

*Affidavit Deposed to by a Legal Practitioner in a Case Where He Acts as
Counsel – Admissibility of*

In The Supreme Court of Nigeria
Holden at Abuja
On Friday 9th December, 2022

Before Their Lordships

Kudirat Motonmori Olatokunbo Kekere-Ekun
Mohammed Lawal Garba
Helen Moronkeji Ogunwumiju
Ibrahim Mohammed Musa Saulawa
Adamu Jauro
Justices, Supreme Court

SC/CV/1353/2022

Between:

1. Barr. Emmanuel Nnabuike Nwite Appellants
And

1. Peoples Democratic Party
2. Independent National Electoral Commission (INEC) Respondents
3. Dr. Johnson Obinna Nwachukwu

(Lead judgement delivered by Honourable Mohammed Lawal Garba, JSC)

Facts

The Appellant contested and emerged the winner of the 1st Respondent's re-scheduled primary election conducted on 4th June 2022 with 46 out of 74 votes cast, for the election of candidate for the Ezza-North/Ishielu Federal Constituency of Ebonyi State for the House of Representatives' election in 2023. The 3rd Respondent also partook in the re-scheduled primaries where he recorded zero votes cast. The zero vote notwithstanding, the 1st Respondent's preferred candidate was the 3rd Respondent, consequent upon which the 1st Respondent approached the Appellant to ask for his withdrawal from the race.

Owing to the Appellant's refusal to back down from the race, the 1st Respondent forward the 3rd Respondent's name to the 2nd Respondent on 17th June 2022, as its

candidate for the said Federal Constituency for the 2023 election into the House of Representatives. Aggrieved by the actions of the 1st Respondent, the Appellant commenced an action *via* Originating Summons at the Federal High Court, Abakaliki (the “trial court”) filed on 29th June 2022, where the Appellant challenged the submission of the 3rd Respondent’s name to the 2nd Respondent in lieu of his name and sought declaratory reliefs that the substitution was null and void.

In a judgement delivered by the trial court on 28th July 2022, which shows a “scanty review of the affidavit evidence before that court, no evaluation of the evidence was even attempted and no reasons, howsoever, were stated for the conclusion that ... the suit lacks merit and resolving all the issues in favour of the 3rd Defendant against the Plaintiff” (Appellant herein).

On appeal, the Appellant complained about the failure of the trial court to evaluate the evidence placed before it, consider the issues raised and to proffer or give any reason for the dismissal of the substantive suit. The Court of Appeal, however, dismissed the appeal after resolving all three (3) issues raised in the appeal against the Appellant. Still dissatisfied, the Appellant further appealed to the Supreme Court.

At the Supreme Court, the 3rd Respondent filed a Notice of Preliminary Objection challenging the competence of the appeal as gross abuse of court process in view of the earlier decisions of the Supreme Court in *Appeal No: SC/363/2022 – Chief Chukwuma Odili Ifeanyi v Sen. Joseph Obinna Ogba & 20 Ors. and Appeal No: SC/CV/939/2022 – Mr. Mbam Ojimba Chikodili Fidelis v. Peoples Democratic Party & 2 Ors.*

Issues for Determination

The issue in the Preliminary Objection was subsumed in the second and third issues raised by the Appellant and the first and second issues of the 3rd Respondent. The first Respondent was not represented by counsel and no Brief of Argument was filed on its behalf. The 2nd Respondent on the other hand, raised a sole issue for determination on *whether the 2nd Respondent acted and performed its statutory role in the conduct of the primary election of the 1st Respondent.* This issue, which did not derive from any of the Grounds of Appeal before the court, was discountenanced by the apex court.

The following three issues, comprising the issue in the Preliminary Objection and the issues posed in the main appeal, were determined by the Supreme Court:

1. *Whether the appeal is a gross abuse of the process of the Supreme Court and whether the Appellant can derive any legal benefits or rights from the primary elections of the Peoples Democratic Party held in Ebonyi State on the 4th day of June 2022, which said primary elections had been declared unconstitutional, null, void and of no effect whatsoever by a court of competent jurisdiction.*
2. *Whether the Court of Appeal was in error when it held that the inadmissible affidavit evidence of Adams U. Oboke, Esq. relied on by the trial court was admissible, when same was contrary to the decision of the Supreme Court in AKINLADE v INEC (2020) 17 NWLR (Pt. 1754) 439 and also inadmissible.*
3. *Whether on a proper evaluation of admissible evidence before it and application of relevant principles of law as canvassed, the Court of Appeal was right when it held that the Appellant failed to establish a case worthy of success at the trial stage.*

Arguments

Arguing the appeal, the 3rd Respondent's Preliminary Objection, which formed the fulcrum of the 3rd Respondent's argument, was that the trial court had nullified the 1st Respondent's primary election conducted on the 4th and 5th June 2022 in Ebonyi State in Suit No. FHC/AI/CS/88/2022 between ODILI v PDP & ANOR and that the decision of the Supreme Court delivered on 14th September 2022 in Appeal No. SC/CV/939/2022; ODILI v OGBA & 2 ORS. had affirmed the cancellation by the trial court. The Preliminary Objection contends that the Appellant seeks to rely on the cancelled primary election of 4th June 2022, to base his claim for being the rightful candidate of the 1st Respondent selected for the election in question. The 3rd Respondent, therefore, urges the apex court to strike out/dismiss the appeal on the above basis. Refuting the submissions above, counsel for the Appellant contended that the 3rd Respondent failed to provide the judgement referenced in line with Section 128 of the Evidence Act and merely provided oral summary of the said decision. He contended further that the election cancelled in the said judgement is the gubernatorial election of the 1st Respondent for Ebonyi State conducted on 6th June 2022 and not the election for Ezza North/Ishielu Federal Constituency, which the Appellant won.

On issue two, the Appellant argues that the affidavit evidence of Adams U. Oboke was inadmissible for the reason that the evidence was incompetent on the authority of **AKINLADE v INEC (2020) 17 NWLR (Pt. 1754) 439 at 557**. He contended that Adams U. Oboke, Esq. was not a competent witness for the 3rd

Respondent in the case which was contentious and that he cannot act as both counsel and witness to a client. Counsel for the Appellant argued further that the affidavit evidence deposed to by Oboke, Esq. was documentary hearsay since he did not witness the conduct of the primary election of the 1st Respondent and the evidence was inadmissible by virtue of Section 38 of the Evidence Act. On the other hand, counsel for the 3rd Respondent posited that the instant case is distinguishable from the decision in AKINLADE's case which motion was contentious. He argued that though it is not desirable for counsel to depose to an affidavit in a case, it is not illegal since no law prohibits same if counsel is conversant with the facts or where the facts are within his personal knowledge – **SODIPO v LEMMINKAINEM (1986) 1 NWLR (Pt. 15) 220**. He argued further that the evidence of Oboke, Esq. was not hearsay as he is a member of the 1st Respondent who had personal knowledge of facts deposed to. More so, there is nothing in the judgement which shows that the trial court relied on the affidavit of Oboke, Esq. and that in the absence of the evidence, the Appellant needed to succeed on the strength of his own case since he sought declaratory reliefs.

Court's Judgement and Rationale

Resolving the issue in the Preliminary Objection, the Supreme Court held that *the only evidence of the contents of a judgement of a court of law or any other judicial or official proceedings, is the judgment itself, for purpose of admissibility*. The court, however, noted that the Appellant had gone ahead to produce the said judgements in court as additional authorities, and held that it could consider the contents of the said judgements, which were then before it. Considering the referenced judgement of the Federal High in *Suit No. FHC/AI/CS/88/2022, CHIEF CHUKWUMA ODILI IFEANYI v PDP & INEC*, Their Lordships held that the decision dealt with the governorship election conducted in Ebonyi State, and not the subject of this appeal and that the Appellant was not a party in the said suits. Further, the Supreme Court held that in the lead judgement of the referenced decision, the court did not at any point pronounce on the nullification of the primary election conducted by the 1st Respondent for Ebonyi State Governorship election or affirm the nullification or cancellation ordered by the trial court above. Thus, the Preliminary Objection of the 3rd Respondent and his issues one and two were resolved in favour of the Appellant.

In respect of arguments canvassed on accidental slip, which was the basis of the Court of Appeal changing the Suit No. of the case before the trial court as contained in the record of appeal, on the prodding of counsel for the 3rd Respondent, when parties did not challenge the record of appeal, the apex court

held that appellate courts are bound by the records of appeal before it. It remarked that *there is a procedure for challenging records of appeal on ground of "accidental slip"; as such, the party complaining about the slip should have challenged the record at the court below, and seek for an amendment, rather than proceed to alter any conceived slip at the appellate court.* To this end, the apex court held that the Court of Appeal was wrong to have allowed the argument that the trial court made an accidental slip in using FHC/AI/CS/61/2022 in lieu of FHC/AI/CS/88/2022. The holding of the court was that this amounted to altering the record of the trial court without an application to so do.

Regarding the Appellant's argument on admissibility of the affidavit evidence of Adam U. Oboke Esq., the apex court held that by the provisions of the Evidence Act, *any evidence, oral or documentary, on relevant fact/s given is admissible, unless excluded in accordance with the Act or any other Act/Law or legislation validly in force in Nigeria. The Rules of Professional Conduct for Legal Practitioners, 2007 made pursuant to the Legal Practitioners Act, LFN 2004, constitutes any other law or legislation mentioned in the Evidence Act. Rule 20(1), (4) and (6) prohibit a legal practitioner from being a witness for his client in a case in which he appears as counsel for such client ... particularly where contentious issues are involved. Although the Rules do not render evidence deposed to by a legal practitioner in a client's case in which he appears as a counsel, inadmissible in evidence in the proceedings of court, they render such legal practitioner liable for unprofessional conduct in contravention of the Rules.*

On the case before the Supreme Court, Their Lordships held that there was nothing in the scanty judgement of the trial court (which did not evince the court's analysis to reach its conclusions) suggesting that the trial court relied on the affidavit evidence of the deponent, in reaching its conclusion.

Given the foregoing the Supreme Court went ahead to evaluate the evidence supplied to the trial court, having established that there was no proper evaluation of the evidence before the trial court. The Supreme Court found that the affidavit evidence relied on by the Appellant was uncontroverted. Worse still, the 3rd Respondent denied participating in the re-scheduled primary election which was the dispute in court. The 3rd Respondent only claimed to have participated in the alleged original primary election, which the 1st Respondent admitted never held but was re-scheduled to 4th June 2022. In the result, the apex court found that the decisions of both courts below were perverse for not being

supported or even borne out by the credible evidence adduced by the parties in the case.

Further to the above, the Supreme Court unanimously allowed the appeal and ordered that the submission of 3rd Respondent's name was contrary to section 84(5) of the Electoral Act, and that the name of the Appellant shall be submitted to the 1st Respondent. The 2nd Respondent was also directed to accept the Appellant as the PDP candidate for the House of Representatives for Ezza-North/Ishielu Federal Constituency, Ebonyi State, for the 2023 general elections.

Appeal allowed.

Representation:

F.S.N. Ogazi, *Esq.* with Petrus I. Elechi *Esq.*, Nnamdi U. Mba *Esq.*, Chibuzor Ezike *Esq.*, F.S.Agbakoba *Esq.*, and J.O. Nwanga for the Appellant.

1st Respondent not represented.

Prince Adebiyi Adetosoye, *Esq.* with Isaac Idota *Esq.*, Rabi Umar Mohammed *Esq.*, Adekemi M. Olusegun *Esq.*, and Ogonna Bria Maduabuchi *Esq.* for the 2nd Respondent.

Chief Mudiaga Erhenede *Esq.* with Egwu Kelechi Okpani *Esq.*, Adams Uzuakpunwa Oboke *Esq.*, D.C. Onocha *Esq.*, Abigail U. Chukwu *Esq.* for the 3rd Respondent.

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