

## A LEGAL EXPOSITION OF THE JURISDICTION OF THE COURTS IN PRE-ELECTION LITIGATION IN NIGERIA

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### Abstract

*Before every general election is conducted in Nigeria, Political Parties are expected to conduct internal primary elections to choose candidates that would represent the party in the general election. This often leads to a flood gate of litigation on issues of qualification, disqualification, nomination, substitution and sponsorship of candidates for an election preceding the general election. The controversy as to which court, between the Federal High Court and States High Courts has the exclusive jurisdiction in pre-election matters would be considered and concluded with the aid of decided cases stating the current position of the law on the subject matter.*

**Keywords:** Courts, Election, Jurisdiction, Litigation, Nigeria

### 1.0. Introduction

The controversy as to which court has the requisite jurisdiction to try pre-election matters have bedeviled the court over the years, as courts are inundated with one preliminary objection or the other challenging her jurisdiction to entertain pre-election matters. This article is geared towards providing the legal solution to this raging legal problem that has been used by parties to delay the speedy dispensation of justice in pre-election matters. In the course of this article, the meaning of jurisdiction, the parties in pre-election matters, what the court must consider before assuming jurisdiction in pre-election matters in Nigeria will be considered.

### 2.0. Definition of Jurisdiction

Jurisdiction is the legal power or authority which a court must have to decide matters litigated before it, or to take cognizance of matters presented in a formal way for its decision and the limit of this legal power or authority are circumscribed by the statute<sup>1</sup>. Jurisdiction is also

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<sup>1</sup> *Oduko v. Govt. of Ebonyi State* (2009) 25 WRN 1 @ Pp.10-11 lines 45-5 per Aderemi, JSC

described as the cornerstone of all litigation<sup>2</sup>, and the law is settled that if a court is bereft of jurisdiction to hear and determine a matter before it, any steps taken in the matter is a nullity and void<sup>3</sup>. For any court or tribunal to be competent to assume jurisdiction in any matter brought before her, it must consider the following conditions:

- a) It is properly constituted as regards numbers and qualification of the members of the bench, and no member is disqualified for one reason or the another;
- b) The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising jurisdiction and;
- c) The case comes before the court initiated by due process of the law, and upon fulfillment of any condition precedent to the exercise of jurisdiction see. ***Madukolu & Ors v. Nkemdilim (1962) 2 NSCC P.374***<sup>4</sup>.

The above conditions are applicable to pre-election matters without exception

### 3.0. Factors affecting Jurisdiction in Pre-Election Cases

It is trite for the court to consider the following before assuming jurisdiction in pre-election matters;

#### 3.1. Parties

The parties to a pre-election matter is germane to the success or failure of the suit, since the law is settled that the plaintiff can only sue the parties he has a cause of action against, otherwise such an action will fail. This position has been restated by the erudite jurist per Niki Tobi (of blessed memory) in the case of ***Abubakar v. Yar Adua***<sup>5</sup> as follows;

*“The plaintiff who sues a wrong person in law cannot be heard to say that the court should give judgement in his favour against the wrong person. After all a court of law cannot give judgement against a person not known to law”*

The law is also settled that a judgement or order made against a person who was not made a party to a suit is to no avail, as he will not be bound by it<sup>6</sup>.

Therefore, it is important at this point to enumerate parties to a pre-election matter. The following parties can commence a pre-election matter

- a. Proper parties (aspirants for nomination in the primary election and any interested person who may not be a member of a political party)<sup>7</sup>
- b. Necessary parties (independent national electoral commission, a political party and/or any agency)

<sup>2</sup> *Dapialong v. Dariye*(2007) 27 WRN I; *Governor, Kwara State v. Lawal*(2007)13 NWLR (pt.1050) 347

<sup>3</sup> *Kotoye v. Saraki*(2001) 48 WRN 1; (1994) 7 NWLR (pt. 357) 414; *Rhoda v. FRN* (2015) 1-2 MJSC 1@ Pp. 21-22 paras. G-C

<sup>4</sup> *CGG Nig. Ltd v. Aminu* (2015) 3 MJSC (pt.1) 1 @ Pp. 16-17 paras. F-A

<sup>5</sup> (2009)5 WRN 1 at 140 line 40

<sup>6</sup> *Yusuf v. Adeyemi* (2009) 9 WRN 29 @ Pp. 34-35 Ratio 6

<sup>7</sup> S. 87(9); S.31(5) of the E. A. 2010

### 3.2. Time

In pre-election matters, unlike election petitions, there is no statute in Nigeria stipulating the specific time limit within which an aggrieved party can approach a court for redress<sup>8</sup> but this is not the end of the issue since there are different sources of law in Nigeria, which includes; Common law, the Constitution, Statutes, Judicial precedents, Customary law and *Stare decisis* or judicial precedent, which have resolved this controversy<sup>9</sup>. It must be stated that a pre-election matter will become statute barred once the aggrieved parties fail to file a suit until after the election is concluded, winners declared and sworn in. This is the position of the court in the case of **Salim v. CPC** where the Supreme Court held thus;

*“The issue of disqualification, nomination, substitution and sponsorship of candidates for an election precede election and are therefore pre-election matters. The instant situation where the appellant as plaintiff did not complain to court before the election and even after 38 days after the election to talk of a pre-election matter for the first time is a pill too difficult to swallow. He by his lack of consciousness took his matter out of the domain of pre-election matters he can only go before the election tribunal to try his luck since the status of the matter was post-election, clearly outside ambit of either the federal high court or state high court or high of the FCT.”*

The only exception to the above limitation is where the aggrieved party is able to show that he took steps immediately he became aware of his substitution, then the jurisdiction of the court to entertain the suit will remain<sup>10</sup>.

Therefore, once the election is concluded, winners declared and sworn in the aggrieved party should go to the Election Petition Tribunal relying on section 138(1) (a) and (d) of the Electoral Act which provides as follows;

- (1) An election may be questioned on any of the following grounds, that is to say;
  - (a) That the person whose election is questioned was at the time of the election not qualified to contest the election,
  - (d) That the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.

### 3.3. The Subject Matter

These are the pleadings and claims of the plaintiff filed before the court<sup>11</sup>. In order to determine whether a court has jurisdiction to entertain a cause or matter, it is the plaintiff's claim that must be examined<sup>12</sup>. In pre-election matters the claim must be based on the issue of

<sup>8</sup> *Ezeigwe v. Nwawulu* (2010) 4 NWLR (pt.1183) 159 @ 206; *Ameachi v. INEC* (2010) 10 WRN 1SC

<sup>9</sup> *Hassan v. Babangida Aliyu & Ors* (2010) All FWLR (pt.539) 1007; (2010) 17 NWLR (pt.1223) 547

<sup>10</sup> *Odedo v. INEC* (2008) 7 SC 25

<sup>11</sup> *Anekwe v. Nweke* (2015) 2 EJSC 42 @ 55 paras. F-G

<sup>12</sup> *Tukur v. Govt. of Gongola State* (1989) 4 NWLR (pt.117) 517 @ 549; *Mogaji v. Matari*(2000) 8 NWLR (pt.670)722@735 paras. F-G; *Onourah v. KRPC* (2005) 6 NWLR (pt.921) 393 @ 404 paras. E-F

qualification, disqualification, nomination, substitution and sponsorship of candidates for an election.<sup>13</sup>

#### 4.0. The Issue of Jurisdiction of the Federal and State High Court

The claim over the exclusive jurisdiction of court in pre-election matters is not new to our legal jurisprudence even when the Supreme Court in the case of *Amaechi v. INEC (supra)* p. 146 lines 25-30 per *Musdapher*, JSC held thus;

*“This is clearly not an election petition within the meaning of section 285 of the Constitution. It is not a case dealing with the conduct of the election but it is a pre-election matter in which the ordinary court of the land have undoubted jurisdiction to adjudicate in pre-election matter or matters connected with the conduct of the election. The suit herein is not affected by section 198(2) and 285(2) of the Constitution”.*

This controversy also led to the amendment of the Electoral Act to include sections 31(5) and 87(9) Electoral Act 2010 which provides thus;

*31(5) Any person who has reasonable grounds to believe that any information given by a candidate in the affidavit or any document submitted by that candidate is false, may file a suit at the Federal High Court, the High Court of a State or FCT against such person seeking declaration that the information contained in the affidavit is false 87(9) Notwithstanding the provision of this Act or rules of a political party, an aspirant who complains that any of the provisions of this Act or guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court or the High Court of a State or High Court of FCT for redress*

Notwithstanding the above Supreme Court decision and the provisions of the Electoral Act on the jurisdiction of the Federal High Court and State High Court to try pre-election matters same have been challenged continuously.

It is pertinent to consider the two schools of thought claiming the exclusive jurisdiction of a court in pre-election matters; the school of thought in support of the exclusive jurisdiction of the Federal High Court in pre-election matters will be considered first.

#### 4.1. The Federal High Court

The proponents/legal practitioners in this school of thought opined that whenever a federal agency is made a party in any suit (in the case of pre-election matters INEC), the Federal High Court shall exercise jurisdiction to the exclusion of all other courts as provided in Section 251 of the 1999 Constitution as amended.<sup>14</sup> The advocates for this school of thought further argued that section 87(9) of the Electoral Act 2010 as amended expressly confers jurisdiction on the Federal High Court with respect to complaints arising from pre-election matters, that the above

<sup>13</sup> *Salim v. CPC* (2013) SC.160/2012; *Kolawole v. Folusho* (2009) 8 NWLR (pt.1143) 338; *Ayogu v. Nnamani* (2006) 8 NWLR (pt.981) 160

<sup>14</sup> *NEPA v. Edeghero* (2002) 16 NWLR (pt.798)79@95 paras. B-F & 97 paras. E-G; *Inakoju v. Adeleke* (2007) 4 NWLR (pt.1025) 427 @ 588-589; *Obasanjo v. Babafemi* (2000) 23 WRN 30

provision is an additional jurisdiction to the original jurisdiction created by the National Assembly pursuant to the introductory part of section 251 of the 1999 Constitution.<sup>15</sup> It is their conclusion that once a Federal Government agency is made a party in a pre-election matter, the claim notwithstanding the Federal High Court has exclusive jurisdiction.

#### 4.2. The State High Courts

On the other hand, the proponents of this school of thought argue that in pre-election matters the claim usually litigated upon is between the aspirants in a primary election and their party, it is only the State High Court that has the exclusive jurisdiction to try such matters as it falls outside the exclusive jurisdiction conferred on the Federal High Court in section 251 of the Constitution. Since pre-election matters does not challenge the validity or otherwise of executive and /or administrative actions of the federal government and/or its agencies,<sup>16</sup> conceding that INEC which is a federal government agency is always made a party in pre-election matters, it is their submission that INEC is only made a necessary party and the law is settled that it is the plaintiff's claims that determine the jurisdiction of a court and once a court has the jurisdiction to grant the principal relief it can rightly exercise jurisdiction over a matter even though the ancillary reliefs therein do not fall within its jurisdictional scope.<sup>17</sup>

In revoking the jurisdiction of the Federal High Court to hear pre-election matters, the Supreme Court held in the case of **Kakih v. PDP**<sup>18</sup> per *S. Galadima* JSC thus;

*"The claim of the party and the reliefs sought must be within the provision of section 251(1) of the Constitution before the Federal High Court can have jurisdiction. Furthermore, where an agency of the federal government is a party, the principal reliefs must be directed against the Federal Government or any of its agencies before a Federal High Court can have jurisdiction... Selection or nomination of a candidate is done at party primaries. So, when a candidate who participated at a party primary complains about the conduct of the primaries, section 87(9) of the Electoral Act allows him to apply to the Federal High Court, or State High Court or a High Court of the Federal Capital Territory for redress. The choice of court depends on the nature of the claims/reliefs and the parties involved. Claims/reliefs sought must be those that the court can entertain. There are five principal reliefs sought, the rest are alternative and ancillary reliefs. There are four respondents. The 1st respondent is the People's Democratic Party(PDP), a political party, the 2nd & 3rd respondents are INEC and WAEC, agencies of the Federal Government, while the 4th respondent is an individual, the Governor of Benue State. The principal reliefs (1-5) are against the 1st & 4th respondents who are not agencies of the Federal Government. The reliefs sought are not within the provision of section 251(1) of the Constitution. The 2nd & 3rd respondents are agencies of the Federal Government but none of the principal reliefs are directed against them or the Federal Government. Both courts below came to the correct finding that a Federal High Court had no jurisdiction to hear the principal*

<sup>15</sup> *Gwede v. INEC* (2014) 18 NWLR (pt.1438) 56 @ 66; *PDP v. INEC* (2014) 17 NWLR (1437) 525 @558; *Eligwe v. Okpokiri* (2015) 2 NWLR (pt.1443) 548 @ 373-374

<sup>16</sup> *PDP v. Slyva* (2012) 13 NWLR (pt.798) 79 @ 95 paras. B-F & 97 paras. E-G; *Tukur v. Govt. of Gongola State* (n.12)

<sup>17</sup> *Mogaji v. Matari* (supra); *Daniel v. INEC* (2015) 9 NWLR (pt.1463) 113 @120;

<sup>18</sup> (2014) 15 NWLR (pt.1430) 374 @ Pp.413-415 Pp. 54-55, paras. B-F



*claims. The case ought to have been heard by a State High Court which has unlimited jurisdiction whittled by section 251 of the Constitution.”*

Since all the ancillary claims made against INEC, a Federal Government agency in a pre-election matter will fail or succeed depending on the principal claim.<sup>19</sup> That notwithstanding the provisions of sections 31(5) and 87(9) of the Electoral Act 2010 (as amended), the National Assembly cannot rely on sections 251(1)(s) and 252 of the Constitution to vest jurisdiction in pre-election matters on the Federal High Court, that will derogate from the exclusive jurisdiction vested on the Federal High Court by virtue of section 251 of the Constitution and parties cannot pick and choose which court to go in pre-election matters, parties can only approach the court with the jurisdiction to entertain the principal claim and where the principal reliefs is a political party and an individual and not the Federal Government or its agencies, the aggrieved party must approach the State High Court.<sup>20</sup>

#### 4.3. The Current Law on Jurisdiction

The controversy on the jurisdiction of the Federal High Court and the State High Court to adjudicate on pre-election matters has been settled by the Supreme Court in her recent decisions. In the case of *Salim v. CPC*, the Supreme Court per M U Peter Odili JSC, **Pp. 178-179, paras. H-E** Held thus;

*“It is therefore to be said in view of this novel provision, that the previous all-embracing interpretation of section 251 of the 1999 Constitution given once the Federal Government or its agencies are involved; would have to be given broad view in the co-existing situation of the provisions of section 87(9), Electoral Act and the sui generic nature of the subject matter. In that whole picture therefore, section 251 would be applied subject to this specific legislation in factors of play. That was the mind of this court as anchored by Mohammed, JSC in Adetayo v. Ademola (2010) All FWLR (pt.533) 1806 @ 1823-1828 when he stated thus:*

*‘On the face of the provisions of the Constitution, it appears that impression have been created that the Federal High Court has exclusive jurisdiction to the exclusion of all other courts in Nigeria in any civil case or proceedings in which the Federal Government or any of its agencies is a party. However, a very close, careful and proper interpretation or construction of the provision would show that this is not necessarily the true position. This is because in my view, it is the facts and circumstances of each case that determines... The need to examine parties in the litigation as well as the subject matter of the litigation was strongly advised for close scrutiny.’*

*Reference was also made to the cases of Adigun v. Asugbon (2008) NSCQLR Vol. 36 (pt.1) 171 @ 193; Dingyadi v. INEC & Ors (2011) 4 SCNJ @ 38.*

*The conclusion from the above is that the Court of Appeal was in error in holding that the Federal High Court had the exclusive jurisdiction to adjudicate on this pre-election dispute to*

<sup>19</sup> *Uba v. Etiaba* (2010) 10 NWLR (pt.1202) 343 @ 393 paras. D-E; *Nwaogwugwu v. President FRN* (2007) 6 NWLR (pt.1030) 237 @275.

<sup>20</sup> *Kakih v. PDP* (n.18)

*the exclusion of the State High Court. This is because the jurisdiction is exercisable by either the Federal High Court or the State High Court or High Court of the Federal Capital Territory”*

It should be noted that the jurisdiction of a court may be limited or extended by statute and for a suit to be competent the plaintiff's claims must fall within the jurisdiction conferred on the court by the relevant statute<sup>21</sup>.

By virtue of sections 251(1) and 252 of the 1999 Constitution (as amended) the National Assembly enacted the Electoral Act 2010 (as amended), which conferred concurrent jurisdiction in pre-election matters on the Federal High Court, State High Court and the High Court of the Federal Capital Territory. In the case of **Lokpobiri v. Ogola**<sup>22</sup> the Supreme Court per Onnoghen JSC, considered the provision of sections 31(5) and 87(9) of the Electoral Act and explained the rationale for the concurrent jurisdiction of the Courts in pre-election matters thus;

*“It is not in doubt that the intention of the National Assembly in enacting the said Act is clearly to confer concurrent jurisdiction on the Federal High Court and State High Court and High Court of the Federal Capital Territory in pre-election matters, so as to enlarge the range of choice of courts available to an aggrieved party to ventilate his grievances”*<sup>23</sup>

The court went further to define concurrent jurisdiction thus;

*“Whereas the exclusive jurisdiction of a court is peculiar to it, a concurrent jurisdiction is common to two or more courts. The word ‘Concurrent’ is defined by the Webster’s New Twentieth Century Dictionary, unabridged 2nd ed., page 379, inter alia as ‘(1) ... 5 in law, having equal jurisdiction or authority.’*<sup>24</sup>

The Court further stated thus;

*“It is therefore my considered opinion that when the Federal High Court’s pre-election jurisdiction is invoked, the parties claim(s) and relief(s) must be in conformity with the provisions of the Electoral Act 2010, as amended, not under the provisions of section 251 of the 1999 Constitution as amended, In fact INEC maybe a nominal party or be liable to an ancillary claim in a pre-election or post-election jurisdiction of the Federal High Court”.*<sup>25</sup>

In the recent case of **Gen. Mohammed A. Garba v. Mustapha Sani Mohammed & 2Ors (unreported) Appeal No. SC. 377/2015 delivered on 24/6/2016 @ Pp. 40-41**, where the Plaintiff/Appellant had filed an originating summons at the Federal High Court, Minna seeking amongst other things that he should be declared the winner of the Niger South Senatorial

<sup>21</sup> *SPDC v. Anaro* (2015) 12 NWLR (pt.1472) 123; *Umanah v. Attah* (2007) 17 NWLR (Pt.1009) 503

<sup>22</sup> (2016) 3 NWLR (Pt.1499) pp. 18-20

<sup>23</sup> *Lokpobiri V Ogola* (2016) 3 NWLR (Pt.1499) pp. 18-20

<sup>24</sup> *Ibid*

<sup>25</sup> *Ibid*

District primary election of the APC since the 1<sup>st</sup> Defendant/Respondent who won the APC primary election, was not a registered member of APC at the time the primaries was conducted. Mr. Ihematulam C. Gavers council to the 1<sup>st</sup> Defendant/Respondent had challenged the jurisdiction of the Federal High Court Minna to hear and determine the matter, the trial court went ahead and decided the matter in favour of the Plaintiff/Appellant. On Appeal, the Supreme Court dismissed the appeal in part by setting aside the judgement of the trial court on the ground of fair hearing for her failure to consider the preliminary objection of the 1<sup>st</sup> Defendant/Respondent. The court went ahead to hold per Kekere-Ekun JSC, who delivered the lead judgement thus;

*“The decision of this court in Kakih’s case as regards the issue of jurisdiction of the Federal High Court in pre-election matters is limited to its peculiar facts and circumstances having regards to the decision in Jev v. Iyortom (supra) @ 612-613 paras., E-A per OKORO, JSC,*

*Therefore by virtue of section 251(1) (s) of the 1999 Constitution and sections 31(5) and 87(9) of the Electoral Act, 2010, made pursuant thereto, the Federal High Court have concurrent jurisdiction with the State High Court and High Court of the Federal Capital Territory to hear pre-election matters, the case is hereby remitted to the FHC Minna to be tried by another Judge”<sup>26</sup>*

## 5.0. Conclusion

The Supreme Court has removed the cobweb of judicial uncertainty that has shrouded the jurisdiction of the Federal High Court, State High Court and High Court of the FCT in pre-election matters in Nigeria.

As seen from the above legal discourse, it is now clear that an aggrieved party in pre-election matters has unlimited choice to decide which court to approach to ventilate his grievances, in as much as the suit is filed before the election is conducted and winners declared, as failure to do so will remove the suit in the realm/domain of pre-election matters and same will be transformed into a post-election matter which can only be adjudicated upon by an Election Tribunal. This transformation is justified by the principle of equity that ‘equity aids the vigilant and not the indolent’ and in the case of **Okorochoa v. PDP**<sup>27</sup> where His Lordship Ogunbiyi JSC, restated the position of Onnoghen JSC, in **Hassan v. Aliyu** thus;

*“If the situation in this case is encouraged, it will breed uncertainty in the polity when a person may wake up a year or more after an election and swearing in of a president or Governor to challenge his nomination by way of substitution for election that brought him to power. Or he may even do so after the tenure of office of the official concerned which attitude ought not to be encouraged by the law. It should be noted that appellant has the right to waive his right to the nomination by substitution which by his inordinate delay he appears to have projected. Everyone must be watchful of his legal rights and be vigilant”<sup>28</sup>*

<sup>26</sup> *Lokpobiri V Ogola* (2016) 3 NWLR (Pt.1499) pp. 18-20

<sup>27</sup> (2015) 1 EJSC 1 @45 paras., E-G

<sup>28</sup> *Okorochoa v. PDP* (2015) 1 EJSC 1 @45 paras., E-G



Furthermore, once a pre-election matter is filed before the election, time ceases to run against it, as the matter would continue even after the election is concluded, winners declared and sworn in. This is the position of the Supreme Court in the case of **Wambai v. Donatus**<sup>29</sup> thus;

*“There is no doubt at all that a pre-election matter instituted prior to the conduct of an election subsists, and the High Court in which it was so instituted continues to have jurisdiction to hear and determine same, even after the conduct of the election material to the pre-election matter and declaration of result etc..., under the principle of lis pendens as held by this court in a number of cases including Amaechi v. INEC (2008) All FWLR (pt.407) 1; Odedo v. INEC (2007) All FWLR (pt.392) 1907, (2008) 17 NWLR (pt.1117) 534 @ 622-623”*<sup>30</sup>

It is in the light of the above that parties in pre-election matters are called upon to always act timeously once they discover that their rights have been infringed upon immediately after their party primary election and to approach any of the three courts with the requisite jurisdiction to hear and determine their case. It should also be noted that the concurrent jurisdiction vested in the three courts by sections 31(5) and 87(9) Electoral Act 2010 is not an invitation for counsel to overlook the peculiar circumstances surrounding their case and the claims/reliefs sought and the parties against whom those claims/reliefs are sought against before choosing the court to approach for redress as the Supreme Court did not overrule **Kakih’s case**. It is always safe to err on the side of caution/surplus.

This article concludes that an aggrieved litigant in a pre-election matter has clearly defined choices when deciding which court to approach to litigate on their matter.

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<sup>29</sup> (2015) 12 EJSC 94 @ 118 paras., B-D

<sup>30</sup> Ibid