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CASE NOTE

All Progressives Congress v Bashir Sheriff and Others: The Conflict Between Legal Technicalities and Justice

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Abstract
One of the issues for determination in *All Progressives Congress v Bashir Sheriff and Others* was whether the first respondent won the primary election that was conducted according to the Electoral Act 2022. This issue, however, was not addressed because the Supreme Court set aside the suit because the first respondent failed to initiate it through the proper originating process. This decision contrasts with its previous judgment in *Ekanem v The Registered Trustees of the Church of Christ the Good Shepherd*, where it held that an inappropriate originating process does not undermine the competence of a suit. By departing from this previous decision, this note argues that there is a high possibility that the Supreme Court may have aided in the subversion of the Constitution. It recommends that the Electoral Act 2022 be amended to restrict the court's authority to dismiss election disputes if they were initiated through inappropriate originating processes.

Keywords: Election; Nigeria; originating processes; jurisdiction; Electoral Act 2022

Introduction

One of the issues affecting democracy in Nigeria is the absence of internal democracy among the political parties.[1] Each election cycle underscores the need for electoral rules to ensure that political parties conduct free and fair primary elections and, more crucially, that lawfully elected candidates at the primary stage are not arbitrarily excluded from the general election. This is undoubtedly one of the reasons the Electoral Act 2022 requires party primaries to be overseen by the Independent National Electoral Commission (INEC), the election management body in Nigeria.[2] Specifically, the Electoral Act 2022, section 84(1) provides that a "political party seeking to nominate candidates for elections under this Act shall *hold primaries for aspirants to all elective positions which shall be monitored by the Commission*" (emphasis added).

One of the issues for determination in *All Progressives Congress v Bashir Sheriff, Ahmed Lawan and INEC* (*APC v Bashir Sheriff and Others*)[3] was whether the first respondent won the primary

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1 DA Odigwe "Nigerian political parties and internal democracy" (2015) 4/2 *African Journal of Governance and Development* 66; B Sule and MA Yahaya "Internal democracy and Nigerian political parties: The case of All Progressive Congress (APC)" (2019) 4/1 *Qualitative and Quantitative Research Review* 113.

2 Constitution of the Federal Republic of Nigeria 1999 as amended, sec 153; Nigeria's Electoral Act 2022, sec 2.

3 LPELR-59953(SC).

election that was conducted in accordance with the Electoral Act 2022.[4] Unfortunately, given that the judgment of the Supreme Court was based wholly on the type of originating process that was used to commence the proceeding at the Federal High Court, the court did not have the opportunity to consider the substantive issue in dispute. A corollary of this judgment therefore is the risk that the Supreme Court might have aided the appellant political party to successfully exclude a candidate that participated in a primary election that was conducted according to the provisions of the Electoral Act 2022. This is because the first respondent instituted the suit to restrain the appellant from recognizing the second respondent as a lawful candidate on the basis that he did not participate in the primary election. The Supreme Court, on the other hand, ruled that the first respondent should not have filed the claim through an originating summons because the allegations of electoral fraud, along with other irreconcilable inconsistencies in the parties' affidavits, proved that there was a tangible dispute on the facts, which rendered the proceedings inappropriate for adjudication through the originating summons.[5]

It is evident that this decision in *APC v Bashir Sheriff and Others* has repercussions not only for the parties, particularly the first respondent, but also for the development of democracy in Nigeria. This leads to the question as to the appropriate amendment that should be made to the Electoral Act 2022 to ensure that the courts do not have the power to set aside pre-election and election suits that were commenced using the wrong originating process. Democracy is still in its early stages in Nigeria, and there is an important need for the judiciary to interpret pertinent provisions of the existing law. Interestingly, court decisions in Nigeria have led to the amendment of the electoral law. For example, the Supreme Court decision in *Amaechi v INEC*[6] inspired a significant amendment to the Electoral Act 2006. In this case, the appellant contested the primary elections in Rivers State and emerged as the People's Democratic Party's (PDP's) gubernatorial candidate for the general election. However, his party replaced his name with another member of the party. At the end of the general election, the PDP won.

In a suit instituted by the appellant, the Supreme Court declared the appellant the governor of Rivers State even though he did not participate in the general election. The court argued that since the Constitution of the Federal Republic of Nigeria 1999 (the Constitution) does not make provision for independent candidature,[7] only political parties can win elections in Nigeria.[8] Consequently, the court ordered that the appellant be sworn in as governor even though he did not personally participate in the election. To forestall the abnormality of this decision, the Electoral Act 2006 was amended in 2010. According to the Electoral Act 2010, section 141, "an election tribunal or court shall not under any circumstance declare any person a winner at an election in which such a person has not fully participated in all the stages of the said election". If this provision had been present in the Electoral Act 2006, the Supreme Court in *Amaechi v INEC*[9] would not have had the power to declare the appellant the winner of the election since he did not participate in the general election. Accordingly, in *Abdulrauf Modibbo v Mustapha,*[10] the Supreme Court held that *Amaechi v INEC*[11] is no longer a good law as it has been set aside by the aforementioned section 141 of the Electoral Act 2010.

This note contends that *APC v Bashir Sheriff and Others*, just like *Amaechi v INEC*, should result in the amendment of the Electoral Act 2022 to ensure that courts do not have the power to set aside an election or pre-election suit simply because it was initiated through the wrong process. In addition to this introduction, this note is divided into four sections. Section two explores the facts of the case pertinent to this discourse. Section three critically examines what informs the

4 Id at 6.
5 Id at 37.
6 [2008] 5 NWLR (Pt 1080) 227.
7 See the Constitution, sec 221.
8 *Amechi v INEC*, above at note 6 at 317.
9 [2008] 5 NWLR (Pt 1080) 227.
10 [2020] 3 NWLR (Pt 1712) 470.
11 *Amechi v INEC,* above at note 6.

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choice of an originating process and what a litigant should do when the rules of court conflict with other rules imposed by the court. It also deepens the thesis of this note by evaluating the rationale for amending the Electoral Act 2022. Finally, section four presents the recommendations and conclusion.

Relevant facts of the case

On 22 June 2022, the first respondent filed an action at the Federal High Court by way of originating summons against the appellants, the second and third respondents, alleging that the second appellant withdrew from the Yobe North Senatorial District primary election to participate in the presidential primary election and thus did not participate in the appellant's primary election conducted in accordance with section 84 of the Electoral Act 2022. He therefore sought, among other things, a declaration that it is illegal for the appellant to recognize the name of the second respondent as its candidate for Yobe North Senatorial District in the 2023 general election, as well as a declaration that it is illegal for the appellant to replace his name with the name of the second respondent in the primary election for Yobe North Senatorial District conducted by the INEC. After hearing arguments from the contending parties, the trial court found in favour of the first respondent. Aggrieved by the decision of the trial court, the appellant appealed to the Court of Appeal, which affirmed the decision of the trial court. The appellant then appealed to the Supreme Court. Before considering the substantive issues, the Supreme Court had to determine whether the first respondent was right to commence the proceedings through an originating summons.

The appellant's counsel argued that the originating summons was not an appropriate method to commence the suit at the Federal High Court because the facts contained in the first respondent's affidavit directly accused the appellant of being fraudulent in forwarding or attempting to forward the second respondent's name to the third respondent as the candidate for the Yobe North Senatorial District general elections in 2023. In his response, the counsel to the first respondent argued that the appellant has waived its right to challenge the mode of commencement of the suit since it did not do so at the trial court and the Court of Appeal. He further argued that the second appellant did not deny the fact that he was an aspirant to the presidential primary election of the appellant, which concluded, and that he withdrew from the Yobe North Senatorial District primary election of the appellant in order to contest in this presidential primary election of the appellant.[12] In his reply, the counsel for the appellant argued that the mode of commencement of the suit affected the jurisdiction of the court and thus could be raised at any point.[13] After hearing the argument of both parties, the Supreme Court held in favour of the appellant and set aside the judgment of the Court of Appeal, which affirmed the judgment of the Federal High Court. In the Supreme Court's opinion, the trial court and the Court of Appeal's decisions were erroneous because of the originating process that the first respondent used to initiate the suit. According to Nweze JSC:

> "In the instant case, particulars were not even set out on the allegations of fraud as required by law, between the parties on the strength of the affidavit evidence placed before the lower court by the first respondent. The originating summons procedure was, irredeemably, improper to commence a suit founded steeply on allegation of diverse acts of fraud, misrepresentation and forgery.
> Such allegations are criminal in nature and central to the claims of the first respondent. They must be proved beyond reasonable doubt even in a civil proceeding and thus suitable for proceedings commenced by way of writ of summons …[14]

12 Citing *Lawson-Jack v SPDC (Nig) Ltd* [2002] LPELR- 1767 (SC).

13 Citing *State v Onaguruwa* [1992] 2 SCNJ 1 at 20.

14 Citing the Evidence Act 2011, sec 135(1); *UAC Ltd v Taylor* [1936] 2 WACA 70; *Usenfowokan v Idowu* [1969] NMLR 77; *Nwobodo v Onoh* [1984] NSCC 1.

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> With the allegations of fraud, coupled with other irreconcilable conflicts in the numerous affidavits, counter-affidavits and further affidavits filed by the parties, it becomes crystal clear that there is palpable dispute on the facts which makes the proceedings hostile and unsuitable for adjudication under the originating summons procedure …[15]
>
> It is thus clear to me that the judgment of the trial court and the lower court on the first respondent's originating summons, which they reached on disputed depositions in affidavits, were perverse and occasioned miscarriage of justice and so liable to be set aside. This must be so for where the procedure adopted to ventilate grievances is wrong, the processes ought to be struck out …[16]
>
> Facts are the spring board of law. It is the facts of the case that determine the appropriate procedure. *The first respondent's case is lost because of the unpardonable procedure resorted to by learned senior counsel for the first respondent*" (emphasis added).[17]

The court therefore found that commencing the dispute through an originating summons deprived the court of its jurisdiction to hear the substantive issues in dispute.[18]

Commencement of proceedings: Rules of court and practice directions

In Nigeria, civil proceedings can be commenced through the filing of any of the following four originating processes: writ of summons, originating motion, originating summons and petition. The provisions of the civil procedure rules of court show that the choice of originating process is dictated by a combination of the nature of the suit, the cause of action and of course the rules of the relevant court. For example, order 3 rule 1 of the Federal High Court (Civil Procedure) Rules 2019[19] states that, "[s]ubject to the provisions of any enactment, a civil proceeding may be begun by writ, originating summons, originating motions or petition or by any other methods required by other rules of court governing a particular subject matter".

Further to this, the rules contain instances where parties can use these types of originating processes.[20] The provisions of these rules of court clearly show that parties are not free to adopt any form of originating process but must look at the relevant rules of court to determine the appropriate mode to commence their proceedings. This notwithstanding, a cursory look at order 3 rule 1 also shows that a litigant can adopt other methods as long as the subject matter is regulated by another rule of court governing that particular subject matter. For instance, the Federal High Court (Pre-Election) Practice Directions 2022 mandates parties to pre-election matters to commence their dispute with an originating summons. Rule IV(1) of this Practice Direction[21] states that "every pre-election matter shall be commenced by an originating summons as specified in Forms 3, 4 or 5 of Appendix 6 to the Federal High Court (Civil Procedure) Rules, with such variations as circumstances may require".

It therefore follows that, since the direction regulates the institution of pre-election cases, parties ordinarily should comply with the Practice Directions 2022 and commence pre-election matters through originating summons. This literal interpretation of order 3 rule 1 of the Federal High Court (Civil Procedure) Rules 2019 and rule IV(1) of the Practice Directions 2022 is probably the reason counsel for the first respondent (the plaintiff at the court of first instance) in *APC v*

15 Citing *Ekanem v The Registered Trustees of the Church of Christ, the Good Shepherd* (SC/349/2011 delivered on 02/12/2022) reported in [2023] All FWLR (Pt 637) 203.

16 Citing *Odiase and Another v Agho and Others* [1972] 1 All NLR (Pt 1) 170 at 177.

17 *APC v Bashir Sheriff and Others*, above at note 3 at 47–49.

18 Id at 38.

19 This rule was used because *APC v Bashir Sheriff and Others* was commenced at the Federal High Court.

20 The Federal High Court (Civil Procedure Rules) 2019, order 3 rules 2, 6 and 7.

21 Rule II(1) of the Practice Directions 2022 states that the directions shall apply to every pre-election matter brought pursuant to the provisions of the Constitution of the Federal Republic of Nigeria 1999 and the Electoral Act 2022.

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Bashir Sheriff and Others[22] commenced the proceedings through an originating summons since the issue regarding whether the appellant should forward the name of the first respondent to INEC is a pre-election matter as envisaged by the Practice Directions 2022.

However, it is worth noting that in complying with a practice direction or "other rules of court" as envisaged by order 3 rule 1, counsel has an important obligation to ensure that the provisions of the practice direction are not in conflict with the main rules of that specific court. This is because the preponderance of judicial decisions shows that the rules of court take pre-eminence over any practice direction issued by the chief judge of that court. Accordingly, in *University of Lagos & Another v Aigoro*,[23] the Supreme Court held that practice directions "do not have the authority of rules of court although they are instructions in aid of the practice in court". Citing this decision of the Supreme Court, the Court of Appeal in *Haruna v Modibbo*[24] held that practice directions can neither overrule the rules of court nor judicial decisions. It therefore follows that where there is any conflict between the rules of court and a practice direction, the rules of court will ordinarily prevail. Therefore, in *Adams v Umar*,[25] the court held that notwithstanding their value, practice directions must be acknowledged as lacking legal authority and being unable to impose restrictions on a rule of court.

In other words, if a rule of court and a practice direction conflict, the rule of court must take precedence. In situations where there is no such conflict, they collaborate to further the interests of justice. The clear implication of this for parties wishing to commence a pre-election matter at the Federal High Court, like the parties in *APC v Bashir Sheriff and Others*, is that although initiating a pre-election matter through originating summons as mandated by the practice direction can expedite the resolution of the issues in dispute,[26] they must ensure that the provisions of the practice direction are not in conflict with the court rules on the appropriate mode to commence the suit. This is because, if there is a conflict, the court rules will take precedence over the practice direction.

The use of originating summons and the civil justice system in Nigeria

The English common law from which Nigeria's justice system owes its origin developed instances and cases which are suitable and unsuitable to be commenced by originating summons. Generally, originating summons are used to commence non-contentious matters, especially where the action involves an issue of construction of any written law or any instrument made under any written law or of any deed, will, contract or other document or some other question of law.[27] At the other end of the spectrum, in the Nigerian legal system, originating summons are not used for proceedings that are contentious. Accordingly, in *Ezeaku v Okonkwo*[28] it was held that originating summons "should not be adopted if the proceedings are hostile, that is, proceedings in which the facts are apparently disputable". Further to this, the Supreme Court held in *Dapianlong v Dariye*[29] as follows:

> "The originating summons procedure is a means of commencement of action adopted in cases where the facts are not in dispute or there is no likelihood of them being in dispute and when the sole or principal question in issue is or is likely to be one directed at the construction of a written law, constitution or any instrument or of any deed, will, contract or other document or

22 *APC v Bashir Sheriff and Others*, above at note 3.
23 [1984] 1 NWLR (Pt 1) 143.
24 [2004] 16 NWLR (Pt 900) 487.
25 [2009] 5 NWLR (Pt 1133) 41.
26 The Court of Appeal emphasized in *The Governor of Kogi State v Oba SA Mohammed* [2008] LPELR-CA/A/79/07 24 that one of the merits of originating summons is the swift resolution of proceedings initiated through this process.
27 Federal High Court (Civil Procedure) Rules 2019, order 3 rules 6, 7 and 8. See also *Ossai v Wakwah & Others* [2006] 4 NWLR (Pt 969) 208; *Federal Government of Nigeria v Zebra Energy Ltd* [2002] 18 NWLR (Pt 798) 162.
28 [2012] 4 NWLR (Pt 1291) 529 at 533.
29 [2007] LPELR-928 (SC).

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> other question of law or in a circumstance where there is not likely to be any dispute as to the facts. In general terms, it is used for non-contentious actions or matters i.e. those actions where facts are not likely to be in dispute. In actions commenced by originating summons, pleadings are not required rather affidavit evidence is employed …"[30]

Thus, an important feature of an originating summons is that it makes hearings simple and fast since pleadings are not required and witnesses are rarely called and examined.[31] In addition to contentious cases, originating summons cannot be used when there are allegations of fraud. In fact, one of the reasons for the Supreme Court's decision in *APC v Bashir Sheriff and Others* was that the first respondent's claims, as detailed in the affidavit in support of the originating summons, implied that he was accusing the appellant of fraud and so could not initiate the suit through an originating summons.[32] Consequently, the Supreme Court held that the first respondent ought not to have commenced the suit at the Federal High Court through an originating summons since order 3 rule 2(b) expressly precludes parties from instituting a suit through an originating summons when the claim is based on or includes an allegation of fraud. It therefore follows that in order to initiate an action through an originating summons, parties must ensure that the issues are not contentious and most importantly that there is no allegation of fraud.[33]

All Progressives Congress v Bashir Sheriff and Others and the amendment of the Electoral Act 2022

The above analysis shows that the Supreme Court in *APC v Bashir Sheriff and Others* followed its earlier judgment and thus held that failure to properly commence a suit goes to the root of the court's jurisdiction to entertain the same. This notwithstanding, given the significance of this decision for democracy, the Supreme Court should have followed its earlier decision in *Ekanem v The Registered Trustees of the Church of Christ the Good Shepherd (Ekanem)*[34] where it clearly held that a suit commenced through the wrong originating process will not deprive the court of jurisdiction to decide the issues in dispute.[35] According to Garba JSC:

> "I should however restate the trite position of the law that the use or employment of a wrong procedure or mode of commencement of action, does not, *ipso facto*, make or render the action incompetent or liable to be struck out.
> For instance, where a suit was initiated or commenced by way of originating summons when the material facts involved are in serious and material dispute from the affidavit evidence placed before a court by the parties or likely to be in such dispute, the proper order to be made is not one striking out the suit on ground of improper mode of the commencement, but one for the parties to file pleadings in the matter for the requisite resolution of the dispute."[36]

It is worth noting that the Supreme Court made reference to its judgment in *Ekanem* only to support its decision that *APC v Bashir Sheriff and Others* ought to have been commenced by originating

30 See *Director State Security Service v Agbakoba* [1999] 3 NWLR (Pt 595) 314; *Keyamo v Lagos State House of Assembly* [2002] 18 NWLR (Pt 799) 605.

31 *Famfa Oil Ltd v AG of the Federation* [2003] 18 NWLR (Pt 852) 453.

32 *APC v Bashir Sheriff and Others*, above at note 3 at 37.

33 When the claim is based on or includes an allegation of fraud and when the facts are substantial, contentious and likely to be disputed by the parties, the law provides that the suit must be initiated through a writ of summons. See Federal High Court (Civil Procedure) Rules, order 3 rule 2; *PDP v Abubakar* [2007] 3 NWLR (Pt 1022) 515 at 540.

34 *Ekanem v The Registered Trustees*, above at note 15.

35 Citing its previous decision in *Emezi v Osuagwu* (2005) All FWLR (Pt 259) 1891.

36 *Ekanem v The Registered Trustees,* above at note 15 at 227.

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summons.[37] The Supreme Court, however, failed to follow its judgment as stated by Garba. By not following this decision and, by implication, not determining the substantive issue in dispute, there is a risk that the appellant has successfully excluded the first respondent who allegedly participated in a primary election that was conducted in accordance with section 84 of the Electoral Act 2022.

Indeed, the Supreme Court can depart from its previous decision subject to the conditions stated in *Bronik Motors Ltd v Wema Bank*.[38] In this case, the Supreme Court held that this can only occur where a party prays and satisfies the court that there is "a broad issue of justice, or policy, and a question of legal principle such that the retention of the decision would amount to a perpetuation of injustice".[39] The Supreme Court can also depart from its previous decision if "it is satisfied it was reached on the wrong principles".[40] The rationale for these stringent conditions, according to the Supreme Court, is to "keep the stream of justice pure".[41]

It is therefore strange that the Supreme Court departed from its previous decision not to keep the stream of justice pure but to increase the likelihood of inflicting great injustice on the first respondent and subverting the core principles of democracy as guaranteed by the Constitution.

The main thesis of this note is therefore that *APC v Bashir Sheriff and Others* should lead to the amendment of the Electoral Act 2022 because it has the potential of undermining the provisions of the Constitution that recognize Nigeria as a democratic state. Significantly, section 14(1) of the Constitution provides that the "Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice". Even though the term "democracy" is not defined in the Constitution, it is widely accepted that it is a system of government that ensures the participation of the general public in governance through elections and voting.[42] As a result, it is commonly defined as "the government of the people, by the people, and for the people".[43] Indeed, the will of the people serves as the epicentre of democracy, underpinning the three central ideas that are inherent in it as a system of government: first, that public authority is legitimate only when it originates from the people; second, that the powers exercised by the government do not belong to the state but to the people subject to them; and finally, that the people are the genuine holders of sovereignty and the ultimate authority in the state.[44] It is therefore not unexpected that section 14(2)(a) of the Constitution declares that "sovereignty belongs to the people of Nigeria, from whom the government … derives all its powers and authority".

The implication of sections 14(1) and 14(2)(a) is that the Constitution explicitly envisages that the will of the people must be the basis for the exercise of political power and that, most importantly, the people must be given the freedom and opportunity to elect their representatives. It also acknowledges the vital function that free and fair elections play in enabling people to elect their representatives and exercising the sovereignty conferred by the Constitution.[45] Given that sovereignty belongs to the people and the will of the people can only be determined through

37 *APC v Bashir Sheriff and Others*, above at note 3 at 37.

38 [1983] NSCC 226.

39 Id at 227.

40 *Abdulkarem v Incar (Nigeria) Ltd* [1992] 7 NWLR (Pt 251) 1 at 17.

41 Id at 18.

42 J Wallace, H Kundnani and E Donnelly "The importance of democracy" (14 April 2021, Chatham House), available at: <https://www.chathamhouse.org/2021/04/importance-democracy> (last accessed 29 January 2024).

43 A Lincoln "The Gettysburg address" (19 November 1863, Houston Independent School District), available at: <https://www.houstonisd.org/cms/lib2/TX01001591/Centricity/Domain/9764/The_Gettysburg_Address.pdf> (last accessed 29 January 2024).

44 A Buchanan "Political legitimacy and democracy" (2002) 112/4 *Ethics* 689.

45 JC Ebegbulem "The imperative of democratic consolidation in Nigeria through credible elections" (2017) 10/1 *African Journal of Politics and Administrative Studies* 70 at 71. Elections are not only fundamental to competitive politics, but they also provide political participation and competitiveness, which are critical to democratic transition and consolidation. See JS Omotola "Elections and democratic transition in Nigeria under the fourth republic" (2010) 109/437 *African Affairs* 535 at 537.

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free and fair elections, everyone desiring to exercise political power in Nigeria must participate in an election in order to give the electorates the opportunity to exercise the sovereignty accorded by the Constitution. No arm of the government should therefore exercise its powers in a manner that will permit anyone who was not voted for by the electorate in an election to occupy any political office.[46]

The analysis of the relevant facts of the case above clearly shows that the first respondent's argument was that the second respondent did not participate in an election in which he was declared the winner. By implication, the first respondent's case was that the appellant subverted the provisions of the Constitution and violated the sovereignty granted to the people by section 14(2)(a) of the Constitution and the democratic principles protected by section 14(1) of the Constitution. The Supreme Court's decision in *APC v Bashir Sheriff and Others* is therefore crucial because it borders on the legitimacy of the second respondent to be a political office holder in Nigeria and the likely injustice of excluding the first respondent who was validly elected by the party representatives.

The method of instituting a pre-election or election suit is therefore a technical issue that can be quickly remedied by filing additional documents and is not grave enough to preclude the court from determining an issue that has the likelihood of rendering the provisions of the Constitution nugatory, negatively affecting democracy and the will of the people in Nigeria. Without amending the Electoral Act 2022 to curtail the effects of the court judgment in this case, it is submitted that there is a high risk that dubious politicians will simply focus on the method through which a suit was commenced to subvert the will of the people and, by extension, the principles of democracy as guaranteed by the Constitution. The legislature has an inalienable right to make laws for effective electoral governance and this cannot be deemed an interference with the decision of the court.[47] Indeed, a pre-election matter commenced via a writ of summons may take over four years to journey from trial court to the Supreme Court, by which time a candidate illegally submitted to INEC by a party would have completed their tenure in office if elected and the rightfully nominated candidate would have completely lost the chance of flying the party's flag in the election. This was the very reason the Practice Directions 2022 provided that pre-election matter should be commenced via originating summons, which proceeds more speedily to meet the justice of the case.

The Supreme Court has highlighted the need to always jettison technicalities especially when it will undermine justice. According to Oputa JSC in *Aliu Bello v Attorney-General of Oyo State*,[48] "the spirit of justice does not reside in forms and formalities, nor is the triumph of the administration of justice to be found in successfully picking one's way between pitfalls of technicality". It is obvious that in *APC v Bashir Sherriff and Others*, the Supreme Court relied on a technicality and did not consider the implications of its decision on the parties, the will of the people, on Nigeria's nascent democracy and ultimately the provisions of the Constitution. The argument for amending the Electoral Act 2022 to mitigate the effects of this decision is therefore critical, not because it is unacceptable to right-thinking members of society but because it will set a precedent for relying on a departure from the rules of court to jeopardize democracy in violation of the provisions of the Constitution.

It is also obvious that this judgment shut out justice and created a scenario that increased the possibility of giving legitimacy to an alleged collusion between the appellant and the second respondent to fraudulently exclude the first respondent to subvert the provisions of the Constitution. Consequently, this note specifically argues that there is a need to amend the provisions of the Electoral Act 2022 to ensure that courts do not have the powers to set aside a pre-election or election suit that was commenced through the wrong originating process. Commencing a suit

46 Sec 13 of the Constitution mandates every organ of the government to inter alia discharge its obligation to protect democracy in Nigeria.

47 See the Constitution, sec 4.

48 [1986] 5 NWLR (Pt 45) 528 at 886.

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through the wrong originating process is an irregularity that can be remedied by ordering the litigants to file additional documents.

It is worth noting that courts in other African countries have overlooked insignificant violations of rules of practice in order to do substantial justice especially when the violation did not negatively affect any of the parties. The judgment of the Zimbabwean Constitutional Court in *Chamisa v Mnangagwa*[49] is an example of this. In this case, the applicant challenged the validity of the presidential election held in 2018. One of the issues for determination was whether the application was properly before the court since it was not served within the time provided by section 93(1) of the Zimbabwean Constitution and rule 9(7) of the Constitutional Court Rules.[50] Even though the court agreed with the respondents that the applicant did not serve the documents within the time stipulated by the rules, it nevertheless granted the applicant's application for condonation of non-compliance with the procedural requirement. In contrast to Nigeria's Supreme Court in *APC v Bashir Sherriff and Others*, the court specifically considered the importance of the issues in dispute, the public interests involved and the fact that the non-compliance with the rules did not affect the respondents in any way. According to the court:

> "The one-day delay in serving the application on the respondents through the Sheriff was not inordinate. The respondents did not allege any prejudice arising from the applicant's non-compliance with the procedural requirements of r 23(2), as read with r 9(7) of the Rules. *The national importance of the dispute cannot be overlooked* (emphasis added). It has been held that where the delay is relatively short and no prejudice is suffered, the court is likely to grant condonation of noncompliance with procedural requirements."[51]

As a result of the above decision, it is reasonable to argue that the court in Zimbabwe ensured that politicians did not hide behind the guise of following the rules to sabotage the democratic process. Africa has had tremendous socio-economic development as a result of democracy.[52] Consequently, every arm of the government should use its power to ensure the growth of democracy in Africa.

Conclusion

Elections are a fundamental tenet of democracy, and there is a critical need to guarantee that they are conducted in conformity with the applicable laws. One approach to accomplishing this in Nigeria is to ensure that primary elections are not just held in compliance with existing laws but that political parties are not given any opportunity to disqualify candidates who won primary elections held in accordance with the rules of the Electoral Act. This note examined the Supreme Court's decision in *APC v Bashir Sheriff and Others* which set aside a pre-election suit because it was commenced through the wrong originating process. The court argued that this singular error deprived it of jurisdiction to determine the substantive issues.

The note shows that by not considering the main issue in dispute, the Supreme Court might have aided the appellant in subverting the provisions of the Constitution, particularly sections 14(1) and 14(2)(a). The Constitution recognizes Nigeria as a democratic state where the powers of the government must emanate from the will of the people expressed through free and fair elections. It also

49 Judgment No CCZ 21/19; Constitutional Application No CCZ 42/18 available at: <https://www.veritaszim.net/sites/veritas_d/files/Nelson%20Chamisa%20and%2024%20Ors%20v%20Emmerson%20Mnangagwa.pdf> (last accessed 29 January 2024).

50 By the provisions of sec 93(1) and rule 23(2), the applicant was meant to file and serve the application challenging the presidential election not later than 10 August 2018. Even though the application was filed on 10 August 2018, the respondents were served on 11 August 2018, outside the period prescribed by the rules.

51 *Chamisa v Mnangagwa*, above at note 49 at 41.

52 BK Twinomugisha "The role of the judiciary in the promotion of democracy in Uganda" (2009) 9 *African Human Rights Law Journal* 1.

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shows that because the decision was entirely dependent on the type of originating process used to initiate the lawsuit at the trial court, there is a danger that the decision might have disqualified a candidate who won a primary election conducted in conformity with the provisions of the existing legislation.

It therefore contends that this judgment underscores the need to amend the Electoral Act 2022 because the method by which a pre-election or election suit was commenced should not take precedence over determining whether the provisions of the Constitution were subverted. It concludes by recommending that the Act be amended to ensure that courts do not have the power to set aside a pre-election or election suit that was commenced through the wrong originating process.

Competing interests. None.

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