

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA

THIS WEDNESDAY, THE 15TH DAY OF JULY, 2020.

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: FCT/HC/CV/1616/2020

BETWEEN

1. MUHAMMED SANI AUDU 2. OJO FEBISOLA 3. OTEGHE ADAMS	}CLAIMANTS
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AND

1. ALL PROGRESSIVE CONGRESS (APC) 2. ADAMS OSHIOMHOLE 3. WAZIRI BULAMA 4. INDEPENDENT NATIONAL ELECTORAL COMMISSION	}	...DEFENDANTS
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JUDGMENT

The Claimants commenced this action by way of an Amended Originating Summons filed on 3rd June, 2020 in the Court’s Registry. The Claimants sought for a determination of the following questions:

- 1. Whether, upon the interpretation of the provisions of Section 223 (1) (a-b), (2) (a-b) of the Constitution of the Federal Republic of Nigeria 1999 (As Amended), Section 85(1), (2) a-c, (3) of the Electoral Act 2010 (As Amended) and Article 20 1(a) of the Constitution of the 1st Defendant, the 1st Defendant being a registered political party in Nigeria can validly and**

lawfully appoint any person including the 3rd Defendant as its National Secretary or Acting national Secretary and a member of its National Working Committee (NWC), without having been duly elected at the Congress or Convention of the 1st Defendant.

2. Whether, upon the interpretation of the provisions of Section 223 (1) a-b, (2) a-b of the Constitution of the Federal Republic of Nigeria 1999 (As Amended), Section 85(1), (2) a-c, (3) of the Electoral Act 2010 (As Amended) and Article 20 1(a) of the Constitution of the 1st Defendant, it is lawful and constitutional for the 3rd defendant to assume the office of the Acting National Secretary or National Secretary of the 1st defendant without the 3rd defendant having being democratically elected as the National Secretary at the Congress or Convention of the 1st Defendant.
3. Whether, upon the interpretation of the provisions of Section 223 (1) a-b, (2) a-b of the Constitution of the Federal Republic of Nigeria 1999 (As Amended), Section 85(1), (2) a-c, (3) of the Electoral Act 2010 (As Amended) and Article 20 1(a) of the Constitution of the 1st Defendant, the 3rd defendant can constitutionally and lawfully occupy/or act or discharge the functions of the National Secretary of the 1st defendant having not been duly elected into the office of the National Secretary of the 1st defendant at the congress or convention of the 1st defendant.
4. Whether, upon the interpretation of the provisions of Section 223 (1) a-b, (2) a-b of the Constitution of the Federal Republic of Nigeria 1999 (As Amended), Section 85(1), (2) a-c, (3) of the Electoral Act 2010 (As Amended) and Article 20 1(a) of the Constitution of the 1st Defendant it is not unconstitutional and unlawful for the 3rd defendant to occupy the office and carryout the function of the National Secretary of the 1st defendant, whether in substantive, acting or by howsoever described, without having been elected into the office of the National Secretary of the 1st defendant at the congress or convention of the 1st Defendant.

- 5. Whether, upon the interpretation of the provisions of Section 223 (1) a-b, (2) a-b of the Constitution of the Federal Republic of Nigeria 1999 (As Amended), Section 85(1), (2) a-c, (3) of the Electoral Act 2010 (As Amended) and Article 20 1(a) of the Constitution of the 1st Defendant, the provision of Article 17 (i)-(vi) of the Constitution of the 1st Defendant allowing or permitting the filling of vacancies occurring among the officers of the 1st defendant by appointment and without the holding of election at the Congress or Convention of the 1st Defendant is not unconstitutional, unlawful and therefore null and void.**
- 6. Whether, upon the interpretation of the provisions of Section 223 (1) a-b, (2) a-b of the Constitution of the Federal Republic of Nigeria 1999 (As Amended), Section 85(1), (2) a-c, (3) of the Electoral Act 2010 (As Amended) and Article 20 1(a) of the Constitution of the 1st Defendant, it is not unconstitutional and unlawful for the 4th defendant to recognise the 3rd defendant as the Acting National Secretary or National Secretary of the 1st Defendant the 3rd defendant having not been duly elected into the office of the National Secretary of the 1st defendant at the Congress or Convention of the 1st defendant.**

The Reliefs sought upon a determination of the above questions are as follows:

- i. A Declaration that, upon the interpretation of the provisions of Section 223 (1)a-b, (2)a-b of the Constitution of the Federal Republic of Nigeria 1999 (As Amended), Section 85 (1), (2) a-c, (3) of the Electoral Act 2010 (As Amended) and Article 20 1(a) of the Constitution of the 1st Defendant, the 1st defendant being a registered political party in Nigeria cannot validly and lawfully appoint any person including the 3rd defendant as its National Secretary or Acting National Secretary and a member of its National Working Committee (NWC), without having been duly elected at the Congress or Convention of the 1st Defendant.**
- ii. A Declaration that, upon the interpretation of the provisions of Section 223 (1)a-b, (2)a-b of the Constitution of the Federal Republic of Nigeria 1999 (As Amended), Section 85 (1), (2) a-c, (3) of the Electoral Act 2010 (As**

Amended) and Article 20 1(a) of the Constitution of the 1st Defendant, it is lawful and constitutional for the 3rd defendant to assume the office of the Acting National Secretary or National Secretary of the 1st defendant without the 3rd defendant having being democratically elected as the National Secretary at the Congress or Convention of the 1st Defendant.

- iii. A Declaration that, upon the interpretation of the provisions of Section 223 (1)a-b, (2)a-b of the Constitution of the Federal Republic of Nigeria 1999 (As Amended), Section 85 (1), (2) a-c, (3) of the Electoral Act 2010 (As Amended) and Article 20 1(a) of the Constitution of the 1st Defendant, the 3rd defendant cannot constitutionally and lawfully occupy/or act or discharge the functions of the National Secretary of the 1st Defendant having not been duly elected into the office of the National Secretary of the 1st Defendant at the Congress or Convention of the 1st defendant.
- iv. A Declaration that, upon the interpretation of the provisions of Section 223 (1)a-b, (2)a-b of the Constitution of the Federal Republic of Nigeria 1999 (As Amended), Section 85 (1), (2) a-c, (3) of the Electoral Act 2010 (As Amended) and Article 20 1(a) of the Constitution of the 1st Defendant, is unconstitutional and unlawful for the 3rd defendant to occupy the office and carryout the functions of the National Secretary of the 1st defendant, whether in substantive, acting or by howsoever described, without having been elected into the office of the National Secretary of the 1st defendant at the congress or convention of the 1st defendant.
- v. A Declaration that, upon the interpretation of the provisions of Section 223 (1)a-b, (2)a-b of the Constitution of the Federal Republic of Nigeria 1999 (As Amended), Section 85 (1), (2) a-c, (3) of the Electoral Act 2010 (As Amended) and Article 20 1(a) of the Constitution of the 1st Defendant, the provision of Article 17(i)-(vi) of the Constitution of the 1st defendant allowing or permitting the filling of vacancies occurring among the officers of the 1st defendant by appointment and without the holding of election at the congress or convention of the 1st defendant is unconstitutional, unlawful and therefore null and void.

- vi. A Declaration that, upon the interpretation of the provisions of Section 223 (1)a-b, (2)a-b of the Constitution of the Federal Republic of Nigeria 1999 (As Amended), Section 85 (1), (2) a-c, (3) of the Electoral Act 2010 (As Amended) and Article 20 1(a) of the Constitution of the 1st Defendant, is unconstitutional and unlawful for the 4th defendant to recognise the 3rd defendant as the Acting National Secretary or National Secretary of the 1st Defendant the 3rd Defendant having not been duly elected into the office of the National Secretary of the 1st Defendant at the congress or convention of the 1st defendant.**
- vii. An Order of this Honourable court directing the defendants not to appoint or cause the appointment of the 3rd defendant as the Acting National Secretary or National Secretary of the 1st defendant as such an appointment would be unconstitutional, unlawful, null and void.**
- viii. An Order of this Honourable Court striking out Article 17 (i) – (vi) of the Constitution of the 1st defendant for being in conflict with the provision of Section 223 (1) a-b, (2) a-b of the Constitution of the Federal Republic of Nigeria 1999 (As Amended), Section 85(1), (2) a-c, (3) of the Electoral Act 2010 (As Amended).**
- ix. An Order of this Honourable Court, setting aside and declaring null and void all actions taken or documents signed and attested to by the 3rd Defendant as the Acting National Secretary or National Secretary of the 1st defendant.**
- x. An Order of this Honourable Court restraining the 3rd defendant for parading himself or further parading himself as the Acting National Secretary or National Secretary of the 1st defendant.**
- xi. And such consequential order as the Honourable Court may deem fit to make in the circumstances of this suit.**

The summons is supported by a 20 paragraphs affidavit with four (4) Annexures marked as **Exhibits A-D**.

A written address was filed in which one issue was raised for determination as follows:

Whether having regards to the provisions of Section 223 (1) a-b, (2) a-b of the Constitution of the Federal Republic of Nigeria 1999 (As Amended), Section 85(1), (2) a-c, (3) of the Electoral Act 2010 (As Amended) and Article 20 1(a) of the Constitution of the 1st Defendant, the 3rd claimant can be appointed as the Acting National Secretary or National Secretary without being democratically elected at the Congress or Convention of the 1st defendant.

Submissions were made on the above issue which forms part of the Record of court.

The Respondents were then all served with the originating court processes. The 1st - 3rd Respondents filed a counter-affidavit to the above originating summons on 18th June, 2020 together with a written address in which one issue was also raised for determination to wit:

Whether having regards to the extant laws and the provision of the 1st defendant's constitution, the arrangements being made for the appointment of the 1st defendant's National Secretary is lawful?

Submissions were equally made on the above issue which forms part of the Record of court.

The 1st – 3rd Respondents equally filed a notice of preliminary objection dated 18th June, 2020 and filed on the same date contending as follows:

- i. That the suit as constituted is incompetent and ought to be struck out or dismissed as the Claimants/Respondents lack the locus standi to institute the action.
- ii. That this Honourable court lacks the jurisdiction to entertain the suit as constituted.

The Grounds of the objections were then streamlined and in support of the objection is a five paragraphs affidavit together with a written address in which one issue was raised for determination as follows:

Whether the claimants possess the locus standi to clothe this Honourable court with the jurisdiction to entertain this suit.

Arguments were then canvassed which equally forms part of the Record of court. The Claimants in response to the above processes filed:

1. Claimants Reply on points of law to the 1st – 3rd defendants counter affidavit and written address in opposition to the originating summons.
2. Claimants/Respondents written address in opposition to the 1st – 3rd Defendants/Applicants notice of preliminary objection.

The 4th Respondent, though represented by counsel did not file any process or take a position on the different processes filed. They were merely onlookers. Guided as I am by the decisions of the Supreme Court in **Amadi V N.N.P.C (2000) 10 NWLR (pt.674) 76 at 100** wherein his lordship Uwais CJN called attention to the desirability of taking preliminary issues together with the substantive issues raised in a case in order to save precious judicial time, this court with the agreement of all counsel directed that both the substantive Amended originating summons and the preliminary objection raised by the 1st – 3rd defendants be taken together.

On 26th June, 2020 counsel on either side then moved the processes filed as identified above and each side equally responded and the matter was then adjourned for judgment on 15th July, 2020.

As the court was working on the judgment, the Claimants then filed a Notice of Discontinuance dated 3rd July, 2020 and filed same date in the Court's Registry.

When the matter came up on 15th July, 2020, counsel to the Claimants/Applicants informed the court that after arguments were advanced on 26th June, 2020, his clients informed him that the President of the country and leader of their party has intervened in the party dispute and ordered for all parties to withdraw all cases filed so that the intra party dispute can be settled amicably out of court. Counsel then was instructed to withdraw and or discontinue the action which he has now done via the notice of discontinuance. He apologised for any inconveniences caused. The 1st – 3rd defendants counsel indicated that he was not opposing the notice of discontinuance.

Now from the trajectory of the facts as narrated above, there is no doubt that issues have not only being joined on both the substantive summons and the preliminary objection but parties have fully contested and presented their side of the grievance.

The question that then arises is simply what is the appropriate order to make in such circumstances?

Several authorities of our Superior Courts appear to donate the position to the effect that a withdrawal of a suit after issues have been joined should be dismissed and not merely struck out. See **Omo V Ananta (1993) 3 NWLR (pt.280) 187, Eromini V Iheuko (1989) 2 NWLR (pt.1010) 46.**

Let me refer to some few more cases on the point.

In **Wema Bank Plc V D.A.M Ltd (2008) All FWLR (pt.421) 992 at 1001 – 1002**, Salami J.C.A (As he then was) stated instructively as follows:

“A plaintiff or claimant who has presented its claim up to the stage of address, even up to the close of evidence, not to talk of address will not be entitled to the luxury of unilaterally withdrawing it without suffering some consequence. The order to make clearly will not be one of striking out but one of dismissal except with the leave of the court.”

In **Egbukohia & Ors V Onyegbule & Anor (2014) LPELR – 23548 (CA)**, The Court of Appeal per Oho J.C.A stated thus:

“It is important to note that once pleadings have been filed in a given case and issues possibly joined between the parties, a case under withdrawal at that stage will be dismissed and not struck out. See Nwokedi V Roxy Travel Agency ltd (2002) 6 N.W.L.R (pt.762) 181 at 199 par. F. In the same token, where a matter has become part heard, as in a situation where the claimant has commenced giving evidence, the proper order to make is one of dismissal. See Obasi Brothers V Merchant Bank of Africa Securities ltd (2005) 9 NWLR (pt.929) 117 at 129 C-E. This is especially so, when the stage of “*Litis Contestatio*” has been achieved, which ordinarily describes as between the litigants, a period of “no retreat and no surrender.” But that if ever there is to be a surrender on the part of the claimant, that automatically will be a

dismissal of his suit and a defeat of his claims.” See also *Young Shall Grow Motors V Okonkwo* (2002) 16 N.W.L.R (pt.794) 536 at 568 A-C.

In *Ugwokeh-Omene V Stanbic IBTC Bank Plc & Anor* (2013) LPELR – 22032 (CA), the Court of Appeal per Pemu J.C.A again stated as follows:

“Where a matter has started by way of commencement of hearing in a court of law, the proper order to make upon an application for discontinuance of the suit is that of dismissal.”

In *Alhaji Isyaku Yakubu Ent. Ltd V Tarfa & Anor* (2014) LPELR – 24223 (CA). The Court of Appeal per Sankey J.C.A stated thus:

“In *Eromini V Iheuko* (1989) 20 NSCC (pt.1) 503, at the trial stage, after a few faltering steps, the plaintiff’s counsel, who was taken aback by the witnesses evidence which was at variance with the plaintiffs pleading, stopped the witness from concluding his evidence and applied to the trial court to discontinue the case. The application was granted and the case was struck out. On appeal against the order striking out the action, the Court of Appeal affirmed the decision of the trial court. On further appeal to the Supreme Court, the decision of the trial court which was affirmed by the Court of Appeal was reversed and an order dismissing the action substituted therefore on the ground that at the time the plaintiff discontinued the action, *litis Contestatio* had been reached.

Nnaemeka Agu JSC elaborated on the decision thus:

“In my view, the rationale of the rule i.e. in *Soeteins* case, is that once issues have been joined to be tried and the stage set for the conflict, then once a certain stage has been reached, the plaintiff is no longer *Dominis Litis* and cannot be allowed to escape through the back door to enter again through another action.”

In other words, after pleadings have been exchanged by the parties whereby issues between them have become crystallized, *Litis Contestatio* can be deemed to have been reached. A withdrawal of a suit from that point in time must, as an unbendable Rule, lead to a dismissal of the action. Thus, where the suit is shown to have been withdrawn at a point where *Litis Contestatio* has been

reached, the proper order to be made by the court is, by operation of the law one of dismissal. And since, the order of dismissal erases any expectation for a revivification of the suit, an application for its reenlistment is tantamount to a stab in the dark, a hopeless quest.”

I need not say more. The extant case clearly must suffer the inevitable consequence as enunciated by the above decisions of our Superior courts. I agree that while the power to dismiss cases withdrawn are not lightly exercised, where however a case has reached a point of no return or *Litis Contestatio* have been reached as in this case, then the room for maneuver no longer exist. See **Babatunde V Pan Atlantic Shipping & Transport Agencies ltd & Ors (2001) 4 SC (pt.1) 71.**

The reality flowing from the above decisions is that the claimants having fully ventilated their case and reached a point of *Litis Contestatio*, a withdrawal of the case at this point will by operation of the law lead to a dismissal.

Accordingly, the proper order to make as a consequence of the Notice of Discontinuance filed by the claimants is a dismissal of the action. The Claimants case is accordingly hereby dismissed.

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Hon. Justice A.I. Kutigi

Appearances:

- 1. Shuaibu Enejoh, Esq. with Mustapha Issa Balogun, Esq. and Ayuba Ibrahim Idris, Esq., for the Claimants.**
- 2. Audu Anuga, Esq. with Kigai Zotong, Esq. and Akinola Abass for the 1st – 3rd Respondents.**
- 3. S.M. Danbaba, Esq., for the 4th Respondent.**