

LEGAL ISSUES IN SUCCESSION TO PRESIDENTIAL OFFICE

By Bamidele Aturu

Introduction

SUCCESSION is defined here to refer to the periodic or circumstantial replacement of officials of the state through elections or through constitutional means. The crisis generated by the fact that the President of Nigeria travelled out of the country for medical treatment without transmitting a declaration to the President of the Senate and the Speaker of the House of Representatives as required by Section 145 of the Constitution of the Federal Republic of Nigeria, 1999, compels an examination of constitutional procedure for succeeding to the elective offices of President and Vice President in Nigeria.

In this paper, as should be obvious, we shall be dealing with succession to the two Presidential offices in circumstances arising after election through constitutional means. We shall not be examining electoral matters in this intervention.

Circumstances leading to succession

Generally, the President and Vice President of Nigeria hold their offices for a period of four years¹ subject to re-election for another term. However, before the expiration of the term of office, situations or circumstances may arise that may necessitate another person succeeding to either of the two offices. We intend here to cursorily examine and discuss such situations and circumstances.

Death

By virtue of Section 135(1)(b) of the Constitution, a President shall cease to hold office if he or she dies during the term. When this happens, the Vice President shall automatically become the President². It follows that the office of the Vice President then becomes vacant. The latter office is filled by the new President who was the Vice President nominating another person as Vice President designate. The person nominated becomes the Vice President only with the approval of each House of the National Assembly, that is, the Senate and the House of Representatives³.

Resignation

Holders of the offices of President and vice President can resign from office in accordance with Section 306 of the Constitution. For the resignation of the President to be valid, the holder must tender it to the President of the Senate while that of the Vice President must be submitted to the President. Once the resignation notice is received by the appropriate authority, the Vice President becomes the President by virtue of Section 146 and the same procedure

discussed under the segment on death is used to fill the vacant office of the Vice President.

Impeachment⁴

The President and the Vice President may be removed from office by the National Assembly through an impeachment proceeding under Section 143. Once the procedure stipulated in the Constitution is complied with, the two offices are filled as discussed in the earlier segments of this paper.

Temporary incapacity

Temporary incapacity can be defined as a situation in which a person for a short period of time lacks the ability to discharge the functions of his or her office. Section 145 of the Constitution envisages this type of incapacity when it provides:

Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives a written declaration that he is proceeding on vacation or that he is otherwise unable to discharge the functions of his office, until he transmits to them a written declaration to the contrary, such functions shall be discharged by the Vice-President as Acting President.

We have argued repeatedly that the fact that the section makes provision for the President transmitting a contrary declaration puts it beyond doubt that it deals with temporary as opposed to permanent incapacity. Thus, it is our submission that a President who is temporarily incapacitated and would be 'unable to discharge the functions of his office' ought to make the necessary declaration to the prescribed officers of the National Assembly. In other words, our contention is that the section is obligatory and not directory as Honourable Justice Abutu held in the *Onwuekwe, Aliyu and NBA cases*⁵.

The section might have been inelegantly worded, but since the law is to be interpreted as not to create a vacuum in governance, the only logical inference to be drawn from a provision that deals with inability to discharge presidential functions must be that it is obligatory for the President to write the prescribed declaration. Anything short of that is tantamount a breach of his oath of office contained in the Seventh Schedule not to allow his personal interest influence official conduct or decisions and to defend the Constitution and to act in the interest of the wellbeing and prosperity of Nigeria. Certainly throwing Nigeria into constitutional uncertainty and creating unnecessary vacuum by denying the Vice President the opportunity to become the Acting President by the neglect, failure or refusal to write the declaration under Section 145 cannot be in the interest of the wellbeing and prosperity of Nigeria. It is surprising and a matter for much regret that the learned Chief Judge could not see this point.

Permanent incapacity

In the Aliyu's case, the learned trial Chief Judge disagreed with our contention that there are two types of permanent incapacity under the Constitution, namely medically investigated permanent incapacity under Section 144 of the Constitution and circumstantial permanent incapacity under Section 146 of the Constitution -we shall return to this point later. He then proceeded on the authority of the Supreme Court decision in *Abubakar v AGF* to hold that he could not declare the office of the President vacant under Section 146 of the Constitution. He was not persuaded by our efforts at distinguishing the *Abubakar's* case which as a matter of fact is a warrant for the proposition that there is only but a single Presidency in Nigeria and that the Vice President cannot exercise presidential functions in the absence of express delegation contrary to what the learned judge held in the *Onwuekwe* and *NBA* cases.

It is incontestable that the President travelled out of the country since November 23, 2009, for medical treatment and has not returned ever since. There is also no dispute as to the fact that he is not on vacation and that he is not merely temporarily unable to discharge the functions of his office. This conclusion is inescapable from a proper consideration of the provision of Section 145 of the Constitution of the Federal Republic of Nigeria.

For the avoidance of any doubt whatsoever that section provides thus:

'whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives a written declaration that he is proceeding on vacation or that he is otherwise unable to discharge the functions of his office, until he transmits to them a written declaration to the contrary, such functions shall be discharged by the Vice-President as Acting President.

It is our submission that unless the President transmits the declaration required by Section 145 of the Constitution and in the prescribed manner, he cannot claim to be on vacation. In the same vein without the declaration being transmitted, he cannot claim to be temporarily incapable of discharging the functions of his office.

This last point is borne out by the fact that the same section envisages a situation in which he can transmit a contrary declaration. The inference from this it submitted is that this section deals with temporary and not permanent incapacity.

What then is the implication of the President not transmitting the prescribed declaration in Section 145 of the Constitution? He could be presumed to have abdicated the office, to suffer from permanent incapacity or just negligent. However given what is known by the public and his avowed respect for the rule of law, we may assume that the President did not abdicate and that it was not just a case of negligence as he was flown abroad for medical treatment. The reasonable inference, it is submitted, is that the President who has made the

upholding of the rule of law his cardinal objective was so ill at the time of his evacuation that he could not transmit the necessary declaration.

Furthermore, the facts that he has been away for over two months now at the time of writing this and that no one even among the members of the Executive Council of the Federation has seen or spoken with the President supports or justifies the inference that his illness or infirmity is such that borders on permanent incapacity.

Although there is no precedent for this sort of case in Nigerian jurisprudence, our courts ought to be able to determine what length of absence would justify the conclusion that a President who is evacuated on medical grounds out of the country suffers permanent as opposed to temporary incapacity. Certainly, a period of over two months, without being on vacation and without any contact with the Vice President and other members of the Executive Council of the Federation constitutes permanent incapacity. This conclusion is supported by Section 148(2) of the Constitution, which provides that 'The President shall hold regular meetings with the Vice President and all the ministers of the Government of the Federation...'

The word 'regular' has been defined to mean according to the Oxford Advanced Learners' Dictionary something 'done or happening often; frequent' (see page 983 of the Low Priced Edition). It is submitted that given the practice of the government where meetings of the Executive Council of the Federation are held weekly, the absence of the President since the past four weeks as at the time of filing this address ought to be held to warrant an inference of permanent incapacity.

Now, it is important to make the point that the constitution provides for two types of permanent incapacity. The first type is contained in Section 144 of the Constitution. That may be referred to as medically investigated permanent incapacity. This is activated by two-thirds majority of all the members of the Executive Council of the Federation. Upon a resolution by them that the President is incapable of discharging the functions of his office, a medical panel appointed by the Senate President would be constituted to determine if the President is permanently incapable. Their decision is final.

There is another type of permanent capacity contained in Section 146 of the Constitution. That may be called circumstantial permanent incapacity. It seems that the drafters of the Constitution realising that the members of the Executive Council of the Federation are appointees of the President who may for political and patronage reasons not want to take the drastic even if patriotic decision to pass the resolution referred to in Section 144, provides for a situation in which it should be possible in clear cases to declare that the President suffers from permanent incapacity.

Section 146 of the Constitution states unambiguously:

'The Vice President shall hold the office of President if the office of President becomes vacant by reason of death or resignation, impeachment, permanent incapacity or the removal of the President from office for any other reason in accordance with section 143 or 144 of the Constitution' (emphasis supplied)

It is contended that the permanent incapacity mentioned in Section 146 is different from the permanent incapacity referred to in Section 144. If that had not been the case, the drafters of the Constitution would not have used the phrase 'or removal of the President from office for any other reason in accordance with Section 143 or 144 of the Constitution'. The word 'other' has been judicially defined as additional in the case of *Onwudiwe v F.R.N.*(2006) 10 NWLR (Pt. 988) at 382 at 485. Similarly the phrase, or other court of equivalent jurisdiction, used after listing Area Court and Customary Court was construed in the context of Section 41 of the Land Use Act to import court other than the two mentioned courts. In other words, the phrase was construed to confer jurisdiction on an additional court. It is our argument that the phrase 'or the removal of the President from office for any other reason in accordance with Section 143 or 144 of the Constitution' connotes that permanent incapacity in Section 144 is different from the permanent incapacity in Section 146 of the Constitution.

The refusal or neglect of the President to transmit the necessary declaration under Section 145 of the Constitution is a breach of his oath of office under the Seventh Schedule to the Constitution.

Thus, where for example, the President fails as in the instant case to make the necessary transmission of the declaration referred to in Section 145 of the Constitution, and it is indubitable that he is in a hospital and has been there for weeks or months on end, a court of law would be justified to hold that he is permanently incapacitated with the meaning and intendment of Section 146 of the Constitution.

The Supreme Court case of *AGF v Abubakar* (2007) 10 NWLR (Pt. 1041)1 containing an obiter that courts cannot declare the office of Vice President vacant under Section 146 of the Constitution is distinguishable from the present situation. In that case, a sitting President on his own declared the office of the Vice President vacant. Thus the issue was on the legality of that declaration. Consequently, the issue before the Supreme Court was not whether or not the court can declare the office of the President vacant. In other words, even the dictum of Akintan, JSC is an obiter, of course an eminent obiter if ever there is such.

Nevertheless, even Justice Akintan in that case made it clear that while the court may not declare the office of the President vacant, Section 146 speaks of 'Discharge of functions of President'. The logical inference from the obiter of

Justice Akintan is that although the court may not declare the office vacant, in deserving cases, it may permit or order the Vice President to discharge the functions of office of the President.

Onu, J.SC listed the conditions under which the Vice-President can hold the office of the President at page 94 of the report. He did not use the word 'vacant' and that obviously is advised. He listed those conditions in section 146 and separated permanent incapacity from the removal of the President under section 144. This we contend supports our argument that there are two types of permanent incapacities.

The above interpretation of Honourable Justice Akintan's dictum is also supported by the view of Aderemi, JSC. While making the point that in important Constitutional cases like this, courts should never plead frustration or that they are helpless. On pages 171-172 of the law report, he urged judicial creativity in the following powerful words: 'No legal problem or issue must defy legal solution. Where this not to be so, the society as usual will continue to move ahead law. God forbid. We then remain stagnant and consequently become useless to mankind. With this unfortunate consequence at the back of his mind, a judge whenever faced with a new situation which has not been considered before by his ingenuity regulated by law must say what the law is on that new situation, after all law has a very wide tentacle and must find solution to all man-made problems'.

Our current constitutional crisis certainly that calls for ingenuity.

But what is 'permanent incapacity'? 'Permanent disability' which is akin to 'permanent incapacity' is defined by the Black's Law Dictionary (Seventh Edition), page 474 as 'a disability that will indefinitely prevent a worker from performing some or all of the duties that he or she could do before an accident' (emphasis supplied). It is submitted that 'permanent incapacity' can be defined as any situation in which a person will be indefinitely prevented from performing some or all of the duties that he or she could do before. The President arising from his absence has not been able to perform most of his duties. In particular, he has not been able to perform his function under Section 148(2) which requires him to hold regular meetings with the Vice President and other ministers. Of course, he cannot delegate that power to the Vice President because that would mean that the Vice President would be meeting with himself, an absurdity that the lawmaker could not have imagined let alone intended.

Guidance exists in employment law. At any rate, rule 010101 of the Public Service Rules, 2006, states that the rules are applicable to the President to the extent that they do not conflict with the Constitution. Whenever an employee absents himself from work without any excuse or information to his employers (in this case the National Assembly which represent the people, the President's employer) he is liable to summary dismissal. See *Udegbonam v FCDA* (2003) 10

NWLR (Pt. 829) 487 at 502-503. In that case, the Supreme Court affirmed a rule of the Civil Service to the effect that an employee who absents himself from duty without leave renders himself liable to be dismissed from service without formality and the onus shall rest on him to show that the circumstances do not justify the imposition of the full penalty. We submit that the onus rests on the President and his handlers to show that the circumstances of his absence do not warrant a conclusion that he suffers from permanent incapacity within the meaning of Section 146 of the Constitution.

Conclusion

Our argument here has been that compliance with Section 145 of the Constitution is mandatory and that where a President who travels out for medical treatment fails to comply with it, that failure should warrant an inference that he or she was either too infirm as not to be able to do so or that the President negligently or wilfully failed to comply with it.

In both cases, the court should rise to the occasion and hold that the infirmity necessitating the inability or failure to comply with the provision of section 145 borders on permanent incapacity. Of course, the National Assembly may proceed against a defaulting President under section 143 and treat the failure to comply with section 145 as a gross violation or breach of the provision of the Constitution.

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