

**IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA
IN THE BENIN JUDICIAL DIVISION HOLDEN AT BENIN CITY**

BEFORE

**HIS LORDSHIP, HON. JUSTICE N.A. IMOUKHUEDE –JUDGE ON THURSDAY THE 18TH DAY OF APRIL,
2013**

BETWEEN:

SUIT NO. B/18/OS/13

PEOPLES DEMOCRATIC PARTY

CLAIMANT

AND

EDO STATE INDEPENDENT ELECTORAL COMMISSION
& ANOR.

..... DEFENDANTS

JUDGMENT

The Claimant by an Originating Summons filed on the 8th of March 2013 seeks the following four issues for determination:

1. Whether having regard to the provisions of sections 7(4), 106 and 107(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the provisions of Section 16(e) of Edo State Local Government Electoral Law, 2012 and paragraph 5, 1(e)(i) and (ii) of the Electoral Guidelines for Edo State Local Government Election, 2012 issued by the 1st Defendant are not invalid, unconstitutional, null and void and of no effect whatsoever.

2. Whether the Defendants can impose additional qualification requirements for candidates seeking to contest Local Government elections in Edo State other than those prescribed in Sections 7(4), 106 and 107(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

3. Whether the 1st Defendant still possesses the power to screen and disqualify candidates for Local Government elections in Edo State for reasons outside section 106 and 107(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) or for no reasons at all.

4. Whether the provisions of section 24(1) and (2) of Edo State Local Government Electoral Law, 2012 are not invalid for reason of inconsistency with sections 106 and 107(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended.)

The Claimant's originating summons is supported by a 13 paragraph affidavit with 3 exhibit attached to it. The Defendants in response deposed to a 9 paragraph counter- affidavit and formulated the following four issues for determination:

1. Whether the Edo State House of Assembly has the legislative competence to enact the Electoral Law 2012 and the guidelines issued thereof.

2. Whether Local Government Council Elections are conducted under the Act of the National Assembly and or the law of the State House of Assembly.

3. Whether sections 16(e), 24(1)& (2) of the Edo State Local Government Law 2012 and paragraph 5.1 (e)(i) & (ii) of the guidelines issued by the 1st respondent are ultra-vires the powers of the Edo State House of Assembly.

4. Whether the said sections 16(e), 24(1) & (2) are inconsistent with the provisions of sections 7(4), 106 and 107 of the Constitution and to that extent unconstitutional, null and void and of no effect whatsoever.

Issues 1,3 and 4 in the Claimant's address are similar and border on the question of the constitutionality of the provisions of Sections 16(e) and 24(1) of Edo State Local Government Electoral Law, 2012 and paragraph 5, 1(e)(i) and (ii) of the Electoral Guidelines for Edo State Local Government Election, 2012. I therefore intend to consider them together.

On issues 1,3 and 4, Counsel for Claimant, K. O. Obamogie Esq in his written address submits that Section 7(4) of the Constitution guarantees that every person who is entitled to vote or be voted for in an election shall have a right to vote and be voted for. He further refers this Court to Section 106 of the Constitution which lists the qualification requirements and Section 107 which sets out the grounds for disqualification of a candidate. Counsel further submits that where the Constitution has specifically provided for a particular subject, the provisions are deemed to have covered the field, he refers to the case of Attorney General of Abia State V Attorney General of the Federation. (2002) 6 NWLR(763) 264. Counsel submits that the 1st Defendant does not possess the power to screen and disqualify candidates for Local Government Elections in Edo State, for reasons not tenable under the provisions of Sections 106 and 107(1) of the Constitution. He submits that Sections 106 and 107(1) of the Constitution are sacrosanct and binding on all authorities in Nigeria, including the 1st Defendant, so 1st Defendant can neither add nor vary the qualification and disqualification requirements.

Referring to Section 24(1) of Edo State Local Government Electoral Law, 2012, K. O. Obamogie Esq submits that as long as Section 24(1) ties the validity of a Candidate's nomination to the payment of the non-refundable deposit, the said section is inconsistent with Sections 106 and 107(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and should be declared null and void by the Court, for this submission he relies on the case of Phoenix Motors V N.P.F.M.B. (1993) 1NWLR (Part 272) 718 at 730. In arguing Issue 2, K. O. Obamogie Esq submits that the Defendants lack the legal capacity to impose additional requirements on candidates seeking to contest the local government elections. He submits that 1st Defendant's demand for payment of non-refundable deposit as condition for qualification to contest the local government election in Edo State is unconstitutional.

The Defendant filed a nine paragraph Counter Affidavit as well as a written address in opposing Claimant's Claim. The Defendant also formulated the aforementioned four issues for determination. S.U. Ibadon Esq., Counsel to the Defendant submitted under issue 1 that the Edo State House of Assembly has legislative competence to make laws for the Conduct of Elections into the Local Government Councils of Edo State. He relied on the provisions of Section 6, 7, paragraphs 11 and 12 of the 2nd Schedule to the Constitution and the case of Doherty V Balewa 1961 1 All NLR

604. He further relies on Section 7(1) of the Constitution. Relying on item 12 of the 2nd Schedule to the Constitution which provides 'That nothing in item 11 which empowers the National Assembly to make such Laws shall preclude the House of Assembly of a State from making Laws with respect to the election to Local Government Council in addition to but not inconsistent with any Law made by the National Assembly.' Counsel to the Defendants submits that the provisions of the said sections 16(e), 24(1) & (2) are not inconsistent with the provisions of sections 7(4), 106 and 107 of the Constitution and are therefore not unconstitutional, null and void and of no effect. He submits that they are laws made in addition to that of the National Assembly and are clearly not inconsistent with same. The 2nd schedule, part 2, item 12 provides against inconsistency. The Black's Law Dictionary, 8th Edition defines 'inconsistency' as not compatible with another fact or claim.

In my Judgment I have to consider whether sections 16 (e) and 24(1) of Edo State Local Government Electoral Law, 2012 and paragraph 5.1(e)(i) and (ii) of the Electoral Guidelines for Edo State Local Government Election, 2012 are inconsistent with the Constitution. Under Issue 2 which is, whether Local Government Council Elections are conducted under the Act of the National Assembly and or the law of the State House of Assembly; learned Counsel for the Defendants submits that Local Government elections are conducted by virtue of the Electoral Act 2011 and the Electoral Laws of each of the States of Nigeria. He further submits that the Constitution has not covered the field in matters of qualification of Local Government Council election requirements, as submitted by K. O. Obamogie Esq.

He submits that the Constitution donated powers to the National Assembly and State House of Assembly to make laws with regard to the conduct of Local Government Elections. On Issue 3 which is, whether sections 16(e), 24(1) & (2) of the Edo State Local Government Law 2012 and paragraph 5.1(e)(i) & (ii) of the guidelines issued by the 1st Respondent are ultra-vires the powers of the Edo State House of Assembly, Counsel to the Defendants submitted that the provisions are in substantial conformity with the Electoral Act 2011 and the Constitution. On Issue 4 which is, whether the said sections 16(e), 24(1) & (2) are inconsistent with the provisions of sections 7(4), 106 and 107 of the Constitution and to that extent unconstitutional, null and void and of no effect whatsoever, Counsel to the Defendants submits that the Defendants have powers to legislate, screen and disqualify Candidates by virtue of Sections 7(4), 107(1). He further submits that Sections 16(e) and 24(1) of Edo State Local Government Electoral Law, 2012 and paragraph 5.1(e)(i) and (ii) of the Electoral Guidelines for Edo State Local Government Election, 2012 are valid and that the 1st Defendant has not violated the qualification and disqualification requirements set out in Sections 106 and 107 of the Constitution. S. U. Ibadon Esq submits that the aforementioned provision is simply a condition precedent for clearance of candidates to contest Local Government Elections and relies on the case of *Atolagbe V Awani* (1997) NWLR(pt 522) 536 .

The Claimant filed a reply on points of law to the Defendant's written address on the 12th of April 2013. In determining this suit I have considered the following sections:

1. Sections 7 (4), 106, 107, Items 11 and 12 of the Second Schedule, Part 2; Item 4 of Part 2 of the Third Schedule of the 1999 Constitution ,as amended.
2. Sections 16(e) and 24(1) of Edo State Local Government Electoral Law, 2012

3. Paragraph 5, 1(e)(i) and (ii) of the Electoral Guidelines for Edo State Local Government Election, 2012 have carefully reviewed the submissions of learned Counsel for the parties and I find that the main issue for determination from the facts of this case is whether the provisions of Sections 16(e) and 24(1) of Edo State Local Government Electoral Law, 2012 and paragraph 5, 1(e)(i) and (ii) of the Electoral Guidelines for Edo State Local Government Election, 2012 are unconstitutional null and void. Sections 106 and 107 provides for the qualification and disqualification of candidates for election into a State House of Assembly. Section 7(4) of the Constitution provides that the qualification and disqualification requirement of Sections 106 and 107 also applies to the Local Government Elections candidates.

Counsel for Defendant argues that section 16(1)(e), 24(1) of Edo State Local Government Electoral Law, 2012 and paragraph 5, 1(e)(i) and (ii) of the Electoral Guidelines for Edo State Local Government Election, 2012 do not impose additional qualification on the Claimant, contrary to Sections 7(4), 106 and 107 of the Constitution and argues that Claimant's submission is misconceived. Counsel for Defendant submits that the requirement for payment of non-refundable fee is a condition precedent. I reproduce hereunder the said sections. Section 16(1)(e) A person shall not be qualified to contest as a candidate in any Local Government election if: (e) He has not made a non-refundable deposit as prescribed by the Commission. Section 24 (1) Every candidate shall before his nomination paper is delivered to the Electoral officer, deposit or caused to be deposited the sum specified in Section 15 of this Law and shall at the time of the delivery of this nomination paper produce to the Electoral Officer the official receipt for the said sum and no nomination shall be valid and/or accepted unless such sum is deposited and the receipt for the sum produced in the manner required by this section. (2) When any nomination paper is delivered and a deposit is made in accordance with this law, the candidate shall be deemed to stand nominated unless and until the Electoral Officer decides that the nomination paper is invalid or proof is given to the satisfaction of the Electoral Officer of the candidate's death, or he withdraws his candidature as specified in Section 25 or 26 of this law. Section 5(1) A person shall not be qualified to contest as a candidate in any Local Government election if:

(i) In the case of a candidate contesting as a Chairman of the Local Government Council, he has made a non-refundable deposit of N100,000.00 (One hundred thousand Naira) to the Commission;

(ii) In the case of a candidate contesting as a Councillor, he has made a non-refundable deposit of N50,000.00 (Fifty thousand Naira) to the Commission. The above quoted sections clearly make non-payment of the non-refundable deposit a disqualification and not a condition precedent and I so hold. By imposing compulsory non-refundable deposit as a qualification requirement which was not provided for by the Constitution, 1st Defendant has set its own disqualification requirement different from the Constitution. A careful consideration of sections 15 and 16 of the Local Government Electoral Law 2012 and paragraph 5, 1(e)(i) and (ii) of the Electoral Guidelines for Edo State Local Government Election, 2012 show that its provisions are a duplication of sections 106 and 107 of the Constitution which relates to qualification and disqualification of candidates. K.O. Obamogie argues that by the doctrine of covering of the field the provisions are null and void. In the case of AG Abia V AG Fed (supra) at page 369 Kutiji JSC held that:

'Where the provision in the Act is within the legislative powers of the National Assembly but

the Constitution is found to have already made the same or similar provision, then the new provision will be regarded as invalid for duplication and or inconsistency and therefore inoperative. The same fate will befall any provision of the Act which seeks to enlarge (the word enlarge was highlighted by the Learned JSC) curtail or alter any existing provision of the Constitution. The provision or provisions will be treated as unconstitutional and therefore null and void.'

On the same issue of covering the field, Ogundare JSC at page 435 of the same case, stated: 'The doctrine however renders the paramount legislation predominant and the subordinate legislation goes into abeyance and remains inoperative so long as the paramount legislation remains operative.' hold that Sections 16(e) and 24(1) of the Local Government Electoral Law 2012 and paragraph 5, 1(e)(i) and (ii) of the Electoral Guidelines for Edo State Local Government Election, 2012 are void for duplication and lack of legislative competence. It is trite that by Section 1(1) of the Constitution, the Constitution is supreme and any law inconsistent with the provisions of the Constitution shall to the extent of the inconsistency be void -see Section 1(3) of the Constitution. These Sections are accordingly struck out.

Counsel to the Defendants submits that the provisions of the said sections 16(e), 24(1) & (2) are not inconsistent with the provisions of sections 7(4), 106 and 107 of the Constitution and are therefore not unconstitutional, null and void and of no effect. He submits that they are laws made in addition to that of the National Assembly and are clearly not inconsistent with same. In paragraph 8 of Defendants' counter affidavit, they further admit that the said guidelines are an addition to the Constitutional provisions.

I hold that addition is not envisaged by the Constitution because these provisions appear to be a revenue generating exercise, contrary to the spirit of the Constitution. The Constitution did not envisage that the conduct of an election will be a revenue generating exercise for the 1st Defendant. Looking at Exhibit C, seven political parties submitted names for Chairman, Vice Chairman and Councillor in the 18 Local Governments of the State. The provisions of 16(e) and 24(1) of Edo State Local Government Electoral Law, 2012 and paragraph 5, 1(e)(i) and (ii) of the Electoral Guidelines for Edo State Local Government Election, 2012 would thus generate millions of Naira for the 1st Defendant, thus turning conduct of Local Government election into a money making venture, which was not the intendment of the Constitution..Section.228 of the Constitution states that: 'INEC may give grants to political parties to enable them conduct their affairs'.

I hold that Sections 16(e) and 24(1) of Edo State Local Government Electoral Law, 2012 and paragraph 5, 1(e)(i) and (ii) of the Electoral Guidelines for Edo State Local Government Election, 2012 are therefore inconsistent with the Constitution, which even empowered INEC to give grants to political parties to enable them conduct their affairs. The Counsel for the Defendants in his submission has made heavy weather of the competence of the House of Assembly to make laws on the conduct of Local Government Elections. From my understanding of this case, the Claimant is not challenging the competence of the House of Assembly to make laws or guidelines regulating the conduct of Local Government elections. I agree with Counsel for Defendant's submission that by virtue of item 12 of Part 2 of the Second Schedule of the Constitution, the State House of Assembly has powers to make laws regulating the local government elections. It is trite that by Section 1(1) of the Constitution, the Constitution is supreme and any law inconsistent with the provisions of the Constitution shall to the extent of the inconsistency be void- see Section 1(3).

Claimant is only challenging the parts of the Electoral Law and guidelines which it claims are inconsistent with the Constitution. Claimant has, in this suit challenged the constitutionality of the aforesaid provisions of the guidelines and the Edo State Local Government Electoral Law empowering the 1st Defendant to impose the above non-refundable deposit as qualification for the election. The 1st Defendant is a creation of the Constitution by virtue of section 197(1)(b) while part 2 of the 3rd Schedule of the amended Constitution states the powers of the State Independent Electoral Commission. These are laws that spell out the powers and responsibilities of the 1st Defendant.

On the question of 1st Defendant not giving reasons for not clearing candidate, Counsel for Claimant submitted that 1st Defendant acted arbitrarily by not stating reasons for not clearing its candidates. I have carefully looked at Exhibit C attached to Claimant's affidavit in Support of the Originating Summons and I find that no reasons were given for non-clearance of certain candidates of Claimant.

As an independent umpire conducting local government elections the 1st Defendant must be seen at all times to be transparent and above board in all its dealings with the political parties through the election processes. 1st Defendant should not give any persons grounds to accuse it of partiality.

It is therefore only just and proper for the 1st Defendant to give its reasons for not clearing certain candidates in order to avoid arbitrariness in the electoral process. I have already found that the enactment making payment of the non-refundable deposit by candidates is unconstitutional and therefore illegal. The Claimants are thus entitled to a refund of their money that was demanded from them by 1st Defendant, and I so hold. The Claimant is asking for a mandatory injunction.

On the issue of relief no 6 which is an order of mandatory injunction, learned Counsel for Defendants submitted that since the money has been paid and receipts issued, the remedy of injunction cannot avail the Claimant. He relied on the authority of *C.B.N. V Industrial Bank* 1999 NWLR(522)71. I have read the case cited by learned counsel for Defendant and the facts of that case differ from this one. In *CBN V Industrial Bank* supra, the issue was whether an interlocutory injunction could be granted for an already completed act. In this case the Claimant is asking for a mandatory injunction, which is very different from an interlocutory injunction. In the book 'Injunctions and Enforcement of Orders' by Chief Afe Babalola SAN, mandatory injunction was defined at page 101:

"A mandatory injunction or positive injunction is an order of a court requiring a party to do a specific act or action. It is a direct opposite of a prohibitory order of injunction which is made to preserve the Res. Since mandatory injunction is granted to undo what has already been done it is also referred to as the restoratory injunction".

I do not agree with Counsel for the Defendants that since the money has been paid and receipted for, the Claimant is not entitled to a remedy. The legal maxim *Ubi jus ibi remedium* -where there is a right there is a remedy, thus holds. I have already found that the enactment making payment of the non-refundable deposit by candidates was unconstitutional and therefore illegal. The Claimants are thus entitled to a refund of their money that was illegally demanded from them by 1st Defendant and I so hold.

In view of all the findings I have made in this Judgment I make the following orders in accordance with the reliefs sought by the Claimant:

1. A declaration that sections 16(e), 24(1) and (2) of Edo State Local Government Electoral Law, 2012 and paragraph 5.1(e)(i) & (ii) of the Guidelines issued by the 1st Defendant in Edo State Local Government Election, 2012 are unconstitutional, invalid, null and void to the extent of their inconsistency with section 106 and 107(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).
2. A declaration that the Defendants have no power whatsoever to add to the qualification and disqualifications requirements for persons seeking to contest Local Government elections in Edo State already set out elaborately in sections 7(4), 106 and 107(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)
3. An order of perpetual injunction restraining the 1st Defendant, its members, employees and/or agents from rejecting candidates for the Local Government elections in Edo State scheduled for the 20th April, 2012, on the ground of non-payment of non-refundable deposit of N100,000.00 (One hundred thousand Naira) for Chairmanship candidates and N50,000.00 (Fifty thousand Naira) for Councillorship candidates.
4. An Order of mandatory injunction directing the 1st Defendant to refund to all candidates of the Claimant all monies collected as non-refundable deposits in breach of the provisions of sections 7(4), 106 and 107(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

HON. JUSTICE NOGI IMOUKHUEDE
JUDGE
18/4/2013

COUNSEL:

K.O.OBAMOGIE FOR THE CLAIMANT

M.E. OKOJIE FOR THE DEFENDANT