

COURT OF APPEAL JOS DIVISION
FRIDAY 6TH OF NOVEMBER, 2003. CA/ J/152/2003
CORAM:- O. O. OBADINA, I. C. NZEAKO,
I. F. OGBUAGU, JJCA

ALHAJI MOHAMMED
SANUSI DAGGASH

..... APPELLANT

AND

1. HAJIA FATI IBRAHIM
BULAMA

2. INDEPENDENT NATIONAL
ELECTORAL COMMISSION

..... RESPONDENTS

3. THE RESIDENT ELECTORAL
COMMISSIONER, BORNO STATE
& 4 OTHERS

DOCUMENTS - Public documents - Proof - By s. 112 Evidence Act - A certified true copy of such document may be produced - In proof of its contents (H1)

DOCUMENTS - Public document - Certified true copy - Fees - Legal requirements - By s. 111(1) Evidence Act - Certification should contain date - Name and official title of officer concerned - And sealed when authorized (H2)

DOCUMENTS - Signature - Proof - By s. 108(1) Evidence Act - The tribunal ought to compare signature on exhibit A - With that on exhibit I - And then make finding (H3)

TRIBUNALS - Election Petition Tribunal - Jurisdiction - By s. 66(1)(h) 1999 Constitution - The tribunal lacks power to inquire into how the panel of inquiry arrived at its decision (H4)

CONSTITUTIONAL LAW - Interpretation - "Set up under the Tribunals of Inquiry Act" - The words apply to class of tribunals set up under the Act - And do not apply to administrative panel (H5)

CONSTITUTIONAL LAW - 1999 Constitution s. 66(1)(h) - Interpre-

tation - Tribunal was wrong as there is no provision in the section - That makes it mandatory that Administrative Panel of Inquiry must be set up by law (H6)

TRIBUNALS - Evidence - Fraud - Allegation of - Proof - Appellant is required to prove the allegation - By sufficient cogent and credible evidence - And not with a particular document (H7)

DOCUMENTS - Public document - Admissibility - Once public document is certified and signed - It is admissible on its mere production - And it is unnecessary to prove custody (H8)

DOCUMENTS - Public documents - Admissibility - By s. 93 Evidence Act - Document may be proved by primary or secondary evidence - Hence it is not only certified copy that is admissible (H9)

ESTOPPEL - Issue estoppel - Determination - It must be considered inter alia whether parties are same - And whether the issues are material to cause of action in previous and latter case (H10)

ELECTION PETITIONS - Appeal - Judgment - Proper order - Since 1st respondent is disqualified by 1999 Constitution s. 66(1)(h) - Court must make an order nullifying the election (H11)

FACTS

Following the declaration of appellant (1st respondent at the trial Tribunal) as the winner of the Senatorial election conducted for Borno North Senatorial District on 12th April 2003, petitioner/1st respondent instituted this action against appellant in the National Assembly/Governorship and Legislative Houses Election Petition Tribunal holden at Maiduguri, Borno State seeking inter alia, for a declaration that appellant was not validly elected by majority of lawful votes cast at the election, that petitioner is validly elected by majority of lawful votes cast at the election and in the alternative that the election be invalidated by reason of corrupt practices and illegality witnessed during the exercise.

Subsequently, appellant filed preliminary objection against the hearing of the petition on the ground inter alia, that 1st respondent

lacked locus standi to bring the action, not being a qualified candidate at the election and that 1st respondent was under constitutional incapacity which disqualified her from seeking election into the senate. After hearing on the petition, the Tribunal dismissed it. The matter went to trial on merit. At the end, the Tribunal found for 1st respondent and declared her as the winner of the said election. Being dissatisfied, appellant filed appeal in the Court of Appeal, Jos Division.

ISSUES FOR DETERMINATION

“(1) Whether the majority of members of the tribunal were correct when they rejected and refused to admit the certified true copy of the Borno State white paper on the Report of the Panel of Inquiry on Revenue Generation and Utilization by the Maiduguri Metropolitan Council from April to December, 1994.

(2) Whether an election tribunal has the jurisdiction to review the decision of a panel of enquiry of the type envisaged under section 66(1)(h) of the 1999 Constitution or otherwise inquire into how it arrived at its decision and recommendations.

(3) Whether the tribunal was correct when it held that panel which indicted the 1st respondent must have been set up by a law for it to qualify as a panel of enquiry under section 66(1)(h) of the 1999 Constitution.

(4) Whether the non-production of the report of the panel of inquiry which indicted the 1st respondent was fatal to the notice of preliminary objection.

(5) Whether the appellant has established that the 1st respondent was and remains disqualified to contest for and hold the office of Senator under the 1999 Constitution.

(6) Whether the tribunal was correct in rejecting the original copy of the white paper of the Panel of Inquiry set up by the Borno State Government on Revenue Generation and Utilization by the Maiduguri Metropolitan Council from April to December, 1994 and the Borno State white paper on the said report.

(7) Whether the tribunal was correct in holding that the appellant did not score the majority of the lawful votes cast at the election.

(8) Was the tribunal correct in holding that the appellant was involved in election malpractices on the day of the election, that is, 12th April, 2003?

(9) *Whether the tribunal was correct when it found that paragraphs 31 - 37 of the appellant's reply to the petition were not within the contemplation of paragraph 12(2) and paragraph 42 of Schedule 1 to the Electoral Act, 2002 and in holding that it amounted to a cross-petition.*

B (10) *Whether the tribunal was correct when it held that the 1st respondent did not lead evidence in prove (sic) of his averments that lawful votes were unlawfully excluded from the total votes scored by the candidates.*

C **HELD** (Unanimously allowing the appeal per
OBADINA JCA)

Public documents - Proof

D **1. Issue of admissibility of document is always governed by the Evidence Act. A cursory look at exhibit "A" titled "Government white paper on the Report of the Panel of Inquiry on Revenue Generation and Utilization by the Maiduguri Metropolitan Council from April - December, 1994" marked "restricted"**
E **with the "Logo" "Borno State of Nigeria", shows that exhibit "A" is a public document within the meaning of section 109 of the Evidence Act. By the provisions of section 112 of the Evidence Act a certified true copy of the Government white**
F **paper may be produced in proof of its contents. (p. 2555 C)**

Public document - Certified true copy - Contents

2. From the provisions of section 111(1) of the Evidence Act, what a certificate written at the foot of a certified true copy of
G **a public document should contain are clearly stated.**

"Such certificate shall be dated, and subscribed by such officer with his name and his official title and shall be sealed, whenever such officer is authorized by law to make use of a seal."

H A careful look at exhibit "A" i.e. the white paper in question, shows that the officer who certified exhibit "A" as certified true copy subscribed to exhibit "A" with his signature and his official title, namely:-

“Secretary to the State Government, Borno State” and date, namely, 18/5/2003. Payment of legal fee on application for a certified true copy is not part of the condition to make a document so certified a certified true copy. It is only a condition which must be fulfilled before the officer certified a document. (p. 2555 H) B

DOCUMENTS - Signature - Proof

3. I think some options were open to the tribunal under the provisions of section 108 of the Evidence Act, which provides as follows:- C

“108(1) In order to ascertain whether a signature, writing, seal or finger impression is that of the person by whom it purports to have been written or made, any signature, writing, seal or finger impression admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, seal or finger impression has not been produced or proved for any other purpose.” D

In the instant case, since the 1st respondent filed exhibit I with her counter-affidavit admitting that exhibit I was signed by the Secretary to the Government of Borno State who was alleged by the appellant to have certified exhibit “A”, the proper thing for the tribunal to do was to compare the Signature on exhibit “A” with that on exhibit I, and then make a finding. E F

The law is settled that in resolving the issue of due execution of document where the alleged maker denies his signature, the course or options opened to the court would inter alia be to compare the signature admitted by the alleged signatory to be his own with the one under contention under section 108(1) of the Evidence Act. (pp. 2557 A/2569 B) G

Election Petition Tribunal - Jurisdiction H

4. From the combined provisions of sections 66(1)(h) and 285(1) of the Constitution, it is very clear that there is no provision requiring an investigation by the tribunal into how the panel of inquiry referred to under section 66(1)(h) of the

Constitution arrived at its decisions or recommendations or a review of its procedure or decision. The election tribunal was not sitting as a State or Federal High Court either in its original or appellate jurisdiction, or in a supervisory capacity over the panel of inquiry. All the Constitution requires, is proof that a panel of inquiry set up by the Government of Borno State or any other Government indicted the petitioner/1st respondent for fraud or embezzlement and that the indictment was accepted by the Government; and that exhibit "A" duly certified, signed, dated and stamped by the Secretary to the Government of Borno State is sufficient evidence for the purposes of section 66(1)(h) of the Constitution. An inquiry by the tribunal into the procedure adopted by the panel of inquiry or an attempt by the tribunal to review the legality or other wise of the decisions of the panel of inquiry is to my mind completely outside the power or jurisdiction of Election Petition Tribunal. The jurisdiction of the tribunal cannot extend beyond what is granted to it by the constitution. (p. 2559 H)

CONSTITUTIONAL LAW - Interpretation
5. By the golden rule of interpretation, i.e. the simple and ordinary meaning of the words of that section, the words "set up under the Tribunals of Inquiry Act, a Tribunals of Inquiry Law or any other Law by the Federal or State Government" appearing in section 66(1) (h) aforesaid do not in any way, qualify and apply to Administrative Panels of Inquiry. The said words, apply to a class of Tribunals, namely, the tribunals set up under the Tribunals of Inquiry Act or the Tribunals of Inquiry Law or any other law by the Federal or State Government. Certainly, it does not apply to an Administrative Panel. (p. 2561 E)

1999 Constitution s. 66(1)(h) - Interpretation
6. The provisions of section 66(1)(h) are very clear and unambiguous. The key phrases are:-
(i) has been indicted for embezzlement or fraud by a Judicial Commission of Inquiry;
(ii) has been indicted for embezzlement or fraud by an

Administrative Panel of Inquiry;

(iii) has been indicted for embezzlement or fraud by a tribunal set up under the Tribunals of Inquiry Act, Tribunals of Inquiry Law or any other law by the Federal or State Government.

The three phrases are disjunctive and separate and indeed independent of one another. In the circumstances, it is my view that the majority members of the tribunal were wrong when they stated at page 88 of the record of appeal as follows:-

“These three phrases presuppose that whichever panel that made the indictment, whether judicial or administrative, for it to qualify as a panel of inquiry envisaged by S. 66(1)(h) it must have been set up by Law.”

I am of the view that the interpretation given by the majority members of the tribunal is very erroneous. There is no provision in section 66(1)(h) making it mandatory that an Administrative Panel of Inquiry must be set up by law. The interpretation seems to be importing into section 66(1)(h) of the Constitution a condition which the Constitution does not impose or envisage. That is very wrong. In that regard, issue No.3 is hereby resolved in favour of the appellant.

(p. 2561 G)

Evidence - Fraud - Allegation fraud - Proof

7. I think there was sufficient credible and cogent evidence of indictment for fraud and embezzlement which indictment had been accepted by the Government of Borno State against the petitioner/1st respondent before the tribunal and the non-production of the report of the panel of inquiry which indicted the 1st respondent was not fatal to the notice of preliminary objection. The appellant having asserted in his reply to the petition that the 1st respondent has been indicted for fraud and embezzlement by a panel of inquiry set up by the Government of Borno State, must prove the allegation. What is required to prove the allegation is sufficient cogent and credible evidence and not a particular document. The evidence may be the report of the inquiry and may be any other credible documentary

evidence. With the white paper i.e. exhibit “A” in evidence, I think there is sufficient credible evidence before the tribunal and therefore it is not compulsory or necessary that the report of the panel must be produced or attached to the objection.
(p. 2567 C)

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Public document - Admissibility

8. It is the law that once a public document is certified and signed as required by section III of the Evidence Act, such a document is admissible on its mere production and it is unnecessary to prove custody or verify it. (p. 2569 F)

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Public documents - Admissibility

9. With the greatest respect possible to my Lord, Salami, JCA, I do not agree with the view expressed by His Lordship that only certified copies of public documents are admissible.

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A critical examination of that case shows that what His Lordship, Coker, J.S.C. was considering was the admissibility of various types of secondary evidence and in particular a certified copy and a photocopy came to the conclusion that among the various types of secondary evidence of a public document, the only type that is admissible is a certified true copy thereof. The consideration was not between the original i.e. primary and secondary evidence of a public document. The phrase “the only type of secondary evidence” does not seem to me to exclude primary evidence from being admissible.

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Section 93 of the Evidence Act, provides that:-

“the contents of documents may be proved either by primary or secondary evidence.”

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Section 94(1) defines primary evidence as “the document itself.”

Section 96 of the Evidence Act provides that “documents must be proved by primary evidence,” except in the cases to be mentioned later. There is no section of the Evidence Act that provides that no primary evidence of a public document is admissible. Section 112 of the Act allows certified true copy to be produced in proof of the contents of public documents or part of public document. I do not think the provision of

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section 112 of the Act renders the primary evidence of public document inadmissible in evidence.

In my view, the net effect of sections 91(1)(a), 93, 94(1), 95, 97(1)(e) and 112 of the evidence is that the contents of public documents such as the report and the white paper in question may be proved by producing the originals themselves for the court to inspect as primary evidence. If the maker of the statement, as in this case had personal knowledge of the matter dealt with by the statement i.e. DW1, or prove by the production of their certified true copies as secondary evidence, the two documents being public documents. By virtue of section 96 of the Evidence Act, it is my view that public documents are provable by their originals. It says:-

“Documents must be proved by primary evidence except in the cases herein after mentioned.”

Although section 112 allows certified true copies thereof to be used as well, it does not make originals inadmissible. These sections of the Evidence Act in summary lay down that in proving the contents of documents, the emphasis is on the production of their originals i.e. their primary evidence. They however go on to provide that if the contents are to be proved by secondary evidence, a restricted type of secondary evidence only may be accepted i.e. certified copies in the case of public documents. (pp. 2574 F/ & 2575 A)

Issue estoppel - Determination

10. The law is settled that when the question is whether the doctrine of issue estoppel is applicable to a case or not, the important questions to ask, are whether the parties are the same; whether the issues are the same; whether the issues are material to the cause of action in the previous and in the latter case; and whether that issue has been resolved in the previous case. (p. 2583 A)

Appeal - Judgment - Proper order

11. Having set aside the judgment of the tribunal which declared the 1st respondent as elected by the majority of lawful votes at the senatorial election held on the 12th of April, 2003,

a very important question arises namely:-

What consequential order should the court make?

The 1st respondent herein was declared as elected by the majority of lawful votes cast at the senatorial election held on the 12th of April, 2003, by the tribunal. The appellant appealed against the decision of the tribunal and this court saw merit in the appeal in the sense that the 1st respondent herein was caught by the provisions of section 66(1)(h) of the Constitution of the Federal Republic of Nigeria, 1999. Accordingly, she was disqualified to contest the election. Indeed, I am of the view that by virtue of the provisions of section 66(1)(h) of the 1999 Constitution, the 1st respondent herein had no business in contesting the election. Accordingly, I hold and declare that she was not validly elected, on the ground of her disqualification under section 66(1)(h) of the Constitution.

I think, disqualification under section 66(1)(h) of the Constitution falls within section 136(1) of the Electoral Act, 2002 and the correct consequential order that the court must make is an order nullifying the election. (pp. 2584 H/2586 B)

REPRESENTATION

Dr. B. O. Babalakin, SAN with O. Akoni, Esq.; D. B. Hadzana, Esq.; H. M. Dlakwa, Esq.; I.G. Amuda, Esq. and T. Adebayo, Esq., for the Appellant

D. A. Bello, Esq. with A. Abiodun, Esq., for the Respondents

CASES REFERRED TO

Bamigbose v. Jiaza (1991) 3 NWLR (Pt. 177) 64

Adenle v. Olude (2002) 18 NWLR (Pt. 799) 413

Military Government of Imo State v. Nwauwa (1997) 2 NWLR (Pt. 490) 675

FCSC v. Laoye (1989) 2 NWLR (Pt. 106) 652

UNCP v. DPN (1998) 8 NWLR (Pt. 560) 90

Agagu v. Dawodu (1990) 7 NWLR (Pt. 160) 56

Ogbuanyinya & Ors. v. Okudo (1979) 3 LRN 318

Lawson v. Afani (2002) 2 NWLR (Pt. 752) 585

Anatogu v. Igwe Iweka II (1995) 8 NWLR (Pt. 415) 547

Shanu v. Afribank Nigeria Plc. (2002) 17 NWLR (Pt. 795) 185

Akanor v. Ilorin Emirate Council (2001) FWLR (Pt. 42) 59

Ajao v. Ambrose Family & Ors. (1969) 1 NWLR 25

UNCP v. DPN (1998) 8 NWLR (Pt. 560) 90

Green v. Green (1987) 3 NWLR (Pt. 61) 480

Ejiofor v. Onyekwe & Ors (1972) 1 All NLR (Pt. 2) 527

B

STATUTES REFERRED TO

Evidence Act Cap. 112 LFN 1990, ss. 90, 93, 94(1), 95, 97(1), 108(1), 109, 111(1), 112, 114(1)

Constitution of Federal Republic of Nigeria 1999, ss. 66(1)(h), 285(1) C

BOOK REFERRED TO

Aguda: Law and Practice Relating to Evidence in Nigeria 1980, paras. 9-10

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LEAD JUDGMENT BY OBADINA JCA

This is an appeal against the judgment of the National Assembly/ Governorship and Legislative Houses Election Petition Tribunal holden at Maiduguri, Borno State and delivered on 28th June, 2003. At the tribunal, the 1st respondent was the petitioner while the appellant herein, was the 1st respondent to the petition. In her petition as petitioner, the 1st respondent herein, stated inter alia, as follows:- E

“(2) The petitioner was a candidate who contested in the National Assembly Election for the Borno North Senatorial District under the platform of All Nigeria Peoples Party (ANPP) held on the 12th day of April, 2003 and was therefore entitled to bring this petition. F

(3) The 1st respondent was also a candidate who contested in the said senatorial election for the Borno North Senatorial District under the platform of Peoples Democratic Party (PDP). G

(4) The 2nd respondent was the statutory body that conducted the National Assembly Election in Borno State on the 12th day of April, 2003.

(5) The 3rd respondent is the Resident Electoral Commissioner for Borno State and heads the 2nd respondent’s office in Borno State. H

(6) The 4th respondent is the returning officer for the senatorial election held on the 12th day of April, 2003.

(7) The 5th to 8th respondents were agents of the 2nd respondent who participated in the election within the Senatorial Dis-

trict as returning officers.

(8) *The 6th respondent is the returning officer for the Kaga Local Government Area.*

(9) *At the said election the following political parties presented candidates, i.e. All Nigeria Peoples Party (ANPP), Peoples Democratic Party (PDP) and Alliance for Democracy (AD).*

(10) *At the conclusion of the election the following results were declared as the overall result of the election within the Borno North Senatorial District:-*

- (i) *Maina Mohammed Tar..(AD) - 34,044 votes*
- (ii) *Hajja Fati Ibrahim Balama (ANPP) - 41,468 votes*
- (iii) *Mohammed Sanusi Daggash (PDP) - 41,586 votes*

The other political parties had no candidates and no vote at the election. The petitioner will rely on the declaration of result Form C8E No. 0000156 at the trial of the petition.

(11) *That sequel to the above result the 1st respondent was returned as validly elected with a majority of 118 votes above the votes scored by the petitioner.*

(12) *The petitioner contends that the petition is brought on the following grounds:-*

(A) *That the 1st respondent was not validly elected by a majority of lawful votes cast at the senatorial election held on the 12th day of April, 2003.*

(B) *That the elections in some polling units were invalidated by reasons of corrupt practices, illegalities, and unconstitutional act committed by the 1st respondent and his agents on the day of the election, thus making the election in the said polling unit inconclusive as several ballot boxes containing ballot papers and electoral forms and materials were forcefully snatched away by them ...*

(19) *Wherefore your petitioner prays as follows:-*

(a) *That it may be determined that the 1st respondent was not validly elected by a majority of lawful votes at the election.*

(b) *That it may be determined that the petitioner was validly elected by a majority of lawful votes cast at the said election and should therefore be returned as validly elected.*

In the alternative

(a) *That it may be determined that the 1st respondent was not validly elected by majority of lawful votes cast at the election.*

(b) That it may be determined that the election was invalidated by reasons of corrupt practices, illegalities and unconstitutional acts committed by the 1st respondent and his agents in the aforementioned polling units during the election.

(c) That the election conducted at the following polling units
i.e. B

(1) Kingerwa Limanti I polling unit,

(2) Kingerwa Limanti II polling unit

(3) Buwa polling unit of Kingerwa Ward and Fijimatori polling unit are null and void.

(d) An order for a bye-election at the above mentioned polling units of the Senatorial District. C

(e) The costs of this suit."

On the 13th day of May, 2003, the appellant, as the respondent to the petition entered a memorandum of conditional appearance to the petition. On the 19th of May, 2003, the appellant, as the respondent to the petition also filed 1st respondent's reply, and on the 20th of May, 2003, he filed a notice of preliminary objection, pursuant to section 66(1)(h) of the Constitution of the Federal Republic of Nigeria, 1999, on the following grounds: E

"(1) The petitioner lacks the requisite "locus standi" to bring and maintain this petition, not being a qualified candidate at the election to the Senate held in respect of the Borno North Senatorial District on 12th April, 2003.

(2) The petitioner was at all material time to this petition, and is presently under a legal/constitutional incapacity which disqualifies her from holding and thus seeking election into the Senate of the Federal Republic of Nigeria. F

(3) The petitioner was indicted for fraud and embezzlement by a panel of enquiry set up by the Borno State Government on Revenue Generation and Utilization by the Maiduguri Metropolitan Council and the said indictments have been accepted by the Government of Borno State." G

The notice of preliminary objection was supported by affidavit sworn to by the appellant, with an exhibit, marked as exhibit 'A'. The 1st respondent herein, as the petitioner, filed a counter-affidavit against the objection, also with an exhibit, marked as exhibit I. The 2nd - 8th respondents also filed respondent's reply, to the petition. The peti- H

tioner i.e. the 1st respondent herein, also filed petitioner's reply to the 1st respondent's reply.

The learned tribunal then heard arguments from learned counsel on both sides, in respect of the notice of preliminary objection. In a considered ruling delivered on the 3rd day of June, 2003, the tribunal by a majority of (4) four members to one (1) member overruled the preliminary objection and dismissed it. On the 10th June, 2003, the appellant filed a notice and grounds of appeal against the said majority decision of the tribunal contained in its ruling of 3rd June, 2003. After the ruling on the preliminary objection, the substantive matter went to trial. The tribunal heard evidence from both sides. Counsel for the parties also addressed the tribunal. On the 28th of June, 2003 by a majority of four (4) members to one (1) the tribunal found for the petitioner, declared her as elected by the majority of lawful votes cast at the senatorial election held on the 12th of April, 2003. Dissatisfied with the decision of the majority of the tribunal, contained in its judgment dated 28th June, 2003, the appellant has appealed to this court, vide the notice and grounds of appeal filed on the 11th of July, 2003.

By an application filed on the 11th of July, 2003 by the appellant and granted by this court, on the 28th of July, 2003 the appeals filed by the appellant against:

(1) the interlocutory decision of the tribunal dated 3rd day of June, 2003 and

(2) the final judgment dated 28th June, 2003 were consolidated, to be heard together, on the 11 (eleven) amended grounds of appeal.

From the 11 grounds of appeal, the appellant formulated nine (9) issues in the following terms:-

"(1) Whether the majority of members of the tribunal were correct when they rejected and refused to admit the certified true copy of the Borno State white paper on the Report of the Panel of Inquiry on Revenue Generation and Utilization by the Maiduguri Metropolitan Council from April to December, 1994.

(2.) Whether an election tribunal has the jurisdiction to review the decision of a panel of enquiry of the type envisaged under section 66(1)(h) of the 1999 Constitution or otherwise inquire into how it arrived at its decision and recommendations.

(3) *Whether the tribunal was correct when it held that panel which indicted the 1st respondent must have been set up by a law for it to qualify as a panel of enquiry under section 66(1)(h) of the 1999 Constitution.*

(4) *Whether the non-production of the report of the panel of inquiry which indicted the 1st respondent was fatal to the notice of preliminary objection.*

(5) *Whether the appellant has established that the 1st respondent was and remains disqualified to contest for and hold the office of Senator under the 1999 Constitution.*

(6) *Whether the tribunal was correct in rejecting the original copy of the white paper of the Panel of Inquiry set up by the Borno State Government on Revenue Generation and Utilization by the Maiduguri Metropolitan Council from April to December, 1994 and the Borno State white paper on the said report.*

(7) *Whether the appellant had established that the 1st respondent was and still remains disqualified to contest for and hold the office of Senator under the 1999 Constitution.*

(8) *Whether the tribunal was correct in holding that the appellant did not score the majority of the lawful votes cast at the election.*

(9) *Was the tribunal correct in holding that the appellant was involved in election malpractices on the day of the election, that is, 12th April, 2003."*

The 1st respondent herein, Hajia Fati Ibrahim Bulama filed a notice of cross-appeal on the 18/7/2003; and 1st respondent's brief of argument on the 4/8/2003. I shall come later to the cross-appeal. In her 1st respondent's brief of argument, the 1st respondent raised seven (7) issues for determination. Issues are as follows:-

"(1) *Whether the majority of the members of the tribunal were correct when after reviewing the affidavit and documentary evidence placed before it found that there were no admissible evidence and sufficient material on which to determine the disqualification of the petitioner.*

(2) *Whether the report of the panel of inquiry and the Borno State Government white paper tendered by DW1 were admissible in law.*

(3) *Whether there was evidence of indictment for fraud and embezzlement which said indictments were accepted by the Govern-*

ment of Borno State against the petitioner.

(4) *Whether the tribunal was correct when it found that paragraphs 31 - 37 of the appellant's reply to the petition were not within the contemplation of paragraph 12(2) and paragraph 42 of Schedule 1 to the Electoral Act, 2002 and in holding that it amounted to a cross-petition.*

(5) *Whether the tribunal was correct when it held that the 1st respondent did not lead evidence in prove (sic) of his averments that lawful votes were unlawfully excluded from the total votes scored by the candidates.*

(6) *Whether on the evidence before the court the tribunal rightly found that the 1st respondent was involved in electoral malpractices on the date of the election.*

(7) *Whether the appellant scored majority of lawful votes cast at the election."*

A critical analysis of the issues formulated by the appellant as well as those formulated by the 1st respondent clearly shows that the issues formulated by the appellant adequately embrace issues Nos. 1, 2, 3, 6 and 7 raised in the 1st respondent's brief of argument. I will therefore deal first with the issues distilled by the appellant and later come back to issues 4 and 5 raised in the 1st respondent's brief which are not covered by the issues in the appellant's brief.

Issue No.1

"Whether the majority of the members of tribunal were correct when they rejected and refused to admit the certified true copy of the Borno State white paper on the Report of the Panel of Inquiry on Revenue Generation and Utilization by Maiduguri Metropolitan Council from April to December, 1994."

This issue is similar and the same in substance with issue No.1 raised in the 1st respondent's brief of argument. I will therefore treat them together. In arguing the first issue, the learned leading counsel to the appellant, Dr. Babalakin (SAN) referred to the notice of preliminary objection taken by the appellant against the petition filed by the 1st respondent. He said that the essence of the objection was that the tribunal lacked the requisite jurisdiction to hear the petition of the 1st respondent, on the ground that the 1st respondent was under a constitutional incapacity to contest for the office of Senator of the Federal Republic of Nigeria. He referred to section 66(1)(h) of the

1999 Constitution. He also referred to exhibit “A” attached to the affidavit in support of the notice of preliminary objection. He again referred to the ruling of the majority members of the tribunal and section 111(1) of the Evidence Act and submitted that the majority of the members of the tribunal were wrong when they held that exhibit “A” did not comply with section 111(1) of the Evidence Act and was therefore inadmissible. He again referred to exhibit “A” at pages 22 - 46 of the record of appeal. He referred to section 114(1) of the Evidence Act and submitted that section 114(1) of the Evidence Act creates a strong presumption in favour of a document which purports to be a certified true copy once it complies substantially with the form and manner of execution provided by law. He referred to the opinion of the learned author “Aguda in Law and Practice relating to Evidence in Nigeria, 1980.” Paragraphs 9-10. He submitted that the certification on exhibit “A” substantially conformed with the provisions of section 111(1) of the Evidence Act. He referred to exhibit I attached to the counter-affidavit sworn to by the 1st respondent at page 49 of the record of appeal. He argued that exhibit I, was signed by the Secretary to the Borno State Government (SSG) who also certified exhibit “A”. He submitted that exhibit “A” was admissible and urged the court to allow the appeal and affirm the minority decision of the tribunal.

In his brief on issue No.1, the learned counsel to the 1st respondent also referred to the notice of preliminary objection filed by the appellant and exhibit “A” attached to the affidavit in support thereof. He referred to the counter-affidavit filed by the 1st respondent and paragraphs 4 and 5 of the said counter-affidavit. He submitted that by the counter-affidavit, the 1st respondent challenged the existence of the report of the panel and the white paper, exhibit “A” and the appellant was duty bound to satisfy the tribunal that such documents existed in fact and in law. He referred to the majority ruling of the tribunal at page 90 of the record of appeal, from line 32, wherein the majority of the tribunal held that exhibit “A” “having not been gazetted and given the fact that on the face of it there is nothing to show that it was executed by the Borno State Government, its admissibility has been called into question as proof of the indictment of the petitioner. He submitted that the tribunal was right in its findings. He again referred to exhibit “A” and argued that exhibit “A” was not signed

by anybody on behalf of the Government of Borno State. It does not contain the name and signature of the Secretary to the State Government. He submitted that exhibit “A” did not meet the requirement of section 111(1) of the Evidence Act, and therefore could not be produced in proof of the original in accordance with section 112
 B of the Evidence Act. He submitted that the tribunal was right in rejecting exhibit “A” and in refusing to act on it. The learned counsel argued that exhibit “A” was said have been certified by the Secretary to the State Government of Borno State (SSG) on the 18th of May, 2003. He argued that 18th of May, 2003 was a Sunday, a non-
 C working day. He submitted, in effect, that exhibit “A” was forged. He referred to exhibit I, attached to the counter-affidavit of the 1st respondent to the objection, and argued that the document exhibit I was signed by the Secretary to the Borno State Government Dr. Shetti
 D Bukar Abba, appointing the 1st respondent a Commissioner in Borno State. He submitted that the non-production of the report of the panel of inquiry was fatal to the preliminary objection raised by the appellant. Mr. Bello again referred to paragraphs 6 and 7 of the affidavit in support of the objection and paragraphs 4 and 5 of the counter
 E affidavit against the objection and submitted that issues had been joined by the parties and the appellant owed a duty to present the report of the panel and the white paper accepting the recommendations of the panel. He said that the appellant only presented exhibit
 F “A” before the tribunal and that the tribunal was right to hold that non-production of the report was fatal to the appellant’s objection. He referred to the case of *Bamigbose v. Jiaza* (1991) 3 NWLR (Pt. 177) 64 at 74. He referred to section 66(1)(h) of the 1999 Constitution and submitted that both the report of the panel of inquiry and
 G the white paper must be in evidence to satisfy the provisions of section 66(1)(h) of the Constitution. He further stated that the tribunal had power to review the decision or recommendation of the panel of Inquiry. He urged the court to dismiss the appeal.

The main question to be answered in the issue under consid-
 H eration is whether exhibit “A” attached to the notice of preliminary objection is admissible. The learned counsel for the appellant Dr. Babalakin (SAN) argued strongly that exhibit “A” attached to the notice of preliminary objection is admissible. Mr. Bello for the 1st respondent argued to the contrary. He referred to the finding of the

majority of the tribunal that exhibit "A" was not executed by the Borno State Government, because the name of the maker of the document i.e. Exhibit "A" was not contained on it. He said that exhibit "A" was not signed by anybody on behalf of the Government of Borno State and that it did not contain the name and signature of the Secretary to the Government. Mr. Bello further argued that if the purpose of tendering exhibit "A" was to show the tribunal that the indictment against the petitioner was accepted by Government of Borno State, the date of the acceptance must be contained on the document, the signature of the person acting on behalf of the government must be affixed on the document. He added that the document did not meet the requirement of section 111(1) of the Evidence Act.

Issue of admissibility of document is always governed by the Evidence Act. A cursory look at exhibit "A" titled "Government white paper on the Report of the Panel of Inquiry on Revenue Generation and Utilization by the Maiduguri Metropolitan Council from April - December, 1994" marked "restricted" with the "Logo" "Borno State of Nigeria", shows that exhibit "A" is a public document within the meaning of section 109 of the Evidence Act. By the provisions of section 112 of the Evidence Act a certified true copy of the Government white paper may be produced in proof of its contents. Mr. Bello however, made so many derogatory observations about exhibit "A" including an allegation of forgery and concluded that exhibit "A" did not meet the requirements of section 111(1) of the Evidence Act. Section 111(1) of the Evidence Act, Cap. 112, Laws of the Federation, 1990 provides as follows:-

"111(1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies."

From the provisions of section 111(1) of the Evidence Act, what a certificate written at the foot of a certified true

copy of a public document should contain are clearly stated.

“Such certificate shall be dated, and subscribed by such officer with his name and his official title and shall be sealed, whenever such officer is authorized by law to make use of a seal.”

B **A careful look at exhibit “A” i.e. the white paper in question, shows that the officer who certified exhibit “A” as certified true copy subscribed to exhibit “A” with his signature and his official title, namely:-**

C ***“Secretary to the State Government, Borno State” and date, namely, 18/5/2003. Payment of legal fee on application for a certified true copy is not part of the condition to make a document so certified a certified true copy. It is only a condition which must be fulfilled before the officer certified a docu-***

D **ment.** Every page of exhibit “A” from pages 22 - 46 of the record of appeal was duly certified and dated. Exhibit “A” having been purportedly certified by the Secretary to the State Government of Borno State, the court or tribunal has a duty to presume under section 114(1) of the Evidence Act, that exhibit “A” is a genuine certified true copy of
E the white paper which it purports to be. Section 114(1) of the Evidence Act provides:-

“114(1) The court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be certified by any officer in Nigeria who is duly authorized thereto to be genuine, provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.”

G **Section 114(2) also enjoins the court or tribunal to presume that any officer by whom any such document, as in this case, purports to be signed or certified, held, when he signed it, the official character which he claims in such paper. In the circumstances, it is my view that exhibit “A” has been substantially certified in conformity**
H **with the provision of section 111 of the Evidence Act. The learned counsel to the 1st respondent, P.A. Bello argued that exhibit “A” was not signed by the Secretary to Borno State Government, whom he said, signed exhibit I attached to the counter-affidavit filed by the 1st respondent. In that regards, what was before the tribunal for resolu-**

tion as to the execution of exhibit "A" was the denial by the 1st respondent that the Secretary to the Government of Borno State signed exhibit "A". ***I think some options were open to the tribunal under the provisions of section 108 of the Evidence Act, which provides as follows:-***

"108(1) In order to ascertain whether a signature, writing, seal or finger impression is that of the person by whom it purports to have been written or made, any signature, writing, seal or finger impression admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, seal or finger impression has not been produced or proved for any other purpose."

In the instant case, since the 1st respondent filed exhibit I with her counter-affidavit admitting that exhibit I was signed by the Secretary to the Government of Borno State who was alleged by the appellant to have certified exhibit "A", the proper thing for the tribunal to do was to compare the Signature on exhibit "A" with that on exhibit I, and then make a finding. See *Adenle v. Olude* (2002) 18 NWLR (Pt. 799) 413 at 430. There is no evidence that the tribunal followed such a course of action in this case. I have myself compared the signature on exhibit "A" and exhibit I, and I think they are similar. I am therefore of the view that exhibit "A" was duly certified by the Secretary to the Government of Borno State substantially in accordance with the provisions of section 111(1) of the Evidence Act. Exhibit "A" is therefore admissible under the provisions of section 112 of the Evidence Act, in proof of the contents of the public document in question of which it purports to be copy i.e. 'The white paper on the Report of the Panel of Inquiry on Revenue Generation and Utilization by the Maiduguri Metropolitan Council from April - December, 1994.' In that regard I am of the view that the majority of the members of the tribunal were very wrong when they rejected and refused to admit the certified true copy of the Borno State white paper on the Report of the Panel of Inquiry on Revenue Generation and Utilization by the Maiduguri Metropolitan Council from April to December, 1994. The document was relevant, and duly certified and was accordingly admissible in evidence. Issue No. 1 is accordingly resolved in favour of

the appellant.

Issue No.2

“Whether an Election Petition Tribunal has the jurisdiction to review the decision of a panel of enquiry of the type envisaged under section 66(1)(h) of the 1999 Constitution or otherwise inquire into how it arrived at its decision and recommendations.”

The learned counsel for the 1st respondent, Mr. Bello did not specifically formulate an issue on the issue under consideration but he extensively argued it as part of issue No.1 which has just been disposed of. I will however allude to his submission in the course of treatment of the issue. In arguing issue No.2 the learned leading counsel for the appellant, Dr. Babalakin (SAN) referred to the appellant’s notice of preliminary objection. He also referred to the findings of the majority of the tribunal at page 89 of the record of appeal, wherein the tribunal held as follows:-

“Another pre-supposition of the provision of section 66(1)(h) of the Constitution is that for the Administrative Panel of Enquiry whose recommendations would be accepted must have conducted the inquiry in accordance with the Law.”

He also referred to page 90 of the record of appeal where the tribunal again stated:-

“The question that needs to be answered in our bid to exhaustively inquire into the disqualification of the petitioner is, how did the panel of inquiry arrives at the decision and recommendations that were accepted in exhibit “A”.

The learned Senior Advocate submitted that the tribunal fell into serious error. He referred to section 66(1)(h) of the Constitution and submitted that the tribunal had no power to review the decision of the panel. He urged the court to allow the appeal. In his own brief on the issue the learned counsel to the 1st respondent, Mr. Bello also referred to section 66(1)(h) of the 1999 Constitution and submitted that the tribunal had the power to review the decision or recommendations of the panel of inquiry. He said that the tribunal was entitled to examine whether the allegations and recommendations of the panel of inquiry were indeed allegations involving fraud and embezzlement, and to make its own finding that what was alleged was not fraud and embezzlement as the case may be. He submitted that the failure of the appellant to attach the report of the panel as exhibit to the notice

of preliminary objection was fatal to the appellant's objection. He urged the court to dismiss the appeal.

Section 285(1) of the 1999 Constitution established the National Assembly Election Tribunals and prescribed the jurisdictions of the tribunals. It provides:-

"285(1) There shall be established for the Federation one or more election tribunals to be known as the National Assembly Election Tribunals which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether:-

(a) any person has been validly elected as a member of the National Assembly;

(b) the term of office of any person under this constitution has ceased;

(c) the seat of a member of the Senate or a member of the House of Representatives has become vacant; and

(d) a question or petition brought before the election tribunal has been properly or improperly brought."

The powers of the tribunal as provided by the Constitution (supra) is very clear and unambiguous. In the instant case, the power of the tribunal was to hear and determine whether the appellant has been validly elected as a member of the National Assembly and whether the petition brought by the petitioner/1st respondent before the tribunal has been properly or improperly brought. Section 66 of the 1999 Constitution prescribes conditions that would disqualify a person from being qualified for election. It provides:-

"66(1) No person shall be qualified for election to the Senate or the House of Representatives if:-

(h) he has been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or an Administrative Panel of Inquiry or a tribunal set up under the Tribunal of Inquiry Act, a Tribunal of Inquiry Law, or any other law by the Federal or State Government which indictment has been accepted by the Federal or State Government respectively,"

From the combined provisions of sections 66(1)(h) and 285(1) of the Constitution, it is very clear that there is no provision requiring an investigation by the tribunal into how the panel of inquiry referred to under section 66(1)(h) of the Constitution arrived at its decisions or recommendations or a re-

view of its procedure or decision. The election tribunal was not sitting as a State or Federal High Court either in its original or appellate jurisdiction, or in a supervisory capacity over the panel of inquiry. All the Constitution requires, is proof that a panel of inquiry set up by the Government of Borno State or any other Government indicted the petitioner/1st respondent for fraud or embezzlement and that the indictment was accepted by the Government; and that exhibit "A" duly certified, signed, dated and stamped by the Secretary to the Government of Borno State is sufficient evidence for the purposes of section 66(1)(h) of the Constitution. An inquiry by the tribunal into the procedure adopted by the panel of inquiry or an attempt by the tribunal to review the legality or other wise of the decisions of the panel of inquiry is to my mind completely outside the power or jurisdiction of Election Petition Tribunal. The jurisdiction of the tribunal cannot extend beyond what is granted to it by the constitution. In the circumstances the majority decision of the tribunal dated 3rd day of June, 2003 is completely wrong and is accordingly hereby set aside. In its place I affirm the minority decision of the tribunal delivered on the 3rd day of June, 2003 by Honourable Justice Abiri. It is indeed a very sound decision. Issue No.2 is therefore resolved in favour of the appellant.

Issue No.3

"Whether the tribunal was correct when it held that the panel which indicted the 1st respondent must have been set up by a law for it to qualify as a panel of inquiry under section 66(1)(h) of the 1999 Constitution".

In arguing the issue, the learned counsel to the appellant Dr. Babalakin (SAN) referred to section 66(1)(h) or the 1999 Constitution. He also referred to the interpretation and findings of the tribunal on section 66(1)(h) or the Constitution, wherein, the tribunal took the view that the word "set up under the tribunals of Inquiry Act, a Tribunals of Inquiry Law or any other Law by the Federal or State Government" appearing in section 66(1)(h) qualifies and applies to Administrative Panels of Inquiry. He submitted that the interpretation of the tribunal did not accord with the simple and ordinary meaning or the words of that section. He argued that an Administrative Panel or Inquiry need not be set up by any law whatsoever. He

urged the court to set aside the finding or majority or the members or the tribunal on the point. The learned counsel to the 1st respondent did not specifically address the issue under consideration in his brief of argument. Section 66(1)(h) or the 1999 Constitution in prescribing conditions that shall disqualify a person for election to the Senate or the House of Representatives provides as follows:- B

“66(1) No person shall be qualified for election to the Senate or the House of Representatives is:-

(h) he has been indicted for embezzlement or fraud by a Judicial Commission or Inquiry or an Administrative Panel or Inquiry or a Tribunal set up under the Tribunals or Inquiry Act, a Tribunals of Inquiry Law or any other law by the Federal or State Government which indictment has been accepted by the Federal or State Government respectively.” C

From the provisions or section 66(1)(h) or the Constitution D quoted above, it is very clear that three types or bodies are postulated therein namely:-

- (a) a Judicial Commission of Inquiry,
- (b) an Administrative Panel of Inquiry, and
- (c) a tribunal set up under the Tribunals of Inquiry Act, a Tribunals or Inquiry Law or any other law by the Federal or State Government. E

By the golden rule of interpretation, i.e. the simple and ordinary meaning of the words of that section, the words “set up under the Tribunals of Inquiry Act, a Tribunals of Inquiry Law or any other Law by the Federal or State Government” appearing in section 66(1) (h) aforesaid do not in any way, qualify and apply to Administrative Panels of Inquiry. The said words, apply to a class of Tribunals, namely, the tribunals set up under the Tribunals of Inquiry Act or the Tribunals of Inquiry Law or any other law by the Federal or State Government. Certainly, it does not apply to an Administrative Panel. F

The provisions of section 66(1)(h) are very clear and unambiguous. The key phrases are:- H

- (i) has been indicted for embezzlement or fraud by a Judicial Commission of Inquiry;***
- (ii) has been indicted for embezzlement or fraud by an Administrative Panel of Inquiry;***

(iii) has been indicted for embezzlement or fraud by a tribunal set up under the Tribunals of Inquiry Act, Tribunals of Inquiry Law or any other law by the Federal or State Government.

The three phrases are disjunctive and separate and indeed independent of one and another. In the circumstances, it is my view that the majority members of the tribunal were wrong when they stated at page 88 of the record of appeal as follows:-

“These three phrases presuppose that whichever panel that made the indictment, whether judicial or administrative, for it to qualify as a panel of inquiry envisaged by S. 66(1)(h) it must have been set up by Law.”

I am of the view that the interpretation given by the majority members of the tribunal is very erroneous. There is no provision in section 66(1)(h) making it mandatory that an Administrative Panel of Inquiry must be set up by law. The interpretation seems to be importing into section 66(1)(h) of the Constitution a condition which the Constitution does not impose or envisage. That is very wrong. In that regard, issue No.3 is hereby resolved in favour of the appellant.

Issue No.4

“Whether the non-production of the report of the Panel of Inquiry which indicted the 1st respondent was fatal to the notice of preliminary objection.”

This issue and issue No.3 formulated by the 1st respondent are similar and the same in substance. Issue No.3 raised by the 1st respondent reads as follows:

“Whether there was evidence of indictment for fraud and embezzlement which said indictments were accepted by the Government of Borno State against the petitioner.”

The two issues deal with the question of whether there was evidence of indictment against the 1st respondent before the tribunal. I will therefore treat the issues together.

In his brief of argument on the issue, the learned leading counsel to the appellant, Dr. Babalakin (SAN) referred to the ruling of the tribunal on the notice of preliminary objection, wherein the tribunal, held, inter alia, that the failure of the appellant to produce the report

of the panel of inquiry was fatal to the objection filed by the appellant. He submitted that the tribunal was in error in coming to that decision, as there was no requirement that the report of such a panel must be produced in court. He referred to page 90 of the record of appeal, wherein the tribunal was of the view that under the provisions of section 66 of the Constitution, the appellant must produce before the tribunal both the report of the panel of inquiry and the white paper accepting the recommendations in the report. He argued that all the tribunal needed to concern itself with was whether there was proof that a panel of inquiry set up by the Government of Borno State indicted the 1st respondent for fraud and/or embezzlement and that the indictment was accepted by the Government. He referred to the white paper - exhibit "A" attached to the notice of preliminary objection, and submitted that exhibit "A" has supplied all the needed facts which the report of the panel of inquiry could have supplied.

The learned counsel to the 1st respondent, Mr. Bello in his brief of argument on the issue under consideration referred to the white paper, exhibit "A" and argued that assuming, without conceding that exhibit "A" was admissible, in law, that exhibit "A" did not disclose any indictment for fraud and embezzlement against the petitioner. He referred to Black's Law Dictionary, 5th Edition at page 594, wherein embezzlement was defined. He argued that there was no where in the white paper - exhibit "A" where willful intention to do any of the acts allegedly done were disclosed in exhibit "A". He submitted that what was accepted by the Government of Borno State was not the report of the panel of inquiry indicting the petitioner, but the recommendations of the panel of inquiry for refund of various sums of money which was not within the contemplation of section 66(1)(h) of the Constitution. He said that what the panel of inquiry embarked upon were criminal trials which the panel of inquiry had no power to do. He cited the cases of - *Military Government of Imo State v. Nwauwa* (1997) 2 NWLR (Pt. 490) 675, (1997) 2 SCNJ 60 at 86; *FCSC v. Laoye* (1989) 2 NWLR (Pt. 106) 652 at 707; *UNCP v. DPN* (1998) 8 NWLR (Pt. 560) 90 and urged the court to dismiss the appeal.

The issue under consideration is whether the non-production of the report of the panel of inquiry which indicted the 1st respon-

dent was fatal to the notice of preliminary objection before the tribunal; in other words, whether there was evidence before the tribunal of indictment for fraud and/or embezzlement which said indictments were accepted by the Government of Borno State against the petitioner/1st respondent. Section 66(1)(h) of the Constitution of the Federal Republic of Nigeria, 1999 provides that no person shall be qualified for election to the Senate or the House of Representatives, if he has been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or an Administrative Panel of Inquiry or a tribunal set up under the Tribunals of Inquiry Act, a Tribunals of Inquiry Law or any other law by the Federal or State Government which indictment has been accepted by the Federal or State Government respectively. In paragraphs 2, 3, 4, 5, 6, 7 and 8 of the reply to-the petition, the appellant as the 1st respondent to the petition challenged the qualification of the petitioner/1st respondent to contest the election to the Senate. In particular, the appellant stated in paragraphs 5, 6 and 7 of his reply to the petition as follows:-

“(5) The petitioner was at all material times to this petition, and is presently, under a legal/constitutional incapacity which disqualified and continues to disqualify her from holding and thus seeking election into the Senate of the Federal Republic of Nigeria.

(6) The petitioner was indicted severally for fraud and embezzlement by a panel of enquiry set up by the Borno State Government on Revenue Generation and Utilization by the Maiduguri Metropolitan Council from April to December, 1994.

(7) The said indictment has been accepted by the Government of Borno State as contained in the white paper issued by the Government of Borno State in respect of the report of the panel of inquiry. The 1st respondent shall rely on the white paper at the trial of this petition.”

From the provisions of paragraphs 5, 6 and 7 of the appellant's reply to the petition the appellant has asserted that the 1st respondent was not qualified to contest as a Senator of the Federal Republic of Nigeria having been indicted for fraud and embezzlement by a panel of inquiry set up by the Government of Borno State and that the indictment has been accepted by the Government of Borno State.

In paragraph 8 of the reply, to the petition, the appellant stated as follows:-

“(8) In the said white paper, the Government of Borno State accepted the report of the panel indicting the petitioner in respect of:-

(i) fraud/embezzlement involving the collection of the sum of N226,800.00 and failing to remit the same to the council. The sum was recovered and she was relieved of her appointment. B

(ii) fraud/embezzlement involving the sum of N155,600.00 being the cost of materials not supplied. She was ordered to refund the said sum.

(iii) fraud/embezzlement in the sum of N251,706.90 being the value of work not done in respect of a contract purportedly awarded to a contractor but which was found out by the panel to have been carried out by the petitioner. C

(iv) fraud/embezzlement in the sum of N15,000.00 being out of pocket expenses not properly accounted for. She was ordered to refund the said sum. D

(v) fraud/embezzlement in the sum of N40,000.00 which she was ordered to refund personally and the sum of N110,906.25 which she was ordered to refund along with other councilors and other staff of the council. This was in respect of monies overpaid for the hiring of tippers. E

(vi) fraud/embezzlement in the sum of N273,088.00 being the amount in respect of fake names which she and other members of the committee of which she was the chairman fraudulently collected concerning the Bukarti Resettlement Scheme. She and other members of the committee were ordered to refund the said sum.” F

The above are the allegations of frauds/embezzlement levied by the appellant against the petitioner/1st respondent. The allegations render a person disqualified under section 66(1)(h) of the Constitution. Having asserted, the appellant was under a duty to lead evidence in proof of the allegations. The appellant, as the respondent to the petition, filed a notice of preliminary objection against the petition. The grounds of the objection read as follows:- G

“(1) The petitioner lacks the requisite locus standi to bring and maintain this petition, not being a qualified candidate at the election to the Senate held in respect of the Borno North Senatorial District on 12th April, 2003. H

(2) The petitioner was at all material times to this petition, and

is presently, under a legal/constitutional incapacity which disqualified and continues to disqualify her from holding and thus seeking election into the Senate of the Federal Republic of Nigeria.

B (3) *The petitioner was indicted for fraud and embezzlement by a panel of enquiry set up by the Borno State Government on Revenue Generation and Utilization by the Maiduguri Metropolitan Council and the said indictments have been accepted by the Government of Borno State."*

C (4) The notice of preliminary objection was supported with an affidavit. Attached to the affidavit is a document titled "Government white paper on the Report of the Panel of Inquiry on Revenue Generation and Utilization by the Maiduguri Metropolitan Council from April - December, 1994," and marked exhibit "A".

D A cursory look at exhibit "A" attached to the notice of preliminary objection shows that it was clearly certified as true copy of the original by the Secretary to the Government of Borno State, who had the original in his custody, signed, stamped and dated by him. With exhibit "A" duly certified as the true copy of the original by the Secretary to the Government of Borno State, signed stamped and dated by him, it seems to me that exhibit "A" being a public document has been duly certified in substantial conformity with the provisions of section 111 of the Evidence Act and is therefore admissible in evidence under section 112 of the Evidence Act, in proof of the contents therein.

F The learned author of Law and Practice Relating to Evidence in Nigeria by T. Akinola Aguda, 2nd Edition, page 280, para. 18.09 had the following to say on admissibility of public document:-

G *"Once a public document is certified and signed as required by S. 111, such a document is admissible on its mere production, and it is unnecessary to prove custody or to verify it. It is unnecessary to call the public officer who certified it, and may even be tendered from bar."* See *Agagu v. Dawodu* (1990) 7 NWLR (Pt. 160) 56 and *Ogbuanyinya & Ors. v. Okudo* (1979) 3 LRN 318, (1979) 6 - 9 SC H 32.

A careful examination of exhibit "A" shows the members of the panel of inquiry in question; the terms of reference given to the panel of inquiry; the panel's findings and recommendations; the recommendations that were accepted and those that were rejected by the

Government of Borno State. Exhibit "A" generally shows how the 1st respondent was indicted for fraud and embezzlement of various sums of money during her tenure of office in the council. See pages 23 - 46 of the record of appeal. In that regard, with exhibit "A" i.e. the Government white paper on the Report of the Panel of Inquiry on Revenue Generation and Utilization by the Maiduguri Metropolitan Council from April to December, 1994, duly certified, signed, stamped and dated by the Secretary to the Government of Borno State in evidence before the tribunal, which document must be presumed as evidence of the fact it purports to establish, under section 114(1) of the Evidence Act, ***I think there was sufficient credible and cogent evidence of indictment for fraud and embezzlement which indictment had been accepted by the Government of Borno State against the petitioner/1st respondent before the tribunal and the non-production of the report of the panel of inquiry which indicted the 1st respondent was not fatal to the notice of preliminary objection. The appellant having asserted in his reply to the petition that the 1st respondent has been indicted for fraud and embezzlement by a panel of inquiry set up by the Government of Borno State must prove the allegation. What is required to prove the allegations is sufficient cogent and credible evidence and not a particular document. The evidence may be the report of the inquiry and may be any other credible documentary evidence. With the white paper i.e. exhibit "A" in evidence, I think there is sufficient credible evidence before the tribunal and therefore it is not compulsory or necessary that the report of the panel must be produced or attached to the objection.*** Issue No.4 in the appellant's brief of argument and No.3 in the 1st respondent's brief are accordingly resolved in favour of the appellant.

Issue No.5

"Whether the appellant had established that the 1st respondent was and remains disqualified to contest for and hold the office of Senator under the 1999 Constitution."

The issue No.1 raised in the 1st respondent's brief of argument is also similar to issue No.5 in the appellant's brief. It reads:

"Whether the majority of the members of the tribunal were correct when after reviewing the affidavit and documentary evidence

placed before it found that there were no admissible evidence and sufficient material on which to determine the disqualification of the petitioner.”

I will treat the two issues together. In arguing the issue, the leading counsel to the appellant, Dr. Babalakin (SAN) referred to his earlier submission and submitted that the majority of the members of the tribunal fell into serious error when they held that there was no material before the tribunal to enable them determine the qualification or otherwise of the 1st respondent to contest for and hold office as a Senator of the Federal Republic of Nigeria. He referred to the white paper, exhibit “A” and argued that the white paper - exhibit “A” clearly showed that a panel of inquiry set by the Borno State Government to Investigate Revenue Generation and Utilization in the Maiduguri Metropolitan Council between April and December, 1994 indicted the 1st respondent of several cases of fraud and embezzlement. He submitted that the appellant had established that the 1st respondent was disqualified from contesting and holding office of Senator under section 66(1)(h) of the 1999 Constitution. He urged the court to allow the appeal against the majority decision of the tribunal and to affirm the minority decision.

The learned counsel to the 1st respondent, Mr. Bello in his brief of argument also referred to exhibit “A” attached to the notice of preliminary objection. He referred to paragraphs 4 and 5 of the counter-affidavit filed by the 1st respondent challenging the existence of the report of the panel and the white paper exhibit “A”. He submitted that it was the duty of the appellant to satisfy the tribunal that such documents existed. He referred to the findings of the tribunal at page 90 of the record of appeal wherein the tribunal rejected exhibit “A”, saying that exhibit “A” was not executed by the Government of Borno State. He said exhibit “A” was not signed by anybody on behalf of the Government of Borno State. He further submitted that exhibit “A” which purported to be a certified true copy of the original did not meet the requirement of section 111(1) of the Evidence Act, in that it did not contain the name of the officer that certified it.

I have earlier in this judgment found that exhibit “A” attached to the notice of preliminary objection was certified in substantial conformity with the provisions of section 111(1) of the Evidence Act.

Exhibit “A” clearly shows that it was certified by the Secretary to the Government of Borno State, who after the certification, signed, stamped and dated same. The 1st respondent attached a letter claimed by the 1st respondent to have been signed by the same Secretary to the Government of Borno State to her counter-affidavit against the objection. The letter was marked exhibit I. **The law is settled that in resolving the issue of due execution of document where the alleged maker denies his signature, the course or options opened to the court would inter alia be to compare the signature admitted by the alleged signatory to be his own with the one under contention under section 108(1) of the Evidence Act.** See also Adenle v. Olude (2002) 18 NWLR (Pt. 799) 413 at 430. B
C

A careful examination and analysis of the signature of the person who certified exhibit “A” pages 22 - 46 of the record and the signature on exhibit I admitted by the 1st respondent to be that of the Secretary to the Government of Borno State clearly shows that there is something intrinsic in the signatures that makes them pretend to be that of the same person i.e. the Secretary to the Government of Borno State. Indeed I have no doubt in my mind that the person who signed exhibit I attached to the counter-affidavit signed exhibit “A” attached to the notice of preliminary objection. Exhibit “A” having been certified by the Secretary to the Government of Borno State in substantial compliance with section 111(1) of the Evidence Act, the tribunal must presume it a certified true copy of the document which it purports to be under the provisions of section 114 of the Evidence Act. **It is the law that once a public document is certified and signed as required by section III of the Evidence Act, such a document is admissible on its mere production and it is unnecessary to prove custody or verify it** - See Agagu v. Dawodu (1990) 7 NWLR (Pt. 160) 56 (supra). In the circumstances, exhibit “A” is admissible and the tribunal was wrong to have rejected it and to state that there was no material before the tribunal on which to determine the disqualification of the petitioner/1st respondent. D
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A cursory look at exhibit “A” i.e. the white paper, at pages 22 46 of the record and in particular pages 25 - 26; 28 - 29; 30; 32; and 39 of the record of appeal, shows very clearly that the panel of inquiry set up by the Government of Borno State to investigate rev-

enue generation and utilization in the Maiduguri Metropolitan Council between April and December, 1994 heavily indicted the 1st respondent, “in the sense of ascribing to her blame with a coloration of dishonesty”. The indictment was accepted by the Government of Borno State. In the circumstance, it is my view that the appellant as
 B 1st respondent before the tribunal clearly established that the petitioner/ 1st respondent herein was and remains disqualified under the provisions of section 66(1)(h) of the 1999 Constitution of the Federal Republic of Nigeria to contest for election to the Senate or the
 C House of Representatives. Accordingly, I hold that the 1st respondent was not qualified to contest for and hold office of Senator under the 1999 Constitution.

Therefore the appeal against the ruling of the majority of the members of the Tribunal contained in the decision of Hon. Justices
 D N.C. Otti, G. L. Kurada, H. M. Tsammani and H.S. Bashar dated 3rd of June, 2003 succeeds and it is hereby allowed. The said ruling dated 3rd of June, 2003 is set aside in its entirety.

I affirm the minority decision of the said tribunal contained in the ruling of the Hon. Justice A. S Abiri, striking out the petition
 E before the tribunal. I hereby strike out the petition No. EPT/M/01/2003 filed by the petitioner/1st respondent on the 8th of May, 2003 before the tribunal.

I now go to the 2nd appeal which is against the decision of the majority of the members of the tribunal dated 28th June, 2003. The
 F issues formulated by the appellant in respect of the said second appeal are issues No.6, 7, 8 and 9 in the appellant’s brief of argument.

Issue No.6 reads:-

“Whether the tribunal was correct in rejecting the original copy
 G of the report of the panel of inquiry set up by the Borno State Government on Revenue Generation and Utilization by the Maiduguri Metropolitan Council from April to December, 1994 and the Borno State Government white paper on the said report.”

In arguing the issue the learned counsel to the appellant again
 H referred to the ruling on the appellant’s preliminary objection wherein the majority of the members of the tribunal held, inter alia, that it was necessary for the appellant to produce the report of the panel of inquiry before the tribunal, and that there was no sufficient material before the tribunal for the tribunal to determine whether or not the

1st respondent was qualified to contest the election. He referred to the evidence of DW1 given at the trial of the substantive petition. DW1 who was the chairman of the panel of inquiry sought to tender the report of the panel. The tribunal rejected the report in evidence. He referred to the case of *Lawson v. Afani* (2002) 2 NWLR (Pt. 752) 585, (2002) FWLR (Pt. 109) 1730 at 1736 upon which the tribunal based its ruling. He also referred to *Anatogu v. Igwe Iweka II* (1995) 8 NWLR (Pt. 415) 547. The learned counsel further referred to the evidence of DW1 wherein he sought to tender the original white paper issued by the Borno State Government on the report of the panel of inquiry and the tribunal rejected the white paper. He submitted that the rejection of the two documents were erroneous and that the tribunal was enjoined to re-visit the issue in the course of its final judgment. He relied on the case of *Shanu v. Afribank Nigeria Plc.* (2002) 17 NWLR (Pt. 795) 185. The learned counsel submitted that the tribunal was wrong in rejecting the two original documents. He said that the findings of the tribunal on the issue were perverse. He urged the court to reverse the rejection of the report of the panel as well as the white paper on the report and admit the two exhibits. He urged the court to affirm the minority decision of the tribunal and admit the report and the white paper. B C D E

In his own argument on the issue the learned counsel to the 1st respondent, Mr. Bello also referred to the evidence of DW1 at page 213 of the record. He said that the DW1 sought to tender the report of the panel of inquiry and the report was rejected by the tribunal on the ground that the original of public document was not admissible in evidence. He argued that the tribunal also found that the document was a copy of the original and was also inadmissible. He referred to section 94(4) of the Evidence Act, and argued that for the report of the panel to be admissible in evidence without certification, the documents must have been made by a uniform process. He stated that there was no such evidence from DW1 that the document he sought to tender were made by a uniform process. He submitted that the copy of the report given to the DW1 and which he sought to tender in evidence was a copy of a common original which was not a primary evidence of the contents of the original. As regards the rejection of the white paper in evidence by the tribunal, the learned counsel submitted that the white paper was not signed by anybody and F G H

was not dated. He referred to a number of cases, in particular, *Akanor v. Ilorin Emirate Council* (2001) FWLR (Pt. 42) 59 at 92 C and submitted that the tribunal was right when it rejected the white paper in evidence. He urged the court to dismiss the appeal.

The crux of the matter under the issue in consideration is whether the original report of the panel and the original white paper made in respect thereof are admissible in evidence. The question as to whether or not a document is admissible in evidence is governed by the Evidence Act; and whether the document is relevant. DW1 gave evidence before the tribunal from page 211 of the record of appeal. He was the Chairman of the Panel of Inquiry on Revenue Generation and Utilization by the Maiduguri Metropolitan Council between April to December, 1994. He sought to tender the report of the panel in evidence. He also sought to tender the Government white paper on the report of the panel. The tribunal rejected the two documents. In seeking to tender the report, DW1 stated inter alia as follows:-

“At the end of our sitting we wrote a report which we submitted to the then BOSG highlighting our finding, making observations and recommendations. The report we made was bound and submitted in copies to the BOSG. Each of the member of the panel was given a copy and I was also given a copy for my own records. The report was signed by the members of the committee. I was on subpoena to bring a copy of the report, and I have my signature on the document. Counsel seeks to tender the document. Counsel for the 1st respondent opposed the document being tendered in evidence.”

In the ruling of the majority of the members of the tribunal, the tribunal rejected the document on the ground that it was the original of a public document and that “only certified true copy of public documents are admissible in evidence, and not the original”. He relied on the case of *Lawson v. Afani Continental Co. (Nig.) Ltd.* (2002) 2 NWLR (Pt. 752) 585, (2002) FWLR (Pt. 109) 1730 at 1736 CA; citing the Supreme Court case of *Philip Anatogu v. Igwe Iweka II* (1995) 8 NWLR (Pt. 415) 547. The learned counsel to the appellant Dr. Babalakin (SAN) in his brief of argument submitted that the Court of Appeal case of *Lawson v. Afani* (supra) on which the tribunal based its rejection was decided ‘per in curiam’. He said that the reasoning of Salami (JCA) in ratio 7 of the case that the

original of a public document was inadmissible as evidence was not supported by the Supreme Court decision on which it was purportedly based, i.e. *Anatogu v. Iweka II* (supra). The learned counsel stressed that it is not the correct position of the law that only certified copies of the public document are admissible. He submitted that their originals were equally admissible. B

Mr. Bello for the 1st respondent submitted that the issue of whether the petitioner/1st respondent had locus standing to present the petition, whether she was disqualified to contest the election and whether she was indicted for fraud and embezzlement had been carefully examined by the tribunal and ruled in her favour by dismissing the appellant's notice of preliminary objection on 3rd June, 2003. According to Mr. Bello that ruling laid all the issues to rest, and the appellant is estopped from relitigating them. C

As indicated earlier in this judgment, the issue of admissibility of document is governed by the Evidence Act and whether the particular document is relevant. The relevant provisions of the Evidence Act are very clear and unambiguous. Section 93 of the Evidence Act deals with primary and secondary evidence, indicating that documentary evidence may be primary evidence and maybe secondary evidence. Section 93 of the Evidence Act, provides:- D

"(93) The contents of documents may be proved either by primary or by secondary evidence." E

Section 94(1) provides:-

"primary evidence means the document itself produced for inspection of the court." F

In the instant case on appeal, it means the original report and the original white paper. Section 94 goes on to provide:-

"(2) Where a document has been executed in several parts, each part shall be primary evidence of the document." G

(3) Where a document has been executed in counterparts, each counterpart being executed by one or some of the parties only, each counterpart shall be primary evidence as against the parties executing it." H

(4) Where a number of documents have all been made by one uniform process, as in the case of printing, lithography, or photography, each shall be primary evidence of the contents of the rest; but where they are all copies of a common original, they shall not be

primary evidence of the contents of the original.”

As a general rule, all documents must be proved by primary evidence i.e. the original, the exceptions to this rule being contained in section 97. Section 94 sets down what constitutes the primary evidence of a document. The obvious one is the original document
B itself.

In the instant case on appeal, the tribunal in its ruling at pages 215 to 217 of the record of appeal admitted at page 216 of the record that the document sought to be tendered was a public document within the contemplation of section 109(a)(ii) of the Evidence
C Act and that the document was the record of the Administrative Panel of Inquiry set up to investigate Revenue Generation and Utilization by the Maiduguri Metropolitan Council and as such, is a public document. The tribunal also concluded that *“the tribunal had no alterna-*
D *tive other than to hold that the document sought to be tendered through DW1, being the original of a public document is inadmissible.”* The tribunal relied on the case of *Lawson v. Afani Continental Co. (Nig.) Ltd.* (2002) 2 NWLR (Pt. 752) 585, (2002) FWLR (Pt. 109) 1736 at 1757 - 1759, where Salami, JCA stated as follows:

“*This takes me to the question of admissibility of statutory right of occupancy, exhibit 3, the plan, exhibit 4, and the customary certificate of occupancy, issued by Chikun Local Government. The three documents qualify as acts of public officers within the contemplation of section 109 of the Evidence Act, Cap. 112 of the Laws of the*
E
F *Federation of Nigeria, 1990. In the result only certified copies thereof are admissible and not original.”*

With the greatest respect possible to my Lord, Salami, JCA, I do not agree with the view expressed by His Lordship
G ***that only certified copies of public documents are admissible.***
My Lord, Salami, JCA. Seems to have relied on the case of *Obadina family and executors of Chief J. A. Ajao v. Ambrose Family & Ors.* (1969) 1 NWLR 25 at 30, where the Supreme Court, Per Coker, J.S.C. stated as follows:-

“*The combined effect of the subsection is that in the case of public documents, the only type of secondary evidence permissible is a certified true copy of the document and none other. The document now marked exhibit “2” is not a certified copy but a photostat copy and it is therefore inadmissible as secondary evidence of a pub-*

lic document which it purports to be. There was no objection to its admissibility when it was produced but it is not within the competence of parties to a case to admit by consent or otherwise a document which, by law, is inadmissible."

A critical examination of that case shows that what His Lordship, Coker, J.S.C. was considering was the admissibility of various types of secondary evidence and in particular a certified copy and a photocopy came to the conclusion that among the various types of secondary evidence of a public document, the only type that is admissible is a certified true copy thereof. The consideration was not between the original i.e. primary and secondary evidence of a public document. The phrase "the only type of secondary evidence" does not seem to me to exclude primary evidence from being admissible.

Section 93 of the Evidence Act, provides that:-

"the contents of documents may be proved either by primary or secondary evidence."

Section 94(1) defines primary evidence as "the document itself."

Section 96 of the Evidence Act provides that "documents must be proved by primary evidence," except in the cases to be mentioned later. There is no section of the Evidence Act that provides that no primary evidence of a public document is admissible. Section 112 of the Act allows certified true copy to be produced in proof of the contents of public documents or part of public document. I do not think the provision of section 112 of the Act renders the primary evidence of public document inadmissible in evidence.

In my view, the net effect of sections 91(1)(a), 93, 94(1), 95, 97(1)(e) and 112 of the evidence is that the contents of public documents such as the report and the white paper in question may be proved by producing the originals themselves for the court to inspect as primary evidence. If the maker of the statement, as in this case had personal knowledge of the matter dealt with by the statement i.e. DW1, or prove by the production of their certified true copies as secondary evidence, the two documents being public documents. By virtue of section 96 of the Evidence Act, it is my view that public docu-

ments are provable by their originals. It says:-

“Documents must be proved by primary evidence except in the cases herein after mentioned.”

Although section 112 allows certified true copies thereof to be used as well. It does not make original inadmissible. These sections of the Evidence Act in summary lay down that in proving the contents of documents, the emphasis is on the production of their originals i.e. their primary evidence. They however go on to provide that if the contents are to be proved by secondary evidence, a restricted type of secondary evidence only may be accepted i.e. certified copies in the case of public documents. In *Anatogu & Ors. v. Igwe Iweka II & Ors.* (1995) 8 NWLR (Pt. 415) 547 at 572, The Supreme Court, per Uwais, J.S.C. (as he then was) talking on the mode for tendering public documents in court stated inter alia, as follows:-

“In my opinion, the documents could only be admitted in evidence if they satisfied the provisions of section 90 subsection 1 or section 112 of the Evidence Act quoted above. The latter section allows for certified copies of the documents to be produced, but even then what were sought to be tendered in this case were not certified copies but the original public documents. Had the procedure under sections 110 and 111 been adhered to by the respondents, the certified copies of the documents would have automatically become admitted in evidence by the trial Judge without PW1 giving evidence of them. In other words, the documents would have been directly admissible without any foundation being laid.”

It should be noted that sections 90 and 111 being referred to above are now sections 91 and 112 of the Evidence Act, Cap. 112 of the Laws of the Federation, 1990. What the Lord Chief Justice of Nigeria is saying as quoted above is that public documents could be admitted in evidence either under section 91(1) or section 112 of the Evidence Act. If a party intends to tender under section 91(1) he must comply with the procedure under section 91(1) by producing the original document, provided the maker of the statement therein who had personal knowledge of the matters dealt with by the statement is called; or by complying with the provisions of section 111 by producing a certified true copy of the document and tender it under section 112 of the Evidence Act. It seems to me in the circumstance

that the authority i.e. the case of Lawson v. Afani Continental Co. (Nig.) Ltd. (supra) relied upon by the tribunal is very much incongruous and inconsistent with the two cases of the Supreme court, namely:- Obadina Family and Executors of Chief J. A. Ajao v. Ambrose Family & 7 ors. (supra) and Philip Anatogu v. Igwe Iweka II (supra).

In the instant case on appeal, the appellant as 1st respondent at the trial tribunal, call DW1 as witness. DW1 was the Chairman of the Administrative Panel of Inquiry set up by the Borno State Government to investigate Revenue Generation and Utilization of the Maiduguri Metropolitan Council. He gave unchallenged evidence that he was the Chairman of the Panel of Inquiry set by the Borno State Government. He gave the names of all the members of the panel and stated how they carried out the assignment given to them. Indeed, he laid very good foundation for the tendering of both the report of the panel and the Government white paper thereon accepting some of the recommendations of the panel. He has complied with guidelines for tendering original public documents contained in the case of Philip Anatogu & Ors. v. Igwe Iweka II & Ors. (supra). In that regard, I am of the view that both original report of the panel and the original Government white paper thereon are admissible and the majority members of the tribunal were in grave error when they rejected the two documents. The original report of the said Administrative Panel of Inquiry and the Government white paper thereon are accordingly hereby admitted in evidence. Issue No.6 is also resolved in favour of the appellant.

Issue No.7

“Whether in the trial of the substantive matter the appellant established that the 1st respondent was and remains disqualified to contest for and hold the office of Senator under the 1999 Constitution.”

This issue is similar in substance with issue No.3 in the 1st respondent’s brief of argument. I will treat them together. In arguing the issue, the learned counsel to the appellant Dr. Babalakin (SAN) repeated and adopted his argument on issue No.5 in the appellant’s brief of argument. He submitted that if the panel report and the Government white paper thereon were admitted in evidence by this court as being urged by the appellant, the only effect of the evidence would be to prove conclusively that the 1st respondent was certainly

indicted for fraud and embezzlement and that the indictment was accepted by the Government of Borno State. He referred to the evidence of DW1. He submitted that the appellant had proved before the tribunal that the 1st respondent was not qualified to contest election and hold office as Senator of the Federal Republic of Nigeria, under the 1999 Constitution. He urged the court to allow the appeal.

In his own brief of argument, the learned counsel to the 1st respondent Mr. Bello argued that assuming but not conceding that the panel report and the Government white paper thereon were admissible in law, the documents did not disclose any indictment for fraud and embezzlement against the petitioner/1st respondent. He referred to Black's Law Dictionary, 5th Edition at page 594, wherein the word 'embezzlement' was defined. He submitted that no where in the report was an allegation of fraud and embezzlement made against the 1st respondent. He said that the indictment could only relate to breach of contract, negligence of duty, irregularities and recklessness in the manner of handling projects and various acts of malpractices. He submitted that irregularities do not constitute offence known to criminal law. He further submitted that there was no where in the report where wilful intention to do any of the acts allegedly done were disclosed. He further submitted that what was accepted by the Government of Borno State was not the report of the panel of Inquiry indicting the petitioner/1st respondent but the recommendation of the panel of inquiry for a refund of various sums of money which was not what was contemplated by the provisions of section 66(1)(h) of the 1999 Constitution. He said what the panel of Inquiry embarked upon were criminal trial which the panel had no power to do. He referred to the case of *Military Government, Imo State v. Nwauwa* (1997) 2 NWLR (pt. 490) 675, (1997) 2 SCNJ 60 at 86 and that the recommendations are null and void. He also cited the case of *UNCP v. DPN* (1998) 8 NWLR (Pt. 560) 90 at 94. He urged the court to dismiss the appeal.

As indicated earlier in this judgment, the majority members of the tribunal were in error when they rejected and refused to admit the report of the panel of inquiry and the Government white paper thereon, and that the two documents were admissible and accordingly admitted in evidence. Having been so admitted, the documents

constitute evidence which the court must critically examine and appraise and act upon. Upon a careful and critical examination of the documents it is very clear to me that the Administrative Panel of Inquiry under the chairmanship of one Sadiq Abubakar in its report and the Government white paper on the said report indicted the petitioner/1st respondent for fraud and embezzlement of various sums of money totaling over one million Naira. It is also very clear that the Government of Borno State has accepted the indictment. Section 66(1)(h) of the 1999 Constitution provides:-

“66(1) No person shall be qualified for election to the Senate or the House of Representatives if:-

(h) he has been indicted for embezzlement fraud by a Judicial Commission of Inquiry or an Administrative Panel of Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, a Tribunals of Inquiry Law or any other Law by the Federal or State Government which indictment has been accepted by the Federal or State Government respectively.”

A sober and thorough examination of the panel's report and the Government white paper thereon before the court leaves no one in doubt that the petitioner/1st respondent is clearly caught by the provisions of section 66(1)(h) of the 1999 Constitution. In that regard it is my view that the petitioner/1st respondent was not qualified for election to the Senate or the House of Representatives under the provisions of the Constitution of the Federal Republic of Nigeria, 1999. In the circumstances, the finding of the majority of the members of the tribunal that the petitioner/1st respondent was not under any legal or constitutional disqualification to contest for and hold the office of Senator is perverse and not supported by evidence. The finding is accordingly hereby set aside.

Having so found, I do not think there is any need to go into consideration of the two remaining issues i.e. issues 8 and 9 formulated by the appellant, and issues Nos. 4 to 7 in the 1st respondent's brief of argument. They all related to issue of the votes cast and scored by the respective parties at the election.

The 1st respondent filed a cross-appeal of one ground of appeal. The ground of appeal without the particulars reads as follows:-

“The tribunal erred in law when it found as follows:-

We are unable to accept the submission of Mr. Bello that this

tribunal is ‘functus officio’ to determine the issue of disqualification of the petitioner on the strength of the ruling dismissing the preliminary objection for want of sufficient materials that would have enable us consider the issue of disqualification’.”

B The cross-appellant formulated one issue in the following term:-
“Whether the ruling of the tribunal dated the 3rd day of June, 2003 finally disposes of the issue of disqualification of the petitioner so as to preclude the loosing (sic) party and the tribunal from revisit (sic) the issue all over again.”

C The appellant/cross-respondent filed cross-respondent’s brief and also formulated one issue. The issue reads:-

“Whether the ruling of the tribunal dated 3rd June, 2003 finally determined the issue of the qualification of the cross-appellant so as to preclude the 1st respondent and the tribunal from revisiting the issue again in the substantive trial and judgment.”

D The two issues are the same and indeed in pari materia. I will treat them together.

E In arguing the cross-appeal, the learned counsel for the 1st respondent/cross-appellant, Mr. Bello referred to the petitions filed by the cross-appellant at the tribunal. He also referred to the reply filed by the appellant/cross-respondent to the petition raising the issue of non-qualification of the cross-appellant to contest the election and to present the petition, being legally and constitutionally incapacitated by reason of having been indicted for fraud and embezzlement by an Administrative Panel of Inquiring set up by the Borno State Government. He referred to paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the reply filed to the petition by the cross-respondent. He also referred to the notice of preliminary objection filed by the cross-respondent against the petition to the effect that the cross-appellant was not qualified by virtue of section 66(1)(h) of the 1999 Constitution to contest election to the Senate or the House of Representatives. He referred to the affidavit in support of the preliminary objection and exhibit “A” attached thereto. He also referred to the counter-affidavit filed by the cross-appellant with exhibit I attached thereto. He argued that the parties having filed affidavit and counter-affidavit with exhibits respectively, the parties had put the tribunal in a position in which it must adjudicate on the issue of the qualification or disqualification of the cross-appellant, having regard to the issues

that arose from the pleading. The learned counsel again referred to the argument of counsel for the cross-respondent at the hearing of the preliminary objection and the ruling of the majority of the members of the tribunal dismissing the objection. He submitted that what the tribunal did was a judicial examination of the issue of disqualification of the petitioner/cross-appellant based on the evidence put forward for that purpose. He submitted that the issue of disqualification of the petitioner/cross-appellant has been tried and settled. He argued that the parties had by their evidence annexure and oral submissions encouraged the tribunal to examine the issue of qualification of the cross-respondent but the cross-respondent failed to place the proper materials before the tribunal that would enable the tribunal find in his favour. He said the cross-respondent has failed to discharge the burden placed upon him and his objection was properly dismissed by the tribunal. He submitted that the issue of disqualification of the cross-appellant has been finally determined and none of the parties is competent to raise the issue afterwards for estoppel per rem judicata applies and the tribunal is functus officio to raise the issue again at a later date. He relied on the cases of *Nwosu v. Imo State Environmental Sanitation Authority* (1990) 2 NWLR (Pt. 135) 688 at 715; *Green v. Green* (1987) 3 NWLR (Pt. 61) 480, (2001) FWLR (Pt. 76) 795 at 848; *Ejiofor v. Onyekwe & Ors.* (1972) 1 All NLR (Pt. 2) 527 at 536.

He submitted that the entire three grounds of the objection were dismissed and the cross-respondent is estopped from raising the issue again. He argued that the cross-respondent did not proffer evidence on the issue of disqualification of the cross-appellant at the trial, as the issue had been finally determined and laid to rest. Mr. Bello referred to the case of *Udo v. Obot* (1989) 1 NWLR (Pt. 95) 59 at 76 - 77 and *New Brunswick Railway Co. v. British and French Trust Corp. Ltd.* (1939) A.C. 1, 19-20, and submitted that the issue of disqualification of the cross-appellant exhaustively determined in the preliminary objection and the cross-respondent and/or the tribunal are estopped from raising the issue again at the substantive trial of the case. He argued that it was a mere waste of time and unnecessary dissipation of energy for the parties and the tribunal to consider the evidence of DW1 and the exhibits produced and tendered by him. He urged the court to allow the cross-appeal. The learned counsel

for the cross-respondent Dr. Babalakin (SAN) in the cross-respondent's brief of argument submitted that the contention of the cross-appellant that the issue of the disqualification of the cross-appellant raised in the notice of preliminary objection had been finally determined and could not be raised in the course of substantive trial is misconceived. He referred to the principle governing the doctrine of estoppel and in particular, issue estoppel; namely that:-

(i) the same question must be for decision in both proceedings;

(ii) the decision relied upon to support the plea of issue estoppel must be final, and

(iii) the parties must be the same. He cited many cases:-Williams Ladega & Ors. v. Shittu Durosimi & Ors. (1978) 3 SC 91; Oseni v Oniyide (1999) 13 NWLR (Pt. 634) 258 etc. He argued that the second criteria listed above was absent in this case, as the decision relied upon i.e. the ruling on the objection was not final. He said that the plea of issue estoppel raised by the cross-appellant was rightly rejected by the tribunal. He further argued that the issue of the disqualification of the cross-appellant was not determined in any way what so ever by the tribunal in its ruling of 3rd June, 2003. He referred again the case of Udo v. Obot (supra). He referred to the ruling of the tribunal on the preliminary objection in the instant case, and submitted that there was no where in the said ruling where the tribunal ruled or decided that the cross-appellant was qualified to contest the election in question. He referred to the preliminary objection and the ruling of the tribunal to the effect that the tribunal having rejected exhibit "A" as being inadmissible, had no material before it on which to determine the qualification of the cross-appellant. He submitted that the issue as to the qualification or otherwise of the cross-appellant was not decided by the tribunal in its ruling on the preliminary objection. He urged the court to dismiss the cross-appeal.

The crux of the issue being raised in this cross-appeal is whether the issue of qualification or non-qualification of the cross-appellant to contest the election to the Senate has been finally determined by the tribunal in its ruling dated 3rd of June, 2003 on the preliminary objection. In other words, whether the doctrine of issue estoppel is applicable.

The law is settled that when the question is whether the doctrine of issue estoppel is applicable to a case or not, the important questions to ask, are whether the parties are the same; whether the issues are the same; whether the issues are material to the cause of action in the previous and in the latter case; and whether that issue has been resolved in the previous case. - See Mackson Ikeni & Or. v. Chief William Akuma Efamo & Ors. (2001) 10 NWLR (Pt. 720) 1, (2001) 87, LRCN 1690 at 1704. The doctrine of issue estoppel is founded on strong principles of justice and public policy. Were parties to be allowed to relitigate the same issue over and over again, litigation will be as endless as it takes the losing party to revise his evidence and engage a more skilful lawyer to present his case. The process would go on endlessly until the party seeking to prove the point succeeds or wears his opponent down to submission. Litigation would then become a war of attrition which it is not supposed to be.

The crucial question seeking for an answer in the instant cross-appeal is whether the tribunal has determined in its ruling of 3rd June, 2003 that the cross-appellant was qualified or not to contest the election to the Senate. The answer is clear from the ruling of the tribunal itself. In its ruling dated 3rd June, 2003, pages 85 - 91, the tribunal stated inter-alia at page 91 of the record of appeal as follows:- "It is trite that for exhibit "A" to be admissible in evidence, it must satisfy the provisions of S. 111(1) of the Evidence Act and must contain the following:-

- (i) It must be dated,
- (ii) It must contain the name, official title of the officer certifying same
- (iii) Where such officer has a seal, it must be sealed,
- (iv) There must be evidence of payment of legal fees.

Exhibit "A" without doubt is lacking some of the criteria for its being regarded as a public document. Neither the name of the maker is subscribed to it nor is there any evidence of the payment of the requisite legal fees. This renders it inadmissible and we so find. In the light of the above, it is our considered view that following the finding that exhibit "A" is not admissible, there is no proper material before 'us on which to determine the disqualification of the petitioner."

From the provisions of the ruling of the tribunal quoted above,

it is clear that the tribunal had not determined the issue of qualification or otherwise of the petitioner/cross-appellant. A careful perusal of the ruling of the tribunal dated 3rd June, 2003 clearly reveals that there is no where in the ruling, where the tribunal stated that the petitioner/cross-appellant was qualified or not qualified to contest the election. The tribunal clearly stated that it had no materials to determine the qualification of the petitioner/cross-appellant. In its final judgment delivered on the 28th of June, 2003, the tribunal made its intention about the issue of disqualification of the petitioner/cross-appellant very clear. It said:-

“In the ruling of 3/6/2003, this tribunal determine that on the basis of S. 133(1)(a) of the Electoral Act, the petitioner has the legal standing to present the petition.

With regards to the issue of disqualification under S. 66(1)(h) of the 1999 Constitution, this tribunal was of the view that ‘there is no proper material before us on which to determine the disqualification of the petitioner’. This finding of the tribunal in our view did not preclude us from re-visiting the issue especially as the same objection is contained in the reply of the 1st respondent to the petition.”

For the doctrine of issue estoppel to apply, the parties in the previous case and the case in which the issue is raised must be the same; the issue must be the same; the issue must be material to the cause of action in the previous case and the issue must have been resolved in the previous case. See *Ikeni v. Efamo* (2001) 10 NWLR (Pt. 720) 1, (2001) 87 LRCN 1690 at 1904.

In the instant case on appeal, it is very clear from the ruling dated 3rd June, 2003 that the issue as to the qualification or disqualification of the petitioner/cross-appellant was not resolved. In the circumstance, there is no merit in the cross-appeal. In the final analysis the appeal against the ruling of the majority of the members of the tribunal dated 3rd June, 2003 and the appeal against the judgment of majority members of the tribunal delivered on the 28th of June, 2003 succeed. The two appeals are allowed. I therefore strike out the petition of the 1st respondent before the tribunal and set aside the judgment of the majority of the members of the tribunal dated 28th June, 2003.

Having set aside the judgment of the tribunal which declared the 1st respondent as elected by the majority of lawful

votes at the senatorial election held on the 12th of April, 2003, a very important question arises namely:-

What consequential order should the court make?

The learned counsel for the appellant in his notice and grounds of appeal sought for some reliefs to be granted by the court, which include:-

“an order confirming that the appellant herein was elected and duly returned as having scored the highest number of valid votes in the election conducted into the Senate of the Federal Republic of Nigeria, in Borno North Senatorial District.”

Section 136 of the Electoral Act, 2002 prescribes the types of consequential orders that should be made in appropriate cases if the court determines that a candidate who was returned as elected was not validly elected. Section 136 of the Electoral Act, 2002, provides as follows:-

“136(-1) subject to subsection (2) of this section, if the tribunal or the court as the case may be, determines that a candidate who was returned as elected was not validly elected on any ground, the tribunal or the court shall nullify the election.

(2) If the tribunal or the court determines that a candidate who was returned as elected was not validly elected on the ground that he did not score the majority of valid votes cast at the election, the election tribunal or the court, as the case may be, shall declare as elected the candidate who scored the highest number of valid votes cast at the election and satisfied the requirements of the Constitution and this Act.

(3) On the motion of a respondent in an election petition, the election tribunal or the court, as the case may be, may strike out an election petition on the ground that it is not in accordance with the provisions of this part of this Act, or the provisions of the First Schedule of this Act.”

In the instant case, the appellant was alleged to have won at the conclusion of the election. The 1st respondent filed a petition at the tribunal challenging the return of the appellant as being invalidly elected. The tribunal held in its judgment delivered on the 28th of June, 2003 as follows:

“Having found that there was a simple mathematical error in the calculation of the total votes of the 1st respondent in Dongo Ward

that gave him extra votes of 141 which he did not win at the polls, we hold that the 1st respondent was not validly elected by a majority of lawful votes cast at the senatorial election held on the 12th day of April, 2003. We hold that the petitioner having scored the highest number of votes cast at the election, and having satisfied the requirements of the Constitution of the Federal Republic of Nigeria, 1999 and of this Act, should be and is hereby declared as elected by the majority of lawful votes at the senatorial election held on 12/4/2003."

The 1st respondent herein was declared as elected by the majority of lawful votes cast at the senatorial election held on the 12th of April, 2003, by the tribunal. The appellant appealed against the decision of the tribunal and this court saw merit in the appeal in the sense that the 1st respondent herein was caught by the provisions of section 66(1)(h) of the Constitution of the Federal Republic of Nigeria, 1999. Accordingly, she was disqualified to contest the election. Indeed, I am of the view that by virtue of the provisions of section 66(1)(h) of the 1999 Constitution, the 1st respondent herein had no business in contesting the election. Accordingly, I hold and declare that she was not validly elected, on the ground of her disqualification under section 66(1)(h) of the Constitution.

I think, disqualification under section 66(1)(h) of the Constitution falls within section 136(1) of the Electoral Act, 2002 and the correct consequential order that the court must make is an order nullifying the election. In coming to this conclusion, I have considered the cases of *Sugun Maimele v. Alhaji Tijjani Goni Mohammed & 7 ors.* (1999) 3 NWLR (Pt. 495) 425 at 436; *Jacob Dashe v. Adamu Bawa* (1989) 1 NEPLT 71.

However, the Court of Appeal is not limited to or bound by the reliefs sought before the court. Order 3 rule 23(1) of the Court of Appeal Rules, 2002 gives the Court of Appeal the liberty to give appropriate reliefs on hearing an appeal and will not therefore be bound by the reliefs sought in the notice of appeal. See *Onuaguluchi v. Ndu* (2001) 7 NWLR (Pt. 712) 309, (2001) 3 SCNJ 110 at 118.

In the final analysis, the appeal is allowed. The judgment of the majority of the members of the tribunal dated 28th June, 2003 is hereby set aside. The National Assembly Election for Borno North Senatorial District held on the 12th of April, 2003 wherein both the

appellant and the 1st respondent were candidates are hereby nullified pursuant to section 136(1) of the Electoral Act, 2002. The 2nd respondent, i.e. Independent National Electoral Commission (INEC) is hereby ordered to conduct a fresh election in the Borno North Senatorial District as soon as possible. N10,000 costs to the appellant. B

NZEA KO JCA

I have had the advantage of reading in draft the leading judgment of my learned brother Obadina, JCA with which I entirely agree. C

Suffice it to further identify that the central issue in this appeal relates to the finding of the majority members of the election tribunal, one member dissenting, who found for the petitioner, the 1st respondent in this appeal. In the said majority judgment, they declared the petitioner the candidate elected by the majority of lawful votes cast at the election for the senatorial seat of Borno North Senatorial District. This is in place of the appellant, whom the 2nd respondent, the Independent National Electoral Commission (INEC) had declared winner, after the election held on 12th April, 2003. I wish to also identify that much of the substance of the grounds of appeal, the issues for determination distilled by learned counsel for the parties from the grounds of appeal and the argument preferred in their respective briefs of argument, centre on the 1st respondent/appellant's charge against the petitioner/respondent. This is as set out in his reply to the petition and his notice of preliminary objection filed at the tribunal. Therein, the appellant had raised the issue that the petitioner/1st respondent lacked the "locus standi" to bring the election petition for the reason that she was not a qualified candidate at the election as prescribed by the 1999 Constitution of the Federal Republic of Nigeria and the Electoral Act, 2002. This, the appellant averred, is by reason of a legal, and constitutional disability disqualifying her. According to the appellant, incapacity identified was that the petitioner was indicted for fraud and embezzlement by a panel of enquiry appointed by the Borno State Government which accepted the findings of the panel. F G H

Much argument raged over the evidence adduced in proof of that allegation and the admissibility and evidential value of various

pieces of evidence especially of exh. A, the white paper relied on by the appellant but denied by the 1st respondent. It is in this regard I wish to give my view.

On that issue of evidence, I would state that it is always essential to appreciate, in dealing with the issue of admissibility of evidence, that it is governed by the provisions of the Evidence Act. In resolving the status of exhibit A, the white paper sought to be relied on by the appellant, issued by the Borno State Government following the report of the Commission of Enquiry, the relevant sections of the Act applicable are: Sections 109, 111(1), 112, 114(1), 114(2) and 108(1). The sections are set out hereunder: Section 109. The following documents are public documents-

- (a) documents forming the acts or records of the acts-
 - (i) of the sovereign authority,
 - (ii) of official bodies and tribunals, and
 - (iii) of public officers, legislative, judicial and executive, whether or Nigeria or elsewhere:

(b) public records kept in Nigeria of private documents.

s. 111(1) - Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or party thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorised by law to make use of a seal, and such copies so certified shall be called certified copies.

112. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

114(1) The court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer in Nigeria who is duly authorised thereto to be genuine, provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

(2) The court shall also presume that any officer by whom any

such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

108(1) In order to ascertain whether a signature, writing, seal or finger impression is that of the person by whom it purports to have been written or made, any signature, writing, seal or finger impression admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, seal or finger impression has not been produced or proved for any other purpose. B

Exh. A is the white paper which had become evidence in court via being exhibited with the notice of preliminary objection, to prove that the petitioner was disqualified by virtue of section 66(1)(h) of the Constitution of Nigeria and could not be a candidate at the election to the Senate; and to show that she did not possess the “locus standi” to bring the petition, not being a candidate entitled to present a petition under section 145 of the Electoral Act, 2002. C D

At the trial in the lower tribunal, for reasons, which the petitioner’s counsel sought to justify, he had endeavoured to discredit and exclude that piece of evidence. Upon the examination of exh. A and when the foregoing sections of the Evidence Act are read together, however, it becomes clear that exh. A is a public document as it fits into the meaning ascribed to it by section 109 of the Act. It was produced by the Government of Borno State on the report of the panel of enquiry which it set up. As such, its certified true copy may be tendered in proof of its contents, by virtue of section 112 of the Act (supra). This debunks the case of the 1st respondent that exh. A is not admissible in evidence because it does not comply with or meet with the requirement of section 111(1) of the Act. E F

The certified true copy of a Government white paper set out in the form in which exh. A is couched, from the Government of Borno State ought not to have been excluded by the lower tribunal. The presumption of regularity enacted in sections 114(1) of the Evidence Act set out above is commended to trial courts for consideration when faced with documents from official sources such as exh. A, herein. Without any evidence rebutting that presumption of regularity enacted in section 114(1), the piece of evidence to which C it applies materializes as genuine, and admissible in evidence and of evidential value. H

That is the case with exh. A, there being nothing in rebuttal of its genuineness and admissibility, it is admissible in evidence and the tribunal ought to have relied on it. Apart from expressing the foregoing view, I am in agreement with the reasoning and conclusions reached on the issues in this appeal by my learned brother, Obadina, B JCA in his leading judgment.

For those same reasons, I would allow the two appeals. I have no doubt in my mind that the 1st respondent was proved to have been disqualified to contest the election to occupy the senatorial seat for Borno Central, by virtue of the provisions of section 66(1)(h) of the Constitution of 1999. There was indeed un-rebutted and cogent evidence that the 1st respondent was indicted for fraud and embezzlement. The indictment was accepted by the Government of Borno State of Nigeria as the white paper exh. A produced in evidence shows. She has no locus to present an election petition under the Electoral Act, 2002. In this regard, I would rather go along with the decision in the minority judgment of Abiri, J. striking out the petition of the 1st respondent. I myself do hereby strike out the petition and set aside the majority judgment of the electoral tribunal delivered on 28/6/2003. The main appeal as well as the interlocutory appeal succeed and are allowed.

In the light of the decision reached above, the cross-appeal becomes irrelevant. It is without merit and it is dismissed. I abide all the orders made in the leading judgment of my learned brother, Obadina, JCA.

OGBUAGU JCA

This is an appeal by the appellant against the majority of 4.1 judgment/decision of the National Assembly/Governorship and Legislative Houses Election Tribunal sitting at Maiduguri, Borno State and delivered on 28th June, 2003 - Coram: Hon. Justice N. C. Oti - Chairman, Hon. Justice A. S. Abiri, Hon. Justice G. I. Kurada, Hon. Justice H. M. Tsammani and Hon. Justice S. H. Bashar - Members.

The petition of the 1st respondent challenging the election of the appellant as the Senator representing the Borno North Senatorial District, was upheld and the 1st respondent, was declared as elected by the majority of lawful votes cast at the said election, by the major-

ity of the members of the tribunal. One member - Hon. Justice Abdul Salami Abiri, dissented in his own judgment. Dissatisfied with the decision of the majority, the appellant, has appealed to this court. It should be noted that apart from the appellant appealing against the final judgment of the said majority members, he also appealed against the interlocutory ruling of the same majority, delivered on 3rd June, 2003, to this court. B

In respect of the ruling, the appellant filed five (5) grounds of appeal. The relief sought therein, is an order of this court setting aside the said ruling of the majority and affirming the minority decision. As regards the main appeal, originally, ten (10) grounds of appeal were filed on 11th July, 2003. On 23rd July, 2003, the appellant, filed a motion on notice for leave to file an additional ground raising the issue of jurisdiction for the first time. C

It is noted by me that the 1st respondent filed on 1st or 23rd July, 2003, a notice of cross-appeal based on one lone ground of appeal. On 11th July, 2003, the appellant filed an application for an order of the court, consolidating the two (2) appeals in respect of the interlocutory ruling and the judgment. The application was granted on 28th July, 2003. A total of twenty (20) exhibits were tendered in evidence while two (2) were rejected. In the index, it is not shown the pages where the various witnesses testified as it is usually done. D E

When this appeal came up for hearing on 13th October, 2003, Dr. Babalakin, B. O. (SAN) learned leading counsel for the appellant and appearing with him, Okene, O. Esq., Wakzani, O. Esq., Sunama, O. B. Esq., Dalkwa, H. M. Esq., Amuda, I.G. Esq. and Adebayo, T. Esq., referred to the two (2) appeals and their consolidation by the court. He told the court that the records of appeal was entered on 15th July, 2003. That the appellant's brief is dated 24th July, 2003 and that it was' filed on the same date. That the appellant's reply brief was filed on 14th July, 2003 while the 1st respondent's cross-appellant's brief, is dated 30th July, 2003. He adopted their said briefs. F G

Learned SAN submitted that the appellant has demonstrated H clearly, that the entire decision of the tribunal - i.e. the majority decision, is inconsistent with the laws and practice of evidence. As regards the first ruling, he stated that they sought to tender the certified true copy of the white paper of the Government of Borno State which,

according to him, copiously indicted the 1st respondent. That the tribunal rejected the document - ext. "A" - i.e. to the application to the tribunal attached to the preliminary objection, for two (2) reasons -

B (1) that the Secretary to the Government of Borno State that certified the document only signed as Secretary, but did not state his name. That reliance was placed by the tribunal on section III of the Evidence Act. He did not state the second reason - perhaps he forgot.

C Learned SAN submitted that to answer if this said section was satisfied, reference had to be made to section 114(1) of the Evidence Act. He relied on the words "substantially" and "purports" and submitted that the absolute compliance, is not necessary for the certification of the document.

D It is his contention that when the matter came for full trial, the original white paper, was brought to the tribunal. That the original report that led to the white paper, was also brought to the tribunal by the Chairman of the Panel of Inquiry - D.W.1 who sought to tender the document, but this was rejected by the tribunal, on the ground
E that the only evidence of a public document that was admissible was a certified true copy. In other words, that the originals were inadmissible. That the tribunal relied on the case of *Lawson v. Afani Continental Co. (Nig.) Ltd. & Anor. (2002) 2 NWLR (Pt. 752) 585, (2002) FWLR (Pt.109) 1736 at 1758 CA* which was relied on or followed in
F the case of *Chief Philip O. Anatogu & 2 Ors. (not & anor. v. H.R.H. Igwe Iweka II & 4 Ors. (1995) 8 NWLR (Pt. 415) 547 at 572; (1995) 9 SCNJ 1.*

G Learned counsel submitted that the decision in *Anatogu v. Iweka* (supra), could not have been a basis of the decision in *Lawson v. Afani* (supra) because, according to him, it is stated very clearly, that in the absence of an original public document, the best, is a certified true copy. He cited and relied on the case of *Ali v. Obande & 3 Ors. (1999) 9 NWLR (Pt. 620) 563 CA*. He further submitted that a certified true copy, is a substitute to the original. He referred to section 66(1)(h) of the 1999 Constitution and submitted that if a person is indicted as provided in the Constitution, and it is accepted by the court, that person is disqualified from standing an election. He referred to the case of *UNCP & 2 Ors. v. DPN & 2 Ors. (1998) 8*

NWLR (Pt. 560) 90 at 94 which he stated “was thrown at them” and appears in their reply brief. He submitted that the case was decided before the 1999 Constitution and that it related to a Local Government Law.

As to the last issue which he stated are related, learned SAN referred to pages 220 -last paragraph and 221 of the records where, according to him, one of the reasons given for rejecting the document, was stated. He submitted that the white paper, completely complied with the requirements of the Evidence Act. That the distinction drawn by the tribunal, is tenuous and unacceptable. He finally referred to the minority/dissenting decision and commends it to the court - per Hon. Justice Abiri both at the interlocutory and the final stages. Learned SAN urged the court to allow the appeal and dismiss the cross-appeal. Bello, Esq. - learned counsel for the 1st respondent/cross-appellant appearing with Abiodun, A., Esq., told the court that they filed their brief of argument on 4th August, 2003 while the respondents’ notice was filed on 1st August, 2003. That there is a cross-appeal and that the cross-appellant’s brief, was filed on 28th July, 2003. He adopted in toto all the submissions in both briefs.

In respect of the points raised by the learned SAN, he submitted that the main appeal itself, is incompetent and that this is in amplification of the issues raised by the appellant in their brief.

As regards exh. “A”, he submitted that the tribunal relied on several reasons for rejecting the document. That the basis for the reasons, is that the 1st respondent, denied ever appearing before any panel of inquiry. Secondly, that there was no such report or white paper or the existence of exh. “A”. That not only that, that the 1st respondent, went ahead to tender exh. 1 which was a letter appointing her as a Commissioner in Borno State. He referred to page 49 of the records and submitted that the tribunal took a careful look at exh. “A” and saw that it was not dated nor signed by anybody and therefore, was a worthless document- i.e. that it was a photocopy of a purported white paper and that the document did not satisfy the provisions of section 111 of the Evidence Act. That the tribunal, came to the conclusion that the document was worthless.

Learned counsel referred to page 118 of the records and submitted that exh. “A”, was purportedly signed by the Secretary of Borno State Government. That there was a letter from the same Secretary.

That the said document, was certified on 18th May, 2003 which was a Sunday. He further submitted that the tribunal eventually rejected exh. "A". He urged the court to affirm that decision. He submitted that page 118 of the records, does not form part of the exhibit. He stated that the report of the panel of inquiry, was not tendered in the
 B tribunal- i.e. that there must be a report and a white paper.

As regards the judgment, the learned counsel stated that they (meaning the appellant and his learned counsel) sought to tender two (2) documents which were rejected in evidence - (i.e. the report
 C of the panel of inquiry and also a purported white paper) for several reasons. That the white paper only bore a writing that it was printed by a Director. He urged the court to hold that based on several judicial decisions a document not dated, not signed, was a worthless document.

Mr. Bello then referred to the case of UNCP v. DPN (supra) at
 D page 94 and submitted that it expressed the true principles of law. He submitted that assuming the documents were admissible in law, the allegations contained in the report and white paper, have nothing to do with fraud and embezzlement or any crime if the same are read
 E thoroughly. He therefore, submitted that the tribunal came to a right decision. In respect of the cross-appeal, learned counsel submitted that having dismissed the preliminary objection raised by the appellant in this case, the same issue cannot be raised during the full trial of
 F the case. That this is their contention. He referred to page 87 of the records and page 91 lines 1 to 20 and submitted that the appellant was/is caught by issue estoppel and to do so, is overreaching. He cited and relied on the case of Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt.135) 688 at 715 paragraph
 G (it is also reported in (1990) 4 SCNJ 97) cited in No.1 of his list of authorities. He submitted that what the tribunal dismissed, is based at page 17 of the records - i.e. the grounds upon which the objection was dismissed.

He finally urged the court to allow the cross-appeal and con-
 H firm the decision of the tribunal and allow the 1st respondent to take her rightful seat in the Senate at Abuja. Dr. Babalakin (SAN) - replying on points of law, stated that the reasons for the decision of the tribunal, are contained in the ruling and judgment. That anything outside them, go to no issue. He submitted that in interpreting con-

stitutional provisions that are clear and unambiguous, the Constitution itself, is the guiding document. That decision of courts that were not delivered when construing such constitutional provision, cannot be used to defeat the intention of the Constitution. He again referred to the case of UNCP v. DPN (supra) and submitted that only the ratio of the case, is binding or can be considered by this court. B

Learned SAN, further submitted that in the brief in answer to the cross-appeal, the question, is whether an issue estoppel had arisen at the preliminary stage in the tribunal. He also referred to page 91 of the records and submitted that there was no determination of the qualification of the petitioner. He cited and relied on the case of Francis Shanu & Anor. v. Afribank Nigeria Plc. (2002) 17 NWLR (Pt.795) 185 (it is at page 222); (2002) 6 SCNJ 454 at 475 - 476 referred to in No. (xxi) of their list of authorities. C

As to the cross-appeal, Dr. Babalakin (SAN), urged the court D to discountenance it as, according to him, it was filed not in compliance with Order 3 rule 14 of the Court of Appeal Rules, 2002. I will pause here to state that I had noted that one W. A. Zanna, Esq. who told the court that he is the Asst. Chief Legal Officer in INEC, stated E that the 2nd to 8th respondents, were served and that he served their counsel - Dele Oye, Esq. That he is surprised that their said counsel, is not in court. However, with the end of submissions, judgment was reserved till today.

I have had the advantage of reading in draft before now, the F judgment of my learned brother, Obadina, JCA just delivered by him. I agree with him in its entirety, the reasoning and conclusion that the appeals in respect of both the ruling and the judgment of the tribunal, are meritorious and ought and should be allowed. I will G however, herein, make my own contributions, at least, for purposes of high lightening a few points or matters and or by way of emphasis.

Let me pause here, to deal very briefly with the last submission H of Dr. Babalakin (SAN) that the cross-appeal, was filed not in compliance with Order 3 rule 4 of the rules of this court. It is firstly, noted by me, that they did not raise this issue or fact in their brief of argument to the cross-appeal, which they stated, albeit, erroneously as "brief of argument of the '1st respondent' to the cross-appeal" Learned SAN only raised it orally in their reply address stage.

Secondly, the learned SAN, did not tell the court on what date

the cross-appeal was filed.

Thirdly, reliance on Order 3 rule 14 of the rules, with respect, is completely misconceived as the said rule, has nothing to do with filing of a cross-appeal. As the side of heading of rule 14 clearly shows thus - “respondent’s notice of contention that judgment should be affirmed or varied on other grounds Civil Form 11.”

In other words, Civil Form 11 is the “notice by respondents of intention to contend that decision of court below be varied”. In order to give “judicial teeth” to this point, it is now firmly settled that when complete reversal of a decision of a lower court is sought (as in the instant case in this cross-appeal), it should be by cross-appeal and not a respondent’s notice. See *Summonu v. Ashorota* (1975) 1 NMLR 16 at 23. That is to say, that any respondent who seeks to set aside a decision of a lower court or tribunal on any crucial aspect, must do so, by way of a cross-appeal. See *Eliochin (Nig.) Ltd. v. Mbadiwe* (1986) 1 NWLR (Pt. 14) 47; (1986) 1 SC 99 at 130; (1986) 1 All NLR (Pt.1) at 11; (1986) 1 ANLR (Pt. 1) 1; *Anyaduba v. Nigerian Renowned Trading Co. Ltd.* (1990) 1 NWLR (Pt. 127) 397 and referred to recently, in the case of *Chief Briggs & 12 Ors. v. Chief Bob-Manuel & 6 ors.* (2003) 5 NWLR (Pt. 813) 323, (2003) 1 SCNJ 218 at 226-227 - per Uwaifo, JSC.

Therefore, since this is a cross-appeal rightly called and not a respondent’s notice, the said submission of the learned SAN, with respect, is discountenanced by me. I will later in this judgment, come to the merits of the cross-appeal. Now, turning or dealing with the two appeals, as far as I am concerned, the same will be determined by documentary evidence in respect of the said ruling and by both documentary and oral evidence in respect of the judgment.

In respect of the preliminary objection, I have no doubt in my mind, that what was being dealt with at that stage by the tribunal, was exh. “A” a certified true photocopy of the Government White Paper. See page 22 of the records. The tribunal, after hearing arguments from learned counsel for the appellant and the 1st respondent and perusing the affidavit in support and the counter-affidavit, in rejecting exh. “A” had this to say at page 91 of the records - inter alia:

“... It is trite that for exh. “A” to be admissible in evidence, it must satisfy the provisions of S. 111(1) of the Evidence Act and must contain the following:

a. *It must be dated.*

b. *It must contain the name, official title of the officer certifying same.*

c. *Where such officer has a seal, it must be sealed.*

d. *There must be evidence of payment of legal fees.*

Exhibits A without doubt is lacking some of the criteria for its being regarded as a public document. Neither the name of the maker is subscribed to it nor is there any evidence of the payment of the requisite legal fees. ^B

This renders it inadmissible and we so find. In the light of the above, it is our considered view that following the finding that exh. "A" is not admissible, there is no proper material before us on which to determine the disqualification of the petitioner. ^C

In the circumstance, the petitioner has locus standi to present the petition under S. 133(1)(a) of the Electoral Act." (Italics mine). ^D

The appellant has appealed against this ruling/decision in their grounds 3.1, 3.2 and 3.3 of the notice of appeal. I will note briefly here, that the 1st respondent/cross-appellant did not appeal against this ruling. I will expatiate later this fact in this judgment. Now, the question is, was exh. "A" inadmissible in any case? I or one may ask. ^E There is no doubt and this is settled, that a court is expected in all proceedings before it, to admit and act only on evidence which is admissible in law.

Also settled, is that where the original document is not produced but a photocopy, it is inadmissible as not in compliance with sections 94,95 and 96 of the Evidence Act if the whereabouts of the original, was not explained. See Abolade Agboola Alade v. Salami Jagun Olukade (1976) 2 S.C. 183 and 187 per Idigbe, J.S.C. and Abdul Ogo v. Adedemi (1976) 3 S.C. 65, just to mention but a few. ^F

It should be borne in mind, that admissibility of a document, is quite different from the weight to be attached to it. It is only when it is admissible, that the court considers the weight to be attached to it. See Okonji & 4 Ors. v. Njokanma & 2 Ors. (1991) 7 NWLR (Pt. 202) 131, (1990) 9-10 SCNJ 37 at 37. ^G

Also settled, is that in respect of admissibility of copies as secondary evidence, there is the need for certification by someone other than the maker of the copy. See Onobruhere & Anor. v. Esegine & Anor. (1986) 1 NWLR (Pt. 19) 799, (1976) 2 S.C. 315 at 403-404 ^H

and Re: Obadina Family & Anor. (1969) 1 ANLR 49 at 59. I wish to observe that there appear to be conflicting decisions about the admissibility of a photocopy of a document. In the case of Daily Times (Nig.) Ltd. v. Williams (1986) 4 NWLR (Pt. 36) 526 C.A. it was held that a photocopy of a certified copy of a writ, is admissible for it is a
 B photocopy of an authentic document of the High Court, having on its endorsement as being certified as true copy of the original issued with the seal of the court. That the document can therefore, be judicially noticed and admitted in evidence by virtue of section 73(1) Evidence Act. See also International Merchant Bank (Nig.) Ltd. v.
 C Dabiri & 2 Ors. (1998) 1 NWLR (Pt. 533) 284 CA. It has also been held that a photocopy of a copy which on the face of it, shows that it is a certified copy duly signed, is admissible by virtue of section 112 of the Evidence Act. See Raymond Iheonu & Anor. v. Simeon
 D Obiukwu (1994) 1 NWLR (Pt. 322) 594.

However, in the case of Jules v. Ajani (1980) 5-7 S.C. 96 and Ojo v. Primate Adejobi & Ors. (1978) 3 S.C. 65 at 72-73, a photocopy of a true copy, was declared invalid. See also Owonyin v. Omotosho (1961) 1 ANLR 304; (1962) WNLR 1; Alashe v. Olori Ilu
 E (1964) 1 ANLR 390, 397 and Minister of Lands, Western Nigeria v. Dr. Nnamdi Azikiwe & Or. (1969) 1 All NLR 49, S.C.167/68 dated 31/1/69. In the case of Shell Petroleum Dev. Co. (Nig.) Ltd. v. Nwolu (1991) 3 NWLR (Pt.180) 496 at 503 C.A., it was held that a photocopy of a document, is inadmissible. See also Ogbu & 4 Ors. v. Ani &
 F 4 Ors. (1994) 7 NWLR (Pt. 355) 128, (1994) 7-8 S.C.N.J. (Pt. 11) 363 at 369,388; Co-operative & Commerce Bank of (Nig.) Ltd. v. Uzoka (1977) 1 MSLR 21 at 24 and Jadesimi v. Okotie-Eboh (1985) 2 NWLR (Pt. 10) 909; (1986) 1 S.C. 479.

G The reason for authenticating public documents by a designated official to enable its admissibility, are said to be (a) to obviate the necessity of calling the officials to come to testify to the genuineness of copies made from original documents or records of a public nature and (b) to preserve those original documents or record from
 H being removed from their proper place of custody through requests that they be tendered in court. See Anyakora & 4 Ors. v. Obiakor & 8 Ors. (1990) 2 NWLR (Pt. 130) 52 at 645 C.A.

In fact, in the above case, Uwaifo, JCA (as he then was) at pages 67 - 68, expressed the view about the risk that may be in-

involved in producing the original document. It was a case of producing documents in public archives and on the production of judicial documents from archives and whether a court can order the production of such a document pursuant to section 6(3) of the Public Archives Act. It is noted that documents from archives, are admissible under section 7 of the said Act. See *Chief Ayeni & Ors. v. Highness Joseph Dada & Ors.* (1978) 3 S.C. 35. B

In *International Bank of Nigeria Ltd. v. Dabiri & Ors.* (supra), it was held that photocopies of a certified true copy of a public document, needs no further certification under section 111(1) of the Evidence Act. C

However, having stated the above, it seems to me that all the principles about admissibility of documents - whether photocopy, certified true copy or not certified true copy, have been changed and they are no longer, the law as I know it at the moment. This is because, starting from the days of the case of *Ogbuanyinya & 5 Ors. v. Obi Okudo* (1979) 6 - 9 SC 32; (1979) 1 MSLR 731; (1979) ANLR 105 at 112; discussing the provisions of sections 112, 113, 116 now 117 of the Evidence Act, Idigbe, JSC in respect of limbs [A] & [B], it is now firmly settled that admissibility of a or any document in evidence, now depends on relevance. See *Oshunride v. Akande* (1996) 6 NWLR (Pt. 455) 383, (1996) 6 SCNJ 193 at 199 - 200 - per Mohammed, JSC, *Dr. Ufere Torti v. Chief Chris Ukpabi & Ors.* (1984) 1 S.C. 370 at 412 - 143, (1984) ANLR 185 at 195; (1984) ANLR 185 at 195; (1984) 1 SCNLR 214 - per Eso, JSC and the meaning of "proper custody" and *Artra-Industrial Ltd. v. M.B.C.I.* (1997) 1 NWLR (Pt. 483) 574 C.A. E F

In other words, admissibility, should be based on relevance and not proper custody. Indeed, in the case of *Kuruma v. R.* (1955) A.C. 197 at 203, it was held that admissibility of documents, depends on the purpose for which it is being tendered. That the test to be applied in considering whether evidence is admissible, is whether it is relevant to the matter in issue. That if it is, it is admissible and that the court is not concerned with how the evidence or document, was obtained. That there can be no difference in principle for this purpose, between a civil and criminal case. See also *Agbahomovo & 2 Ors. v. Edueyegbe & 6 Ors.* (vice-versa) (1999) 3 NWLR (pt. 594) 170; (1999) 2 SCNJ 94 at 103 - per Onu, JSC; *Ikabala v. Ojesipe* H

(1988) 4 NWLR (pt. 86) 119 at 127; section 6 of the Evidence Act, Cap. 112, Laws of the Federation and A. K. Fadlallah v. Arewa Textiles Ltd. (1997) 8 NWLR (pt. 518) 546, (1997) 7 SCNJ 202 at 217 - per Ogwuegbu, JSC.

In concluding this question, it need be stressed that the apex court of the land in the case of Okonji & 2 Ors. v. Njokanma & 2 Ors. (1999) 14 NWLR (Pt. 638) 250, (1999) 12 SCNJ 259 at 275 - per Achike, JSC, the formalities for admissibility of documents including public documents, with respect, are/were lucidly and comprehensively laid down under sections 111(1) and 112 of the Evidence Act. Said the learned Jurist, inter alia:

"The position of the law in relation to the question of admissibility of a document in evidence is that admissibility is one thing while the probative value that may be placed thereon is another. Generally, three main criteria govern the admissibility of a document in evidence, namely:

- 1. is the document pleaded?*
- 2. is it relevant to the inquiry being tried by the court? and*
- 3. is it admissible in law?"*

The cases of Oba R.A.A. Oyediran of Igbonla v. H. R. H. Oba Alebiosu II & Ors. (1992) 6 NWLR (Pt. 249) 550 at 559; (1992) 7 S.C.N.J. 187 and Duniya v. Jimoh (1994) 2 NWLR (Pt. 334) 609 were referred to.

It seems to me that what appears to be paramount and important, is also governed by the purpose for which the document is sought to be tendered. Thus, a document may be admissible in evidence, if it satisfies the prescribed conditions for admissibility for that purpose, yet, those conditions, may be wholly unsatisfactory, if such document is sought to be admitted in evidence for yet a different purpose.

The learned Jurist further had this to say inter alia:

"This is another way of saying that even if a document is admissible under certain provisions of the Evidence Act that does not ipso facto make the same document admissible for all intents and purposes because where such documents is intended in proof of a specific item under the relevant law, the specific requirements of provisions under that law must be satisfied to the hilt in order to effectuate the reception of that document in evidence." (Italics mine)

The purpose for tendering exh. "A", in my view, was to show

that the 1st respondent, was disqualified from contesting the said election having regard to the said report of the panel of inquiry and the said white paper. Was the document - exh. "A" relevant to the matter or issue, in controversy? My answer, is yes or in the affirmative.

The question of its certification by the SSG, was the bone of contention. I will show later in this judgment, that the said letter from the SSG - Dr. Shettima Abba, was bogus and the contents false to his knowledge. I wish he had deposed to those facts in the said letter, in an affidavit. Undoubtedly, he should have been in for perjury. I will also refer to the unchallenged evidence of the D.W.1 and the contents of the records in this regard. For now, whether or not exh. "A" is a "forged document" as claimed by him in his said letter to the tribunal, will soon be determined by me in this judgment. B
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However, since he attached it to his affidavit as an exhibit for the purpose of proving/establishing his allegation/accusation against the 1st respondent, the document, in my respectful view, was relevant to the issue in controversy and therefore, admissible in evidence. It did not matter even if he stole it or obtained it by an unlawful means. See the receipt decision, also by the Supreme Court as regards relevancy in the case of Gaji & 2 Ors. v. Paye (2003) 8 NWLR (Pt. 823) 583; (2003) 5 SCNJ 20 at 41 - per Tobi, JSC. D
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Finally, in order to put the final nail in respect of this issue/matter, it should be borne in mind and this is also settled, that where a document is attached to an affidavit as an exhibit (as was done in the instant case 'On appeal'), it cannot be objected to until hearing of the substantive suit or petition comes up. See the cases of Adejumo & Anor. v. Governor of Lagos State (1970) 1 ANLR 183 and Nwosu v. Imo State Environmental Sanitation Authority & 4 Ors. (1990) 2 NWLR (Pt. 135) 688 at 735; (1990) 4 SCNJ 97 also cited and relied on by Mr. Bello. This is the more reason, why Mr. Bello, should have not been hammering that the final decision in the said ruling, operated as issue estoppel and that the tribunal was functus officio after the ruling. F
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In the final result, and from what I have demonstrated hereinabove, I have no hesitation in holding that in the circumstances of the settled law about relevancy in the admissibility of a document, I render my answer in respect of issue No. 3.1 of the appellant in the

negative and as will also be shown later in this judgment while dealing with the main judgment of the tribunal.

Grounds Nos. 3.1 and 3.2 of the amended notice of appeal succeed and are allowed. As to ground 3.3, it will be germane in my humble view, when treating or dealing with the appeal against the judgment. Now unto the second appeal in respect of the judgment. In dealing/treating this matter, I will proceed with the same bearing in mind, that I had earlier stated in this judgment, that the issue/controversy, will be based on documentary as well as on oral evidence. It need be emphasized firstly, that the record of proceedings, bind both the parties and the court. See: *Texaco Panama Incorporation (owners of the Vessel "M. V. Star Tulsa") v. Shell Petroleum Dev. Corporation of Nigeria Ltd.* (2002) 5 NWLR (Pt.759) 209, (2002) 2 SCNJ 102 at 118 citing *Sommer v. Federal Housing Authority* (1992) 1 D NWLR (Pt. 219) 548; (1992) 1 SCNJ 73; *Orugbo & Anor. v. Bulari Una & 10 Ors.* (2002) 16 NWLR (Pt. 792) 175, (2002) 9 SCNJ 12 and recently, *Chief Ogolo & Ors. v. Chief Fulara & Ors. v. Chief Minimah & Ors.* (2003) 11 NWLR (Pt. 831) 231, (2003) 5 SCNJ 142 at 168.

Secondly, a court, is entitled to look at its case file and make use of its contents. See *West African Provincial Ins. Co. Ltd. v. Nigerian Tobacco Co. Ltd.* (1987) 2 NWLR (pt.56) 299 at 306; *Nwankwo v. Nwankwo* (1993) 5 NWLR (pt. 293) 281 at 287; (1993) 6 SCNJ 84 at 88; *Funduk Engineering Ltd. v. Mc Arthur* (1995) 4 NWLR (Pt. 392) 640 at 652; (1995) 4 SCNJ 240; *Agbaisi v. Ebikorefe* (1997) 4 NWLR (pt. 502) 630, (1997) 4 SCNJ 147 at 160 and *Agbahomovo & Ors. v. Eduyegbe & Ors.* (supra) just to mention but a few.

Now, the appellant filed an affidavit in support of the notice of preliminary objection. Paragraphs 6, 7, 8(i) - (vi), 10, 11, 12 and 13 thereof are very pertinent. I will just reproduce paragraphs 11, 12 and 13. They read as follows:

"11. For the avoidance of doubt, I know that the petitioner in this matter is one and the same person as the Hajia Fati Garba Meddugu mentioned and referred to in exh. A above."

"12. I also know as a fact that the petitioner was at all times material to the inquiry of the aforementioned panel and until a few months ago, bore the names and was known and referred to as Hajiya Fati Garba Meddugu. She was also the Councillor in charge of works

in the Maiduguri Metropolitan Council at the relevant time.”

“13. *The petitioner used to be married to one Alhaji Garba Meddugu and only recently re-married Alhaji Ibrahim Bulama, a one time Commissioner in the Government of Borno State.*” (Italics mine).

In paragraph 8 thereof, the various acts of the fraud/embezzlement by the 1st respondent, were clearly averred/itemized. See pages 20 and 21 of the records. Significantly, the 1st respondent, never denied specifically in her counter-affidavit of ten (10) paragraphs, the averments in the said supporting affidavit. What I observe, is a general denial. I think that it is now firmly settled, that essential allegations - be they in pleadings or affidavits, should be specifically traversed. See *Wallersteiner v. Moir* (1974) 1 WLR 991 at 1002; *Meridien Trade Corp. Ltd. v. Metal Construction (WA.) Ltd.* (1998) 4 NWLR (Pt. 544) 1, (1998) 3 SCNJ 1 at 10,12; *Metal Construction (WA.) Ltd. v. Meridien Trade Corp. Ltd.* (1990) 5 NWLR (Pt. 149) 144 at 152 C. A.; *Ibeanu & Anor. v. Ogbeide & Anor.* (1998) 12 NWLR (Pt. 576) 1, (1998) 9 SCNJ 77 at 86 citing *Lewis & Peat (N.R.I.) Ltd. v. Akhimien* (1976) 1 All NLR 460 at 421; *Akintola v. Solano* (1986) 2 NWLR (Pt. 24) 598, (1986) All NLR 395 at 421, recently, *Lawson-Jack v. The Shell Petroleum Dev. Co. of Nigeria Ltd.* (2002) 13 NWLR (Pt. 783) 180, (2002) 7 SCNJ 121 at 134 just to mention but a few.

Although the above cases except the last one, deal with pleadings, in my respectful view, the principles also apply to specific allegations or averments in an affidavit. The principles are the same. An allegation in an affidavit which is not specifically traversed/denied, such an allegation/averment, must be deemed to be indirectly admitted by the adverse party and no need for the deponent of the said affidavit, to establish it by evidence.

In any case, the 1st respondent, was thoroughly taken up under cross-examination, in respect of the facts, not only appearing in the appellant's said affidavit, but also in his reply at pages 10 and 11 of the records.

Now, under cross-examination, the 1st respondent as P.W.15, who hid under “I cannot remember” in some of her answers, testified (not under oath on the Quran or by affirmation), admitted these facts, at page 205 of the records thus, -

“I was formerly Hajia Fati Garba Meddugu.”

“I worked with the Maiduguri Metropolitan Council, as Coun-

cillor for Works in 1994.”

“I was then Hajia Fati Garba Meddugu.”

At page 208 - “At the time I was Commissioner, I was still Hajia Fati Garba Meddugu.

B It should be borne in mind as it is pertinent in respect of this controversy, that by these answers hereinabove reproduced and as a witness before the tribunal, she has admitted without any equivocation, the averments in the said paragraphs 12 and 13 of the appellant’s/1st respondent’s reply and by implication, paragraph 11 thereof and so, these facts/admissions, needed/required no further
C proof by the appellant.

Comment: It is now settled, where evidence showed characteristic forgetfulness on the part of the plaintiff held - plaintiff should have been held not to have established his case. See Zaria v. Alhaji D Abdul Small (1973) 6 S.C. 61. The 1st respondent, made other denials at page 206 of the records, like not remembering the name of the Local Government Chairman when she was a councilor in the said councilor the name of the Secretary to the councilor the name of the Accountant or the name of the late Head of the Works Department of the Council. Comment: (Looks to me odd, surprising, but it is possible perhaps).

Said she still under cross-examination, inter alia:

“I never in my life appear (sic) before a panel of inquiry-chaired by Squadron Leader Sadiq Abubakar. I never appear before any, F panel.” (Italics mine)

I note that in paragraph 7 of the said counter-affidavit, the 1st respondent, averred as follows:

“That from the facts gathered from the said exhibit “A” the G Chairman of the panel of enquiry (sic) was one Squadron Leader Sadiq Abubakar who was a Military Officer and I know as a fact that he has never been a judicial officer. Same is true of the other five members of the panel.” (Italics mine)

H From the underlined words, it is not then in doubt, that the 1st respondent, knows/knew the said Squadron Leader Sadiq Abubakar. Now, this officer by name - Group Captain Sadiq Abubakar at the time he testified, gave evidence as D.W.1. He was subpoenaed. He swore on the Quran and stated inter alia, in his evidence at page 212 of the records-in-chief as follows: *“I was appointed to lead the in-*

quiry to investigate the Revenue Generation and Utilization of the Maiduguri Metropolitan Council. I remember the names of the members of the panel. There was Kumshe; there was Peter Bata; there was Alhaji Shettima. The Secretary of panel was Haiyatudeen Baba Ahmed or Umar. I cannot recall the surname. There was Alhaji Zanna Kagu. These are the names I can remember. B

We sat and went into investigation how much revenue was generated under the review and we also looked into the expenditure of the metropolitan council with a view to ascertaining whether there were irregularities and at the end of the sitting, made our findings and recommendations to the Borno State Government. C

I know one Hajia Fati Garba Meddugu.

At the time of the panel of inquiry, I was then a squadron leader. I knew Hajia when she was the Councillor for Works at the then Maiduguri Metropolitan Council and by virtue of our appointment, as part of our investigation, we looked into the expenditure she handled and other issues related to her office in line with our terms of reference. In the course of our work, Hajia Fati Garba Meddugu appeared a number of times. She was invited to explain certain issues in relation to certain expenditures which she undertook. She gave us the explanations required. D E

At the end of our sitting we wrote a report which we submitted to the then BOSG high lighting our findings making observations and recommendations.

The report we made was bound and submitted copies to the BOSG. Each of the members of the panel was given a copy and I was also given a copy for my own records: The report was signed by the members of the committee. I was on subpoena to bring a copy of the report and I have the copy here (sic) (meaning here) I have my signature on the document.” (Italics mine) F G

The records show, that when the learned counsel for the appellant, sought to tender the document, Mr. Bello took objection to its admissibility. Some of his reasons, are/were (a) it is a report of a panel of inquiry, and within the meaning of the Evidence Act, it is a public document. That the only admissible document is a C.T.C. of the original and not the original itself (b) that when a party seeks to rely on a public document, he cannot produce the original in evidence. That it is only a C.T.C. (i.e. certified true copy) of it, that is H

admissible. He referred to sec. 97 of the Evidence Act as well as section 109 of the Act. Honestly, there is nothing, with respect, more ridiculous, and unacceptable to me as these submissions, as they do not at all represent the law even to a layman. i.e. That if an original document of a public document is available and produced, it is inadmissible in evidence. That what is admissible, is the certified true copy. Please, at least, see the pronouncement of Chukwuma-Eneh, JCA in the case of *Ali v. Obande & Ors.* (supra) at page 574 of the report.

Afterwards, a certified true copy of a document, is a substitute in the absence of the original. I had noted the risk expressed in the case of *Anyakor & Ors. v. Obiakor & Ors.* (supra) or the fear in producing the original. But that does not mean that where the original of a public document is available, it is inadmissible - that it is only a certified true copy, that is admissible. What a twist of the law that is firmly established and as I know it in decided authorities. Commonsensical, nobody, to talk of a lawyer, can make such an assertion or submission and get away with it. Such a submission, I honestly believe and hold, ridicules the legal profession and the established principle of the law. The original document, is surely and certainly, the best evidence.

In any case, what the witness - DW1, produced, was "the res" - i.e. "the thing" in his custody. He is/was a signatory to the document - i.e. he signed it. As a matter of fact, the learned counsel for the 1st respondent, did not challenge its authenticity or genuineness. The evidence of this witness, rubbished, so to say, with respect, the shameless denials of the 1st respondent that she never appeared before any panel of inquiry chaired by the DW1 in respect of the council where she admitted, she was a councillor. She confirmed her name then in her evidence, to be Hajia Fati Garba Meddugu. In fact, at page 323 of the records, the tribunal used the words - "The petitioner on the other hand consistently denied ever appearing before any Committee of Inquiry." (Italics mine)

Let me pause here to observe, that after her being cross-examined, the records show as follows at page 209, thus:

"Mr. Bello

Having regard to the issue raised under cross-examination, I intend to call one witness more. So I asked (sic) for an adjournment."

"Court (sic) case is adjourned to the 19/6/2003 for continua-

tion.”

It is significant to note, that on the 19th June, 2003, instead of Mr. Bello calling the said witness, he announced to the tribunal, that *“I hereby close the petitioner’s case.”*

Of course, Mr. Bello and his client the 1st respondent, knew that the dice has been cast so to say. Any other witness called in respect of that cross-examination, was likely to be worsted in cross-examination by the appellant’s counsel. Mr. Bello, knows the consequence - i.e. that section 149(d) of the Evidence Act, was invocable against them in’ the circumstance. Afterwards, he had referred to this provision during the hearing of the preliminary objection. B
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Coming back to the case, Mr. Akoni - learned counsel for the appellant in reply, drew the attention of the tribunal, to the settled law that the only relevant consideration on admissibility, is relevance of that document. That the issue of custody and genuineness, as best, go to weight that would be attached to it. That once a document is relevant, it is admissible. He submitted that the document is relevant by the pleadings. He referred to paragraphs 6 and 7 of the appellant’s/ 1st respondent’s reply and the entire paragraph 1 of the petitioner’s reply to their own reply. He cited the case of *Torty v. Ukpabi* (supra) and submitted that the submission of his learned friend that the original document is not admissible, is misconceived. He referred to sections 93 and 94 of the Evidence Act which makes it imperative that proof of documents, could he either by primary or secondary evidence. That the document sought to be tendered, is not secondary evidence, but primary evidence. D
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Comment: I cannot agree more. These submissions, are, or represent the state of the law and cannot be faulted!

Regrettably, the tribunal upheld the objection of Mr. Bello and held that “the document sought to be tendered through DW1, being the original of a public document is inadmissible and as a result, it should be and is hereby rejected. Wonders it is said, shall never end! See also page 322 - the last two lines or sentences. D.W.1 continued his evidence and almost at every stage, Mr. Bello took objection which were always upheld. This included the admissibility of the white paper which this witness swore that he is aware that the BOSG accepted some of their recommendations, rejected others and modified some. He also swore that the white paper, was printed by the Government G
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press. He then produced the copy in his custody. This was also rejected by the tribunal that upheld the objection of Mr. Bello as to its admissibility.

At the end of all these objections and objections by Mr. Bello and upheld by the tribunal, D.W.1 concluded his evidence at page B 221 thus -

"I said earlier that I know Hajia Fati Garba Meddugu, but I cannot find her here in the court room. She is not in this court now."

It is noted by me that Mr. Bello had no questions for this witness who was eventually discharged by the tribunal. C

It is noted by me also that at page 210 of the records, when the tribunal began sitting on 19th June, 2003, the petitioner, was in court. At page 211 thereof, before the D.W.1 commenced his evidence, the record shows, that "parties not in court. Only the representatives of 3rd - 8th respondents are in court." Why did she leave D the court at the time DW1 was coming to testify? I am not allowed to speculate anything.

So, this confirms and supports the D.W.1's evidence that at the time he testified, the petitioner/1st respondent, was no longer in the E court room and also confirms the fact or his evidence that he knows her.

It is also noted by me that at page 272 of the records, the DW22 on oath, swore that his office *"knows Hajia Fati Garba and F Hajia Fati Ibrahim Bulama. I want to assume that 2 of them are the same person."* He gave his reasons.

As noted hereinabove, learned counsel for the 1st respondent, did not cross-examine the DW1. Now what is the consequence or effect of failure of a party to cross-examine a witness called by his G adversary? One or I may ask. It has been stated and restated in a line of decided authorities, that the effect of failure to cross-examine, means the acceptance in its entirety, the evidence of the witness as true. See Willoughby v. International Merchant Bank (Nig.) Ltd. (1987) 1 NWLR (Pt. 48) 105, (1987) 1 S.C. 137, 166, 179, (1987) 1 SCNJ 46; Att.- H Gen. of Oyo State & Anor. v. Fairlakes Hotels Ltd. & Anor. (1988) 5 NWLR (Pt. 92) 1, (1981) 12 SCNJ 1 at 20 and Amadi v. Nwosu (1992) 5 NWLR (Pt. 241) 273, (1992) 6 SCNJ (Pt. 1) 59 at 71 just to mention but a few. So, where an adversary, does not accept the witness's testimony as true, and fails to cross-examine him on that

fact or facts, a court can take his silence as an acceptance that the adversary does not dispute the fact or facts.

In summary, the material evidence of the D.W.1, i.e. there is the evidence about the said Inquiry, his being a member or the Chairman of the panel, the appearance of the 1st respondent before the panel on invitation on a number of times and testifying, her being a councillor in the said council, her being known as Hajia Fati Garba Meddugu, their writing and submitting their report to the Borno State Government (BOSG) which the members including himself signed, his - D.W.1 being aware that the BOSG accepted some of their recommendations, rejected others and modified some and that the white paper was printed by the Government Press, were never challenged by Mr. Bello in any cross-examination. The said evidence was never controverted by the petitioner or any of her witnesses. In such a situation, this court will act on such evidence as true and correct as they will be or are deemed as having been admitted as true by the 1st respondent and especially by Mr. Bello. See *American Cyanamid Company v. Vitality Pharmaceuticals Ltd.* (1991) 1 NWLR (Pt. 171) 15, (1991) 2 SCNJ 42 at 50 - 51 at 53. Such an acceptance, binds the 1st respondent. As to the general authority of counsel, see *Strauss v. Francis* (1866) 1 Q.B. 379 and *Mosheshe General Merchants Ltd. v. Nigerian Steel Products Ltd.* (1987) 2 NWLR (Pt. 55) 110 at 119; (1987) 1 NSCC 502 at 508; (1987) 4 SCNJ 11.

As a matter of fact, the tribunal at pages 215 to 216, 322 and 326 of the records, noted these said evidence of the DW1 and then stated thus, inter alia:

"By this evidence, he laid a foundation for the said report, to be produced in evidence, and indeed Mr. Akoni applied to tender it in evidence as a document relevant to the issues raised in the pleadings in this case." (Italics mine)

Yet, in spite of the statement, the documents when tendered, were rejected by the tribunal. For the attitude of a court in respect of unchallenged and/or uncontroverted evidence, see *Lagos State Dev. & Property Corp.*

Roadside Engineering & Foundry Ltd. v. Nigerian Land & Sea Foods Ltd. (1992) 5 NWLR (Pt.244) 653; (1992) 6 SCNJ (Pt. 11) 243 at 259 citing *Obimiami Brick & Stone (Nig.) Ltd. v. A.C.B. Ltd.* (1992) 3 NWLR (Pt. 229) 260/294, (1992) 3 SCNJ 1 - per Olatawura,

JSC; Hyacinth N. Nzeribe v. Dave Engineering Co. Ltd. (1994) 8 NWLR (Pt. 361) 124; (1994) 9 SCNJ 161 and recently, Olohunde & Anor. v. Prof Adeyoju (2000) 10 NWLR (pt. 676) 562; (2000) 6 SCNJ 470 at 495 citing several cases therein; International Bank of West Africa Ltd. v. Imano (Nig.) Ltd. & Anor. (2001) 7 NWLR (Pt. 713) 610; (2001) 3 SCNJ 160 at 182 - 183; Tsokwa Oil Marketing Co. (Nig.) Ltd. v. Bank of the North Ltd. (2002) 11 NWLR (pt. 777) 163; (2002) 5 SCNJ 176 at 194 and Okoebor v. Police Council & 2 Ors. (2003) 12 NWLR (Pt. 834) 444; (2003) 5 SCNJ 52 at 66 and many others too many to mention.

I wish to state and this is also settled, that a party be a plaintiff or petitioner, or a defendant or respondent, is entitled to lead evidence through his own witness or by cross-examination of the opponent's witnesses in order to extract a fact pleaded by either the defence or the plaintiff or petitioner as the case may be. See Bamgboye & Ors. v. Olanrewaju (1991) 4 NWLR (Pt. 184) 132 at 155; (1991) 5 SCNJ 88.

Secondly, evidence procured from cross-examination, is as valid and authentic as evidence procured from examination-in-chief. Both is said to have the potency of relevancy and relevancy is also said to be the heart of admission in the law of evidence. That where evidence is relevant, it is admissible and admitted whether it is procured from examination-in-chief or under cross-examination. See again Gaji & Ors. v. Paye (supra).

I will now come to and deal with the last stretch of this judgment that is perhaps, getting too long because of all the surrounding circumstances. The questions I or one may ask, are: (i) Was there indeed or in fact, a valid and existing report of a panel of inquiry submitted to the Borno State Government by D.W.1's panel and was there any white paper issued by the said Government as testified by the D.W.1 and as alleged by the appellant in his reply to the petition of the 1st respondent? and (ii) Did the SSG - Dr. Shettima, Abba, tell the truth when he wrote his said letter to the tribunal making the denial contained therein?

I have already stated that the parties and this court, are bound by the record of proceedings.

(1) The appellant in his evidence-in-chief as D.W.23, at page 278 of the records, affirmed "on oath" when he was asked, not put

(as appears in the record) testified inter alia, as follows:

"Ans: I happened to be seated in court, when during cross-examination the petitioner implied directly that my person may have either initiated or facilitated or even committed the act of forgery of the signature and stamp of the former SSG to the BOSG.

I am personally aware of the white paper document and that administrative panel sat when my own sister was the Commissioner for Justice and Att.-Gen. of the State at the time when the administrative panel was set up, the report submitted the white issued (sic) and the executive council's conclusions adopted.

I did not forge the white paper." (Italics mine)

At page 279 to 280 of the record under cross-examination by Mr. Bello, he testified inter alia, as follows:

"... I was the one who deposed to the affidavit in support of the preliminary objection, and I equally attached "the white paper" D to it. The white paper is not "purported". It is Government white paper. The claim of Dr. Shettima Abba the former S.S.G. that he did not sign the white paper nor did he stamp it is not true. The former SSG signed the document 25 times in the office of the Permanent Secretary Ministry of Agriculture in the presence of T. Adebayo, one of my counsel, the Permanent Secretary Ministry of Agriculture and his office staff." (Italics mine)

He went on, thus:

"Subsequently, a letter emanated with the signature of Dr. Shettima Abba claiming that he had no knowledge of signing that document. An unnamed curia (sic) sent photocopy of the letter to Mr. Wadzani's office which had no address. That was when I was made aware, of the development, and I was at Abuja, I asked for a copy and forwarded it to the SSS and the SSS was directed to investigate. Dr. Shettima Abba refused to make himself available for 3 days to the SSS, Director. The police was also directed by this tribunal to investigate, and the investigation is on going." (Italics mine)

Now, at page 202 of the records, there is a letter dated 16th June, 2003 to the Commissioner of Police, Borno, State, Maiduguri for the attention of the Asst. Commissioner of Police, 'D' Dept. (C.I.D), the Nigeria Police written and signed by one B.G. Mustapha - Secretary Cabinet Affairs and S/Services, for Secretary to the State Government. I will reproduce it. It reads as follows:

“Re: Request for Executive Conclusion on Squadron leader Sadiq Abubakar white paper on Misappropriation of Revenue in Maiduguri Metropolitan Council (MMC) 1994.

1. I am directed to refer to your letter on the above subject matter Ref. No. CB. 3380/BRX/Vol.2/301 dated 12th June, 2003
B and release to you a copy of the white paper requested.

2. However note that the conclusion cannot be released to you as a classified document; however it will be taken to you by an officer of the department for examination.

6. Thank you.” (Italics mine)
C

The said letter has on its top “Secret Office of the Secretary to the Government” and is with Ref. No. SEC/212/Vol.11/4/T.

Now, at pages 199 to 201 of the records, there is a letter from the Commissioner of Police, Borno State Command, signed by him -
D (Bashiru Azeez) CP. The Re. No. is SP.3000/BRS/T2/68 and dated 18th June, 2003. It is addressed to the Chairman, National Assembly/Governorship & Legislative House Election Tribunal, Maiduguri and for the Att: The Secretary to the tribunal. I shall also reproduce the contents verbatim. It reads as follows:

“Police interim investigation report
E

Re-Presentation of forged documents to election petition tribunal in respect of the case of Hajiya Fati Ibrahim Bulama v. Mohammed Sanusi Dagash and seven others. I refer to your letter No. EPT/M/NPF/IA/Vol.1/A dated 6th June, 2003 in which you requested for an investigation to be carried out on the above named subject matter. Investigation has been extensively carried out in the course of which statements were recorded from the parties concerned, in addition to interrogations/interviews. In furtherance of investigation, a letter No. CB.3380/BRX/Vol.2/301 dated 12th June, 2003 was written to the Permanent Secretary, Political Cabinet and Services, Governor’s Office, Maiduguri, requesting for an authentic copies of the controversial white paper and the relevant “Executive Council Conclusion” so as to verify the issue of certification which was denied by the SSG Dr. Shettima Bukar Abba in his letter dated 4th June, 2003, addressed to you which was attached to your letter under reference.
F
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In his response, the SSG (Political Cabinet and Special Services) Governor’s Office obliged the Police an original copy of the

white paper. However, he remarked that “the Executive Council Conclusion/Approval” could not be released as it is a restricted document. Nevertheless, he assigned an officer from his office to bring the original copy of the executive conclusion for examination during which it was confirmed that the controversial white paper is a genuine document from the office of the SSG, Borno State. We further extracted the relevant portion which deals with the subject-matter as reflected below:

‘BOC (95)22 Adoption of Government white paper on the Report of the Panel of Inquiry on Revenue Generation and Utilization by the Maiduguri Metropolitan Council from April, 1994 to December, 1994. The Executive Council considered the comments observations, suggestions, and recommendations in white paper after which it adopted it for implementation by the SSG.

Attached herewith are copies of a reply to a letter received from the office of the secretary, cabinet affairs and special services in the SSG’s office duly signed by Mr. B. G. Mustapha, and the relevant white paper supplied from the same office for perusal. Detailed investigation will be communicated to you in due course, please.” (Italics mine)

The two letters, speak for themselves and do not require any interpretation. They are concrete and genuine confirmation of the allegations/assertions of the appellant in his reply to the petition of the 1st respondent. In other words, he had/has overwhelmingly both by oral and documentary evidence, proved his allegations of wrong doings - fraud and embezzlement and the disqualification of the 1st respondent, as a consequence, beyond reasonable doubt pursuant to the provisions of section 138(1) of the Evidence Act.

Let me here and now say or state straight away, that the legality of setting up of the panel of inquiry, is of no moment. This is because, it is now settled that setting up of a tribunal of Inquiry, is purely a residual matter under the Constitution of the Federal Republic of Nigeria, both in the 1979 and 1999 Constitutions.

In other words, it is not a matter on which the National Assembly can legislate save in respect of the Federal Capital Territory. The power to make a general law for the establishment and regulation of tribunals of inquiry in the form of Tribunals of Inquiry Act, 1966, is now a residual power under the Constitution belonging to the States.

However, in respect of the Federal Capital Territory, Abuja, the power resides in the National Assembly. So said the Supreme Court - per Uwaifo, JSC in the case of Chief Gani Fawehinmi & 2 Ors. v. Gen. Ibrahim Babangida (Rtd.) & 2 Ors. (2003) 3 NWLR (Pt. 808) 604, (2003) 1 SCNJ 231 at 258 - 259.

B Thus, the Tribunals of Inquiry Act, 1966 promulgated by the Federal Military Government for the entire Federation under the existing laws, is an existing law pursuant to section 315 of the 1999 Constitution and is deemed to be an Act enacted by the National
C Assembly for the Federal Capital Territory, Abuja only and a law enacted by a State House of Assembly under the residual powers of both legislatures.

The Supreme Court further held that this is because, the National Assembly, has no power under the 1999 Constitution, to enact
D a general law on tribunals of inquiry in the form of the said Act to have effect throughout the Federation of Nigeria.

I have made these observations because, this issue was raised and canvassed by Mr. Bello during the hearing of the preliminary objection. See pages 68 and 69 of the records, and in the ruling at
E pages 88-89 thereof.

Now, reverting to these my posers, the above two (2) letters, have vindicated the appellant and the D.W.1 in particular. The said letters, have damnified both the 1st respondent and Dr. Shettima
F Abba. Putting it in another way, it has been proved/established, that there is a valid and existing report by former Squadron leader Sadiq Abubakar's Panel of Inquiry indicting the 1st respondent very seriously. There was/is a white paper by the Borno State Government Executive Council, adopting the said report and directing its SSG to
G implement the same. Period!

I will not bother myself into the claim by the 1st respondent, that she was appointed a Commissioner. Afterwards, at that time, she was married to one of the Commissioners in the State Government. Perhaps, Dr. Shettima Abba was the SSG - perhaps. Again, this is
H speculation: See Incar (Nig.) Ltd. v. Benson Trans. Ltd. (1975) 3 S.C. 117, and Solona v. Olusanya (1975) 6 S.C. 55. To put it mildly, I am saddened to note about these unfortunate but very shameful and despicable episode that took place in the tribunal. One thing is clear to me. These two (2) letters, were made available to the Chairman of

the tribunal. I believe and have no reason to doubt that as at 25th June, 2003, when the tribunal adjourned judgment to 28th June, 2003, the majority members, at least, may have been aware or had knowledge about the existence of the said two letters, and the attached copy of the white paper. Yet, and yet, they with humility, either suppressed or glossed over them and anchored their decision, on most irrelevant issue in the circumstance, of extra votes of 141 and so forth, which they held was not won by the appellant. They proceeded to declare the 1st respondent - (a person they knew, from the material then available to the tribunal, had no honour to protect, having been thoroughly and unequivocally, disqualified pursuant to section 66(1) of the 1999 Constitution), as duly elected by the majority. They took advantage of the small margin in the votes scored by the appellant as against that scored by the 1st respondent.

To say the least, from what has emerged from the two letters and the evidence of the D.W.1 who the tribunal rightly in my respectful view, found as a fact, had laid proper foundation to tender their report, the majority judgment, with respect, was/is perverse. In fact, it is noted by me, that in the ruling at page 90, it was found as fact, thus

“Given the contents of these two paragraphs, 1st respondent (i. e. the appellant) is undoubtedly aware that there is a “report apart from exhibit “A” which contains only the acceptance or non-acceptance of the panel’s report.” (Italics mine)

The attitude of an appellate court where the findings of a trial court or tribunal, are perverse or use made of a document, goes beyond its evidential value particularly, in respect of documentary evidence, has been stated and restated in a string of decided authorities. The appellate court, in such circumstances, is entitled to reconsider and reassess the evidence and apply it if the justice of the case, so requires. See Adeleke v. Iyanda (2001) 13 NWLR (Pt.729) 1 at 20; (2001) 6 SCNJ 101; Tsokwa Oil Marketing Co. (Nig.) Ltd. v. Bank of the North Ltd. (supra) at 200; and Alhaji A.W. Elias v. Oleyemi Disu & Ors. (1962) ANLR (Pt. 4) 214 and many others.

Afterwards, the evaluation of documentary evidence, is not the exclusive preserve of the trial court as had been observed/stated by me earlier in this judgment. See Iwuoha & Anor. v. Nigerian Postal Services Ltd. & Anor. (supra) at 278. Again, an appeal is by way of

rehearing.

I wish to quickly state firstly, that a dissenting judgment, however powerful, learned or articulate, is not the judgment of the court or tribunal and it is not therefore, binding. The judgment of the court or in the case of tribunal, is the majority judgment. So said the Supreme Court - per Tobi, JSC in the case of *Orugbo & Anor. v. Bulara Una & Ors.* (supra) at 30 - 31. I will say however, that an appellate court can make reference to it and in fact, agree about a settled principle of law or a sound reasoning and conclusion in the dissenting judgment and in fact, set aside the majority judgment.

Secondly, that an appeal against an interlocutory ruling/decision, may be merged with the appeal against the final judgment, but with the leave of court as was the case in the instant appeals. See *Ogige & 3 Ors. v. Obiyan* (1997) 10 NWLR (Pt. 524) 179, (1997) 10 SCNJ 1; *Okobia v. Ajanya & Ors.* (1998) 6 NWLR (pt. 554) 348 at 360, 364 - 365; (1998) 5 SCNJ 95; *Dr. M.G.O. Iweka v. S.C.O.A. (Nig.) Ltd.* (2000) 7 NWLR (pt. 664) 325, (2000) 3 SCNJ 71 at 91, *Iloabuchi v. Ebigbo* (2000) 8 NWLR (Pt. 668) 197; (2000) 4 SCNJ 46 at 64, *Shanu & Anor. v. Afribank (Nig.) Plc.* (2000) 13 NWLR (pt. 684) 392, (2000) 10 SCNJ 1 (supra) and *Elom O. Oke & Ors. v. Eze Nwaogbuinya & Ors.* (2001) 3 NWLR (Pt. 700) 406; (2001) 1 SCNJ 157 at 168 just to mention but a few.

Thirdly, an appellate court is not limited to or by the reliefs sought in the notice of appeal. It may grant any reliefs it deems appropriate. See *Rev. Hyde Onuaguluchi v. Ndu & 2 Ors.* (2001) 7 NWLR (Pt. 712) 309, (2001) 3 SCNJ 110 at 119.

Fourthly, I, with profound humility, agree with all the oral submissions of Dr. Babalakin (SAN) in respect of the said ruling and the judgment. They are sound and are adequately borne out by the records and decided authorities.

I want to say that the provisions of section 66(1)(h) of the 1999 Constitution, are quite clear and unambiguous and they need no further interpretation. They apply wholly to the 1st respondent. I need not re-reproduce them in this judgment. Even in the ruling at page 87; majority members of the tribunal, found and held, that it was an Administrative Panel of Inquiry.

The 1st respondent ought and should not be allowed to continue occupying any or the seat in the Senate. She is absolutely dis-

qualified from doing so.

Before I am done with the appeal dealing with the judgment, let me round up by stating further as follows:

(i) There was evidence by the DW1 that the white paper was printed by the Government Printing Press. See page 218 of the records. That the said document has printed on it, "Printed by the Director of Printing, Maiduguri", in my respectful and humble view, did not detract from the fact, that the Director of Printing, Maiduguri, is/was a staff in the Borno State Government. B

At least, the said evidence of the DW1, "erased" so to say, any doubt as to the authenticity and genuineness of the white paper. With respect, I do not agree with the majority members of the tribunal, that the document could be from anywhere other than from the Government. This view, I hold, borders on speculation. But this has already been debunked by me hereinabove. C D

In any case, as already noted by me in this judgment, the D.W.1, was not challenged in cross-examination in respect of his evidence that the white paper, was printed by the Government Press. I notice that every attempt was made by Mr. Bello, (for reasons he well knew about the resultant consequence if those documents were admitted in evidence) to ensure that the said documents, were not admitted in evidence. Regrettably, the majority members of the tribunal, obliged him on most untenable and unacceptable grounds. The said white paper is now before the court. I have examined it personally and I am satisfied that it is one of the original copies in the possession or custody of the Borno State Government. E F

(ii) I wish to state with respect, that it is not acceptable to me, the submission of Mr. Bello, that assuming the documents were admissible in law, that the allegations contained in the report and white paper, have nothing to do with fraud and embezzlement or any crime. G

If the report of the panel of inquiry, which the Government of Borno State accepted and adopted in the white paper indicting the 1st respondent, has nothing to do with fraud and embezzlement, I wonder what the said report and white paper, were all about. In fact, in my respectful view, they also amounted to gross misconduct. The report, clearly and unequivocally, indicted the 1st respondent of various fraud and embezzlement of large sums of money - (public funds) and indeed, what amounts also to gross misconduct on her part as a H

Councilor as clearly averred and particularized in paragraphs 8(i) to (vi) of the appellant's reply to the petition. In No. (i) thereof, the amount or sum of money, was recovered from her and she was relieved of her appointment and in some others, she was asked to refund the money while in Nos. (v) and (vi), she with other councilors and the staff of the council and other members of the committee respectively, were ordered to refund the said sums of money. The 1st respondent did not deny that she and twenty-five (25) of the councilors, were relieved of their appointment.

C I believe that Mr. Bello, with respect, knew and knows that he was not serious and was not standing on a firm ground, when he made the above said submission. However, for the avoidance of doubt, see pages 25 - 44 - Nos. 3.5 - name No.9 - the 1st respondent & 3.7, 5.5, 5.6 and 5.7, 6.3, 6.4 and 6.5, 7.9, 8.0 and 8.1, 13.4, 13.5 and D 13.6, 15.3, 15.4(a) and 15.5(a) and 15.7, 15.8 and 15.9 or the white paper.

Now that I have found as a fact, that there was indeed a valid report by the D.W.1's panel of inquiry and a white paper in respect thereof, accepting and adopting the said report, I believe and hold E that all the arguments or submissions challenging the existence of the two documents or indeed, the shameful/disgraceful and unfortunate denials by the 1st respondent of ever appearing before a panel of inquiry chaired by the DW1 in particular, become very nauseating to me, to say the least.

F With profound humility in me, it is my respectful but firm view, that the said denials by or of the 1st respondent especially under cross-examination clearly and undoubtedly, have exposed her and depict her, as an unreliable person/witness or lady/ Hajia. It is indeed, G a pity!

It has been stated or held, that a witness who testifies falsely on a matter within his or her personal knowledge, leaves no room for any court to credit him or her, with the issues before the Court. See Onibudu & Ors. v. Akibo & Ors. (1982) 7 S.C. 60 at 76; Odivo v. H Obor (1974) 1 SC 23 per Elias, C.J.N. and Nnajofofor v. Ukonu (1986) 4 NWLR (Pt.36) 505, 521. I am aware that the 1st respondent, swore to a counter-affidavit wherein in paragraphs 3, 4, 5, 8 and 9 she denied flatly, about any panel of Inquiry and of any indictment. In fact, in paragraphs 8 and 10, she boasted of having been appointed

a Commissioner and Chairman of the Water Corporation respectively.

A Jurist, is quoted to have said -

"We know that to tell the truth is not merely a good intention. It is damned difficult thing to do - It takes humility and self-examination". - Justice Bontein. "I am happy however, to note that the 1st respondent, in her concluding evidence-in-chief, stated at page 205 of the records, inter alia, as follows:

"...His (i.e. - the 1st respondent/appellant) conduct ought to render him disqualified because what he did at the following units... as long as justice is done because justice is no respecter of anybody.

No one person is above the law." (Italics mine)

So, in the instant case, the law shall never be a respecter of anybody as/since no one person, is above the law. So be it! I will now deal with the cross-appeal. It is to be noted that the 1st respondent, did not appeal against the said ruling in which the tribunal held that she has locus standi to present the petition under S.133(1)(a) of the Electoral Act. Instead, she and her learned counsel, fully participated in the trial and never declined to participate.

The cross-appellant, formulated one (1) lone issue for determination, namely,

"Whether the ruling of the tribunal dated 3rd day of June, 2003 finally disposes of the issue of disqualification of the petitioner so as to preclude the losing (sic) party and the tribunal from revisit the issue all over again." (Italics mine)

The appellant, also formulated one (1) issue the substance of which, is the same with that of the 1st respondent. It reads as follows:

"Whether the ruling of the tribunal dated 3rd June, 2003 finally determined the issue of qualification of the cross-appellant so as to preclude the 1st respondent and the tribunal from revisiting the issue again in the substantive trial and judgment." (Italics mine).

I note that in both briefs, the learned counsel for the cross-appellant at page 6 of their brief and the learned SAN, reproduced some of the relevant portions of the said ruling at page 91 of the records which read inter alia, as follows:

"... In the light of the above, it is our considered view that following the finding that exh. A. is not admissible, there is no proper material before us on which to determine the disqualification of the

petitioner.

In the circumstance, the petitioner has locus standi to present the petition under S. 133(1)(a) of the Electoral Act.” (Italics mine)

With the greatest respect, I think it will be stretching the above pronouncement, to a point of absurdity by contending as the cross-appellant has done, even at the trial, that the tribunal had become functus officio in respect of hearing the substantive case or petition. The tribunal by majority, held that it did not have the proper material before it to enable it determine the disqualification of the 1st respondent from contesting the election. Period!

In my concurring judgment in Patrick O. G. Jang v. INEC & 6 Ors. (2004) 12 NWLR (Pt. 886) 46, I dealt with the effect of raising/filing a preliminary objection. In summary, a preliminary question, is a question that has to be settled before going into other things. Therefore, a notice of preliminary objection complaining about a plaintiffs or petitioner’s lack of standing, should be settled first as the issue of locus standi, is a preliminary question which must be settled before going into any other thing such as trial. See Oroh & 25 Ors. v. Buraimoh (1990) 2 NWLR (Pt. 134) 641 at 645 C.A.

Put in another way, it is firmly settled that a defendant or respondent who conceives that ex facie, he has a good ground of law which if raised, will determine the action or petition in limine, is entitled to raise such ground of law. See Martins v. Administrator-General of the Federation & Anor. (1962) 1 ANLR 120.

It need be emphasized, that the justiciability of an action or petition as the case may be, is decided as a preliminary point, with reference to the plaintiffs or petitioner’s pleadings. See Shell B. P. Petroleum Dev. Co. v. Onasanya (1976) 6 S.C. 89 at 94. It is firmly settled that a preliminary objection or preliminary point of law, could be raised even after the filing and exchange of pleadings See Fadare & Ors. v. Att.-Gen. of Oyo State (1982) 1 ANLR (Pt. 1) 24; (1982) 4 S.C. 1 at 21 & 22.

Thus, a preliminary objection on point of law challenging the validity of the institution of a suit or petition as in the instant case leading to the appeals, it is now firmly settled, could only be determined at the initial stage by reference to the pleadings, particularly, the statement of claim or the petition as in the instant case.

So, once the issue, cannot be determined on the pleadings or

petition or in respect of the exhibit attached to the petition, the trial court or tribunal, is entitled to and indeed ought to proceed with/to full trial of the case and decide the point after evidence have been proffered at the trial. See *Akinbi v. The Military Governor, Ondo State & Anor.* (1990) 3 NWLR (Pt.140) 525 at 531 - 532 C.A.

Also settled is that a point or points of law, can be raised on a preliminary objection, if the point or points of law, will be decisive of the whole litigation. See *L.C. & D Railway v. S. E. Railway* (1888) 55 L.T. III, *Everett v. Ribbands* (1952) 2 QB 198 at 266 and *Yeoman Credit Ltd. v. Apps* (1961) 2 All ER 281 at 292.

To be borne in mind, is that issue or question of locus standi, relates to or deals with jurisdiction and the competence of the court to entertain and determine the action or petition. So, issue of jurisdiction can be raised at any stage of the proceedings and whenever raised, it is to be decided when the point or issue is raised. See *Norwich v. Norwich Electric Tramway Co.* (1906) 2 K.B. 119; *Adani v. Igwe* (1956) 2 FSC 81 at 89 and recently, *NDIC v. Central Bank of Nigeria & Anor.* (2002) 7 NWLR (Pt. 766) 272, (2002) 3 SCNJ 75 at 89 and *Afro-Continental (Nig.) Ltd. & Anor. v. Co-operative Association of Professionals Inc.* (2003) 5 NWLR (Pt. 813) 303, (2003) 1 SCNJ 530 at 537,539.

The reason for dismissing the preliminary objection, was that exh. "A", was not certified in compliance with sec. 111(1) of the Evidence Act. At the trial, the originals of both the report of the panel of inquiry and the white paper, were tendered, but were marked 'abrejected" by the tribunal.

I regret to say that the case of *Chief Ogbogu & 5 Ors. v. Ugwuegbu & Anor.* (2003) 10 NWLR (Pt. 827) 189 at 210 - 211 (it is also reported in (2003) 4 SCNJ 179) cited by Mr. Bello in his list of authorities filed on 22nd October, 2003 and delivered to me on the same date, is not relevant/applicable to the instant case or circumstances. The tribunal was perfectly right and justified in rejecting the said contention by the cross-appellant that it was functus officio after the ruling, from proceeding to full trial. There is no question of any issue estoppel being applicable in the circumstance. Certainly, it was not the rejected document exh. "A", that the tribunal relied on or the majority members used in the judgment, but on the original documents i.e. - the report and white paper properly produced by the

D.W.1 from his own personal custody. What is more, Mr. Bello consented to the trial of their petition. See page 172 of the records where the following appears -

“P.A. Bello

We are ready to commence with the trial of the suit.”

B So, with respect, he cannot be heard to be blowing hot and cold, so to speak, at the same time. If he had declined to further participate in the trial, then their cross-appeal, would still be treated on its merit. I note that at pages 65 - 66 of the records during the arguments in respect of exh. “A”, Mr. Bello is recorded as saying inter alia:

C *“... Even if one of these documents are not presented it means that documents are not there, and the court is entitled to hold under S. 149(d) that if these documents had been presented, it would be D against them. That is the presumption of the law.*

In view then at page 66 continues - of the fact that the respondent/petitioner denied the existence of such a report and denied seeing any, it is essential that the 1st respondent produces the vital documents. See paragraphs 4 - 6 of the counter-affidavit.” (Italics mine)

E Indeed, in the ruling of the majority members of the tribunal at page 86 of the records, the following appear in respect of the submissions of Mr. Bello, inter alia:

F *“P.A. Bello, Esq. of counsel to the petitioner in contending that the petitioner is qualified and competent to present the petition, submitted in the main that the petitioner having joined issues with 1st respondent as to the authenticity of exh. “A” given the disabilities apparent on the face of it; as well as there being no proper material before the tribunal in terms of relevant documents such as the “report” of the Administrative Panel of Inquiry which “report” is vital for proper adjudication of the issue of the disqualification of the petitioner, relying on exh. “A” to question the qualification or disqualification of the petitioner would be going contrary to the requirements of S. 66(1)(h) of the Constitution.” (Italics mine).*

H It could be seen, that it was Mr. Bello himself, who insisted that no proper materials were before the tribunal to enable it adjudicate on the issue in controversy. That the “report” was vital.

Now, the appellant proceeded to produce the originals of the two documents, but Mr. Bello is now saying that the tribunal is func-

tus officio. Regrettably, the majority members proceeded to hold the views contained at page 326 of the records which I will spare myself from reproducing herein. The majority members even called the two said documents - i.e. the original report and white paper, as copies and that the originals are with the Borno State Government. Unbelievable! Even when the said documents were produced in one uniform process of printing them. I say no more on this issue as the whole thing is to me, mind bugging. See section 94(4) of the Evidence Act. B

Finally, on the authorities, the tribunal, was entitled and justified to go into the hearing/trial of the petition on its merits after the said ruling. The tribunal was certainly not functus officio after the said ruling. C

My answer to the lone issue of both the cross-appellant and the appellant, is therefore, rendered in the - D

The cross-appeal in my respectful view, is frivolous and it fails. I too dismiss it as lacking in substance and merits. I observe that in respect of ground 10 in the amended notice of appeal filed on 29th July, 2003 - the same day with the appellant's brief, Dr. Babalakin (SAN), did not breath a word about it both in their said Brief or during oral submissions and there is no issue formulated in respect thereof. However, the said ground with respect is completely misconceived. The said ground which was abandoned is accordingly struck out by me. E

To conclude this rather lengthy concurring judgment in which I have deliberately and for obvious reasons, including my dislike/hatred for any miscarriage of justice, highlighted some salient and pertinent facts and law, I have no doubt in my mind whatsoever, that this appeal deserves to succeed. It accordingly succeeds meritoriously. F G

As to the attitude of an appellate court to findings of fact by a trial court or tribunal and when it can disturb, alter, reverse or set aside the lower court's or in the instant case, the findings of facts by the majority members of the tribunal in both the ruling and the judgment, See *Ezeafulukwe v. John Holt Ltd.* (1996) 2 NWLR (Pt. 432) H 511 at 522; (1996) 2 SCNJ 104.

It is from all the foregoing and the much fuller and detailed lead judgment of my learned brother, Obadina, JCA, that I too allow the two appeals. I also hereby set aside the said ruling and judgment

of the majority members of the tribunal.

The dissenting ruling and judgment of Hon. Justice Abiri, I hold, with respect, are sound, commendable and represent the state of the law in all the circumstances. But I cannot affirm it as it is not the ruling and judgment of the tribunal. See the case of *Bank of Baroda v. Iyalabani Ltd.* (2002) 13 NWLR (Pt. 785) 551, (2002) 7 SCNJ 287 at 300, 301 and 317. I abide by the consequential orders of my said learned brother in the lead judgment, including costs. Appeal allowed.

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