



**IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY  
OF WEST AFRICAN STATES (ECOWAS)**

**HOLDEN AT ABUJA, NIGERIA**

**SUIT NO: ECW/CCJ/APP/02/16**

**JUDGMENT NO: ECW/ CCJ/ JUD/17 / 17**

**BETWEEN**

1. Hon. Sule Audu
2. Ikeleji Agada
3. Labaran Ismail Dadio
4. Isaka Isa
5. Abdul Audu
6. Ademu Abdullahi
7. Sulaiman Abdul

Plaintiffs

**AND**

The Federal Republic of Nigeria

Defendant

# COURT RULING OF DEFENDANT'S PRELIMINARY OBJECTION

## 1. Composition of Court

Hon. Justice Friday Chijioke Nwoke ----- Presiding

Hon. Justice Hameye Founé Mahalmdane ----- Member

Hon. Justice Alioune Sall ----- Member

Assisted by:

Djibor Aboubacar Diakite

-- Registrar

## 2. Counsel for the parties:

### The Plaintiffs:

Festus A. Ogwuche

No. 2 Okporo Road, Artillery Port Harcourt.

### The Defendants.

1. Maimuna Lami Shiru (Mrs.).
2. A.A. Foelong
3. I.I Hassan

Federal Ministry of Justice Abuja.

## **SUBJECT MATTER OF THE PROCEEDINGS:**

- A. Denial of the rights of suffrage and exercise of power of sovereignty which are predicated on the principle that people who bear the burden of Government and governance of Kogi State must exercise franchise of choosing the Governor of the State in accordance with the domestic and legal framework for the elections and Defendant's obligations under international law.
- B. Denial of the right of full, equal and popular participation of the people of Kogi State in the election of the Governor of Kogi State through the conduct of free, fair and transparent elections.
- C. The right of Citizens to vote and be elected at periodic genuine democratic elections.
- D. Denial of the Right to electoral justice.

## **SUMMARY OF FACTS**

The Plaintiffs are citizens of the Federal Republic of Nigeria and Community Citizens of the ECOWAS.

The Defendant is a Member State of the Economic Community of West African States (ECOWAS) and a signatory to its Treaties, Protocols, Directives and

Regulations as well as the Universal Declaration on Human Rights, African Charter on Human and Peoples Rights, and the International Covenant on Civil and Political Rights.

The Plaintiffs filed this application with respect to the governorship election held in Kogi State on the 21<sup>st</sup> day of November 2015 wherein they contend that the election process occasioned a breach of their right to exercise their franchise.

The voters list was compiled, displayed, revised, updated and verified. At the end of the verification, the number of voters billed for the election were ascertained and updated with fresh registrations in accordance with the Defendant's Electoral Act. Primaries were conducted and each Political Party submitted to INEC the proposed Party they sponsored in the prescribed form. These were accompanied by Affidavits sworn by each Candidate indicating that he has fulfilled the constitutional requirements for election into that office. The personal particulars of each Candidate was also published in the State as required by law.

All the election processes and procedures were supposedly diligently and religiously followed and the elections were conducted on the 21<sup>st</sup> day of Nov 2015.

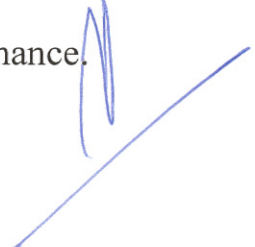
The Plaintiffs aver that while the polls were on going, INEC noted a few discrepancies in some polling units which led to the returning officer declaring the

election inconclusive. Prior to that, the valid votes had been counted and one Prince Abubakar Audu of the APC was leading.

As the elections were on going, the death of the leading candidate was announced. INEC allegedly went ahead with elections in those areas that were declared inconclusive by carrying out a supplementary election to which the APC choose one Yahaya Bello as its Candidate for the said supplementary election amidst protest by the people of the State.

The APC Candidate was said to have won the overall election on the basis of the supplementary polls which the Plaintiffs contend that his victory included a calculation of their votes and all other votes cast for the late Prince Abubakar Audu.

The Plaintiffs further contend that the emergence of Yahaya Bello falls short of the minimum standard of a free, fair, transparent, genuine and credible election. They also allege that the said Yahaya Bello did not participate in the campaign, neither did He at any point present his manifesto or agenda, goals and initiative which he would undertake if voted into office to enable the people hold him accountable and ensure the necessary probity, transparency, citizen participation and representation in the affairs of governance.



The Plaintiffs contend that the people of Kogi were never given the opportunity to assess the said Yahaya Bello and that they were completely sidelined in all the processes that saw his emergence both as candidate and as Governor.

Whereupon the Plaintiffs filed this Application seeking for the following orders:

- a. **A DECLARATION** that it is the plaintiffs entitlement, and indeed that of the entire voters of Kogi State to vote, have their votes represented and counted in the determination of who is to become the Governor of the State in the exercise of their right of sovereignty and their right to franchise in full recognition of their Constitutional, Civil and Political Rights which are inalienable and untransferrable.
- b. **A DECLARATION** that the election of the governorship of Kogi State, held on the 5<sup>th</sup> day of December in which one Alhaji Yahaya Bello emerged winner is not in conformity, and/or consistent with Nigeria's International obligations, and falls short of the internationally recognized standards and core democratic values and principles of a genuine, free and fair franchise as established by existing International Human Rights Instruments, and the Defendants Obligations under International Law.
- c. **A DECLARATION** that it is the Plaintiffs Fundamental Rights and indeed that of other voters to assess, scrutinize, verify, clarify, confirm and do all

other things pursuant to the personal particulars of a Candidate for the governorship of Kogi State, as a veritable measure to ascertaining the candidates integrity, general disposition, capacity, competence, candor, eligibility and character traits; and be free to raise caveat and /or objections and challenge same in accordance with the law and any denial thereof of such right as provided under law impedes against the exercise of both the franchise and the institutionalization of transparency, accountability and popular effective participation and fair hearing in strict adherence to democratic principles and fundamental freedom, is a violation of the fundamental rights of the Plaintiffs under International Human Rights law and the Defendants International obligation.

- d. **A DECLARATION** that the Plaintiffs and indeed the entire people of Kogi State can only hold their Governor to account probity and performance, only if the process the Governor assumes power is by the will of the people expressed through genuine, free and fair elections where equal weights are accorded all votes as the basis of the authority and legitimacy of government, through democratically acceptable franchise in accordance with the Defendants international commitments and obligations under International Law

- e. **AN ORDER** of Court, compelling the Defendants, their agents, servants and privies to entrench Universal Values and principles of democracy and respect for human rights, as a veritable means to the attainment of respective governance, expressed through the ultimate will of the people, in a genuine, free and fair election to the office of the Governor of Kogi State, as the foundation of the authority and legitimacy of government, and in accordance and consistent with the Defendants commitments and obligations under international law.
- f. **AN ORDER** compelling the Defendant, to invoke all necessary measures to guarantee to the Plaintiffs of the worth and weight of their franchise and to exercise their popular sovereignty as citizens of the Federal Republic of Nigeria, from Kogi State, by entrenching a wholly representative, Chief Executive for the state through the conduct of genuine, transparent and credible elections, on the basis of universal, equal and secret suffrage by the expression of the will of the people and, in strict adherence to democratic principles and the Defendants commitment and obligations under international law.
- g. **AN ORDER** compelling the Defendant's to take constitutional, legal and other necessary measures including but not restricted to recourse to International Treaties, Declarations, Conventions to remedy and/or redress the



aberrations and Fundamental Rights Violations flowing from the governorship elections in Kogi State, within a reasonable time, and to inform the Court of the measures taken.

The Defendant filed a Preliminary Objection and Defense on 11/02/16 wherein it challenged the jurisdiction of this Court to entertain the matter and also contend that the Plaintiffs have not disclosed any cause of action.

The Plaintiffs in opposition to the Defendant's preliminary objection filed a reply on 22<sup>nd</sup> April 2016. The Plaintiffs argued that their Substantive Application is for the enforcement of their Fundamental Rights which this Court is imbued with the requisite jurisdiction to entertain. That their Application is essentially anchored on their disenfranchisement in the ultimate determination of who emerges winner in the election, after having voted in the election. That the subject matter imposes international obligations on the exercise of fundamental rights of citizens. That the Defendant anchored its objection on erroneous grounds. That even if alienability or transferability of votes is possible, it cannot be automatically effected without the consent, authority and collaboration of the voters. That the issues raised by the Defendant as objections are issues for argument in the substantive Application.

The Plaintiffs further states that there is no feature in their initiating Application seeking the disqualification of any Candidate by the Court rather, they contend that

their fundamental right to freedom of choice and franchise under Article 13 of the African Charter, had been violated by alienating and transferring their votes without their concurrence

On the cause of action, the Plaintiffs assert that in construing whether there is a cause of action, the first port of call are the instruments donating those rights on a Plaintiff. That the Defendant is misconceived in this regard and for this issue to be successfully raised, the Defendant must canvass serious facts sufficient to debunk, controvert, and countermand the facts adduced by the Plaintiffs. The Plaintiffs further submit that the authorities relied upon by the Defendant in this regard are completely irrelevant. Even if relevant, they cannot render nugatory the enforcement of the fundamental rights sought pursuant to the international instruments protecting and guaranteeing fundamental freedoms.

The Defendant further filed a reply to the Plaintiffs reply on points of law to its Preliminary Objection. In its reply, the Defendant submits that the admission by the Plaintiffs in paragraph 2.1.9 page 8 of their reply that the Application is an electoral matter robs the Court of jurisdiction. They contend that facts admitted need no further prove. That the Plaintiffs did not specifically name any person, Community or group of people that were refused participation in the said election that will qualify the present action to be predicated on Fundamental Human Rights. And that none of the Plaintiffs proved that they were denied the right to participate or partake in the

electioneering process. That the main claim is anchored on election and the provisions of article 9 relied upon did not envisage electoral actions to be amenable to the jurisdiction of this Court. That article 13 and the authorities cited by the Plaintiffs are not apposite in the circumstance of this case and therefore urged the Court to strike out the suit in its entirety.

An examination of the Preliminary Objection and the reply raises some issues for determination.

### **Issues for Determination**

1. Whether this Application as conceived and constituted can be entertained by this Court.
2. Whether the Plaintiffs' have established a reasonable cause of action
  - i. **Whether this Application as conceived and constituted can be entertained by the Court.**

Whereas the Plaintiffs allege a violation of their human rights as enshrined in Articles 13 (1) – (3) of the African Charter on Human Peoples Rights (ACHPR), Article 25 (a) - (c) of the International Covenant on Civil and Political Rights (ICCPR), and Articles 21 (1), (2) , and (3) of the Universal Declaration of Human Rights (UDHR), the Defendant submits that this Court lacks the requisite jurisdiction

to entertain this suit on grounds of incompetence and the Plaintiffs failure to disclose any reasonable cause of action.

In a purported response to the Defendant's objection, the Plaintiffs' submit that the gravamen of their Application is essentially anchored on their disenfranchisement in the ultimate determination of who emerges winner in the Kogi State election, after having voted in the election. That the subject matter imposes international obligations on the exercise of fundamental rights of citizens which this Court is imbued with the requisite jurisdiction to entertain.

The competence of the Court to adjudicate on human right issues is provided for in the Supplementary Protocol (A/SP .1/01/05). Article 9 (4) provides:

"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State".

Article 10(d) of the same Protocol provides that access to the Court is open to the following:

***(d) Individuals on application for relief for violation of their human rights; the submission of application of which shall;***

***not be anonymous; nor***



*be made while the same matter has been instituted before another international Court for adjudication."*

In **HISSIEN HABRE V SENEGAL (2010) CCJELR pg.65**, this Court held that to decide whether or not it has jurisdiction to hear a case, it has to examine if the issue submitted deals with the rights enshrined for the benefit of the human person and arising from the international or community obligation of the State as human rights to be observed, promoted, protected and enjoyed and whether the alleged violations was committed by a Member State of the Community."

The right to vote is not a privilege, but a fundamental right. The protocol on Democracy and good governance imposes on States the obligation to apply the African Charter on Human and Peoples Rights, as well as other International Instruments in their respective states.

**Article 13 (1)** of the African Charter on human and Peoples Rights guarantees the right of every Citizen to participate freely in the Government of his Country, either directly or through freely chosen representatives in accordance with the provisions of the law.

**Article 21** of the Universal Declaration of Human Rights ("UDHR") protects the rights of Citizens to participate in the government of their Country directly or through freely chosen representatives, have equal access to public service in its

Country and the will of the people should form the basis of the authority of government through periodic and genuine elections which shall be by universal and equal suffrage, and held by secret vote or by equivalent free voting procedures.

Article 25 of the International Covenant on Civil and Political Rights (“ICCPR”) requires every Citizen to have the right and the opportunity without unreasonable restrictions in taking part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage held by secret ballot, guaranteeing the free expression of the will of the electors, and to have access, on general terms of equality, to public service in his country.

In **BAKARY SARRE & 28 ORS V. SENEGAL (2011) UNREPORTED Pg 11, Para 25**, the Court held that its competence to adjudicate in a given case depends not only on its texts, but also on the substance of the initiating Application. The Court accords every attention to the claims made by the Applicants, the pleas in law invoked, and in an instance where human right violation is alleged, the Court equally carefully considers how the Parties present such allegations.

A close look at the substance of the Plaintiffs Application disclose that they actually exercised their right to vote but contend that their votes were alienated or transferred to a Candidate who did not contest the election. They further argued that the

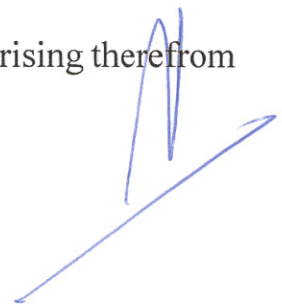
Defendant is obligated to conform to its International Obligations by ensuring that the exercise of the will of the people as represented in their franchise is preserved and not circumvented unduly or manipulated by the Political Elite.

The Crux of the Application before this Court is thus centered on the alleged transfer of votes cast by the Plaintiffs to some other Candidate who did not contest the election.

In **DEMOCRATIQUE POUR LE PROGRESS C.L'ETAT V. BURKINA FASO ECW/CCJ/JUD/16/15** relied upon by the Plaintiffs, the Court assumed jurisdiction over the case on the grounds of alleged denial of the Plaintiffs right to participate in an election process. There is therefore a distinction between that case and the instant case.

In **HON. DR JERRY UGOKWE V. THE FEDERAL REPUBLIC OF NIGERIA AND 1 OR (2005) ECW/CCJ/APP/02/05**, the Court observed that there is no provision whether general or specific, that gives the Court powers to adjudicate on electoral issues or matters arising therefrom.

The jurisdiction of this court in election matters can only be invoked when the Court is satisfied that the right to participate or some other Human Rights arising therefrom has been violated.



The Plaintiffs have not shown any bearing on other International Human Rights arising from the said election capable of invoking the jurisdiction of the Court. They have failed to show any particular act which constitute a violation in line with the articles relied upon.

As rightly said by the Defendant, Article 9 of the Protocol relied upon by the Plaintiffs did not envisage electoral actions to be amenable to the jurisdiction of this Court. Suffice to say that electoral matters are governed by the National Laws of Member States and thus matters arising therefrom which do not in any way relate to Human Rights should be resolved at the National level same being internal issues.

In **CDD V. MAMADOU TANDJA & ANOR, (2011) CCJELR**, the Court declared that it had no jurisdiction to examine the constitutionality or legality of acts which come under the Domestic Norm and laws of authorities of Member States (vis-à-vis) violation of the provisions of the African Charter on Human and Peoples Rights as raised by the Plaintiffs.

Assuming jurisdiction therefore in this matter will amount to the Court exercising the powers of a Sovereign State. This Court has held that it cannot give itself or expand its jurisdictional horizon by misappropriating or misconstruing statutes.

In any case, the Supreme Court of Nigeria on the 20<sup>th</sup> September 2016, in a unanimous judgment affirmed Kogi State Governor, Yahaya Bello, as the validly



elected Governor of the State, wherein it declared that votes cast in an election belong to Political Parties, not Candidates fielded by the Parties. The Court in upholding the substitution of the said Yahaya Bello held that in the face of law, Bello obtained a nomination form, took part in the election, and came second. That the Appellants case was held to be lacking in merit.

In its consistently held case law, this Court has reiterated that it lacks the jurisdiction to examine decisions of National Courts. See **Mousa Leo Keita V. Mali (2004 CCJELR) pg 65**. See also **Pte Alimu Akeem ECW/CCJ/JUD/01/14 Pgh 42**.

In view of the foregoing, and in the absence of sufficient facts and evidence disclosing any human right violation arising from the conduct of the election to invoke its jurisdiction, the Court declares that the issues raised by the Plaintiffs are purely anchored on electoral matters. The Court therefore submits that it lacks the jurisdiction to entertain this matter.

ii. **On whether there is a reasonable cause of action.**

A cause of action determines whether or not a Court is vested with jurisdiction to try a case. It is a set of facts sufficient to justify a right to sue. The Application must contain a clear and concise statement of the material facts upon which the pleader relies for his claim with sufficient particularity. The cause of action has to be in line with the extent of powers conferred on the Court.

The Defendants contend that the Plaintiffs have not disclosed any reasonable cause of action. The set of facts constituting the Substantive Application in this case is the alleged transfer of the votes cast by the Plaintiffs to another Candidate who did not contest the election. This is the main gravamen of the Plaintiff's case. The alleged right to choose a representative is ancillary to the main issue.

It is pertinent to distinguish between the main claim, ancillary claim, and claims bordering on human rights violation in election matters which the Court is vested with competence to entertain.

While the main claim in the instant case is the alleged malpractice by the Defendant's Agents wherein they transferred the Plaintiff's votes to another, the ancillary claim is the denial of their right to choose a Candidate of their choice.

There is also need to clarify the disparity between a cause of action generally and a cause of action in line with the Courts Supplementary Protocol (A/SP .1/01/05). A party may approach the Court with a cause but where the Court is not vested with jurisdiction to entertain that cause, it is presumed that there is no reasonable cause of action before the Court. An Application capable of being entertained before a National Court may not pass the test before an International Court where the facts as presented do not point towards a violation of internationally guaranteed human rights.

The jurisdiction of this Court to entertain election matters however only comes into play where there is an alleged denial of the right to vote, or where there is a human right violation arising therefrom. This is not the position in the instant case. The Plaintiffs admitted that they participated in the election process by casting their votes.

Suffice to say that both the main claims and ancillary claims of the Plaintiffs are national issues not subject to the jurisdiction of this Court.

A cause of action will only be actionable if it is in line with the provisions Article 9 (4) of the Supplementary Protocol which provides for the Courts competence in human right violation matters. This provision does not extend to the conduct of an election process.

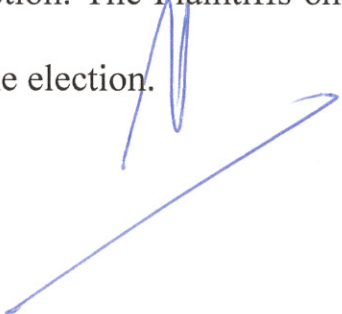
In **MOUSSA LEO KEITA V. THE REPUBLIC OF MALI SUPRA, Pg 75**, the Court held that since the Applicant did not indicate any proof of a characteristic violation of a fundamental human right, the Application must be declared inadmissible.

The cause of action established by the Plaintiff is one which is solely within the scope of competence of a sovereign Member State. It does not fall within the purview of human right violation.

This Court has consistently stated that it does not interfere with the constitutionality or legality of the laws of Member State but when human rights violation arises, it assumes jurisdiction. See **CDD V. MAMADOU TANDJA & 1 OR**. Supra

In **HON. DR JERRY UGOKWE V. THE FEDERAL REPUBLIC OF NIGERIA AND 1 OR**, Supra, the Court held that a dispute having a bearing on other rights of the parties may be referred to in any internal or related dispute relating to electoral issues like the present one. In such an instance, the Court in accordance with Article 19(1) of the 1991 Protocol and particularly with reference to Article 38(1) (c) of the Statute of the International Court of Justice could apply the general principles of law recognized in civilized nations.

A critical look at the facts before this Court shows that the Plaintiffs have misconceived the meaning and extent of applicability of the international provisions relied upon. In as much as the right to vote and be voted for falls within the internationally guaranteed rights, the Plaintiffs have not established a cause of action within the meaning and purport of article 9. They have not established a cause of action relating to other aspects of Human Right Violation which would invoke the Court's jurisdiction. The Plaintiffs only succeeded in confirming to the Court that they voted in the election.



In the absence of a reasonable cause of action in relation to the above articles, the Court is inclined to end the matter at this preliminary stage without going further into the merits of the case. The application is therefore devoid of purpose.

Accordingly, the Preliminary Objection of the Defendant is hereby upheld.

**DECISION:**

The Court adjudicating in a public sitting after hearing the parties in the last resort, after deliberating in accordance with law.

Upholds the Defendant's Preliminary objection and declares the Plaintiffs' case inadmissible on account of lack of jurisdiction to entertain the same.

**AS TO COSTS.**

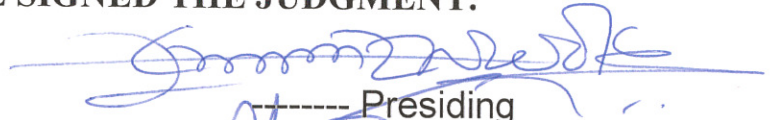
Each Party should bear its own costs

Thus made and Adjudged and pronounced in a public hearing this 22<sup>nd</sup> day of November, 2017.

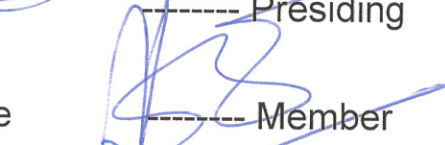
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**THE FOLLOWING JUDGES HAVE SIGNED THE JUDGMENT.**

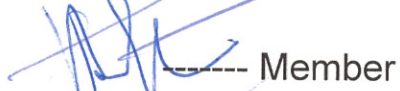
Hon. Justice Friday Chijioke Nwoke

  
----- Presiding

Hon. Justice Hameye Founé Mahamadane


  
----- Member

Hon. Justice Alioune Sall

  
----- Member

**Assisted by:**

**Djibor Aboubacar Diakite**

  
-- Registrar

