

## **Supreme Court on Obi: Reinforcement of its guiding angel role**

*By Akin Ibidapo-Obe*

**I** MUST confess that I was one of the skeptics of Peter Obi's chances of continuing in office in the face of the April 14, 2007, elections which threw up Dr. Andy Uba of the Peoples Democratic Party (PDP) as the elected governor of Anambra State. As far as I could see, the omens were grim. Firstly, no less a figure than the honourable Chief Justice of Nigeria as Chairman of the National Judicial Council (NJC) had warned judges against issuing last minute injunctions, *ex parte* or otherwise, stopping the 2007 elections from holding. (Incidentally, one has always viewed such extra-judicial pronouncements as an undue interference with each judge's judicial discretion.)

Secondly, a battery of contestants had picked up the gubernatorial gauntlet and Peter Obi made spirited efforts to contest the election on the platform of All Progressive Grand Alliance (APGA) but was denied by the Independent National Electoral Commission (INEC). Having thus approbated, I did not imagine that Obi would again reprobate by maintaining that his mandate was still extant and had not been extinguished.

Thirdly and more daunting was that Section 285(1)(v) of the constitution had clearly conferred jurisdiction to the determine whether "the term of office of any person under this constitution has ceased" on "one more Assembly election tribunal.." At this point in the unfolding political drama in Anambra State, no election tribunal had been constituted.

This is a crucial point because the Supreme Court judgment has been impugned on this score by no less a legal authority than the eminent, assiduous and untiring legal observatory - Gani Fawehinmi (SAN) in a recent published commentary (The Guardian of Sunday June 17, 2007.) We shall, however, come back to the issue anon.

Now, my skepticism did not imply that I did not personally sympathise with the principle behind Peter Obi's crusade that he is entitled to a full tenure but the legal prospects and procedural pitfalls appeared daunting.

Somehow, the matter has wound itself through the legal maze and ended up at the apex court enabling that court to give its earth-shaking verdict. The purpose of this analysis is to consider some salient legal issues thrown up by the judgment, as given, even as we speculate on the possible legal principles upon which the *rationes decidendi* will be based when it is issued by the court on July 13. The issues to be considered include the law and principles upheld by the apex court; the pros and cons of the court's unanimous verdict; the vexed issue of jurisdiction, and some observations relating thereto; the jurisprudence of a social engineering role for the courts; and some concluding recommendations for changes in the relevant laws.

Legal principles upheld by apex court

The legal and constitutional principles settled irrevocably and irreversibly by the apex court include the tenure of a governor; the possibility of staggered elections; the

court as master of its own proceedings; the denial of an injunction by the court and its intersection with the sub-judice principle.

The coming of staggered elections

Obi's counsel had narrowed the matter somewhat to seeking a constitutional interpretation of a governor's tenure.

The court in interpreting the constitutional provision relating to Peter Obi's tenure held that Section 180(1) and (2) in its literal or grammatical interpretation implied that his tenure endured till 2010 counting from the date on which he took his oath of office as governor. The fact that this could take Anambra or any other similarly concerned state out of the national electoral calendar, the court opined, is consistent with a federal democracy and practices in other countries.

The court as master of its own proceedings

The appellant, Peter Obi, had asked the Supreme Court on the eve of the swearing in of newly-elected Andy Uba to stay the event by injunction. The court declined, but ordered an accelerated hearing of the matter. In a marked departure from tradition, the court declined to remit the case to the election tribunal as done by the two lower courts. Instead, the court assumed jurisdiction to go into the facts of the case to fully resolve the legal issues in view of its constitutional importance. The court relied on its own rules to substantially abbreviate what could conceivably have been a protracted legal battle, a protractedness that would defeat the time-sensitiveness of the case. For us, the mandate of the Supreme Court is elastic enough to accommodate such a procedure and an apex court ought not to be constrained by unduly technical rules over the need to do substantial justice.

Refusal of injunction does not obviate sub-judice principle

Oftentimes, the only way to restrain a respondent from confronting the court with a fait accompli is to ask for an injunctive order. Being a discretionary power and because of its coercive nature, the courts are reluctant to grant such orders against other estates of the realm. However, such refusal has usually been misinterpreted by the respondent as a licence to flout the ethical rules that come into play in such situations. The Supreme Court at that interlocutory stage warned INEC: "Your action has been challenged. If you proceed with your actions, they will be reversed if the facts warrant it". INEC ignored the warning and proceeded to issue Andy Uba with a certificate of election as governor upon which he was sworn in. In its final judgment, the court through Katsina Alu JSC, its presiding Panelist and Oguntade JSC, alluded to this brazen "disobedience" of an injunction that was never given, yet implied in the sub-judice principle:

A unanimous verdict

The legal order, Nigerian Bar Association's (NBA) former President, Aka-Bashorun once opined, has the inherent capacity to secure our rights and ensure the rule of law. The objective condition for this has always been present. These comments made about the Supreme Court under a military dispensation has deeper resonance in a democracy.

"The command of the public force", noted Oliver Wendell-Holmes the American sociological jurist, is entrusted in the judges who thus point the way to social reform. In the case of Paul Unongo Vs. Aper Aku(1983) 2 S.C.N.L.R. 322., the Supreme Court described its role as that of a "Supervisor-at-large" established by the constitution to do justice to all manner of people coming before it, including the state. Of all the courts, the verdict of the Supreme Court carries the weight of finality and every chief justice desires a unanimous verdict for several reasons:

Firstly, it shows leadership on the part of the chief justice, whether he is a member of the panel or not. It is significant, in my respectful view, that the chief justice did not sit on the Peter Obi Panel because of his impending exit. Perhaps, his successor is being given the opportunity to show his hand and stamp the decision with his authority.

Unanimity sends a powerful message by the unity of the voices behind it. A dissent or two weakens the strength of a judgment. Co-equal judges it then seems, are expounding different perspectives of law with one being as attractive as the other. Chief Justice Earl Warren was a strong chief justice, an effective and persuasive leader and he and his other associate justices are reputed to have achieved more, in terms of social changes engendered by their decisions, than the other two arms of government put together. The Indian Supreme Court had the legendary Justice Bhagwati to champion the course of justice in the world's largest democracy.

The quest for unanimity, however, has its negative sides: it may lead to the sacrifice of individuality whereby valuable insights and perspectives may be lost. It may also lead to quid pro quo situations where a justice may cast a critical vote for unanimity in exchange for judicial support for cases he too may be feel strongly about.

Supreme Court jurisdiction over governorship election cases

Whilst Chief Gani Fawehinmi (SAN) applauds the result of the Supreme Court's decision in Peter Obi's case and urges its acceptance because it is the final court, he is of the strong view that the court lacked the jurisdiction to entertain the suit.

In his words:- "There is nowhere in the Constitution of Nigeria that the Supreme Court is vested with jurisdiction to take an appeal from the Court of Appeal in an election matter determined by the election tribunal and appealed against to the Court of Appeal...

Only in the presidential election can the Supreme Court entertain an appeal from the Court of Appeal in all matters relating to election including the tenure of office of any person."

The learned Senior Advocate predicated his arguments on Sections 285(1) and 246(3) conjunctively. Now, the question of jurisdiction of election tribunals over election matters was raised at both lower courts and confirmed. Apparently, the Supreme Court did not feel constrained by such jurisdictional objections and for now, we can only hazard guesses as to why?

Lacunae in Section 285(1) and (2):

Section 285(1) of the 1999 Constitution proposes the establishment of "one or more" National Assembly election tribunal and the governorship and Legislative Houses election tribunal. It is our respectful contention that only the jurisdiction of the National Assembly election tribunal stretches to the right to determine and hear petitions as to whether "the term of office of any person under this Constitution has ceased". (Section 285(1)(b)) and whether "the seat of a member of the Senate or a member of the House of Representatives has become vacant", (Section 285(1)(c).

Our position is supported by the clear severance of Section 285(1) from Section 285(2) which governs the establishment of governorship and (State) Legislative Houses election tribunals wherein the jurisdiction of the tribunal is restricted to ... "original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of governor or deputy governor or as a member of any Legislative House.

For the purpose of emphasis, only the mandate of the National Assembly election tribunal under Section 285(1) extends to the consideration of whether the tenure of any national legislator has expired.

In contrast the mandate of the Governorship and Legislative Houses Election Tribunal under Section 285(2) does not extend to the consideration of whether the tenure of a governor or state legislator has expired but is restricted to whether "any person" (governor or state legislator) has been validly elected to such office.

The consequence of this analysis is that Peter Obi was well advised to have routed his quest for the determination of the proper extent of his tenure through the Federal High Court, INEC being a federal agency, and, as directed by Sections 251 and 286 of the constitution. The Federal High Court and the Court of Appeal were wrong to have declined jurisdiction.

From this point of view, the provisions of Section 246(3) on the finality of Court of Appeal decision on election petitions, simpliciter would not apply and the Supreme Court would have properly exercised its normal jurisdiction over appeals emanating from the Court of Appeal.

Section 285(1) and (2) Envisages A Permanent "Constitutional Court"

A closer perusal of Section 285 would reveal that the electoral courts (speaking descriptively) envisaged by the constitution in Section 285(1) and possibly, Section 285(2) are not the ad-hoc, post-election, and election - issues - focused tribunals currently seised with election disputes, but a permanent "constitutional" court that would constantly review issues of tenure of members, vacancy of legislative seats, recall of legislators by their constituents among others, as and when they occur. We recall that several of such disputes occurred in the Second Republic (1979 - 1983): Markarfi Vs. Speaker, House of Representatives (1981) 2 N.C.L.R. 473; Senator Wayas Vs. Basil Okwu (1981) 2 N.C.L.R. 522.

Section 285(2), it is submitted evinces a similar intention with respect to the tenure of governors and State legislators (See: Alegbe V. Oloyo (1983) 3 SCNLR 35) but the sub-section has been inelegantly drafted thereby giving the opposite and unintended impression.

Present election tribunals not primed for tenure cases

Election tribunals have been established in the states where election disputes have emanated. That function fell on the president of the Court of Appeal who has not only constituted the membership of the tribunals but also stipulated guidelines for the filing of petitions.

The Electoral Act 2006 and the guidelines for the filing of petitions rolled out by the president of the Court of Appeal again places all its emphasis on procedural election disputes - number of lawful votes cast, disqualification of contestants, contents of petition, fraudulent announcement of results, joinder of electoral officers and so on.

In addition, governorship and legislative election tribunals have been lumped together leading to congestion of these courts. Typically, the election tribunals are seised of about two or more governorship and scores of legislative election petitions. Peter Obi's Anambra State election tribunal has four pending governorship election petitions. Consequently, for Peter Obi to have approached the election tribunal could have delayed his dispute anchored solely on the interpretation of a few sections of the Constitution, on a queue of cases involving testimony of a string of witnesses (possibly hundreds, to judge from the Buhari Vs. Obasanjo (Suit No SC/3/2005) presidential election petition.

There is also the issue of "time jurisdiction." Even if it is conceded that Peter Obi's case is strictly an "election petition; the question of which election remains. A 2003 election tribunal had vindicated his complaint that he had been rigged out by Christ Ngige, Chris Uba and the PDP. He was restored, though belatedly to his elected position of governor. A 2003 election tribunal would therefore be functus officio and a 2007 tribunal time-barred on the same matter of how long his restored tenure would be.

Thus, a severance of issues by Peter Obi is in order: the election matter dealt with by the 2003 election tribunal and the matter of the interpretation of his restored tenure.

The fluidity of legal formulation of issues for determination and selection of forum

The form in which a legal dispute is presented is part of the arcane skills of the legal profession and depending on the ingenuity of counsel, the jurisdiction of a court could be compelled even as the same matter, presented in another legal format could repel jurisdiction.

For example, O.J. Simpson, the Black American actor was discharged and acquitted of murder of his wife Nicole and her lover. However, based on the same facts, before a civil court, Simpson was damnified in hefty damages for wrongful death of the victims.

To take a local example, a counsel may couch the wrongful dismissal of a government employee in such a manner as to present it as a claim for the enforcement of the fundamental right to fair hearing and due process.

Gani Fawehinmi, learned Senior Advocate argued strenuously that Peter Obi's tenure case is an "election petition" over which the apex court lacks jurisdiction based on Section 246(3) of the Constitution.

On the contrary, Obi's counsels (led by Ikpeazu, SAN) presented it as a civil proceeding "involving a question of law alone" and cognisable by the Court of Appeal by virtue of Section 241(b) and (c) and by the Supreme Court under Section 233(1) and 233(2)(a) and (b).

#### Conclusion

The Supreme Court of Nigeria has lived up to the expectations of Nigerians for justice in Peter Obi's case. It has done so in a timely, efficacious and constitutional manner, thereby reinforcing its role as overseer of the rule of law and legality.

An activist or reformist Supreme Court definitely should not allow itself to be constrained by undue jurisdictional restrictions or technicalities in achieving its laudable goals.

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