sup>nd</sup> Defendant had tried to argue that the cause of action in this case derives from the primary election held by the 2<sup>nd</sup> Defendant nationwide on the 4<sup>th</sup> October, 2018 and as such this suit which was filed on the 13<sup>th</sup> of December, 2018 was a clear 69 days outside the 14 days prescribed by Section 285(9) of the Constitution of the Federal Republic of Nigeria, 1999 (Fourth Alteration) Act, 2017.

With due respect to the learned Counsel, the trite position as expressed in the judicial authorities quoted above is that it is the Originating Summons and its supporting affidavit that reveals the cause of action and as such his argument cannot change what is contained therein.

As rightly observed by the learned Counsel for the Claimant, a look at the questions for determination contained in the Originating Summons, as well as its supporting affidavit deposed to by the Claimant, especially paragraphs 8 to 16 thereof, shows that the cause of action is one of unlawful substitution after due nomination and not primary election. In paragraphs 7 – 16 of the Claimant's supporting affidavit to the Originating Summons he deposed as follows:

7. I won the primaries and was duly nominated by the Peoples Democratic Party as its candidate for the Akamkpa State House of Assembly Constituency II in Cross River State.

Now shown to the and attached to this affidavit and marked as Exhibit Akamkpa 2 is the certified true copy of the Form CF 002A which is the Form containing the list of candidates submitted by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant.

8. My attention has been drawn to the letter dated 30<sup>th</sup> November, 2018 with the subject "WITHDRAWAL OF CANDIDATURE" purportedly signed by me and submitted to the National Chairman of the 2<sup>nd</sup> Defendant indicating that I have withdrawn from my candidature for the Akamkpa State House of Assembly Constituency II elections in Cross River State.

Now shown to me and attached to this affidavit and marked as Exhibit Akamkpa 3 is a copy of the letter.

9. I know for a surety that I did not write the letter attached to this affidavit as Exhibit Akamkpa 3, neither did I sign same.

10. I did not deliver the letter attached to this affidavit as Exhibit Akamkpa 3 to any of the offices of the 2<sup>nd</sup> Defendant neither did I instruct any person to deliver the letter to the 2<sup>nd</sup> Defendant on my behalf.

11. Any attempt to substitute my name with that of any other person under the guise of withdrawal of my candidature is false and completely unfounded.
12. I am willing to contest in the forthcoming elections under the Platform of the 2<sup>nd</sup> Defendant for the post of Member representing the Akamkpa in the Cross River State House of Assembly Constituency II elections in Cross River State.
13. I have not changed my mind in my quest to participate in the elections for the post of Member representing the Akamkpa in the Cross River State House of Assembly Constituency II elections in Cross River State under the Platform of the 2<sup>nd</sup> Defendant.
14. The 2<sup>nd</sup> Defendant acting on the basis of the Exhibit Akamkpa 3 has purportedly sent a notice of withdrawal of candidature (CF 004C) to the 1<sup>st</sup> Defendant in an attempt to substitute me with the 3<sup>rd</sup> Defendant as the candidate of the 2<sup>nd</sup> Defendant.  
Now shown to me and attached to this affidavit and marked Exhibit Akamkpa 4 is a copy of the 1<sup>st</sup> Defendant's Form CF004C "Notice of Withdrawal of Candidate" together with its attachments.
15. I wrote a letter of protest to the Defendant dated the 10<sup>th</sup> of December, 2018 informing it that I have no relationship with the letter dated 30<sup>th</sup> November, 2018.

Now shown to me and attached to this affidavit and marked as Exhibit Akamkpa 5 is a copy of the letter.

16. The 2<sup>nd</sup> Defendant is not recanting its step and is already giving effect to the letter dated 30<sup>th</sup> November, 2018 with the subject “WITHDRAWAL OF MY CANDIDATURE” and has sent a notice of withdrawal of candidate (CF004C) to the 1<sup>st</sup> Defendant in an attempt to substitute me with the 3<sup>rd</sup> Defendant as the Candidate of the 2<sup>nd</sup> Defendant.

From the above depositions of the claimant, it is clear that the cause of action of substitution in this case arose not from 30<sup>th</sup> November 2018, the date of the purported letter of withdrawal of Candidature denied by the Claimant, but the date when the Form CF004C the “NOTICE OF WITHDRAWAL OF CANDIDATE” was submitted to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant. A look at the said Form CF004C attached to the supporting affidavit as Exhibit Akamkpa 4 shows that it was submitted to the 1<sup>st</sup> Defendant on the 1<sup>st</sup> of December, 2018. (See the Receipt Stamp on Exhibit Akamkpa 4. Since this suit was instituted by the Claimant on the 13<sup>th</sup> of December, 2018, this suit was clearly commenced within the 14 days period stipulated by Section 285(9) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended by the Fourth Alteration Act, No. 21 of 2017).

Indeed, even if the date the cause of action arose is to be taken to be the 30<sup>th</sup> of November, 2018 when the purported letter of withdrawal in Exhibit Akamkpa 3

was made, this Suit is still filed not later than the 14 days so stipulated by the Section. The words “not later than 14 days” as contained in that Section means not beyond 14 days. This means that the 14<sup>th</sup> day must be included in the computation.

From the foregoing, I find and hold that this suit is not statute barred and accordingly I resolve the first issue against the 2<sup>nd</sup> Defendant and overrule this ground of the 2<sup>nd</sup> Defendant’s Objection.

On issue two relating to whether the filing of this suit at High Court of the Federal Capital Territory, Abuja does not amount to forum shopping, learned Counsel for the 2<sup>nd</sup> Defendant had submitted that going by the questions for determination and affidavit evidence of the Claimant, the subject matter of this suit is the Akamkpa Constituency II House of Assembly primary election which took place in Cross River State and that all the delegates to the primary election are from Cross River State. Learned Counsel submitted that there are Cross River State High Court and Federal High Court in Cross River State.

Citing **JAMES ONANEFE IBORI & ANOR v FRN & 3 ORS (2009) 12 NWLR (Pt. 487); NEWSWATCH COMMUNUCATIONS LTD v ATTA (2006) 12 NWLR (PT. 993) 144 AT 184-189; HON. MAILANTARKI v HON. TONGO & ORS (2017) LPELR-42467(SC), per Eko, JSC at pages 18 – 23, paras. D – B,** Counsel urged the Court to strike out this suit for lack of jurisdiction.

In his written address on this issue dated and filed on 25<sup>th</sup> February, 2019, the learned Counsel for the 3<sup>rd</sup> Defendant submitted that jurisdiction is the pillar or foundation upon which the entire proceedings stand. He cited **GEN. MOHAMMED A. GARBA (RTD) v MUSTAPHA SAMI MOHAMMED (2016) 16 NWLR (Pt. 1537) 114 at 154, paras. F – G, 169 – 170, paras. G – B.** He argued that the primary election was held in Cross River State, the House of Assembly is in Cross River state and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant all have offices in Cross River State, while the 3<sup>rd</sup> Defendant is also a Member of the Cross River State House of Assembly and resident in Cross River State. Counsel argued that the institution of this action in this Court is wrong. He argued that by the combined effect of Sections 31(5) and 87(9) of the Electoral Act, 2010 (as amended) an aggrieved aspirant who participated in the primary election who complains that any of the provision of the Act has not been complied with may apply to the Federal High Court, the High Court of a State or of the Federal Capital Territory for redress. Counsel argued that the extant law has introduced territorial jurisdiction in pre-election matters, and the 1<sup>st</sup> Defendant being an agency of the Federal Government is no longer relevant as the 1<sup>st</sup> Defendant can be sued in all the States of the Federation as it maintains offices in all the States. He added that what is relevant is where the primary election was held, which is Cross River State.

Referring to the Supreme Court decision in **LAU v PDP & 3 ORS (2018) 4 NWLR (Pt. 1608) 60 at 107, paras. F – G,** Counsel argued that there cannot be a valid substitution without a valid nomination. He added that a valid nomination can only come from the result of the primary elections. He submitted that the primary election which gave rise to the alleged nomination of the Claimant was held in



Cross River State. Relying of the cases of **OCEAN FISHERIES (NIG) LTD v VEEPEE INDUSTRIES LTD & ANOR (2009) 5 NWLR (Pt. 1135) 430; URICH AUTO SUPPLY CO. LTD & ANOR v AZUBUIKE (2002) 16 NWLR (Pt. 793) 343; DALHATU v TURAKI & ORS (2003) 15 NWLR (PT. 843) 310 at 339 – 340, paras. G – A; and HON MAILANTARKI v HON TONGO & ORS (2017) LPELR-42467(SC)**, Counsel urged the Court to decline jurisdiction and strike out this suit for want of jurisdiction.

In his opposing argument, learned Counsel for the Claimant submitted that a case is only an authority for what it decides., and before a case can apply as precedence it must be on all fours with the extant case. He cited **OKAFOR v NNAIFE (1987) 4 NWLR (Pt. 64) 120 at 137.**

Counsel submitted that the case of **MAILANTARKI v TONGO & ORS (supra)**, does not apply to this case because in that case the complaint relates to the primary election in Gombe State where the Appellant complained that the 1<sup>st</sup> Defendant ought not to be allowed to participate in the primaries since he was a member of another political party. Counsel argued that In **LAU v PDP & ORS (2017) LPELR-42800(SC)**, the Supreme Court, relying on its previous decision in **MR PERES PERETOR & 4 ORS v CHIEF KOKO GARIGA & 4 ORS (2013) 5 NWLR (Pt. 1348) 415,** had held that the High Court of the Federal Capital Territory has jurisdiction in respect of substitution of candidate to represent Taraba North Senatorial District. Further citing **OSAKUE v FEDERAL COLLEGE OF EDUCATION (TECHNICAL) ASABA (2010) 10 NWLR (Pt. 1201) 36-37,** Counsel urged the Court to discountenance the 2<sup>nd</sup> Defendant's argument on this point and dismiss the preliminary objection.

In considering the first issue in this objection, I had already held that from the questions for determination in the Originating Summons and the affidavit in support, this suit is clearly not one relating to conduct of primaries but relating to substitution of candidate. Suffice it for me to state that substitution in this respect essentially involves the withdrawal of one person and replacement with another. Apart from the fact that both the 2<sup>nd</sup> Defendant that is alleged to have given the notice of withdrawal of candidate (Form CF004C –Exhibit Akamkpa 4), and the 1<sup>st</sup> Defendant to whom the said notice was given, are resident within the Federal Capital Territory, the act of substitution also happened within the Federal Capital Territory.

Being a case of substitution therefore, I hold that this case is on all fours with **LAU v PDP (supra)**. I therefore have no hesitation in applying that decision to resolve the second issue against the 2<sup>nd</sup> defendant and hold that the institution of this suit in this Court does not amount to forum shopping since this Court has the jurisdiction to entertain the suit.

From the foregoing, the 2<sup>nd</sup> Defendant's preliminary objection has failed. Accordingly, it is hereby dismissed for lack of merit.

### 3<sup>RD</sup> DEFENDANT'S PRELIMINARY OBJECTION:

The 3<sup>rd</sup> Defendant's Notice of Preliminary Objection to the competence of this suit was dated 5<sup>th</sup> February, 2019. It was predicated on the following grounds:

1. The suit is not one that can be fought on Originating Summons.

2. The facts of the suit alleging forgery/dishonesty among other highly contentious facts cannot be determined based on Originating Summons procedure.

In response to that objection, the learned Counsel for the Plaintiff had filed a written address titled: Reply on Point of Law to 3<sup>rd</sup> Defendant's Notice of Preliminary Objection, dated and filed on 15<sup>th</sup> February, 2019. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not file any response to the objection.

In his adopted written address in support of the Objection, learned Counsel for the 3<sup>rd</sup> Defendant, M O. Onyilokwu Esq, raised the sole issue of Whether the Court is not robbed of jurisdiction to entertain this suit having regards to the way it is presently constituted before this Court.

Since the learned Counsel for the Plaintiff has also adopted the same sole issue, I shall adopt the same issue in deciding the 3<sup>rd</sup> Defendant's objection.

Learned Counsel for the 3<sup>rd</sup> Defendant had referred to the Claimant's deposition in paragraph 8 of the supporting affidavit to the Originating Summons and submitted that the claimant had alleged forgery or dishonesty which is criminal in nature and cannot be summarily determined based on affidavit evidence. Citing the Supreme Court decision in **SENATOR ABUBAKAR SADIQ YAR'ADUA & ORS v SENATOR ABDU UMAR YANDOMA & ORS (2015) 4 NWLR (Pt. 1448) 123 at 161, paras. F – H,** learned Counsel submitted that in the counter affidavit of the 3<sup>rd</sup>

Defendant, it was deposed that the Plaintiff submitted the letter Exhibit 3 to the 2<sup>nd</sup> Defendant. Counsel argued that by the two contending affidavit evidence of the parties, the facts in this case are in dispute especially as the Plaintiff had anchored his case on the allegation that he did not make Exhibit 3, while the 3<sup>rd</sup> Defendant had deposed in his counter affidavit that the Plaintiff made Exhibit 3. Counsel referred to the case of **JOE ODEY AGI, SAN v PDP & 2 ORS (2017) 17 NWLR (Pt. 1595) 386 at 469, paras G – H,** to the effect that where facts are in contention it is unsuitable to commence an action by originating summons.

Learned Counsel submitted that by the reliefs sought by the Plaintiff, he is seeking the determination of the propriety or otherwise of the substitution done by the 2<sup>nd</sup> Defendant, but a closer look of the case denotes that the Plaintiff's complaint is that Exhibit 3 was forged by saying that it was not made and signed by him and as such it cannot be a ground for substitution pursuant to Sections 33 and 35 of the Electoral Act. He added that the 3<sup>rd</sup> Defendant had in its affidavit stated that the Plaintiff delivered the letter to the 2<sup>nd</sup> Defendant. Relying on **DR. SAMSON UCHECHUKWU OGAH v DR. OJEZIE VICTOR IKPEAZU (2017) 17 NWLR (Pt. 1594) at 335, para. G,** he urged the Court to decline to proceed with this suit by way of originating summons and strike out the case.

In his opposing argument, learned Counsel for the Plaintiff submitted that it is erroneous for the 3<sup>rd</sup> Defendant to contend that because the Plaintiff had used originating summons to initiate the proceedings where there is allegation of forgery, the Court has lost its adjudicatory powers to determine this case. Counsel contended that the trite position of the law is that where there are disputes in an

affidavit, the Court can resolve the dispute by comparing the depositions with the documents before the Court. He cited **BFI GROUP CORP. v BUREAU FOR PUBLIC ENTERPRISES (2013) All FWLR (Pt. 676) 444 at 457.**

Counsel submitted that documentary evidence is the best evidence which serves as a hangar by which the veracity of any oral evidence is tested. He referred to the case of **CHIEF JAMES ADEBAYO OYEWUSI & ORS v OBA SUNDAY OLAGBAMI & ORS (2018) LPELR-44906(SC), per Kekere-Ekun, JSC at page 39, para. B.** Counsel argued that the Court can resolve the dispute as to whether the Plaintiff submitted Exhibit Akamkpa 3 to the 2<sup>nd</sup> Defendant by comparing the depositions and the documents before the Court. He relied on the case of **JEV v IYORTYOM (2014) 14 NWLR (Pt. 1428),** where the Supreme Court held that in an action commenced by originating summons if there are documents annexed to affidavits of the parties which can be effectively used to resolve the conflict, there would be no need to order pleadings. Counsel submitted that the conflict in the affidavits of the parties in this case can be resolved by examining the documents attached to the affidavit in support.

Learned Counsel also submitted that even if the Court holds that it cannot rely on the documentary evidence before it in determining this case, the court is empowered to resolve the dispute by calling oral evidence of the deponent or other witnesses if the crucial facts are irreconcilable. Counsel cited Section 116 of the Evidence Act, 2011 and the case of **CHAIRMAN NATIONAL POPULATION COMMISSION v CHAIRMAN, IKERE LOCAL GOVT & ORS (2001) LPELR-3166(SC).** He submitted that the use of wrong procedure does not rob the Court of

jurisdiction as it does not defeat the cause of action and referred to **UDO v REGISTERED TURSTEES OF THE BROTHERHOOD OF THE CROSS & STAR (2013) LPELR-19910(SC)**. He added that the state of facts before the Court has not presented irreconcilable facts as to warrant the order of pleadings and there is sufficient documentary evidence with which the Court could resolve the dispute in affidavit evidence. He urged the Court to dismiss the 3<sup>rd</sup> Defendant's objection. I have considered the submissions of the parties. The central argument of the 3<sup>rd</sup> Defendant in this objection is that this case is not one that could be commenced by way of originating summons because the facts as disclosed in the affidavit of the parties are contentious.

In explaining the nature of originating summons, the Supreme Court, per Onnoghen JSC (as he then was) in **DAPIANLONG v DARIYE (2007) LPELR-928(SC); (2007) 8 MJSC 140; (2007) 4 S.C. (Pt. III) 18**, held that:

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-contentious actions or matters i.e. those actions where facts are not likely to be in dispute, in actions commenced by originating, summons, pleadings are not required rather affidavit evidence are employed.

See also: **FAMFA OIL LIMITED v ATTORNEY GENERAL OF THE FEDERATION (2003) 18 NWLR (Pt. 852) 453, per Belgore JSC (as he then was) at page 467; DIRECTOR, STATE SECURITY SERVICE v AGBAKOBA (1999) 3 NWLR (Pt. 595) 314; DIN v ATTORNEY GENERAL OF THE FEDERATION (1986) 1 NWLR (Pt. 17) 471; and KEYAMO v HOUSE OF ASSEMBLY, LAGOS STATE & ORS (2002) 18 NWLR (Pt. 799) 605.**

It is however pertinent to state that the mere fact that there is dispute as to facts does not remove a case from being commenced by way of originating summons. Rather, the disputed facts must be material to the issue(s) in the suit. In **BARR. (MRS.) AMANDA PETERS PAM & ANOR v NASIRU MOHAMMED & ANOR (2008) LPELR-2895(SC)**, the Supreme Court, per Niki Tobi, JSC highlighted this position of the law when it held:

It is not the law that once there is dispute on facts, the matter should be commenced by writ of summons. No, that is not the law. The law is that the dispute on facts must be substantial, material, affecting the live issues in the matter. Where disputes are peripheral, not material to the live issues, an action can be sustained by originating summons. After all, there can hardly be a case without facts. Facts make a case and it is the dispute in the facts that give rise to litigation. (Page 89 – 90, paras. G – A).

The question then is whether or not from the facts disclosed in the affidavits of the parties the controversy is such that this suit can be maintained by originating summons.

In **SENATOR ABUBAKAR SADIQ YAR'ADUA & ORS v SENATOR ABDU UMAR YANDOMA & ORS (2015) 4 NWLR (Pt. 1448) 123**, the Supreme Court held that to determine an objection to jurisdiction in an action commenced by originating summons, the Court must consider the objection along with the substantive matter, and in so doing the Court must consider not only the reliefs being claimed against the background of the facts in the supporting affidavit but the totality of available evidence including the facts contained in the counter affidavits in opposition to the originating summons.

As I have held while considering the 2<sup>nd</sup> Defendant's objection, the central issue involved in the Claimant's case is one of substitution. The Claimant's case as contained in the supporting affidavit to the Originating Summons is essentially that he had been unlawfully substituted after having been nominated as candidate of the 2<sup>nd</sup> Defendant for Akamkpa State House of Assembly Constituency II of Cross River State without complying with Sections 33 and 35 of the Electoral Act, 2010 (as amended). In paragraphs 7 to 11 of the supporting affidavit to the Originating Summons deposed by the Claimant which I had reproduced above while considering the 2<sup>nd</sup> Defendant's objection, the Claimant had stated that his attention was drawn to letter dated 30<sup>th</sup> November, 2018 with the subject: WITHDRAWAL OF CANDIDATURE, purportedly signed by him and submitted to the National Chairman of the 2<sup>nd</sup> Defendant indicating that he had



withdrawn from his candidature for the Akamkpa State House of Assembly Constituency II elections in Cross Rivers State, a copy of which he attached as Exhibit Akamkpa 3. He stated that he did not write and sign the said Exhibit Akamkpa 3 and did not deliver it to the 2<sup>nd</sup> Defendant. He had stated that the 2<sup>nd</sup> Defendant had acting on the said Exhibit Akamkpa 3, sent a Notice of Withdrawal of Candidate (Form CF 004C) – (Exhibit Akamkpa 4) to the 1<sup>st</sup> Defendant substituting him with the 3<sup>rd</sup> Defendant, in protest to which he wrote Exhibit Akamkpa 5 – a letter to the 2<sup>nd</sup> Defendant dated 10<sup>th</sup> December, 2018 denying any relationship with the letter of 30<sup>th</sup> November, 2018 (Exhibit Akamkpa 3).

But in the 1<sup>st</sup> Defendant's counter affidavit deposed to by Chioma Obioha the 1<sup>st</sup> Defendant essentially stated that it acted based on the information it received from the 2<sup>nd</sup> Defendant, especially the Plaintiff's letter of withdrawal of candidature signed by the candidate himself and that the name of the 3<sup>rd</sup> Defendant was nominated and sent to it by the 2<sup>nd</sup> Defendant. [See especially paragraph 3(h) of the counter affidavit].

As for the 2<sup>nd</sup> Defendant, its counter affidavit deposed to by Nanchang Ndam, its employee is to the effect that after the its primary election for the Akamkpa State House of Assembly Constituency in Cross River State, the Plaintiff who lost had appealed to the its Appeal Panel against the decision of the Electoral Committee. That its National Executive Committee through the National Working Committee upheld the decision of the Electoral Committee and that the Plaintiff willfully wrote and signed the letter of withdrawal of his candidature upon being aware of

the decision of the National Working Committee, as a result of which the 3<sup>rd</sup> Defendant was nominated to the 1<sup>st</sup> Defendant.

In paragraphs 6 – 13 of the 3<sup>rd</sup> Defendant's Counter Affidavit however, he deposed as follows:

6. That after I was declared winner of the primary election, the Plaintiff complained to the State House of Assembly election Appeal Panel on facts which did not happen at Akamkpa State House of Assembly Constituency II Primary Election and said the Appeal Panel went ahead and recommended that the Plaintiff be declared winner of Akamkpa Constituency I State House of Assembly Election. A copy of the Appeal Panel Report is hereby annexed and marked as Exhibit EKPE 3.
7. That on the basis of the Appeal Panel Report, the Plaintiff went to town telling people that he had been nominated as candidate for Akamkpa State House of Assembly Constituency II of Cross River State by the 2<sup>nd</sup> Defendant.
8. That on the 10/10/2018, the National Working Committee, the highest organ of the 2<sup>nd</sup> Defendant, met to review the reports of the States Houses of Assembly Primary Elections of 4/10/2018 and the States Houses of Assembly Primary Election Appeal Panel Reports.

9. That the National Working Committee of the 2<sup>nd</sup> Defendant upheld the report of the Cross River State Electoral Committee and set aside the Appeal Panel Report and its recommendations. Copies of the Electoral Committee Report and the extract of the National Working Committee decision signed by Anicho Okoro for the National Secretary are hereby annexed and marked as Exhibits EKPE 4 and EKPE 5, respectively.
10. That I know as a fact that upon delivering the letter of his withdrawal to the 2<sup>nd</sup> Defendant, the Plaintiff and I also signed and affixed our passport photograph each to Form CF 004C.
11. That I paid the sum of N100,000.00k to the 2<sup>nd</sup> Defendant for expression of interest to participate in the said primary election. A copy of the receipt of payment and the Expression of Interest Form are hereby annexed and marked as Exhibits EKPE 6 AND 6A.
12. That I obtained a nomination form in the sum of N500,000.00k from the 2<sup>nd</sup> Defendant to be nominated by the 2<sup>nd</sup> Defendant to contest the election on its platform. A copy of the receipt of payment for and the nomination forms are hereby annexed and marked as Exhibits EKPE 7, 7A and 7B.
13. That being winner of the primary election, the National Working Committee of the 2<sup>nd</sup> Defendant submitted my name to the 1<sup>st</sup>

Defendant as the person nominated by the 2<sup>nd</sup> Defendant to contest the general election on the platform of the 2<sup>nd</sup> Defendant.

From the above reproduced affidavit evidence it is clear that the critical issue in the Plaintiff's suit which I had held is based on unlawful substitution, is Exhibit Akamkpa 3, the LETTER OF WITHDRAWAL OF CANDIDATURE, which the Plaintiff said he never wrote and signed and he never delivered to the 2<sup>nd</sup> Defendant, while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants countered that the Plaintiff wrote and signed the letter of withdrawal of his candidature and delivered same to the 2<sup>nd</sup> Defendant after the decision of the National Working Committee of the 2<sup>nd</sup> Defendant upholding the decision of its Electoral Committee, as a result of which the 3<sup>rd</sup> Defendant was nominated.

From the affidavit evidence parties, the Plaintiff's case is hinged upon a plea that he never wrote and signed Exhibit Akamkpa 3, which is the letter of withdrawal of his candidature. This in my view presents either a plea of non est factum by the Plaintiff or even an allegation that the said letter was forged.

In **NATSAHA v STATE (2013) LPELR-22601(CA)**, the Court of Appeal held that:

Non est factum means, "It is not his deed." That is a denial of the execution of an instrument. Non est factum can be general, special or verified. A general non est factum is a broad, nonspecific denial that an instrument was executed or executed improperly. Special non est factum refers to a pleading that specifies ground on which an instrument's execution is invalid or nonbinding. This is also referred to as particular non est factum, Verified

non est factum, on the other hand, is a sworn denial that puts the validity of the instrument as well as the signature on it in question" Per BELGORE, J.C.A. (P. 23, paras. D-G)

Further, in **EGBASE v ORIAREGHAN (1985) LPELR-1030(SC)**, the Supreme Court, per Kayode Eso, JSC held that:

It must also be borne in mind that the plea of non est factum requires clear and positive evidence before it can be established. (Page 39, para. C)

If the allegation of the Plaintiff that he did not write and sign Exhibit Akpamkpa 3 were to be taken to be one of forgery or dishonesty, the trite law is that allegations of fraud or dishonesty must be proved beyond reasonable doubt and cannot be determined purely on affidavit evidence, but by calling evidence. In **SULE v AJANI (1980) LPELR-3123(SC)**, the Supreme Court, per Nnamani, JSC held that:

The point is that the Appellant having raised the issue of Exhibit A being a forgery the burden was on him to prove that assertion. The standard of proof is proof beyond reasonable doubt. Section 137(1) and (2) of the Evidence Act, Cap 62. provide as follows:

"137 (1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.

(2) The burden of proving that any person has been guilty of a crime or wrongful act is, subject to the provisions of Section 140, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.” (Pages 19 – 20, paras. F – B).

See also: **ACN v LAMIDO & ORS. (2012) LPELR-7825(SC), per Mahmud Mohammed, JSC (as he then was) at page 22, paras. D – F; OHALEM & ANOR v UKAEGBU (2002) LPELR-12709(CA), per Akpiroroh, JCA at pages 10 – 11, paras. A – C.**

Although there are documents annexed and relied upon by parties in their respective affidavits, the fact remains that the crux of the Plaintiff’s case is hinged on his assertion that he did not write, sign and deliver his Exhibit Akpamkpa 3 (Withdrawal of Candidature) to the 2<sup>nd</sup> Defendant, which assertion had been denied by the Defendants. Unless evidence is led by the parties, none of the other document can assist in the resolution of this disputed fact.

From the foregoing, it is clear that whether the Plaintiff’s denial of having written and signed Exhibits Akpamkpa 3 and Akpamkpa 4 attached to his supporting affidavit to the originating summons is taken to be a plea of non est factum or an allegation of forgery, same could only be established by clear and positive evidence. In the instant case where the Defendants have countered that the said Exhibit Akpamkpa 3 which the Plaintiff relies in grounding his case was written, signed and delivered to the Plaintiff, I hold the humble view that the dispute can only be resolved by calling witnesses.

As rightly submitted by the learned Counsel for the Plaintiff where there is irreconcilable facts in affidavits, the Court shall in resolving the conflict request the parties to proffer oral evidence as to such facts. In **NIGERIAN NATIONAL SUPPLY COMPANY LTD. v ALHAJI HAMAJODA SABANA & COMPANY LTD. & ORS. (1988) LPELR-2025(SC)**, the Supreme Court, per Nnamani, JSC, held that:

It is settled that the Court cannot resolve such conflict in affidavits except by taking oral evidence. In *Falobi v Falobi* (1976) 9-10 S.C.1; Fatayi-Williams, J.S.C. as he then was, set down the practice of the Court in this issue when he said -"We have pointed out on numerous occasions that when a court is faced with affidavits which are irreconcilably in conflict, the Judge hearing the case, in order to resolve the conflict properly, should first hear oral evidence from the deponents or such other witnesses as the parties may be advised to call.

Also in **THE MILITARY ADMINISTRATOR, FEDERAL HOUSING AUTHORITY & ANOR v C. O. ARO (1991) LPELR-3185(SC)**, His Lordship Belgore, JSC (as he then was) restated this settled practice as follows:

Surely when two parties in a dispute render their facts into affidavits and there are conflicts in the affidavits - such conflict could best be resolved by having oral evidence from the parties. Once this situation of conflict in affidavits arises, and the conflict is not on trivial matter in dispute but on the substance of the dispute; whether the parties so request or not, it is

incumbent on the Court faced with such a situation to advise the parties to give oral evidence to resolve the conflict. (Page 7, paras. D – F).

See also: **THE CHAIRMAN, NATIONAL POPULATION COMMISSION v THE CHAIRMAN, IKERE LOCAL GOVERNMENT & ORS (2001) LPELR-3166(SC)**, per Iguh, JSC at page 26, paras. A – C;

As also rightly submitted by the learned Counsel for the Plaintiff, the fact that the Plaintiff had commenced this suit by originating summons does not rob this Court of the jurisdiction to entertain same. In **UDO v THE REGISTERED TRUSTEES OF THE BROTHERHOOD OF THE CROSS & STAR 2013) LPELR-19910(SC)**, (also cited by the Plaintiff's Counsel), the Supreme Court held that:

Commencing an action by wrong procedure does not constitute a jurisdictional issue since the lapse, except where specifically stated in the rules of court, does not defeat the claimant's cause of action. If the subject matter of the plaintiff's action is within the jurisdiction of the court, the cause of action would not be abrogated simply because it has been commenced by the wrong procedure. The lapse in that regard is only an irregularity that gives the defendant the right to insist that plaintiff adopts the proper procedure in approaching the court. (Per Muhammad, JSC at pages 14 – 15, paras. G – C).



See also: **OKOTIE-EBOH v OKOTIE-EBOH (1986) 1 NWLR (Pt. 16) 264; and IJEBU-ODE LOCAL GOVERNMENT v ADEDEJI BALOGUN & CO. LTD. (1991) 1 NWLR (Pt. 166) 136.**

From all the foregoing, I hereby resolve the sole issue in the 3<sup>rd</sup> Defendant's preliminary objection and hold that the way this suit is constituted does not rob this Court of the jurisdiction to entertain it. Rather, it only gives the 3<sup>rd</sup> Defendant the right to insist that the Plaintiff adopt the proper procedure, which the 3<sup>rd</sup> Defendant had done in raising this objection. See: **UDO v THE REGISTERED TRUSTEES OF THE BROTHERHOOD OF THE CROSS & STAR (supra).**

Having found that this suit has raised contentious facts that could only be resolved by way of oral evidence, I hereby and hold that this case cannot be resolved by the mode of originating summons adopted by the Plaintiff. Accordingly I hereby order that parties should file pleadings and lead evidence in support of their respective cases.

As undertaken, the Claimant shall file and serve his Statement of Claim on the Defendants within one day from today, while the Defendants shall file their respective Statements of Defence within 5 days of service on them of the Claimant's Statement of Claim.

**HON. JUSTICE A. B. MOHAMMED, FCArb**  
JUDGE  
25<sup>TH</sup> MARCH, 2018.

**Appearances:**

1. Abdul Mohammed Esq, with I. T. Abdulrashid Esq and C. M. Onyia Esq, for the Claimant.
2. Rotimi Ojo Esq, with Oladayo Odunlami Esq and Susan Yaktor Esq, for the 1<sup>st</sup> Defendant.
3. Emmanuel Enoidem Esq, for the 2<sup>nd</sup> Defendant
4. M. O. Onyilokwu Esq, with Hilary Ugwu Esq, for the 3<sup>rd</sup> Defendant,