Governor Ngige's acts in office valid (II)

In the Court of Appeal Enugu Judicial Division Holden at Enugu on Thursday, June 26, 2008, before their lordships: Victor Aimepomo O. Omage, Justice, Court of Appeal; Stanley Shenko Alagoa, Justice, Court of Appeal; Mohammed Ladan Tsamiya, Justice, Court of Appeal; Olukayode Ariwoola, Justice, Court of Appeal; Sidi Dauda Bage, Justice, Court of Appeal; CA/E/319/2007 Between: Rt. Hon. Michael Balonwun & five 0rs.

(For themselves and on behalf of Honourable members of Ananbra State House of Assembly who held the first session of the House of Assembly of the State upon the proclamation or the holding) (appellants) of the first session by His Excellency Mr. Peter Obi

(excluding those Honourable members of Anambra State House of Assembly who do not support this suit.)

and

(Governor of Anambra State) first respondent,

Hon. Anayo Nnebe (Speaker) & 32 ors.) second - 32th respondents.

(For themselves and as representing other candidates who contested April 14, 2007, election for all the 30 seats of Anambra State House of Assembly for the session covering June 2007 - June 2011, excluding those candidates who are not is support).

THE members of Anambra State House of Assembly now issued a writ by originating summons for a declaration that on the proper interpretation of sub-section 3 of Section 105 of the 1999 Constitution, (1) which proclamation they asked, of which the governor is binding on them; (2) If the court rules that the proclamation issued by His Excellency, Peter Obi, then by the proclamation of March 17, 2006, their tenure would not have begun on June 9, 2003, when they were sworn in, but on March 17, 2006, when Mr. Peter Obi issued a proclamation order; to enable the term of the member of Anambra State House of Assembly to terminate on March 17, 20 I 0, when the term of Mr. Obi would expire.

The reasoning of the appellants is contained in the following submissions made by them

- That because the election of Dr. Chris Ngige was nullified, the order of proclamation issued by Dr. Ngige was also nullified;

- That the order of nullification issued by Dr. Andy Uba was also nullified since Dr. Uba was chased out of the seat of governor of Anambra State by the Supreme Court.

  That it is only the order of proclamation issued by Mr. Peter Obi that is not nullified, and that it binds the appellants and they reasoned and submitted that the order of proclamation by itself contains within it an implication for

extension of tenure of the period of the membership of Anambra State House of Assembly. My Lords, an order of proclamation does not contain such benefit to the increase of the duration of the House, since to imply so is to defeat the clear provisions of sub-section (1) of Section 105 of the 1999 Constitution, which is a peremptory order for the determination of the life of the membership of the Anambra State House of Assembly.

The comments of the trial court, however, founded which is not contained in the basis of the judgment and decision of the court below is a mere observation and cannot form a ground of appeal.

The trial court is not a litigant in the pending case and the statement is not a subject of contest in the court, which is argued by the counsel in the court below. Ground three and the issue formulated on it is incompetent, it is struck out of the proceedings.

My lords, I will now deal with issues one, two and four in the appellants' brief to which the respondents have filed brief in absolute apposition to the arguments of the appellants. I wish to commence the treatment of this segment of the appeal by expressing the opinion of this court as contained in my judgment on the issue four in the appellants brief to which the second to 30 respondents also responded in the brief of Arthur Obi Okafor for the respondent. The question is whether the lower court erred in law in wrongly interpreting the phrase "shall have power", among others.

The trial court had ruled in his judgment before the court that the phrase "shall have power" merely inform the donee of the power his ability in relation to the issue in contest and under Section 10 of the Interpretation Act, the powers is exercisable as and when due or necessary.

The phrase is not mandatory. The respondents counsel in the submission in his brief agrees with such definition. It is, therefore, correct to cite in support of the submission as authority the decision of the court as in Umar v. Governor of Kaduna State & Ors. Reported (1981) 2 NCL 689. The word "shall' used without more may be one or all of these mandatory directives, or persuasive. It would depend on the circumstance in which it is used. See Ishola v. Ajiboye (1994) 7 - 8 SCNJ per Iguh JSC. For instance, in the 1979 Constitution, it was ruled by the Supreme Court that Section 238 thereon was used not in a mandatory or directory manner, but in a persuasive sense. See Karto v. Central Bank (1991) 12 SCNJ. In sub-section (1) of Section 105 of the 1999 Constitution which subscribe thus: "A House of Assembly shall stand dissolved "at the expiration of four years", among others. The word shall therein used is mandatory. It allows for no alternative. The various Houses of Assembly in Nigeria shall necessarily stand dissolved when four years have been concluded and their tenure ends. What is left uncertain is the date of the first sitting of the House. However, when in sub-section 3 of Section 105 of the 1999 Constitution subscribes thus: subject to the provisions of this Constitution, the governor of a state shall have power to issue a proclamation for the holding of the 1st session of the House of Assembly of the state House concerned immediately after his being sworn in for its dissolution", among others. The phrase "shall have power" therein used is only to inform the elected governor of the power he possess as a governor, an attribute of his

gubernatorial power and position. There is no compulsion to use the power other than as it is necessary. The word shall therein used is not compulsory; it is only directory when it needs to be used.

In an ideal situation, the membership of the House of Assembly would not have had any sitting at the time a governor takes his own oath of office. The House of Assembly may have congregated in the House and await the taking of oath of the governor. Section 105(3) would then be properly applied and the governor may now make a proclamation of the first sitting of the House of Assembly now inaugurated by the proclamation of the governor.

My lords, in my view, once such a proclamation has been made by a governor to bring into life first sitting of House of Assembly, the relevant House of Assembly has begun, there would be no need for further proclamation for another first sitting; as the sitting of the House has already commenced.

The situation advocated by the appellant of having another first sitting after the House of Assembly of Anambra State had been sitting for over two years makes a ridicule of the respected procedure in an Honourable House. It is not feasible. All the House needs to do is to disable the ruling governor. Then, the House will have an endless session when a new governor is unable to proclaim a new fresh session.

The word proclamation therein simply announces the first assemblage of the House of Assembly; not otherwise, it is not intended for use, when the House had previously been proclaimed by a governor.

For the several reasons stated above, the appellant is in error and misconceived the purport and meaning of the phrase 'shall have power' when the counsel submitted that the phrase is directory, it is not.

I resolve the issue against the appellant. Issues one and two in the appellants' brief ask whether the lower court gave proper interpretation to the provisions of Section 105(3) of the 1999 Constitution, on whether the action of Dr. Ngige and Dr. Andy Uba are saved in law.

The objective of the two questions contained in the issues of the appellant is to create opportunity for the appellant to justify his submissions, that it is the second coming of His Excellency, Mr. Peter Obi, which initiated the commencement of sitting of the Anambra State House of Assembly.

The respondents have denied this and submitted that at most, assuming that the tenure not the election of Dr. Uba, and Dr. Ngige are called in question by a nullification by the Court of Appeal, the action taken by the two governors remain effective in law, that the actions of the two governors at different times are saved by the doctrine of regularity and are de facto effective since the said Dr. Ngige and Dr. A. Uba were, in fact, before the annulment of their election regarded as de jure governors. If not so, at least, de facto by virtue of the fact that the two were sworn in as governors.

This is also the decision of the court below with which the appellant was dissatisfied. In this appeal on this issue, Dr. Chris Ngige was returned as the lawful governor of Anambra State at the time before the court's decision nullified his election following the findings of the governorship election tribunal.

Governor Ngige took on his initial election, an oath of office which Mr. Obi took. Governor Ngige exercised for two years all the functions of a governor. Nothing in law has nullified those actions, though his election has been nullified. All the acts performance by him in that period as governor were legally performed. The nullification of his election has made him to cease the performance of those functions as a governor, the actions made by him at a time before his nullification remains valid and enforceable at law. To hold otherwise will engender chaos.

The various and several legislations made by the House of Assembly which were assented to by the governor as an issue from the House of Assembly remain valid, legal and binding and are not set aside or rendered null and void.

The reasons are many; the laws were not made by Dr. Ngige alone. In accordance with parliamentary practice, many of the legislations affecting Anambra State originated from the Anambra State House of Assembly. No matter what procedure was used in Anambra State, the legislations originated from the House in Anambra State, the governor merely assented to each of them to make it law. There are also various appointments made in the over two years spent when Dr. Ngige was governor. All these remain legally made and binding, though the governor has ceased to be one. The same principle applies in the case of Dr. Andy Ubah. The respondents' brief shows that Dr. Ngige made an order for proclamation of the House of Assembly after he took his oath of office, the proclamation created the commencement of the first sitting of the Anambra State House of Assembly. Thereafter, Governor Ngige made the Appropriation Law, which remain in force and enabled the public servants of Anambra State to be paid their salaries. These legislations are still in operation in Anambra State, it leaves little to imagination why the former members of the House of Assembly are saying and submitting that only the proclamation made by Dr. Ngige as governor is null and void.

The proclamation order issued at the commencement of his tenure by Dr. Ngige for the first sitting of the House is valid; and the subsequent order issued by Mr. Peter Obi is needless, because the member of House of Assembly was already sitting.

A new proclamation made by Mr. Peter Obi to the House does not at all affect the tenure of Anambra State House of Assembly, which should terminate at the expiration of four years from the date of its first sitting in 2003.

The enlargement of time given by the Supreme Court to Mr. Peter Obi in (2007) II NWLR 654 as specifically stated applies to Mr. Peter Obi alone. The judgment expressed it in these words "for the avoidance of doubt, this judgment relates only to the Office of the Governor of Anambra State".

I have arrived at the conclusions above because I have read the decision in Ngige v. Obi. I have seen nowhere therein where the tenure of Dr. Ngige as governor was declared null and void; the decision only concerns the nullification of the election of Dr. Ngige as governor of Anambra State after over two years of the governorship of Dr. Ngige whereas the binding force in the judgment is the issue determined in the judgment.

There is no pronouncement on the actions, decisions and tenure of Dr. Ngige. See Anambra State Government v. Marcel Nwankwo (1995) 9 NWLR (Pt. 418) at 247; also Oyewumi v Ogunisan (1990) 3 NWLR (PI. 137).

It will be unwise and unsafe to declare null and void the decision and actions taken and performed as governor in the tenure of Dr. Ngige and Mr. Obi in those years of their governorship because to do so will cause a distrust of subsequent decisions of the government functionaries and create a lawless society. To do so will certainly open a floodgate of fruitless litigation.

A government is a continuing, whether or not its officers are legally appointed. The trial court in its judgment has formulated a way out to declaration of its validity validly when he proposed that at worst, the decision of the governor while in government before he was removed, be treated as action done when the governor was a de facto governor; and submits that it should make the action legal.

It is indeed a statement of fact. The only constant to the proposition is that the time Dr. Ngige was exercising the power of a governor, there was no opposition to the exercise of his power. After all, before the nullification, the governor was lawfully sworn in. The acts performed as the governor by Dr. Ngige, was legal and enforceable at law. In sum, I resolve issues one and two against the appellants and dismiss the appeal.

I award in favour of the respondents the sum of N10,000 as cost.

The parties were represented by Nnamdi Ibegbu (SAN), with Onyechi Ononye for the appellants and Arthur Obi Okafor with him Fidelis Aniukwu, Martins Okeke. J.O. Nwankiti Chugbo Enwezor, and Okey Ubah for the respondents.

(Concluded)