

IN THE COURT OF APPEAL OF NIGERIA
ENUGU JUDICIAL DIVISION
HOLDEN AT ENUGU

ON FRIDAY THE 1ST DAY OF APRIL, 2022
BEFORE THEIR LORDSHIPS:

<u>AHMAD O. BELGORE</u>	<u>JUSTICE, COURT OF APPEAL</u>
<u>JOSEPH OLUBUNMI K. OYEWOLE</u>	<u>JUSTICE, COURT OF APPEAL</u>
<u>SYBIL NWAKA-GBAGI</u>	<u>JUSTICE, COURT OF APPEAL</u>

CA/E/53/2022

BETWEEN

1. SENATOR SONI OGBUOJI	}	APPELLANTS
2. JUSTIN MBAM OGODO		
3. ALL PROGRESSIVES CONGRESS		

AND

1. ENGR DAVID NWEZE UMAHI	}	RESPONDENTS
2. DR ERIC KELECHI IGWE		
3. ATTORNEY GENERAL OF EBONYI STATE		

JUDGMENT

(DELIVERED BY JOSEPH OLUBUNMI KAYODE OYEWOLE, JCA)

This is an appeal against the judgment of the High Court of Ebonyi State, Abakaliki Judicial Division, holden at Abakaliki, delivered on the 28th day of February, 2022 by **NJOKU, J.**

The 1st and 2nd Respondents defected from the Peoples Democratic Party, the political party which sponsored them for election at the 2019 Governorship election for Ebonyi State and on whose platform they were both elected as Governor and Deputy Governor of Ebonyi State respectively, to another political party, the All Progressives Congress, (3rd Appellant herein).

The 1st and 2nd Appellants had contested against the 1st and 2nd Respondents at the said election on the platform of the 3rd Appellant at which election they polled the second highest votes. The Appellants then approached the trial court via an Originating Summons as follows:

- 1. A DECLARATION that the votes scored by the 1st and 2nd Defendants in the 2019 governorship election for Ebonyi State were abandoned and/or invalidated in consequence of which they should vacate their offices as Governor and deputy Governor of Ebonyi State, respectively, and the 1st plaintiff, who scored the second highest lawful votes in the election, declared the winner of the election, returned and inaugurated together with the 2nd plaintiff, being his running mate in the election, as Governor and Deputy Governor of Ebonyi State, respectively, in view of the*

combined provisions of Sections 221, 177, 179 and 285(13) of the Constitution of the federal Republic of Nigeria, 1999 (as amended) read together with sections 31, 85(1), 87(9) and 141 of the Electoral Act, 2010 (as amended).

2. AN ORDER directing 1st and 2nd Defendants to forthwith vacate their offices as Governor of Ebonyi State, respectively, in consequence of their having abandoned the party (PDP), the substratum on which they stood, and defected to the APC, which never sponsored them, and the 1st and 2nd plaintiffs being inaugurated as Governor and Deputy Governor of Ebonyi State, respectively.

3. AN ORDER OF PERPETUAL INJUNCTION restraining the 1st and 2nd Defendants from continuing to parade themselves as Governor and Deputy Governor of Ebonyi State, respectively.

The plaintiffs seek for the determination of the following questions, namely:

1. *Whether the votes score by the 1st and 2nd Defendants in the 2019 governor election for Ebonyi State were abandoned and/or invalidated by virtue of their defection from the Peoples Democratic Party (PDP) to the All Progressive Congress (APC) in consequence of which they should vacate their offices as Governor and Deputy Governor of Ebonyi State, respectively, and the 1st plaintiff, who scored the second highest lawful votes in the election declared the winner of the election, returned and inaugurated together with the 2nd plaintiff, which his running mate in the election, as Governor and Deputy Governor of Ebonyi State, respectively, in view of the combined provisions of Sections 221, 177, 179 and 285(13) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) read together with Sections 31, 85(1), 87(9) and 141 of the Electoral Act, 2010 (as amended).*

2. *If answer to the above question is answered in the affirmative, whether this Honourable Court is not obligated to order the 1st and 2nd Defendants to forthwith vacate their offices as Governor and Deputy Governor of Ebonyi State, respectively,*

and declare the 1st plaintiff as the winner of the said election with an order to retrieve the Certificate of return issued to the 1st defendant and issue another Certificate of return to the 1st plaintiff with an order for the inauguration of the 1st and 2nd plaintiffs as Governor and Deputy Governor of Ebonyi State, respectively.

On being served, the action was contested by the 1st and 2nd Respondents who filed a joint counter-affidavit through Kenneth Igwe Ugbala, the Secretary to the Government of Ebonyi State. After taking the arguments of the respective learned counsel for the parties, the learned trial Judge delivered a judgment as aforesaid on the 28th February, 2022 which was concluded thus:

In the final analysis the answer to the question identified by the plaintiffs in this originating summons is answered in the negative.

This originating summons of the plaintiffs is unmeritorious and same is hereby dismissed with a cost of N500,000. (Five Hundred Thousand Naira) awarded in favour of the defendants.

Displeased with this outcome, the Appellants invoked the appellate jurisdiction of this Court via a Notice of Appeal filed on the 7th March, 2022 containing five grounds as follows:

GROUND OF APPEAL

Ground One:

The trial court was wrong, and this occasioned a gross miscarriage of justice, when it failed to declare that the votes scored by the respondents in the 2019 governorship election for Ebonyi State were abandoned and/or invalidated by reason of the respondents' defection from the Peoples Democratic Party (PDP), on which platform they contested and won the election, to the All Progressives Congress (APC) by reason of which fact they are liable to vacate or be removed from their offices as Governor and Deputy Governor of Ebonyi State, respectively.

Particulars:

1. *By the decisions of the Supreme Court in the cases of **AMAECHE V. INEC & ORS (2008) LPELR-446(SC)** and **FALEKE V. INEC (2016) 18 NWLR (PT. 1543) 61**, and in*

consonance with Section 221 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), it is a political party that wins an election.

2. Without a political party, a candidate would have no platform to contest an election.

3. Votes cast for the PDP in the 2019 governorship election in Ebonyi State availed the respondents as qua candidates of the PDP on which platform they contested the election.

4. In a democracy, the candidate that is declared the winner of a governorship election runs the party-led government.

5. The respondents abandoned and invalidated the votes of the PDP on which pedestal they stood when they defected to the APC.

6. By the respondents' defection to the APC, they became liable to vacate their offices to be replaced with the 1st and 2nd appellants.

Ground Two:

The trial court was wrong, and this occasioned a gross miscarriage of justice, when it failed to declare the 1st and 2nd Appellants, who fully participated in all the stages of the election and scored the second highest lawful votes in the election as the persons entitled to be declared the winners of the election and accordingly entitled to be returned and inaugurated as the Governor and Deputy Governor of Ebonyi State, respectively, by reason of the respondents' defection to the All Progressives Congress (APC) from the Peoples Democratic Party (PDP).

Particulars:

- 1. By their defections to the APC, the defendants are deemed to have vacated or resigned their offices as governor and deputy governor of Ebonyi State, respectively.*
- 2. Having fully participated in all stages of the election, the 1st and 2nd Appellants ought, by reason of the respondents' defection to the APC and section 285(13) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), to*

assume the offices of the respondents as governor and deputy governor of Ebonyi State, respectively, being the first runners-up in the 2019 governorship election in Ebonyi State.

Ground Three:

The trial court was wrong, and this occasioned a gross miscarriage of justice, when it failed to remove or direct the respondents to forthwith vacate their offices as Governor and Deputy Governor of Ebonyi State, in consequence of their having abandoned the party (PDP), the substratum on which they stood having collapsed by their defection to the APC, which never sponsored them, and order that the respondents be inaugurated as Governor and Deputy Governor of Ebonyi State, respectively.

Particulars:

1. Having abandoned the PDP votes, being the pedestal on which they stood as governor and deputy governor of Ebonyi State, respectively, the respondents as qua candidates of the

PDP, ceased to be entitled to remain in office as governor and deputy governor of Ebonyi State.

2. The respondents cannot remain in office as APC governor and deputy governor with PDP votes.

Ground Four:

The trial court was wrong, and this occasioned a gross miscarriage of justice, when it failed to make an order of perpetual injunction restraining the 1st and 2nd respondents from continuing to parade themselves as Governor and Deputy Governor of Ebonyi State, respectively.

Particulars:

1. Having defected from the PDP to the APC and abandoned, the respondents are liable to forfeit their offices as Governor and Deputy Governor of Ebonyi State, respectively.

2. By their ceasure to be Governor and Deputy Governor of Ebonyi State, respectively, by reason of their defection to the APC, the respondents cannot continue to parade themselves

as Governor and Deputy Governor of Ebonyi State, respectively.

Ground Five:

The trial court erred in law, and this occasioned a gross miscarriage of justice, when it held that the plaintiffs (now appellants) did not consider the provision of Section 308(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) before filling the originating summons against the defendants and proceeded to cite the case of **Global Excellence Communications Ltd & Ors Vs Duke (2007) LPELR-1323(SC)**.

Particulars:

1. In the case of **Global Excellence Communication Ltd & Ors Vs Duke (2007) LPELR-1323(SC)**, the then governor of Cross River State was sued for the sum of N5 Billion (Five Billion Naira) damages for libel and exemplary or punitive damages.

2. The case of **Global Excellence Communication Ltd & Ors Vs Duke (2007) LPELR-1323(SC)** is unrelated to an elective office where the occupants vacated their offices.

3. There is nothing stopping a governor and his deputy to vacate office for the 1st runners-up in an election after defecting to another political party and having his votes in the election abandoned.

4. By their defections to the All Progressives Congress (APC), the offices of the respondents became vacant and they ceased to be entitled to the immunity conferred by Section 308 of the Constitution.

In the course of the appeal, the Attorney General of Ebonyi State applied and with the consent of all parties was added to the appeal as the 3rd Respondent thereof.

At the hearing of the appeal, Mr. Okorie adopted the Appellant's brief filed on the 17th March, 2022 as the arguments of the Appellants in this appeal. Mr. Nwaeze adopted the 1st and 2nd Respondents' brief filed on the 18th March, 2022 while Mr. Arthur Obi Okafor, SAN adopted the 3rd

Respondent's brief filed on the same 18th March, 2022 as the arguments of the Respondents in contesting the appeal.

The Appellants in a rather lazy manner distilled five issues from the five grounds of appeal, with some of them appearing repetitive thus:

- (1) *Whether the votes scored by the Respondents in the 2019 governorship election for Ebonyi State were not abandoned and/or invalidated by reason of their defection from the Peoples Democratic Party, on which platform they contested and won the election, to the All Progressives Congress (APC), when there was no division in the PDP, by reason of which fact they are liable to vacate or be removed from their offices as Governor and Deputy Governor of Ebonyi State, respectively.*
- (2) *Whether the trial court should not have declared the 1st and 2nd Appellants, who fully participated in all stages of the election and scored the second highest lawful votes in the election as the persons entitled to be declared the winners of the election and accordingly entitled to be returned and inaugurated as the Governor and Deputy Governor of*

Ebonyi State, respectively, by reason of the Respondents' defection to the All Progressives Congress (APC), on which platform they contested and won the 2019 governorship election in Ebonyi State.

- (3) Whether the trial court should not have removed or directed the Respondents to forthwith vacate their offices as Governor and Deputy Governor of Ebonyi State, in consequence of their having abandoned the party (PDP), the substratum on which they stood having collapsed by their defection to the APC, which never sponsored them, and made an order that the Respondents be inaugurated as Governor and Deputy Governor of Ebonyi State, respectively.*
- (4) Whether the trial court should not have made an order of perpetual injunction restraining the 1st and 2nd Respondents from continuing to parade themselves as Governor and Deputy Governor of Ebonyi State, respectively.*
- (5) Whether by the provisions of section 308 (1) of the 1999 Constitution of the Federal Republic of Nigeria (as*

amended) and the decision in Global Excellence Communications Ltd & Ors v. Duke (2007) LPELR-1323 (SC) the Respondents are protected by immunity as not to sue to remove them from office after having impliedly vacated their offices upon their defection to the APC.

The 1st and 2nd Respondents distilled 2 issues from the grounds of appeal as follows:

- (1) Whether the Respondents have vacated or ought to vacate or be removed from their offices as Governor and Deputy Governor of Ebonyi State respectively and replaced with the 1st and 2nd Appellants in consequence of the Respondents' defection to the All Progressives Congress (APC) from the Peoples Democratic Party (PDP), on which platform they contested and won the 2019 governorship election for Ebonyi State.*
- (2) Whether the trial court has jurisdiction to determine the matter and the Respondents, being the Governor and Deputy Governor of Ebonyi State, could be sued in their personal capacities.*

The 3rd Respondent equally formulated two issues differing from those of the 1st and 2nd Respondents only in semantics thus:

- (1) *Whether there exists any legal implication for the 1st and 2nd Respondents' defections as Governor and Deputy Governor of Ebonyi State respectively from the Peoples Democratic Party (PDP), on which platform they contested and won the 2019 governorship election for Ebonyi State, to the All Progressives Congress (APC) warranting the vacation of their offices or removal therefrom?*
- (2) *Whether the 1st and 2nd Respondents, as Governor and Deputy Governor of Ebonyi State, could be sued in their personal capacities?*

A perusal of the grounds of appeal vis a vis the issues distilled and formulated by the respective parties indicates clearly that issues (1) to (4) of the Appellants are encapsulated in issue (1) of the Respondents with the more lucid version of the 1st and 2nd Respondents to be preferred, with some minor tweaking, while issue (5) of the Appellants resonates with issue (2) of the Respondents with the version of the 3rd Respondent being more elegantly crafted. The issues calling for determination herein are therefore as follows:

(1) Whether the 1st and 2nd Respondents have vacated or ought to vacate or be removed from their offices as Governor and Deputy Governor of Ebonyi State respectively and replaced with the 1st and 2nd Appellants in consequence of the 1st and 2nd Respondents' defection to the All Progressives Congress (APC) from the Peoples Democratic Party (PDP), on which platform they contested and won the 2019 governorship election for Ebonyi State?

And

(2) Whether the 1st and 2nd Respondents, as Governor and Deputy Governor of Ebonyi State, could be sued in their personal capacities?

On the first issue, Mr. Okorie argued that the lower court erred in not granting the reliefs of the Appellants. He predicated this submission on the accepted facts that the 1st and 2nd Appellants were runners up at the 2019 governorship election in Ebonyi State, won by the 1st and 2nd Respondents and that the 1st and 2nd Appellants were the next set of candidates in that election who participated in all the stages of the said 2019 governorship election.

The learned counsel contended that pursuant to the Constitution of the Federal Republic of Nigeria (as amended) hereinafter referred to simply as "the Constitution", a candidate can only contest an election on the platform of a political party and that having won on the platform of a political party, any subsequent defection to another party within the tenure would have consequences. He expatiated that the defection of the 1st and 2nd Respondents implied an abandonment of the votes which heralded them into office and rendered the said votes invalid and that they thereby became liable to vacate their offices.

It was further submitted that votes cast in elections belong to the political parties as candidates contest on platforms of political parties which canvass for votes and offices won are accordingly held in trust for the political parties and exclusively for the benefit of the said political parties. Learned counsel referred to **AMAECHE VS INEC & ORS (2008) LPELR-446(SC)** and **FALEKE VS INEC (2016) 18 NWLR (PT 1543) 61**.

Mr. Okorie conceded that there was no direct constitutional provision on the consequence of the defection of an elected Governor from the political party on whose platform he was elected to another party, he however argued that the lower court should have leaned on its discretion to fill the

vacuum in line with the spirit of Nigeria's partisan democracy. In this regard he urged a community reading of sections 221, 177, and 285 (13) of the Constitution as well as sections 31, 85(1), 87(9) and 141 of the Electoral Act, 2010 (as amended) to sanction the 1st and 2nd Respondents by removing them from office.

Learned counsel contended that the 1st and 2nd Appellants as the next set of candidates who participated at all the stages of the said 2019 governorship election in Ebonyi State should be the beneficiaries to take the places vacated by the 1st and 2nd Respondents. He referred to **CPC & ANOR VS OMBUGADU & ANOR (2013) LPELR-21007, MODIBBO VS MUSTAPHA & 2 ORS (2020) 3 NWLR (PT 1712) 470 at 516-517.**

Contrariwise, Mr. Nwaeze submitted that the position of the Apex Court that votes scored at elections belonged to the political parties in **AMAECHI VS INEC & ORS (supra) and FALEKE VS INEC (supra)** had since been departed from in the more recent cases of **CPC & ANOR VS OMBUGADU & ANOR (supra) and OZOMGBACHI VS AMADI & ORS (2018) LPELR-45152(SC) at 48-49** and also by this Court in **NGIGE VS AKUNYILI (2012) 15 NWLR (PT 1323) 343 at 357-376, NWANKWO & ANOR VS**

INEC & ORS (2019) LPELR-48862(CA) and HARUNA VS APC & ORS (2019) LPELR-47777(CA) 12-27.

The learned counsel further submitted that having been returned duly elected, all issues relating to the election of the 1st and 2nd Respondents were concluded with the final determination of the Supreme Court in the case of **PDM & ANOR VS INEC & 2 ORS (2020) 17 NWLR (PT 1753) 303 SC; (2019) 12 SC (PT 1) 28.** He submitted that thereafter the mandate of the 1st and Respondents expanded beyond the political party which sponsored them for election to the entire State and their defection to any other political party was in line with section 40 of the Constitution which did not attract any sanction under the Constitution.

Learned counsel argued that the Constitution in sections 180, 188 and 189 was explicit on the circumstances where the offices occupied by the 1st and 2nd Respondents would become vacant in addition to resignation provided in section 306 which circumstances did not include defection from the political party which sponsored them for election. He further argued that the provisions of sections 221, 177, and 285 (13) of the Constitution as well as sections 31, 85(1), 87(9) and 141 of the Electoral Act, 2010 (as amended) relied upon by the Appellants were unhelpful to their case as defection of a

Governor or Deputy Governor was neither a pre-election nor post-election issue.

Mr. Nwaeze contended that in the absence of any express constitutional provisions on defection of a governor and/or his deputy, it is beyond the courts to embark on an interpretation which would amount to judicial legislation. He referred to **MADUMERE & ANOR VS OKWARA & ANOR (2013) LPELR-20752(SC) at 38.**

He referred to the provisions of section 1 of the Constitution and submitted that the implications of the reliefs sought by the Appellants was an invitation to pronounce the overthrow or takeover of the Government of Ebonyi State other than as provided by the Constitution. He submitted that the constitutional provisions relating to the removal of a governor or his deputy from office are to be strictly construed and that in this regards the courts cannot make recourse to any other provisions elsewhere. He referred to **MARWA & ORS VS NYAKO & ORS (2012) LPELR-7837(SC) at 144.**

Learned counsel reiterated that the 1st and 2nd Respondents did not defect to another political party as candidates of the sponsoring party but as public office holders whose removal from office must be in accordance with

the provisions of the Constitution. He referred to **A.G. FEDERATION & ORS VS ABUBAKAR & ORS (2007) 10 NWLR (PT 1041) 1 at 156-157; (2007) LPELR-3 (SC) at 160-161.**

He also submitted that the trial court was in order to have followed the principle laid down by the Supreme Court in **A.G. FEDERATION & ORS VS ABUBAKAR & ORS (supra)** in accordance with the principle of stare decisis, as a lower court is duty bound to follow the interpretation of a statutory provision by an higher court even if the said interpretation was wrong. He referred to **UNILAG & ANOR VS OLANIYAN & ORS (1985) LPELR-3119 (SC) at 26, BAKARE VS NIGERIAN RAILWAY CORPORATION (2007) LPELR-712(SC) at 24 and STATE VS YANGA (2021) LPELR-53086 (SC) at 15-16.**

Learned counsel made elaborate reference to various aspects of the Constitution considered by the Supreme Court in **A.G. FEDERATION & ORS VS ABUBAKAR & ORS (supra)** to buttress his position that relevant provisions relating to the present subject-matter were covered by the said case. He then submitted that pursuant to the said decision, no court has constitutional powers to declare the offices of the holders of the position of governor and/or his deputy vacant for whatever reason.

Mr. Nwaeze pointed out that while specific provisions were made in the Constitution for the loss of office by members of the legislature who defect from the political party which sponsored them for election there was no such corresponding provisions for elected executive political office holders and that if such provisions were intended they would have been provided. He submitted that it is not the place of the courts to fill any such lacunae and referred to **JEV VS IYORTOM (2015) 15 NWLR (PT 1483) 484 at 497, THE GOVERNOR OF KWARA STATE & ANOR VS OJIBARA & ORS (2006) LPELR-3178(SC), A.G. LAGOS STATE VS A.G. FEDERATION & ORS (2003) LPELR-620 (SC) at 292, A.G. FEDERATION & ORS VS ABUBAKAR & ORS (supra), AC & ANOR VS INEC (2007) LPELR-66 (SC) 41-42 and ECOBANK NIG PLC VS OBA & ANOR (2017) LPELR-51073 (CA).**

Furthermore, Mr. Nwaeze referred to sections 180, 188 and 189 of the Constitution relating to vacation of office on cessation of tenure, removal from office and impeachment of the governor and/or his deputy and submitted that the provisions are unambiguous and should be given their ordinary meaning. He referred to a plethora of judicial decisions and submitted that it is unacceptable to go outside these provisions to seek

removal of a governor and/or his deputy. He referred to **A.G. FEDERATION & ORS VS ABUBAKAR & ORS (supra), OPIA VS INEC & ANOR (2014) LPELR-22185(SC) and SHINKAFI & ANOR VS YARI & ORS (2016) LPELR-26050 (SC).**

For the 3rd Respondent, the learned Silk, Okafor, SAN similarly argued that the defection of the 1st and 2nd Respondents from the Peoples Democratic Party (PDP), the political party which sponsored them for their election to their respective positions as Governor and Deputy Governor of Ebonyi State, has no known statutory or constitutional implication warranting their removal from or vacation of their offices.

He similarly submitted that the decisions of the Apex Court in **AMAECHE VS INEC & ORS (supra) and FALEKE VS INEC (supra)** upon which the Appellants predicated their arguments had since lost their potency in view of the more recent pronouncement of the said Court in **CPC & ANOR VS OMBUGADU & ANOR (supra) and OZOMGBADI VS AMADI (supra)** which amplified the provisions of section 141 of the Electoral Act (supra) and section 285 (13) of the Constitution that elections are won by individuals and not political parties.

He contended that political parties are agents of candidates for the purposes of gathering votes while the candidates are the beneficial owners of votes cast in elections. He referred to **NGIGE VS AKUNYILI (supra)**, **NWANKWO & ANOR VS INEC & ORS (supra)** and **HARUNA VS APC & ORS (supra)**.

The learned Silk then echoed the same arguments canvassed by the 1st and 2nd Respondents and urged the Court to resolve the issue in favour of the Respondents.

The crux of the reasoning of the learned trial Judge on this issue can be found on pages 77-86 of the record of appeal and hereby reproduced in extenso thus:

Having also considered the submission of counsel to parties in this originating summons and my very careful reading of the available authorities cited and relied upon by them, I am of the view that those provisions of the 1999 Constitution of the Federal Republic of Nigeria (as amended), including the sections of the provisions of the Electoral Act 2010 (as amended), are not applicable to the instant case as they relate to pre-election

matters which have no force on election as in the instant case, election has been concluded, a winner declared, and inaugurated carried out by his having taken the oath of allegiance. Those provisions of the 1999 constitution of the Federal Republic of Nigeria (as amended) and those provisions of the Electoral Act 2010 (as amended) cannot be applicable in the instant case.

In my view, the live issue on this plaintiff's originating summons is the effect of the defection of the defendants to another political party other than the party upon which platform they stood and contested the election, after they had been elected on that party platform and sworn in as governor and deputy governor respectively. I will rely on the provision of Sections 188 and 189 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) which on the side notes has clearly stated thus; "Removal of governor or deputy governor from office" and permanent incapacity of governor and deputy governor respectively.

I wish to reproduce the entire said provision of Sections 188 and 189 of the said 1999 Constitution of the Federal Republic of Nigeria (as amended) thus:.....

In the entire provision of the 1999 Constitution of the Federal Republic of Nigeria (as amended) there is no provision wherein the word "defection", as in the instant case of the plaintiffs, was stated as a ground for the removal of a governor or defecting governor from office.

Though the word "defect" has been defined in Oxford Advanced Learners Dictionary special price Edition at Page 304 to mean.

"To leave a political party and go to another party" yet there is no place in both the 1999 Constitution of the Federal Republic of Nigeria (as amended), the Electoral Act or in the dictionary that such act warrants the removal of any State Governor or Deputy from office.

Let me also state here that I had read the whole provision of the 1999 Constitution of the Federal Republic of Nigeria as amended but was unable to locate any provision of the said Constitution

upon which the defection of a governor or his deputy was stated as a condition for each of them to be removed as governor and deputy governor of a state respectively.

The word "defection" was however used in the 1999 constitution of the Federal Republic of Nigeria (as amended) as it concerns a member of the Senate or the House of Representatives when in Section 68(1) of the 1999 Constitution supra it stated thus in Section 68(1) (g).

"A member of the Senate or the House of Representatives shall vacate his seat in the House of which he is a member if:-

(g) being a person whose election to the House was sponsored by a political party, he becomes a member of another political party before the expiration of the period of which that House was elected:

Provided that his membership of the latter political party is not as a result of a division in the political party of which he was previously a member or of a merger of two or more political parties unless the circumstance as provided in Section 68(1) (g)

of the said constitution supra has occurred is bound to vacate his seat either in the senate or House of Representatives. See also Section 109(1) (g) of the constitution relating to the State House of Assembly.

Any member of the House of Assembly of the States who also vacate his seat of the House of Assembly unless in compliance to section 109(1) (g) of the Constitution supra shall also vacate his membership of such house.

This issue of vacating their membership of the House upon which they were elected as contained in Section 68(1) (g) for the National Assembly members and section 109 (1)(g) for the House of Assembly members does not apply to president of the Federal Republic of Nigeria and the vice president of the Federal Republic of Nigeria and also the Governor and Deputy Governors of States, because there is no provision of the 1999 Constitution of the Federal Republic of Nigeria (as amended) where such provision was made. See the statement of Aderemi, JSC at page 78 of (2007) NWLR I (Pt. 104) in the AG of the Federation Vs Abubakar.

In other words there is no provision of the 1999 Constitution (Supra) where the issue of leaving one's party to join another party by the governor or his deputy during the tenure of their offices or defecting to another political party during the tenure of their offices is provided as a conclusion to vacate his office as the governor or deputy governor respectively.

In the instant case the plaintiff had sought the order of this court to make order retrieving the certificate issued to the defendants as duly elected governor and deputy governor of Ebonyi State on the basis of their having defected from the party upon which they stood on its platform and contested, and won the 2019 election and make order to be now issued with the certificate of return and sworn in as governor and deputy governor of Ebonyi State respectively.

As I stated earlier on there is no provision of the 1999 Constitution of the Federal Republic of Nigeria as amended that has stated anything regarding the defection of a governor or his deputy.

In applying a liberal interpretation to the provision of the Constitution supra, I am of the view that what is not provided for in any Constitution moreso, when like... in the instant case the plaintiff has sought for a very punitive measure against the defendant in a situation that was not created in the said Constitution because there is no provision of the 1999 Constitution of the Federal Republic of Nigeria (as amended) where it was provided that the office of the Governor or Deputy Governor should become vacant on the basis of his or her defection to another political party during the tenure of their offices.

In the case of AG – Federation Vs Abubakar (2007) 10 NWLR (Pt. 1041) Page 1. Muhammed JSC held at Page 157 Paras A – C held thus:

"1st Respondent is alleged to have defected or cross-carpeted to another political party. Although defection or cross-carpeting to another party or changing the original party that sponsored one for election to a particular office which is created by the Constitution, or in the same vein, condemning or criticizing that

party or its members who by virtue of the same election hold some offices created by the constitution is painful, unconscionable, and immoral, it is however not illegal.

I cannot find any fault with the lower court adumbration in Section 40 of the Constitution of the Federal Republic of Nigeria 1999, Chapter IV therefore; which guarantees a citizen of this country freedom of association”.

I am bound by that decision of the Apex court because it is based also on the defection of the defendants from one party to the other that the plaintiffs have brought this originating summons.

The background facts herein are not in dispute. The 1st and 2nd Respondents were sponsored for the 2019 governorship election by the Peoples Democratic Party (PDP). They won the said election on the platform of the said party and were duly returned by the Independent Electoral Commission (INEC), the electoral umpire. The two of them were subsequently sworn in upon which they assumed office respectively as Governor and Deputy Governor of Ebonyi State. Well into their tenure, on

the 17th November, 2020 they defected to another political party, the All Progressives Congress (APC) upon which the Appellants initiated this action.

While the antagonistic position of the 1st and 2nd Appellants who were opponents of the 1st and 2nd Respondents at the said 2019 governorship election may be understandable, the grievance of the 3rd Appellant which is a beneficiary of the defection of the 1st and 2nd Respondents is hard to fathom.

That said, in seeking to supplant the 1st and 2nd Respondents, the Appellants argued that by defecting from the political party on whose platform they were elected into office the 1st and 2nd Respondents had abandoned the votes which got them into office as the said votes belonged to the political party and that they must accordingly vacate their offices. In support of this they relied on a community reading of sections 221, 177, and 285 (13) of the Constitution as well as sections 31, 85(1), 87(9) and 141 of the Electoral Act, 2010 (as amended). They also relied on the decisions of the Supreme Court in **AMAECHEI VS INEC & ORS (2008) LPELR-446(SC)** and **FALEKE VS INEC (2016) 18 NWLR (PT 1543) 61.**

The learned counsel for the Appellants, Mr. Okorie conceded that there was no direct constitutional provision on the consequence of the defection of

an elected Governor from the political party on whose platform he was elected to another political party but however argued that the lower court should have leaned on its discretion to fill the vacuum in line with the spirit of Nigeria's partisan democracy.

The constitutional provisions referred to by the Appellants are set out as follows:

221. No association other than a political party, shall canvass for votes for any candidate at any election or contribute to the funds of any political party or to the election expenses of any candidate at an election.

177. A person shall be qualified for election to the office of Governor if— (a) he is a citizen of Nigeria by birth ; (b) he has attained the age of thirty-five years ; and (c) he has been educated up to at least the School Certificate level or its equivalent.

285 (13). An election tribunal or court shall not declare any person a winner at an election in which such a person has not fully participated in all stages of the election.

The Appellants equally directed our attention to sections 31, 85(1), 87(9) and 141 of the Electoral Act, 2010 (as amended). The provisions thereof are as follows:

31. -(1) Every political party shall not later than 60 days before the date appointed for a general election under the provisions of this Act, submit to the Commission in the prescribed forms the list of the candidates the Party proposes to sponsor at the elections.

(2) The list or information submitted by each candidate shall be accompanied by an Affidavit sworn to by the candidate at the High Court of a State, indicating that he has fulfilled all the constitutional requirements for election into that office.

(3) The Commission shall, within 7 days of the receipt of the personal particulars of the candidate, publish same in the constituency where the candidate intends to contest the election.

(4) Any person may apply to the Commission for a copy of nomination form, affidavit and any other document submitted by a candidate at an election and the Commission shall, upon

payment of a prescribed fee, issue such person with a certified copy of document within 14 days.

(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 High Court of a State or Federal High Court against such person seeking a declaration that the information contained in the affidavit is false.

(6) If the Court determines that any of the information contained in the affidavit or any document submitted by that candidate is false, the Court shall issue an order disqualifying the candidate from contesting the election.

(7) A candidate for an election shall, at the time of submitting the prescribed form, furnish the Commission with an identifiable address in the State where he intends to contest the election at which address all documents and court processes from either the Commission or any other person shall be served on him.

(8) A political party which presents to the Commission the name of a candidate who does not meet the qualifications stipulated in this section, shall be guilty of an offence and on conviction shall be liable to a maximum fine of N500,000.00.

85. -(1) Every registered political party shall give the Commission at least 21 days notice of any convention, congress, conference or meeting convened for the purpose of electing members of its executive committees, other governing bodies or nominating candidates for any of the elective offices specified under this Act.

87-(9) Where a political party fails to comply with the provisions of this Act in the conduct of its primaries, its candidate for election shall not be included in the election for the particular position in issue.

141. An election tribunal or court shall not under any circumstance declare any person a winner at an election in which such a person has not fully participated in all the stages of the said election.

I have examined the provisions of the Constitution and the Electoral Act (supra) and may I say with due respect to learned counsel, that they are totally irrelevant to the situation at hand. The said provisions relate to pre-election issues and steps prior to the conduct of elections and post-election issues to be taken up at the election tribunals. They do not relate to the conduct and removal of elected office holders after coming into office.

This then takes us to the cases of **AMAECHE VS INEC & ORS (supra)** and **FALEKE VS INEC (supra)** relied on by the Appellants.

Central to the principle of stare decisis is that cases are only precedents for what they decide. See **A-G CROSS RIVER STATE VS. A-G FEDERATION & ANOR (2012) LPELR-9335(SC)**, **THOMAS VS FEDERAL JUDICIAL SERVICE COMMISSION (2016) LPELR- 48124 (SC)** and **PDP VS INEC & ORS (2018) LPELR-44373 (SC)**.

In **AMAECHE VS INEC & ORS** the Appellant, Rotimi Amaechi had won the Rivers State governorship primary election of the Peoples Democratic Party leading to the 2007 governorship election in Rivers State and his name was submitted to INEC. The PDP subsequently substituted his name with that of Celestine Omehia who was not even a candidate at the primary election.

He challenged the substitution and what the Supreme Court was presented with was a case dealing with whether the reasons adduced for substitution of a candidate by a political party accorded with the provisions of section 34 of the then Electoral Act, 2006.

In **FALEKE VS INEC (supra)**, the 2015 governorship primary election of the All Progressives Congress (APC) leading to the 2015 governorship election in Kogi State was won by Prince Abubakar Audu who subsequently picked the Appellant (who did not take part in the primaries) as his running mate for the main election. Although they had majority votes at the end of the first round of the election, INEC decided that the election was inconclusive as bye elections needed to be conducted in about 91 polling units. The rationale was that the outstanding votes in those polling units were more than the margin between the two leading candidates. Unfortunately, Prince Audu the governorship candidate died before the date of the supplementary election, upon which INEC wrote to the APC to substitute his name. On receiving the said letter, the APC the picked Yahaya Bello who came second at its primary election. Yahaya Bello then flew the flag of the APC at the supplementary election and the votes scored were added to the earlier votes of the APC and the late Abubakar Audu to declare

Yahaya Bello winner. The earlier attempt of the Appellant to challenge the conduct of the supplementary elections did not succeed upon which he proceeded to the elections tribunal. The Appellant failed at the tribunal and also failed on his appeal to this Court before heading to the Apex Court.

I have taken the pain to outline the facts of the two cases to show that they are totally at variance with the situation in the present case and cannot serve as precedents in respect thereof.

The defection of an elected executive office holder is not novel to our jurisprudence as it formed the consideration of the Supreme Court in the case of **A.G. FEDERATION & ORS VS ABUBAKAR & ORS (supra)**. In that case, the 1st Respondent Atiku Abubakar who had been elected Vice President alongside President Olusegun Obasanjo on the platform of the PDP defected to another political party, the Action Congress. His action drew the ire of his principal and strained their relationship to the extent that his continued occupation of the office of Vice President became subject of litigation.

I do agree with the learned trial Judge that the principles laid down in the said case of **A.G. FEDERATION & ORS VS ABUBAKAR & ORS** (**supra**) are applicable to the facts and circumstances of this case.

It must be stated clearly that issues of votes are necessary for the determination of the winners of elections and popularity of political platforms. However, once the final determination has been made by the Returning Officer and subsequently by the appropriate tribunal and courts, where the the outcome of the election was challenged, the elected office holder assumes their office and their removal must be in accordance with the provisions of the Constitution.

Defection from one party to another may appear immoral or even improper but as well submitted for the Respondents, it must be acknowledged that membership of political parties is an exercise of the freedom of association guaranteed by section 40 of the Constitution but like every exercise of rights it comes with attendant consequences. Where a member of the legislature defects from the party on whose platform he was elected without showing that the party he left had suffered a division, the consequence for him is to vacate his seat as provided in sections 68 (1) (g) and 109 (1) (g) for the Federal and State legislature respectively otherwise

his seat will be declared vacant. See **ABEGUNDE VS. ONDO STATE HOUSE OF ASSEMBLY & ORS (2015) LPELR-24588(SC)**. These provisions accord with the natural workings of the legislature where political party lines hold sway.

The situation is different with regards to holders of the executive offices of President, Vice President, Governor and Deputy Governor as the provisions for their removal do not include where such office holders defect from the political party under whose platform they were elected into office.

Mr. Okorie did concede that much in his brief that unlike the situation with elected members of the legislature, there is no express constitutional provisions relating to defection of elected executive office holders of the offices of President, Vice President, Governor and Deputy Governor. He however invited the Court to fill the lacuna by extrapolating the consequences for elected members of the legislature and to accordingly order the 1st and 2nd Respondents to vacate their offices.

The learned trial Judge must be commended for rejecting this invitation which would have done incalculable damage to the rule of law and constitutionalism. Judicial activism must be guided by the rule of law

otherwise it will degenerate to judicial rascality. In interpreting provisions of the Constitution the literal rule of interpretation is the basic cannon that words and phrases must be given their basic ordinary grammatical meanings.

AKINTAN, JSC quite succinctly captured the position of the law thus:

The generally accepted rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning. Phrases and sentences are to be construed according to the rules of grammar. If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. This approach is regarded as "literal interpretation" or characterized as the "positivist approach." See

Victoria City Corp. v. Bishop of Vancouver Island
(1921) 2 A. C 384; *Bradlaugh v. Clarke* (1883) 8
A.C. 354; and *Maxwell on the Interpretation of*
Statutes 12th edition, page 28.

The approach, of the Indian Judiciary while
interpreting the Indian Constitution is stated as
follows in M.P Jain, Indian Constitutional Law, 3rd
edition, page 675 :

"Generally, the approach of the Indian Judiciary
has been to interpret the Constitution literally and
to apply to it more or less the same canons of
interpretation as are usually applied to the
interpretation of ordinary legislative enactments.

This has been characterized as the positivist
approach." See also Chiranjit Lal v. Union of India , A.R 1951,

41 at 58.

The approach of our courts in interpreting statutes and the constitution is the same as declared above.

This Court had stated the position in numerous cases. The principle as enunciated may be summarized as follows:

(1) That in interpreting the Constitution a liberal approach should be adopted:- See

Nafiu Rabiu v. Kano State

(1980) 8-11 S.C 130 at 148;

(2) That the court must employ care and always bear in mind that the circumstances of our people must be taken into consideration: See

Ukaegbu v. Attorney-General of Imo State

(1983) 1 SCNLR 212;

(3) That the historical facts which are necessary for comprehension of the subject-matter may be called as aid: See Uwaifo v. Attorney-General of Bendel State (1982) 7 SC 124; and Bronik Motors v. Wema Bank (1983) 1 SCNLR 290; and

(4) That regard should be taken to ensure that the mischief which is intended to deter is arrested: See

*Mobil v. F.B.I.R. (1977) 3 SC 53. See **A.G. FEDERATION & ORS VS ABUBAKAR & ORS (2007) LPELR-3(SC) at 46-47.***

The point must be made that it is not the duty of the courts to make laws or speculate as to what the intention of the legislature would be outside the express words of the legislation. With regards to the Constitution the duty is even higher and it is beyond the Courts to insert or manufacture words into the express provisions on the Constitution. Any such exercise by the courts violates the principles of separation of powers. **ONU, JSC** considered similar arguments on the absence of consequences for defecting

elected members of the executive arm and expounded the position of the law
thus:

*For the court to enact or write into the
Constitution what its makers failed to insert would
amount to the court enacting laws and as Lord
Simmons described such an act "a naked
usurpation of legislative functions under the thin
disguise of interpretation, and it is the less
justifiable when it is guess work with what material
the legislature would if it had discovered the gap,
have filled it in. If a gap is disclosed, the remedy
lies in an amending Act. "See Magor & St Melions
Rural District Council v. Newsport Corp. (1951) 2 All
E.R. 839 at 841.
It is not the function of the court to make law but*

to interpret the words used by the legislature

whose primary function is to make the law while

*that of the court is to declare it. See **A.G. FEDERATION & ORS***

VS ABUBAKAR & ORS (2007) LPELR-3(SC) at 64.

As earlier indicated, the removal of the 1st and 2nd Respondents as provided for in the Constitution must be in the circumstances contained in sections 180, 188 and 189 of the Constitution. Defection from the political party on the platform of which they were elected was not stated as one of the grounds and cannot be made a ground for their removal by the Courts pursuant to the extant legal principle of *expressio unius est exclusio alterius*. See **EHUWA VS ONDO STATE INDEPENDENT ELECTORAL COMMISSION (2006) LPELR-1056 (SC), UDOH & ORS VS ORTHOPAEDIC HOSPITAL MANAGEMENT BOARD & ANOR (1993) LPELR-3308 (SC), SHINKAFI & ANOR VS YARI & ORS (2016) LPELR-26050 (SC) and PORTS AND CARGO HANDLINGS SERVICES CO LTD & ORS VS. MIGFO (NIG) LTD & ANOR (2012) LPELR-9725(SC).**

Before concluding on this issue it needs be said that the removal of elected members of the executive arm of government is substantially that of

the legislature and where impeachment is contemplated the role of the judiciary is limited to setting up the investigative panel. The removal of heads of other arms of government has not been ascribed to the judiciary. The power to declare the offices of the holders of the offices of Governor and Deputy Governor vacant was not conferred on the judiciary by sections 180, 188 and 189 or any section of the Constitution. While jurisdiction may be expounded it cannot be expanded. See **AMAECHEI VS INEC & ORS (supra), PORTS AND CARGO HANDLINGS SERVICES CO LTD & ORS VS. MIGFO (NIG) LTD & ANOR (supra) and SOCIETY BIC S.A. & ORS VS. CHARZIN INDUSTRIES LTD (2014) LPELR-22256(SC).**

It needs also be pointed out that even in the case of members of the legislature who must suffer the consequence of loss of their seat if found to have defected from the political party which sponsored them for election, the consequential order is for bye election to be conducted and not for the vacated seat to be allocated to either the political party or the runners up at the election. See **ABEGUNDE VS. ONDO STATE HOUSE OF ASSEMBLY & ORS (supra).**

This issue, which as earlier stated covers issues (1)-(4) of the Appellants, is therefore resolved against the Appellants and in favour of the Respondents.

The remaining issue is:

Whether the 1st and 2nd Respondents, as Governor and Deputy Governor of Ebonyi State, could be sued in their personal capacities?

On this issue, Mr. Okorie submitted that the learned trial Judge was wrong in holding that the 1st and 2nd Respondents were covered by the constitutional immunity provided by section 308 (1) of the Constitution. He submitted that the case of **GLOBAL EXCELLENCE LTD & ORS VS DUKE (2007) LPELR-1323(SC)** referred to by the learned trial Judge was inapplicable to the facts and circumstances of this case as the Appellants had no option other than civil litigation for the redress they sought.

Mr. Nwaeze and Mr. Okafor, SAN both submitted that the 1st and 2nd Respondents were indeed covered by absolute immunity provided by section 308 of the Constitution and referred to **TINUBU VS IMB SECURITIES PLC (2001) LPELR-3248 (SC), I.C.S (NIG.) LTD VS BALTON B.V. (2003) 8**

NWLR (PT 822) 223, FABUNMI VS IGP ABUJA & ORS (2011) LPELR-3550(CA) at 35 and GLOBAL EXCELLENCE LTD & ORS VS DUKE (supra).

Section 308 of the Constitution provides thus:

308.—(1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section—

(a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;

(b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise ; and

(c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued : Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.

(3) This section applies to a person holding the office of President or Vice President, Governor or Deputy Governor ; and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office.

In contesting the position taken by the lower court that the 1st and 2nd Respondents were covered by the immunity contained in section 308 (1) of the Constitution, the Appellants contended that **GLOBAL EXCELLENCE LTD & ORS VS DUKE (supra)** upon which the lower court relied had nothing to with the challenge to the office occupied by the then Governor of Cross River State. This argument extends to all the cases cited on this issue for the Respondents. **TINUBU VS IMB SECURITIES PLC (supra)** was in respect of a civil action which preceded the inauguration of the Appellant as Governor of Lagos State and in respect of which his interlocutory appeal was adjourned sine die based on the interpretation of section 308 (1) of the

Constitution. **I.C.S (NIG.) LTD VS BALTON B.V. (supra)** similarly involved a civil case which preceded the inauguration of the then Governor of Cross River state and in respect of which an appeal filed by him had to be put in abeyance until the expiration of his tenure in line with the provisions of section 308 of the Constitution. **FABUNMI VS IGP ABUJA & ORS (2011) LPELR-3550(CA)** was a fundamental rights application gone awry which had nothing to do with section 304 of the Constitution.

While section 308 (1) of the Constitution seeks to protect the occupants of the offices of President, Vice President, Governor and Deputy Governor from the distractions of unnecessary litigation, the present action of the Appellants cannot be brought within the class of such cases. The subject-matter of the action of the Appellants is the very offices occupied by the 1st and 2nd Respondents which offices cannot be deployed as shield by the 1st and 2nd Respondents as the res would have been extinguished by the time the 1st and 2nd Respondents vacate their respective offices at the end of their tenure. This much was elucidated by **OGUNTADE, JSC** thus:

Section 308 cannot be relied upon

where the nature of the suit is such that the res in


*dispute will be destroyed permanently with the effluxion of time. To hold that Section 308 can be invoked in a matter relating to the eligibility for a political office where the tenure of such office has been set out in the Constitution will translate into denying to a plaintiff his right of access to the Court. It is only in a case where a deferment of plaintiff's right of action is not likely to destroy the res in the suit that Section 308 can be invoked. See **AMAECHI VS INEC & ORS (2008) LPELR-446(SC) at 60.***

I therefore hold that the immunity provided by section 308 (1) of the Constitution cannot avail the 1st and 2nd Respondents in the circumstances of this case.

This issue is accordingly resolved in favour of the Appellants and against the Respondents.

Although the Appellants succeeded in respect of one of the issues, their failure in respect of the main contention herein implies that this appeal must be dismissed.

Appeal is dismissed with N200,000.00 cost in favour of the Respondents and against the Appellants.



JOSEPH OLUBUNMI KAYODE OYEWOLE
JUSTICE, COURT OF APPEAL

Appearance:

Mr. O. Okorie with Mr. C.I. O. Okwor for the Appellants

Mr. R.O.U. Nwaeze with Mr. N. U. Okoro, Mr. C. A. Okike and Mr. G. S. Ekoh for the 1st and 2nd Respondents.

Mr. A. O. Okafor, SAN with him Mr. C. Uwa, Mr. E. N. Nwambam and Mr. R.O. Ogbolu for the 3rd Respondent.

CA/E/53/2022


AHMAD OLAREWAJU BELGORE

JUSTICE, COURT OF APPEAL

This emanated from the judgment of Ebonyi State High Court which dismissed the suit of the Appellants herein. The judgment was well considered and admirably packaged and I do not see any reason why it should be disturbed.

I had the privilege of reading, in draft, the judgment just delivered by my learned brother, JOSEPH OLUBUNMI KAYODE OYEWOLE, JCA. I agree with his Lordship's reasoning and conclusion, which I adopt as mine.

I dismiss this appeal as being unmeritorious, and abide by the consequential orders contained in the lead judgment.



AHMAD OLAREWAJU BELGORE
JUSTICE, COURT OF APPEAL