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EFFICACY OF COURT ORDERS DIRECTING THE CONDUCT OF FRESH PRIMARIES OUTSIDE THE 180 DAYS THRESHOLD FOR GENERAL ELECTIONS:

A Review Of The Electoral Act, 2022

INTRODUCTION

The guidelines of the Independent National Electoral Commission (INEC) include timelines for primary elections, campaigns, substitution of candidates, general elections e.t.c. **Section 29 (1) of the Electoral Act ("the Act")** states that:

"(1) Every political party shall, not later than 180 days before the date appointed for a general election under this Act, submit to the commission, in the prescribed Forms, the list of the candidates the party proposes to sponsor at the elections, who must have emerged from valid primaries conducted by the political party."

By implication, the Act makes it compulsory for a political party to submit to INEC the list of its candidates arising from a valid primary election not later than 180 days before the date of a general election.

Recently, the Federal High Court (FHC) nullified primary elections in several States. In Taraba State, for example, the FHC on 20th September, 2022 nullified the governorship primary election of the All Progressives Congress (APC) that produced Emmanuel Bwacha as the candidate for the 2023 general election. Also, in Ogun State, the FHC on 27th September, 2022 nullified all primary elections conducted by various factions of the People's Democratic Party (PDP).

Following the nullifications above, the court ordered that a fresh primary should be conducted within 14 days. However, INEC had fixed 11th March, 2023 for general election of Governorship and State Houses of Assembly[1]. Going by the provisions of **Section 29(1) of the Act**, APC and PDP were out of time to submit a fresh candidate's list by the date of the order and would continue to be out of time even after the conduct of a fresh primary.

The question that begs for answer is, can a political party validly submit a fresh candidate's name without contradicting and/or offending **Section 84 (13)**[2] of the Act? It may appear the answer is **No**, because such order and any attempt by a political party to execute it will be contrary to the Electoral Act. But then, how does Section 84 (14) of the Act become operative when a challenge to irregular selection or nomination of a candidate is successful? Does Section 84 (14) limit the powers of the Federal High Court to mere nullification of selection or nomination of candidate without collateral powers to order fresh primaries?

FAILURE TO COMPLY WITH THE ACT IN THE CONDUCT OF PRIMARIES

Political parties are bound to comply with the Electoral Act 2022 regarding how they field their candidates in an election. Accordingly, the

1. *https://inecnigeria.org/wp-content/uploads/2022/09/TIMETABLE-FOR-2023-GENERAL-ELECTION.pdf*
2. *"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."*

sanction specified in the Act shall take its course where a political party fails, neglects or refuses to comply with the mandatory provisions of the Act on nomination and submission of the names of its candidates for a general election. Such a political party will be deemed or taken in law to have fielded no candidate in that election[3] and this is in line with Section 84 (13) of the Act. The Supreme Court[4] has held that ***"the principle as to compliance with the requirements of the law is that, where a Statute has made provisions for the steps to be taken, no other steps than those prescribed, must be followed."*** The provisions of the Act on the timeline for submission of a candidate's name are clear and same should be strictly complied with.[5]

It should be noted that a perverse order of a court must be complied with until same is upturned by a higher court on appeal. Thus, in ***EMENIKE V. ORJI & ORS***,[6] it was held that ***"An order of Court remains an order of that Court and subsists until it is set aside on appeal. It does not matter whether the order is regular or irregular, valid or invalid, same must be obeyed' Where a party forms an opinion that the order is not valid, the proper procedure to follow is to take steps to have the order set aside."***

In the circumstance, where the order of court remains uncontested, can a person with remote interest have the requisite locus standi to appeal such order? Generally, a person who was not a party to a suit cannot appeal against the order despite being aggrieved except he seeks and obtains the permission of the court to appeal against the order as an interested party.[7] The interested party's right to appeal is supported by **Section 243(1) (a) of the Constitution 1999 Constitution** ("Constitution"). The interested party must show:

a. That he is a person having an interest in the matter.
b. That the order of the Court he is seeking leave to appeal against prejudicially affects his interest.
c. That the decision has wrongfully deprived him of something or wrongly affected his title to something.[8]

See also **PRINCE OYEDOTUN BABAYEMI V. SENATOR ADEMOLA JACKSON NURUDEEN ADELEKE & ORS (2022) LPELR-57904(CA) (Pp. 23-24, paras. E-C)**

It is pertinent to note that pre-election litigations, like electoral actions, are sui generis (of its own class/kind)[9] and persons of interest have been limited by **Section 84 (14)**[10] of the Act to mean those who participated in the primary election i.e. aspirants.[11] Therefore, only an aspirant can question the result or nomination or declaration of any person by the party as the winner of the primary election. Also, only aspirant can appeal against the against the decision of the court.[12] It follows that

3. The position of the law was enunciated in the case of DAVID V. I.N.E.C. (2020) 4 NWLR (PT. 1713) 188. See also APC V. MARAFA (delivered on 24/5/2019: APPEAL NO. SC.377/2019)
4. AMAECHI V. INEC & ORS (2008) LPELR-446(SC) (PP. 256 PARAS. E)
5. Ibid 2
6. (2008) LPELR-4103(CA) (PP. 19-20 PARAS. B-B)
7. PDP V. VALENTINE & ORS (PP. 16-18 PARAS. D)
8. CONGRESS FOR PROGRESSIVE CHANGE & ANOR V ADMIRAL MURTALA NYAKO & ANOR (2011) LPELR 23009 SC
9. BUHARI & ANOR V. YUSUF & ANOR (2003) LPELR-812(SC) (PP. 18-19 PARAS. D)
10. It provides that: "Notwithstanding the provisions of this Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party have 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 for redress." See also section 29 (5) & (6) of the Act.
11. See EZE V. PDP & ORS (2018) LPELR-44907(SC) (PP. 46-49 PARAS. C)
12. In GUREJE VS. ADEDEJI & ORS (2018) LPELR-45220 (CA), per Ndukwe - Anyanwu, JCA held that the applicant in the circumstance needed the leave of the Court to appeal the ruling of which he was not a party to the original suit.

even a member of the political party concerned who did not participate in the primaries as aspirant has no locus to challenge the nomination of any candidate by a political party for any election or to challenge decision of a Court in a pre-election matter at the Court of Appeal. See generally, **BABAYEMI V. ADELEKE & ORS**,[13] **SHUAIBU V. LADAN**[14] **and APC V. HON. DANLADI KARFI & 2 ORS**.[15]

On the other hand, a question that comes to mind is, whether the appeal process initiated by an aspirant (interested party) who was not joined as a party in the original suit will be subjected to the 14 days window to challenge the outcome of a primary election in an appellate court. What Section 285 (9) of the Constitution provides is for a challenge of the outcome of primaries within 14 days. If the original suit was commenced within 14 days, appealing against it by an interested party does not amount to commencement of a fresh suit because it is a continuation of the suit. Of course, an appeal is a continuation of a case appealed against and does not amount to commencement of a fresh suit. The Supreme Court enunciated the nature of appeal in **SUBERU V. STATE**[16] when it held that

"An appeal is not a new action but a continuation of the original suit which is the subject-matter of the appeal. It is only a complaint against a decision."

13. Supra
14. (2021) ALL FWLR (pt. 1104) 477 @ 512
15. (2018) ALL FWLR (pt. 942) 328 @ 369
16. (2010) LPELR-3120(SC) (Pp. 30 paras. F-F)
17. Ibid 3
18. (2008) LPELR-825(SC) (Pp. 34 paras. D)

In view of the foregoing, for a political party to be duly represented in a general election, it must hold its primary election and submit the name of the candidate that emerges as the winner to INEC 180 days before the date appointed for the general election. Anything that falls short of this, the affected political party will be deemed not to have presented a candidate. It does not matter if the invalid candidate has been declared the winner as his return can be declared null and void as done in the Marafa's case.[17]

We submit that the orders of the federal high courts directing political parties to hold fresh primaries renders Section 84 (13) of the Act otiose and may not stand the test of appeal. The courts should have given the Act its plain and natural interpretation since the words used in Section 84 (13) are mandatory. Niki Tobi JSC in **CALABAR CENTRAL CO-OPERATIVE THRIFT & CREDIT SOCIETY LTD & ORS V. EKPO**[18] held that

"A Court of law cannot ignore provisions of a statute which are mandatory or obligatory and tow the line of justice in the event that the statute has not done justice. Courts of law can only do so in the absence of a mandatory or obligatory provision of a statute. In other words, where the provisions of a statute are mandatory or obligatory, Courts of law cannot legitimately brush the provisions aside just because it wants to

do justice in the matter. That will be adulterating the provisions of the statute and that is not my function."

It is our opinion that the order of FHC for fresh primaries outside the timeline recognized under the Act and guidelines of INEC **may** amount to a pyrrhic victory, one without any utilitarian value for the fresh candidate. Courts have severally been enjoined not to undertake such act that would amount to an academic exercise. See **SUNDAY & ORS V. BANK PHB & ORS**[19] where the court held that

"It is settled law that a Court does not make an order in vain and will not make an order that is incapable of being carried out. The law does not compel the impossible - lex non cogit ad impossibilia. Equally trite law is that a Court of law will never engage in academic discourse no matter how erudite or beneficial it may be to the public at large."

EFFECT OF SECTION 84 (14) ON POWERS OF THE COURT

Without prejudice to the above, can it be said that the draftsman of the Act pandered in impossibility in respect of Section 84 (14) which permits a dissatisfied aspirant to apply to court for redress? The compliance conflict in the Act is resolved on one hand by Section 84 (13) and, on the other hand by the court pursuant to Section 84 (14) which has not expressly or by necessary implication circumscribed the power of the court in ordering fresh primaries in deserving cases. If we investigate Section 84 (13) and marry it with Section 84 (14), one would realize that challenge of outcome of primaries cannot be entertained post-election, that is, an aggrieved person cannot introduce in an election petition a pre-election matter. That being the case, one may be tempted to ask, at what point will Section 84 (13) apply to void a non-compliant primary and exclude the political party from the affected general election if Section 84 (14) would allow the court to order fresh primary? Correspondingly, does Section 84 (14) limit the powers of the Federal High Court to mere nullification of selection or nomination of candidate without collateral powers to order fresh primaries? The answer appears to be in the negative. A liberal and purposive approach to interpretation of the Section 84 (14) suggests that to ensure justice in deserving cases, the court's inherent powers[20] to order fresh primaries cannot be circumscribed except where the Act specifically provides otherwise.

Almost corroborating the above standpoint, the National Commissioner and Chairman, Information and Voter Education Committee, Festus Okoye, said in a statement:[21] ***"Pursuant to Section 32(1) of the Electoral Act 2022 and item 8***

19. (2016) LPELR-41466(CA) (Pp. 23 paras. B)
20. The inherent jurisdiction of the Court is to assist the smooth delivery of justice when it promotes the ends of justice. It supplements the statutory powers of the Court and it is that which is not expressly spelt out by the Constitution or in any statute or rule. See INEC V. JIME & ORS (2019) LPELR-48305(CA) (PP. 28-31 PARAS. B) and Section 6(6) (a) of the 1999 Constitution, as amended.
21. www.sunnewsonline.com/guber-state-assembly-polls-inec-to-parties-you-cant-substitute-withdraw-candidates-unless-by-death-court-ruling/ accessed on 12th October, 2022

of the Timetable and Schedule of Activities for the 2023 General Election, the Commission today 4th October 2022 published the final list of candidates for State Elections (Governorship and State Assembly constituencies). Mr. Okoye concluded by stating: ***"Thereafter, no withdrawal or substitution of candidates is allowed except in the event of death as provided in Section 34(1) of the Electoral Act or pursuant to an order of a Court of competent jurisdiction."***

What is clear from the above statement is that INEC will recognize any candidate that emerges from a Court-ordered fresh primary notwithstanding the time limitation for submission of that candidate's name. The statement therefore gives more bite to the powers of the court to order fresh primaries under Section 84 (14) of the Act.

CONCLUSION

From the foregoing near-conflict provisions of the Act, there is an urgent need for amendment to inject more clarity on the effect of non-compliance in the conduct of primary elections. The fact that a pre-election redress can be sought in court (Federal High Court) does not suggest that the redress must necessarily resort to an order for fresh primary where at the point of giving the order, the minimum threshold in terms of time limitation for submission of names of candidates to INEC would not be achieved.

The maxim is **expresssio unius est exclusio alterius *(i.e. the explicit mention of one thing is the exclusion of another)***. The law that limits the time to submit the list of the candidates clearly excludes the possibility of holding primary election on a date outside the 180 days. Therefore, the court's nullification of any primary election should be appropriate remedy which gives an aggrieved party (Applicant) the sense that the injustice perpetrated by the political party is not allowed to stand. It is pertinent to note that the Act does not specify the remedy that a court should grant but only provides for consequences[22] for failure to comply with the Act in the conduct of primaries.

However, nullification of the primary election may appear to be inadequate remedy for an aggrieved aspirant who aims at taking a second bite at the fresh primary with the hope to emerge victorious. It is a disincentive if all an aggrieved aspirant gets in filing a pre-election suit is the nullification of the primary election, as initiating a suit of this nature may not be worth the efforts of the aggrieved aspirant. This will strengthen the hand of election riggers and frustrate the democratic ethos being built on by the nation.

It is therefore our suggestion that the 180 days limit be adjusted to accommodate the need to conduct fresh primaries in deserving cases.

22. Where it is established that there is non-compliance with the Act, the affected political party's candidate will not be included in the general election.

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