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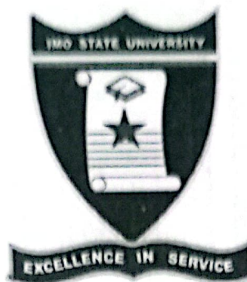
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Journal of Commercial and Contemporary Law

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On behalf of the Editorial Board, I present the 8th edition of Journal of Commercial and Contemporary Law. Irrespective of its challenges, we beat our hearts and declare that the edition has maintained the highest standards which the Journal represent.

This 8th edition packaged Articles of international standard whose impact in commercial law and other contemporary issues are without doubt of focal indispensability. As usual, we remain the bastion for x-raying spellbound and commercial based papers whose impact is unrivalled. Our gratitude continues to go to God, our esteemed contributors and resource persons who have in one way or another propelled this publication.

Finally, our 8th edition is a promise fulfilled. Expect a 9th edition with the latest and uncompromised status.

Dr. Kingsley N. Ogbaegbe

Editor In Chief

08098715595

THE CONSTITUTIONALITY OR OTHERWISE OF THE ELECTORAL ACT, 2010 AS A LEGAL FRAMEWORK SET DOWN TO PLUG LOOPHOLES IN THE ELECTORAL AND POST ELECTORAL MATTERS IN NIGERIA

J. O. Olatoke, (SAN)* &
Abubakar Shehu Ahmad Tijani**

Abstract

This Chapter examines the provisions of Sections 285 (5), (6), (7) and (8) of the constitution of the Federal Republic of Nigeria, 1999 (as amended in 2011) and Section 134 (1), (2), (3) and (4) of the Electoral Act, 2010. By these sections, the time within which an election petition shall be heard is limited to One Hundred and Eighty days from the date of filing the petition and any appeal that may arise from the decision of the Election Petition Tribunal shall be concluded within ninety days, from the date of delivery of judgment of the tribunal. The question is whether the provisions of the above sections which limit the time within which an election petition and any appeal arising therefrom shall be heard and determined by the tribunal/court constitutes an infringement of fundamental / constitutional right to fair hearing of the petitioner in the light of section 36(1) of the constitution and whether the legislature has not interfered with the independence of the judiciary in the discharge or judicial function. Is there any need to re amend the Act and the constitution or not?

Introduction

The judiciary, being a formidable and significant arm of government adjudicates in all matters in the society including election matters. The judiciary plays a very significant role in moulding the nation's democracy as manifested in its various erudite decisions in election matters.

The term election itself is more than a mere selection of a person to occupy a position and it is over and above mere voting at a polling unit. It encompasses accreditation of voters, voting for a candidate of one's choice, counting of the votes, collating the votes and announcement of the result of the election. See the case of *Ogboru v. Uduaghan*ⁱ where Donghan – Mensem, J.C.A held inter-alia that:

election is a generic term; a process which embraces the entire gamut of activities ranging from accreditation, voting, collation to recording on all relevant INEC Forms and declaration of results

See also the case of *Inec v. Nyako*. Therefore, voting alone does not constitute election, rather; it is only specie of the genus, which is election. See *Ogboru V. Uduaghan* (Supra)ⁱⁱ and *Aondoakaa v. Ajo*. Before the advent of the present legal regime on the electoral matters in Nigeria, election petitions and appeals against the decisions of the Election Petition Tribunals took several years before conclusion. In most cases, the Respondent (i.e. the incumbent) would almost serve out his tenure when final judgment was delivered. The cases of Ekiti State and Ogun State are good examples.

In order to ameliorate the situation and to restore the hope and confidence of the citizenries, the legislature introduced section 285(6) & (7) into the Nigerian constitution and amended the Electoral Act. The 1999 constitution of the Federal Republic of Nigeria (as amended) and the Electoral Act, 2010 are the legal framework fashioned to plug the loopholes in the nations electoral and post electoral matters. These two legal frameworks have posed a challenge of time constraint for Election Petition Tribunals in the country which this paper seeks to examine.

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ⁱ (2011) 2 NWLR (pt. 1232) 538 at 589

ⁱⁱ (2011) 12 NWLR (pt. 1262) 439 at 560

The Effect(S) of Constitutional Amendment and the Effect of Introduction of Electoral Act 2010 on Election and Post-Election Matters in Nigeria

The Electoral Act, 2010 is an Act promulgated by the National Assembly to repeal the Electoral Act No.2, 2006. The Electoral Act, 2010 (hereinafter referred to as "the Act") is the Act that regulates the conduct of election of the present political administrations at all levels in Nigeria and its provision governed the hearing and determination of all election petitions arising from the conduct of that election¹. The Act also repealed the Independent National Electoral Commission Act, Cap.15, Laws of the Federation of Nigeria, 2004. The Electoral Act, 2010 is to regulate the conduct of Federal, State and Area Council elections, and for related matters².

In this paper, the provisions of sections 285 (5), (6), (7) and (8) of the constitution of the Federal Republic of Nigeria, 1999 (as amended in 2011) and section 134 (1), (2), (3) and (4) of the Electoral Act, 2010 shall be examined.

Section 285 of the constitution provides thus:

- (5) An election petition shall be filed within 21 days after the date of declaration of result of the election.
- (6) An Election Tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition.
- (7) An appeal from a decision of an election tribunal or Court of Appeal in an election matter shall be heard and disposed of within 60 days from the date of the delivery of judgment of the tribunal or Court of Appeal.
- (8) The Court in all final appeals from election tribunal may adopt the practice of first giving its decision and reserving the reasons therefore to a later date.

The above provisions are *impari material* with the provisions of sections 134 (1), (2), (3) and (4) of the Electoral Act, 2010 respectively.

By virtue of section 134(2) and (3) of the Electoral Act 2010 (hereinafter referred to as the "Act") the time within which an election petition shall be heard is limited to One Hundred and Eighty days from the date of filing the petition and any appeal that may arise from the decision of the Election Petition Tribunal shall be concluded within ninety days, from the date of delivery of judgment of the tribunal.

The question now is what is the necessity for limiting the time within which an election petition may be heard including any appeal arising therefrom?

The answer to the above question is not farfetched at all. The intention of the legislators regarding time limit in the determination of election petition is akin to avoid time wasting in the determination of election matter which is a *sui generis* and to ensure that, as much as possible, such petition is given expeditious adjudication and to enable the parties concerned know their fate and status on time. This submission can be buttressed with the wisdom of the learned justices of the Court of Appeal in the case of *Balogun v. Odumosu*³ where the court held that:

*It must be remembered that traits of all laws affecting election petition tribunal is that of essentiality of time. The Sprit of the Laws is that as much as possible such petitions are given expeditious adjudication to enable the parties know their status*⁴

Preamble to Electoral Act, 2010 (Amended on 27/12/2010)

² Ibid

³ (1999) 2 NWLR (pt. 592) 590 pp. 596-597

⁴ Ibid. See also *P.D.P. vs. Okorocha* (2012) 15 NWLR (pt. 1323) 205 at 252 where the Supreme Court, Pa Adekeye, J.S.C. held that the main objective of section 285 of the constitution is to remedy or remove the mischief (which is the delay in election matters) which hitherto created a cogwheel in the steady progress of election matters in litigation. I think it is a very good innovation which is all out to remove question of any delay whether caused by the deliberate act of the parties or by the non challance of all other bodies, authorities, including the courts of law, legal representatives (counsel) for the parties etc. I therefore find it difficult to fault this vibrant and revolutionary section of the Constitution.

The court further held that:

The issue of time to complete the filing of all processes relating to the hearing and determination of an election petition was uppermost in the mind of the legislation. The enactment stretches itself further afield to do away with tardiness and waste of time, and endeavoured to constrict the time of doing a particular act within a time framework. In other words it is the intention of the legislators that parties stick strictly to the times stated in the Decree. The court would not aid anyone who decides to sleep only to wake up when it is too late⁵

See also section 82 and paragraph 2 (1) Schedule 5 of the Local Government (Basic Constitutional and Transitional Provisions) Decree⁶ which was interpreted and applied in *Balogun v. Odumosu* (supra). See also paragraph 2(1) Schedule 6 to the State Government (Basic Constitutional and Transitional Provisions) Decree⁷ which provides that an election petition relating to the election of Governor of a state shall be heard and determined within 30 days from the date of which the petition is filed. In *Jidda v. Kachallah*⁸, the Court of Appeal, Jos Division, held thus:

It must be borne in mind that in the determination of all election petition matters, public policy dictates that time is of essence so that as much as possible parties affected and generality of the public would readily know the status of the contestants. While I sympathize very much with the appellant in this matter... it should be appreciated that state Government (Basic Constitutional and Transitional Provisions) Decree No.3 of 1999, is meant to be interpreted strictly with regards to the time frame allowed by the provision of the Decree. The Court cannot grant the relief sought as by the defluxion of time the case before us is now dead to all intents and purposes.

Recently, the Supreme Court re affirmed the above position of the law while interpreting section 285 (5), (6), (7) & (8) of the 1999 Constitution (as amended) in the case of *Abubakar v. Nasamu* (NO. 1),⁹ where the court held as follows:

I have to emphasize that any discretion any Judge has in the implementation of Section 285(7) (8) must be exercised within the confines of the sixty days stipulated therein. The reasons for the decision must be delivered within the sixty days. I believe that the time constraint under that section does not envisage writing lengthy and verbose reasons due to the pressure of election petitions filed during this period. The Court of Appeal delivered its reasons for judgment on 23rd of January, 2012. At that point in time by simple arithmetical calculation, the period of 60 days stipulated for the hearing of the appeal had expired and lapsed on the 12th January, 2012. The period between the date of delivery of the Kebbi State Governorship election petition Tribunal on the 13th of November, 2011 and 23rd of January 2012 when reasons for judgment was delivered was 71 days. The two judgments delivered by the Court of Appeal became invalid. The decision delivered on the 29th of November 2011 is not valid in that a good judgment should set out the nature of the action before the court and the issue in controversy, review the case for parties, consider the relevant laws raised and applicable to the case, make specific findings of fact and conclusion and give reasons for arriving at those decisions. There is no valid judgment without giving reasons for the judgment. The Court of Appeal delivered its reasons on 23rd day of January, 2012 after the statutory period. The reasons lapsed by 11 days hence they were given without jurisdiction. Any judgment however well written if given without jurisdiction is no judgment at all.

It should be noted that the court or the tribunal cannot, under any circumstance extend the time within which the election petition or any appeal therefrom can be heard and determined because such power has not been vested on the court or the tribunal by the new Electoral Act, 2010 and even where such provision was made, the court held that the provision limiting the time within which an election petition shall be heard overrides the one giving discretion to the court/tribunal to extend time within which such a matter shall be heard and determined. In the case of *Abah v. Robert* (supra), the Court of Appeal held that:

The Election Tribunal are ad hoc bodies constituted for hearing of the petitions. They are enjoined to determine the petitions within a specified period. To hold that they can extend the life span of the

⁵ Ibid P.97, paras B-C

⁶ No.36, 1998

⁷ No.3, 1999

⁸ (1999)4NWLR (pt 599) 426 at 433-434

⁹ (2012) 17 NWLR (pt. 1330) 407 at 459. See also *P.D.P. vs. Okorocho* (2012) 15 NWLR (pt. 1323) 205 at 239

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petition as limited by law and that in the instant case, the Lower Tribunal was eminently justified in declining the invitation of learned counsel for extending the time within which to hear and conclude the determination of the petition".¹⁰ (Underlining is mine for emphasis)

See also *Abubakar v Nasamu (No 1)*¹¹ where the court held inter alia that:
where the limitation of time is imposed in a constitution, Decree or Edict unless they make provision for extension of time, the courts cannot extend the time. Akinnuoye v Military Administrator Ondo State (1997) 1 NWLR (pt 483) pg 564

Another question that one would like to pose here is whether the provision of section 134 (2) and (3) of the Electoral Act, 2010 which limits the time within which an election petition and any appeal arising therefrom shall be heard and determined by the tribunal/court constitutes an infringement of fundamental/constitutional right to fair hearing.

In one of the decisions of the Court of Appeal, such provision cannot amount to an infringement of fundamental right to fair hearing enshrined in the constitution. See *Abah v. Robert* (supra) where it was held that:

As to whether striking out of the petition in the circumstances narrated above was violative of the petitioner's right to fair hearing, it has been held that fair hearing must mean a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties to the case... OBASEKI, JSC. In the case of Ariori Elemo (1983) 1 SCNLR; (1983) SC.13 at 29. The tribunal having adopted the procedure laid down by the enabling Decree in dealing with the petition until it lapsed when it laws truck out, the complaint about the appellant's right to fair hearing cannot be sustained.¹²

However, the Supreme Court took a different stand on this issue and held that such a provision of the Act limiting the time within which election petition shall be heard and determined constitutes an infringement of the petitioner's fundamental right to fair hearing guaranteed by the constitution of the Federal Republic of Nigeria. See *Unongo v. Aku* (1983) 2 scnlr 332 and *Yusuf v. Obasanjo* (2003) 16 NWLR (pt 847) 554 at pp. 603-605. In *Yusuf v. Obasanjo* (supra), the Supreme Court held that:

The issue in Unongo v. Aku (Supra) was that the Electoral Act of 1982 provided that an election petition should be determined within a period of thirty days. The Supreme Court held that section 129 and 140 (2) of the Electoral Act deprive the petitioner of his fundamental right to fair hearing guaranteed by section 33 (1) of the constitution by limiting the period which an election petition must be disposed of and on this account the two sections are unconstitutional and invalid. It was in that circumstance that Uwais, J.S.C (as he then was) held: that any electoral enactment which specifies a time constraint on the court to determine an election petition, as distinguished from the time of filing same... is to say the least very absurd and indeed defeats the intention of the constitution and the Electoral Act itself, which is to enable an aggrieved candidate to seek redress in court... what the learned justice of the Supreme Court described as absurd, and I entirely agree with him, is the fixing of a period for the determination of an election petition. That is certainly against all known principles of fair hearing as the court, by the provision, is hammed to affix date within which it must, as a matter of law, deliver judgment.¹³

On the principle of judicial precedent otherwise known as stare decisis, the decision of the Supreme Court takes precedence over that of the Court of Appeal. It can therefore rightly be said that on the issue of limitation of time within which an election petition shall be heard and determined by the court/tribunal, the decision of the Supreme Court in *Yusuf v. Obasanjo* (supra) takes precedence over and above the Court of Appeal decision in *Balogun v. Odumosu* (supra) and the like. The consequence of the above judicial analysis is that, the provision of section 134 (2) (3) of the Electoral Act 2010 which stipulates time limit within which an election petition could be heard and determined is unconstitutional, illegal, null and void and of no effect whatsoever to the extent of its inconsistency

¹⁰ (1999) 4 NWLR (pt. 597) 126 at 136

¹¹ supra pp 459-460

¹² Ibid

¹³ (2003) 16 NWLR (pt. 874) 554 at pp. 603-605.

with the provision of section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999. Reliance is placed on the Supreme Court decision in *Dalhatu v. Turaki* where Edozie, J.S.C. held thus:

*The doctrine of judicial precedent otherwise known as stare decisis is not alien to our jurisprudence. It is a well settled principle of judicial policy which must be strictly adhered to by all lower courts. While such lower court may depart from their own decisions reached per incuriam, they cannot refuse to be bound by decisions of higher courts even if those decisions were reached per incuriam. The implication is that a lower court is bound by the decision of a higher court even where that decision was given erroneously"*¹⁴

See also *INEC V. Nyako* (supra) at pp. 517-518

Very interestingly, the legislators cunningly lifted the provision of section 134 (2) & (3) of the Electoral Act, 2010 and inserted same in the amended constitution¹⁵ so that if the provision of the Act is declared null and void by the Court for being inconsistent with the constitutional provision, they may seek solace under the constitution to maintain and justify their position as regards limitation of time within which an election petition may be heard and determined.

Section 285 (5) of the constitution as amended provides:-

- (b) – an election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition;
- (c) an appeal from a decision of an election tribunal or court shall be heard and disposed of within 90 days from the date of the delivery of judgment of tribunal.

We are inclined to settle with the wisdom of the erudite and learned justices of Supreme Court in *Yusuf v. Obasanjo* (supra)^{xvi} that any provision of the Law which tends to limit the period within which an election matter may be heard and determined by the tribunal or court violates the petitioner's fundamental right to fair hearing as enshrined under section 36 (1) of the constitution. Now that the provisions of section 285 (5) and 36 (1) are constitutional provisions, what will happen or which one will prevail over the other.

The three arms of the Government of the Federal Republic of Nigeria are:-

- The Legislature;
- The Executive; and
- The Judiciary.

Each arm must be independent of another and no arm should be allowed to interfere with the functions, duties and responsibilities of another, otherwise, the entire aims and objectives of Federalism will become otiose and obsolete. So, if the legislative arm is eventually allowed to impose time limit on the judiciary in the discharge of judicial functions as envisaged under section 285 (5) (supra), then, the legislature has interfered with the independence of the judiciary.

In any event, it has long been settled that where there exists any conflict between the provisions of Chapter Four of the Constitution, (s.36 (1) inclusive) and any other aspect of the constitution, the provisions of Chapter Four shall prevail over any other provisions of the constitution. Therefore, the provisions of section 36 (1) shall override the provision of section 285 (5) (a) & (b) thereof. See *Funmilayo Ransome Kuti V. A.G., Federation* ¹⁶ where it was held that:

But what is the nature of fundamental right? It is a right which stands above the ordinary Laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilized existence and what has been done by our constitution since independence... (sic) so that the rights could be "immutable" to the extent of the "non-immutability" of the constitution itself.
See also *INEC v. Nyako* (supra) p.508

¹⁴ (2003) 15 NWLR (pt. 843) 310 at pp. 350-351

¹⁵ Constitution of the Federal Republic of Nigeria, 1999, (as amended), section 285 (5) (a) & (b).

¹⁶ (1985) 2 NWLR (pt. 6) 211 at pp. 229-230

Conclusion

There is no doubt that the Election Petition Tribunals in the country have re-echoed the fact that the judiciary is an unbiased umpire and the final resort of the citizenry by re-affirming the independence of the judiciary and preventing undue interference from the political classes. They have also tried to meet up with the challenges posed by the introduction of the Electoral Act, 2010 and with the task imposed upon them by section 285 of the constitution of the Federal Republic of Nigeria, 1999 (as amended in 2011).

The Judiciary has no option than to try to work within the time frame stipulated by the Constitution/Electoral Act in order to move our democracy forward. Attempts would be made by politicians to frustrate the aims and objectives of the Legislature which provides time-limits within which election petitions and appeals therefrom should be heard and determined but it is our collective responsibility to put in our best to resist the attempt by putting our best in these circumstances. Lengthy and verbose judgments should be avoided, likewise irrelevant issues need not be considered in the course of writing judgments. On issue like this, Onnoghen, J.S.C in *Abubakar v Nasamu (No 1)*¹⁷ held:

I wish to observe that the court has recently been bombarded with proliferation of appeals by dissatisfied litigants arising from a single decision of the lower court in circumstances where a single appeal would be more than sufficient to dispose of the issue(s) in controversy between the parties and thereby save the time, energy and costs involved in litigation. Rather than have a single appeal, and where appropriate a cross-appeal, we now have the practice of virtually all respondents, whose defence to the petition are not radically different, now filing separate appeals against the decision of the lower court and ending up formulating the same issues for determination. As a consequence of the current trend, you now see two or more, sometimes six appeals being consolidated to be dealt with accordingly. It may be profitable to the legal practitioners involved to have proliferation of appeals as same may enhance their Bill of Charges, but the development does not add anything to the development of the law apart from being a waste of time and resources. It also adds to the stressful situation the appellate courts are now exposed to in the determination of appeals arising from election petitions which is now subject to limitation of time. Is it not a wise saying that repetition does not improve an argument?

Recommendation

Litigants and counsel should avoid filing multiplicity of appeal otherwise known as proliferation of appeals. Appeals arising from a single decision of a lower court or tribunal will later be consolidated to save time, energy and costs involved in litigation. Rather than having a single appeal and where necessary, a cross-appeal, lawyers are fond of filing different appeals virtually by all the respondents who are dissatisfied with the judgment of the tribunal/lower court and at the end of the day, their defence may not have any radical difference.