

COURT OF APPEAL
CALABAR DIVISION
31ST JULY, 2003. CA/C/NAEA/53/03
CORAM:- R. O. ROWLAND, O. OPENE,
M. E. AKPIROROH, JJCA

SENATOR ANIETIE OKON

AND

1. EFFIONG D. BOB
 2. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)
 3. THE RETURNING OFFICER, UYO SENATORIAL DISTRICT
 4. THE RESIDENT ELECTORAL COMMISSIONER AKWA IBOM STATE
 5. ALL NIGERIA PEOPLE PARTY (ANPP)
 6. NATIONAL DEMOCRATIC PARTY (NDP)
 7. ALL PROGRESSIVE GRAND ALLIANCE (APGA)
-

APPEALS - Election petitions - Right to appeal to Court of Appeal - Striking out a petition - Does not confer right to appeal - Under s.246(1)(b) of the 1999 Constitution - As it did not determine - Whether any person was validly elected (H2)

ELECTION PETITIONS - Appeals - Right to appeal - From election tribunals - To the court of Appeal - Arises only where the petition is determined on the merit - As to whether a person was validly elected - As per S. 246(1)(b) of the 1999 Constitution (H1)

ELECTION PETITIONS - Locus standi - Pleadings - Election candidates - Where plaintiff in his pleadings - Averred that his name was substituted few hours to the election - He has no Locus to sue (H5)

ELECTION PETITIONS - Motions - Jurisdiction - Application that challenges competence of the petition - Was rightly determined by the Tribu-

nal before taking any other step in the proceedings (H6)

ELECTION PETITIONS - Party candidates - Nomination of - Provision of the Electoral Act - That party candidates can be changed - Not later than 30 days to the election date - Is discretional- As the phrase “may” was used - In s.23 of the Act (H4)

PARTIES - Election petition - Actions - Person whose presence is crucial - It is the plaintiff’s duty to bring such party to court (H3)

FACTS

The appellant and 1st respondent are members of the People Democratic Party (PDP). There had been a struggle between them as to who should contest the election on the platform of the PDP to represent the Uyo Senatorial District in the National Assembly elections held on the 12-4-2003. Appellants name was Published as the party's candidate for the election. Before the election was held, appellant's name was replaced with that of the 1st respondent. The result showed that 1st respondent scored the highest vote and he was thereupon declared elected. As a result the appellant filed a petition against the respondents at the National Assembly/Governorship and Legislative Houses Election Tribunal Uyo. Appellant sought inter alia, the nullification of 1st respondent's election and that he be declared the duly elected candidate.

The 1st respondent filed a motion to strike out the petition on the ground that the election has no locus standi to maintain a petition under the Electoral Act, 2002. Appellant on his part filed a motion for leave to Amend his petition. Both motions were heard together. The trial tribunal held that appellant has no locus standi to present the petition. The petition being incompetent and invalid, there was nothing to amend. It struck out appellant's motion for amendment holding that has no jurisdiction to entertain the petition. Being dissatisfied, appellant has now appealed to the Court

of Appeal which had to determine the appeal based on 2 vital issues.

ISSUES FOR DETERMINATION

1. *Whether the appellant has the locus standi to present the petition and also*
2. *Whether the striking out of the motion for amendment was proper.*

HELD (Unanimously dismissing the appeal per lead judgment of **OPENE JCA**)

Right to appeal - From election tribunals

1. It can be seen that section 246(1) of the 1999 Constitution regulates the right to appeal to the court of Appeal from the election tribunals. An appeal will only lie from the election tribunal to the court of Appeal if there is any decision by the election tribunal whether any person has been validly elected as a member of the National Assembly or the State House of Assembly, the office of the Governor or the Deputy Governor as the case may be.

Such an appeal will only come within the provisions of section 246(1) (b) of the 1999 Constitution if there is a determination of the petition on the merits and any other decision made in the course of the election proceedings which is a decision in an election petition is not covered by section 246(1)(b) and this brings us to the striking out of a petition on the ground of locus standi as in the instant case. (p. 210 B)

Striking out a petition - Does not confer right to appeal

2. From the list of the authorities cited above, it is obvious that striking out an election petition does not fall within the provisions of section 246(1)(b) above as there was no decision as to whether any one was elected into the National Assembly, that is, the determination of an election petition. Although it is a final decision in the sense that it determined the petition, but, it is a decision made in the course of an election petition proceedings,

and the Constitution does not confer any right of appeal on the appellant.
(p. 210 E)

B Actions - Person whose presence is crucial

3. It is the duty of a plaintiff to bring to court a party whose presence is crucial to the resolution of his case. See : Adisa v. Oyinwola (2000)10 NWLR (pt. 674) 116.

C In the instant case, it is the PDP that forwarded the appellant's name to the INEC the 2nd respondent as the party's candidate and the presence of the P.D.P. in this action is very crucial as it would say that the appellant is still its official candidate and that he was wrongfully excluded from the election. In any event,
D there is no way that the matter could be resolved without making the P.D.P. a party and failure to join PDP as a party in this action is fatal to the appellant's case. (p. 211 E)

E Party candidates - Nomination of

4. In the instant case, the tribunal was interpreting the provisions of section 23 of the Electoral Act which states:-

"23. Any political party which wishes to change any of its
F candidates for any election under this Act may signify its intention in writing to the Commission not later than 30 days to the date of the election."

If one examines the provisions of section 23 above, it clearly shows that the interpretation given to it by the tribunal cannot be
G faulted at all. The word "May" used in this section of the law is permissive or discretionary. There is nothing in the Electoral Act to show that late nomination can invalidate the election of a candidate or is a ground of questioning an election under section
H 134 of the Act. The fact that there is no provision in the Electoral Act, 2002 like paragraph 7(2) of the 4th schedule to the Local Government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1998, clearly shows that the law does not want

to interfere with the political parties choice and substitution of their candidates. It is their internal affairs and it is entirely up to them to choose, select and substitute their candidates before the election depending on the political winds that are blowing.

It can not therefore be said that failure to take advantage B of the time leaves any candidate as the statutory candidate of the party that cannot be substituted or changed as the Electoral Act does not make such a provision. (p. 215 B)

Locus standi - Pleadings - Election

5. At page 6 of the petition which is page 3 of the records, he pleaded:-

"In a strange manner, your petitioner's name was allegedly substituted barely 12 hours to the election."

At page 9 of the petition which is at page 6 of the records, he also pleaded:

"Your petitioner was validly nominated but unlawfully excluded from the election."

It was after considering the pleadings above that the tribunal in the ruling at page 75 of the records observed;

"The petitioner himself has in his petition copiontly (sic) pleaded that his name was substituted 12 hours to the election. By his pleading, he was not a candidate at that election."

I do not see how this finding can be faulted. If the petitioner has been excluded from the election as he has pleaded, obviously he was not a candidate. If he was excluded from the election, he was not a candidate at the election, he lacks the locus standi to bring this action and the only person that can bring an action and complain in an election petition of valid nomination but unlawful exclusion is a political party by virtue of the provisions of section 134(1)(d) of the Electoral Act which provides:

"134(1) An Election may be questioned on any of the following grounds. That is to say:

(d) that the petitioner or its candidate was validly nomi-

nated but was unlawfully excluded from the election."

Incidentally, P.D.P., the party on whose platform the appellant contends that he contested the election is not complaining about the election and is in fact not joined as a party in this case.

B (p. 216 E)

Motions - Jurisdiction

6. It has been submitted by Mr. Omoh, learned counsel for the appellant that where there are two competing applications one potentially constructive and the other potentially destructive that the one potentially constructive must be taken first. That is a good statement of the law but the learned counsel has lost sight of the fact that in the instant case that the issue of jurisdiction has been raised. The question of jurisdiction is very vital and fundamental that whenever it is raised a court or tribunal must rise to the occasion and ascertain whether or not, it has the jurisdiction to entertain the matter because if it continues to entertain the matter and it turns out at the end of the day that it lacks jurisdiction to entertain the matter, everything it has done in the matter is a nullity. See *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341; *Leedo Presidential Motel v. Bank of the North* (1998) 10 NWLR (pt.570) 353. Besides this, paragraph 49(5) of the first Schedule to the Eletoral Act, 2002 reads:

"An objection challenging the regularity or competence of an election petition shall be heard an determined before any further steps in the proceedings if the objection is brought immediately the defect on the face of the election petition is noticed"

It can therefore be seen that the tribunal ruling in this effect is unassailable. I entirely agree with its observation that "There being no valid petition before us, there is nothing to amend" whereby it struck out the application for amendment.

On the whole, I am of the firm view that the appeal is devoid of merit and that it ought to be dismissed. (p. 217 E)

CASES REFERRED TO

- Okokhue v. Obadan (1989) 5 NWLR (pt. 120) 185
 Olawuyi v. Adeyemi (1990) 4 NWLR (pt. 147) 746
 Adisa v. Oyinwola (2000) 10 NWLR (pt. 674) 116, (2000) 6 KLR B
 (pt 106) 1915
 Onuoha v. Okafor (1983) 2 SCNLR 244
 Madukolu v. Nkemdilim (1962) 2 SCNLR 341
 Orubu v. NEC (1988) 5 NWLR (pt.94) 323 C
 Anya v. Iyayi (1988) 3 NWLR (pt.82) 359
 Olawuyi v. Adeyemi (1990) 4 NWLR (pt.147) 746
 Maikori v. Lere (1992) 3 NWLR (pt.231) 525.
 Leedo Presidential Motel v. Bank of the North (1998) 10 NWLR D
 (pt. 570) 353, (1998) 7 (pt 70) 1985

STATUTES REFERRED TO

- Electoral Act, 2002, ss. 133(1) and 134, para. 2(2) of Sch. 1
 Constitution of Nigeria 1999, ss. 246(1)(b), 285 E
 Decree No.37 of 1987, ss. 31, 34(1), 37, 36(1), para. 28(1) and
 (2) of Sch. 3
 Electoral Act 2002, ss. 21, 22, 23, 24, 25, 133(1), 134(1)(d)
 Local Government (Basic Constitutional and Transitional Provi- F
 sions) Decree No. 36 of 1998 para. 7(2) of the 4th Sch.

LEAD JUDGMENT BY OPENE JCA

The facts of the present case is that the appellant and the G
 1st respondent are members of the Peoples Democratic Party
 (PDP). There had been a struggle between the two as to who
 should contest the election on the platform of the PDP to repre-
 sent the Uyo Senatorial District in the last National Assembly elec-
 tions held on the 12th day of April 2003. In course of this, the 1st H
 respondent on 17/3/2003 filed an action against Independent Na-
 tional Electoral Commission (INEC) at the Federal High Court,
 Abuja complaining about his replacement with the appellant as

the party's candidate for the election but the 1st respondent later discontinued the suit. The appellant's name was then published as the party's candidate for the election.

Before the election was held on 12th of April, 2003, the appellant's name was replaced with that of the 1st respondent. The election result and/or scores show that Effiong Bob (1st respondent) of the PDP scored 230,411 which was the highest vote and he was thereupon declared elected.

As a result of this, the appellant filed a petition at the election petition tribunal holden at Uyo against the respondents complaining about the conduct and the declaration of the results in the election and thereby sought the nullification of the declaration of the 1st respondent as the elected candidate in the said election and then prayed for the following reliefs:-

1. A declaration that the return of the 1st respondent as the winner of the election in the Uyo Senatorial District is null and void.

2. An order returning your petitioner as the duly elected candidate by the majority of the lawful votes cast at the election.

Alternatively:

1. An order declaring the election in Uyo Senatorial District held on the 12th of April, 2003 as a nullity.

2. A further order that fresh election be held in the Uyo Senatorial District in accordance with the provisions of the Electoral Act, 2002.

In response to this, the 1st respondent, filed a motion on notice to strike out the petition under sections 133(1) and 134 of the Electoral Act, 2002 and paragraph 2(2) of Schedule 1 to the Electoral Act praying the tribunal as follows:-

"1. The petition is incompetent and the petitioner not being a candidate at the election nor a political party which participated at the election has no locus standi to maintain a petition under the Electoral Act, 2002.

2. This Hon. Tribunal has no jurisdiction to nullify the elec-

tion of a successful candidate on allegations of corrupt practices when such allegations lack particularity and are not specifically referable to the successful candidate.

3. *The question of who is the candidate sponsored by a political party is the domestic and internal matter of a political party and the court or this Hon. Tribunal has no jurisdiction to choose a candidate for a political party.*

4. *The petitioner has no capacity to question an election on the ground that he was validly nominated but unlawfully excluded; such ground is available only to a political party which has filed a petition.*

5. *The petition is incompetent for want of compliance with paragraph 2(2) of the First Schedule to the Electoral Act, 2002 as the petitioner has failed to obtain an order of this Hon. Tribunal as to the giving of security for all costs."*

The appellant also filed a motion no notice praying the tribunal for an order granting leave to the petitioner to amend his petition in terms of exhibit 'A' which was attached to his motion.

The motion by the 1st respondent to strike out the petition and the appellant's motion for leave to amend the petition were both argued by both sides and on 13/6/03, the tribunal delivered its ruling in which it ruled that the petitioner not being a candidate at the election has no locus standi to present the petition and that the petition is incompetent and that it has no jurisdiction to entertain same. It was also held that there being no valid petition that there is nothing to amend and accordingly struck out the petition.

Dissatisfied and unhappy with this ruling, the appellant has now appealed to this court. With exception of the 5th, 6th and 7th respondents who have not shown much interest in this matter all the parties filed and exchanged their briefs of argument.

Besides this, the 1st respondent filed a notice of preliminary objection and also a respondents' notice of intention to contend that the decision of the court below be confirmed on other

grounds. These were argued in the 1st respondents brief of argument. I will first of all dispose of them before going into the merits of this appeal

The basis of the preliminary objection is that:-

B The appeal is incompetent as no appeal lies to the court of Appeal from an interlocutory decision of the Governorship and Legislative Houses Election Tribunal. Appeal to the Court of Appeal are limited to decisions on any question as to whether "*any person has been validly elected as a member of the National Assembly or of a House of Assembly of a State*".

In his argument, Chief Ekong Bassey, SAN referred to section 246(1) of the Constitution of Federal Republic of Nigeria, 1999 and the following cases:

D Orubu v. NEC (1988) 5 NWLR (pt.94) 323;

Okokhue v. Obadan (1989) 5 NWLR (pt.120)185; Aondoakaa v. Ajo (1999) 5 NWLR (pt.602) 206

E He submitted that the appeal does no where relate to the question whether any person has been validly elected as a member of the National Assembly and that all the tribunal did was to strike out the petition on the grounds that the petitioner has no locus standi, that there is no right of appeal except as permitted by the statute and that the appeal does not fall within the provisions of section 246 of the 1999 Constitution.

F In his address Mr. Umoh, the learned counsel for the appellant submitted that the authorities cited by the learned senior counsel are irrelevant and that section 246(1)(b) renders appeal-
G able any decision of the National Assembly Election Tribunal set up pursuant to section 285 of the 1999 Constitution and that in section 246(1)(b) any question is emphasized, that all the questions sought to challenge the validity of the 1st respondent's election and that any decision is a question on the validity of the said
H election.

The question is whether any decision made in the course of an election proceeding before the final decision is appealable or it

is only the final decision on the merits that is appealable has been decided in a long line of cases.

In Orubu v. NEC supra:

"... The supreme Court held that section 36(1) has provided for appeals to the court of Appeal from a decision on an election petition which naturally refers to the conclusion of the proceedings. It does not contemplate decisions in an election petition made before the final determination." B

In Okokhue v. Obadan supra at p. 205, Ogundare, JCA, (as he then was) observed as follows: C

"Reading together sections 31, 34(1), 37 and paragraph 28(1) and (2) of Schedule 3 to Decree No. 37 of 1987, the phrase 'a decision on an election petition' could only mean a determination of any question whether any person has become an elected member of a Local Government Council, or that the election was avoided, that is, a determination on the merits of the petition. Any other decision made in the course of the election proceedings would only be a decision in an election petition." D E

At page 206, he stated as follows:

"In ordinary civil proceedings, the striking out of an action puts an end, how be it extempore, to the rights of the parties, it is a final decision. But section 36(1) of Decree No. 37 of 1987 does not confer right of appeal from a final decision in an election petition, but from a decision on an election petition." F

In Aondoakaa v. Ajo supra this court also cited Orubu v. NEC supra and held that the only matter which is appealable to the court of Appeal is the determination of an election petition. G

Section 246 of the 1999 Constitution provides for an appeal from the decisions of election tribunal under Electoral Act to the Court of Appeal and it states as follows:-

246(1) An appeal to the court of Appeal shall lie as of right from: H
(b) decisions of the National Assembly Election Tribunal and Governorship and Legislative Houses Election Tribunals on any question as to whether:

(i) any person has been validly elected as a member of the National Assembly or of a House of Assembly of a State under this Constitution;

(ii) any person has been validly elected to the office of Governor or Deputy Governor ; or

(iii) the term of office of any person has ceased or the seat of any such person has become vacant.

It can be seen that section 246(1) of the 1999 Constitution regulates the right to appeal to the court of Appeal from the election tribunals. An appeal will only lie from the election tribunal to the court of Appeal if there is any decision by the election tribunal whether any person has been validly elected as a member of the National Assembly or the State House of Assembly, the office of the Governor or the Deputy Governor as the case may be.

Such an appeal will only come within the provisions of section 246(1) (b) of the 1999 Constitution if there is a determination of the petition on the merits and any other decision made in the course of the election proceedings which is a decision in an election petition is not covered by section 246(1)(b) and this brings us to the striking out of a petition on the ground of locus standi as in the instant case.

From the list of the authorities cited above, it is obvious that striking out an election petition does not fall within the provisions of section 246(1)(b) above as there was no decision as to whether any one was elected into the National Assembly, that is, the determination of an election petition. Although it is a final decision in the sense that it determined the petition, but, it is a decision made in the course of an election petition proceedings, and the Constitution does not confer any right of appeal on the appellant.

The issue raised in the 1st respondents notice is that as a necessary party that the P.D.P. was not joined and that this has rendered the petition a nullity.

It was argued by the senior counsel that it was absolutely necessary to join the PDP as a party in the proceedings and that the appellant acted mala fide when he failed to join the PDP. He stated that it can not be doubted that the PDP will be affected one way or the other by the result of this case and that the law is that the court will not make an order or give judgment that will affect the interest or rights of a person or body that is not a party to the case and who was never heard on the matter. B

He referred to - Anya v. Iyayi (1988) 3 NWLR (pt.82) 359; Olawuyi v. Adeyemi (1990) 4 NWLR (pt.147) 746; Maikori v. Lere (1992) 3 NWLR (pt.231) 525. C

He submitted that the PDP must certainly have a say as to who its candidate was.

It has been the contention of the appellant that he has no quarrel with the PDP and that he does not need to join the party in this action. I find this very curious. This is the party on whose platform he was a candidate at the election and before the election, another candidate's name had been substituted for his name and that candidate was declared elected on the platform of that same party. Yet he is saying that the party is not a necessary party in this action. D E

It is the duty of a plaintiff to bring to court a party whose presence is crucial to the resolution of his case. See : Adisa v. Oyinwola (2000) 10 NWLR (pt. 674) 116. F

In the instant case, it is the PDP that forwarded the appellant's name to the INEC the 2nd respondent as the party's candidate and the presence of the P.D.P. in this action is very crucial as it would say that the appellant is still its official candidate and that he was wrongfully excluded from the election. In any event, there is no way that the matter could be resolved without making the P.D.P. a party and failure to join PDP as a party in this action is fatal to the appellant's case. G H

Another point raised in the 1st respondent's notice is that it

is mandatory under paragraph 4(2) of schedule 1 to the Electoral Act that "*the election petition shall be divided into paragraphs each of which shall be confined to a distinct issue or major facts of the election petition and every paragraph shall be numbered consecutively*". It was submitted that the petitioner woefully failed to number his petition and that non-compliance with this provision renders the petition incompetent.

I must observe that this is the very vice that the appellant sought to cure in his motion for amendment which was also argued along side with the 1st respondent's motion to strike out the petition. The tribunal after striking out the petition held that there being no valid petition that there was nothing to amend and that motion was also struck out. It will be very unfair to the appellant for the 1st respondent to raise that same issue in his respondent's notice. In the appellant's brief, four issues were identified for the determination by the court and they are:

Issue No. 1:

Whether the interpretation accorded to section 23 of the Electoral Act, 2002 by the Hon. Tribunal was proper in the circumstance. (This issue is distillable from ground one of the grounds of appeal)

Issue No. 2:

Whether in deciding a preliminary objection on jurisdiction, the tribunal was at liberty to make allusion to facts not donated by the statement of claim or, the petition as the case may be. (This issue is distillable from ground two of the grounds of appeal).

Issue No. 3:

Whether the petitioner was a candidate at the election and if so, was he validly substituted, having regards to the facts as contained in the petition? (This issue is distillable from ground three of the grounds of appeal).

Issue No. 4

Whether having regards to the circumstances of this case,

it was right and proper for the Hon. Tribunal to strike out the motion for amendment. (This issue is distillable from ground four of the grounds of appeal).

In the 1st respondent's brief of argument, two issues were raised.

They read:-

(1) Whether the Hon. Tribunal was right in holding that the appellant has no locus standi to present the petition.

(2) Whether a court is not bound to settle and decide the question whether it has jurisdiction whenever its jurisdiction is questioned before embarking on any other issue in the case.

In the 2nd, 3rd and 4th respondents' brief of argument, two issues were formulated and they read as follows:-

1. Whether the appellant's petition was competent.

2. Whether the striking out of the motion for amendment of the petition was proper.

It appears to me that only two vital issues arose from the whole appeal and they are whether the appellant has the locus standi to present the petition and also whether the striking out of the motion for amendment was proper.

However, I will proceed to discuss the arguments adduced by all the parties.

In its ruling at page 74 and 75 of the record of proceedings, the tribunal observed as follows:

"Under the Electoral Act, 2002, a political party that wishes to substitute its candidate at an election may signify its intention to the Electoral Commission not later than 30 days to the date of the election. The section provides:

'23. Any political party which wishes to change any of its candidates for any election under this Act MAY signify its intention in writing to the Commission not later than 30 days to the date of election.'

Black's Law Dictionary, Seventh Edition at page 993 states that where the word MAY is used in a legislation in its primary

legal sense, it is permissive or discretionary. By the use of the term MAY and not SHALL in section 23 of the Electoral Act, 2002, we are tempted to interpret the section as discretionary, permissive or discretionary. By the use of the term MAY and not SHALL in section 23 of the Electoral Act, 2002, we are tempted to interpret the section as discretionary, permissive or directory and not mandatory or commanding. We are of the view that this interpretation accords with the Supreme Court decision in Onuoha v. Okafor (1983) 2 SCNLR 244 which is a binding authority on us.

"The petitioner himself has in his petition copiously pleaded that his name was substituted 12 hours to the election. By his pleading, he was not a candidate at the election. His grouse is that he should be and was supposed to be a candidate at that election. Unfortunately, by the provision of section 23 of the Electoral Act, he has no locus standi to present a petition before this tribunal."

It is this finding that the appellant is quarrelling with. Learned counsel for the appellant has argued that the tribunal in interpreting the provisions of section 23 of the Electoral Act overlooked the importance and relevance of the qualifying phrase "Not later than 30 days to the date of the Election" and that it also overlooked the provisions of section 21, 22, 24 and 25 of the Electoral Act which clearly make time for nomination or substitution of candidates by their political parties of great essence. It is his submission that failure to take advantage of the time leaves the candidate as the statutory candidate of the party that can not be substituted or changed capriciously any more.

It appears clearly that the learned counsel after quoting the case of Wike v. Icheonwo (1999) 4 NWLR (pt.600) 618 at 626 has been carried away by the decision in that case that *"once a person has been screened and cleared to contest an election, the political party to which he belongs, no longer has the powers to stop him from contesting the election"*

In the case under reference, the court of Appeal was inter-

preting the provisions of paragraph 7(2) of the 4th Schedule to the Local Government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1998 which provided as follows:-

"No candidate who was screened and cleared to contest an election shall be prevented from contesting the Local Government Election except the candidate voluntarily withdraws his candidature."

In the instant case, the tribunal was interpreting the provisions of section 23 of the Electoral Act which states:-

"23. Any political party which wishes to change any of its candidates for any election under this Act may signify its intention in writing to the Commission not later than 30 days to the date of the election."

If one examines the provisions of section 23 above, it clearly shows that the interpretation given to it by the tribunal cannot be faulted at all. The word "May" used in this section of the law is permissive or discretionary. There is nothing in the Electoral Act to show that late nomination can invalidate the election of a candidate or is a ground of questioning an election under section 134 of the Act. The fact that there is no provision in the Electoral Act, 2002 like paragraph 7(2) of the 4th schedule to the Local Government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1998, clearly shows that the law does not want to interfere with the political parties choice and substitution of their candidates. It is their internal affairs and it is entirely up to them to choose, select and substitute their candidates before the election depending on the political winds that are blowing.

It can not therefore be said that failure to take advantage of the time leaves any candidate as the statutory candidate of the party that cannot be substituted or changed as the Electoral Act does not make such a provision.

As to whether the appellant had a locus standi to present the pe-

tion, section 133 of the Electoral Act, 2002 stipulates as follows:

133(1) An election petition may be presented by one or more of the following persons:-

- B (a) a candidate at an election.
- (b) a political party which participated at the election.

No doubt, the appellant is not a political party so the onus is on him to show that he was a candidate at the election.

- C At page 5 of the petition which is page 2 of the record of proceedings, he pleaded as follows;

"The result and/or scores on the election are as follows:

<i>Party</i>	<i>Votes</i>	<i>Names</i>
<i>P.D.P</i>	<i>230,411</i>	<i>EFFIONG BOB</i>
<i>A.N.P.P.</i>	<i>55,099</i>	<i>AKPAN ISEMIN</i>
<i>N.D.P</i>	<i>27,360</i>	<i>EKONG ETUK</i>
<i>A.P.G.A.</i>	<i>360</i>	<i>OBONG OKON</i>
<i>UDO EKONG."</i>		

- D
- E **At page 6 of the petition which is page 3 of the records, he pleaded:-**

"In a strange manner, your petitioner's name was allegedly substituted barely 12 hours to the election."

- F **At page 9 of the petition which is at page 6 of the records, he also pleaded:**

"Your petitioner was validly nominated but unlawfully excluded from the election."

- G **It was after considering the pleadings above that the tribunal in the ruling at page 75 of the records observed;**

"The petitioner himself has in his petition copiontly (sic) pleaded that his name was substituted 12 hours to the election. By his pleading, he was not a candidate at that election."

- H **I do not see how this finding can be faulted. If the petitioner has been excluded from the election as he has pleaded, obviously he was not a candidate. If he was excluded from the election, he was not a candidate at the election, he lacks**

the locus standi to bring this action and the only person that can bring an action and complain in an election petition of valid nomination but unlawful exclusion is a political party by virtue of the provisions of section 134(1)(d) of the Electoral Act which provides:

"134(1) An Election may be questioned on any of the following grounds. That is to say:

(a)

(b)

(c)

(d) that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election."

Incidentally, P.D.P., the party on whose platform the appellant contends that he contested the election is not complaining about the election and is in fact not joined as a party in this case.

The last issue to be resolved in this matter is the complaint that the appellant ought to have been allowed to move his motion to amend before the issue of jurisdiction was taken.

It has been submitted by Mr. Omoh, learned counsel for the appellant that where there are two competing applications one potentially constructive and the other potentially destructive that the one potentially constructive must be taken first. That is a good statement of the law but the learned counsel has lost sight of the fact that in the instant case that the issue of jurisdiction has been raised. The question of jurisdiction is very vital and fundamental that whenever it is raised a court or tribunal must rise to the occasion and ascertain whether or not, it has the jurisdiction to entertain the matter because if it continues to entertain the matter and it turns out at the end of the day that it lacks jurisdiction to entertain the matter, everything it has done in the matter is a nullity. See *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341; *Leedo Presidential Motel v. Bank of the North*

(1998) 10 NWLR (pt.570) 353. Besides this, paragraph 49(5) of the first Schedule to the Eletoral Act, 2002 reads:

"An objection challenging the regularity or competence of an election petition shall be heard an determined before any further steps in the proceedings if the objection is brought immediately the defect on the face of the election petition is noticed"

It can therefore be seen that the tribunal ruling in this effect is unassailable. I entirely agree with its observation that "There being no valid petition before us, there is nothing to amend" whereby it struck out the application for amendment.

On the whole, I am of the firm view that the appeal is devoid of merit and that it ought to be dismissed.

In the final result, I hereby dismiss the appeal. There will be N5,000.00 costs in favour of 1st respondent and another N5,000.00 costs for 2nd, 3rd and 4th respondents all against the E appellant.

ROWLAND JCA

I had the privilege of reading the draft of the judgment just delivered by my learned brother, Opene, JCA. The facts of the case are well set out and the issues canvassed in the appeal adroitly considered. I therefore agree with his reasoning and conclusion.

However, I would like to add a few words of mine for the purpose of emphasis. My first port of call is S.133(1) of the Eletoral Act, 2002 which says:

"An election petition may be presented by one or more of the following persons-

- (a) a candidate at an election.,*
- (b) a political party which participated at the election."*

It is manifest from the records that the appellant was not a candidate for the Uyo Senatorial District, Akwa Ibom - election which

took place on 12th April, 2003. That being so, he is not a candidate that can bring a petition under S.133(1) of the Electoral Act, 2002 reproduced above. In other words he has no locus standi to bring the petition which is the subject-matter of this appeal.

The Supreme Court in a recent decision has said that court B cannot choose candidates for parties in an election. See Bashir Mohammed Dalhatu v. Ibrahim Saminu Turaki & ors. (2003) 15 NWLR (pt. 843) 310. The trial tribunal is therefore not in error when it held that it had no jurisdiction to hear the petition of the C appellant.

It is also pertinent to note that the appellant's counsel refused or neglected to file a reply brief when it was necessary for him to do so. Order 6 rule 5 of the Court of Appeal Rules, 2002 says:

*"Rule 5 - The appellant may also, if necessary, within four- D
teen days of the service on him of the respondent's brief and not
later than three clear days before the date set down for the hear-
ing of the appeal, file and serve or cause to be served on the
respondent a reply brief which shall deal with all the new points E
arising from the respondent's brief."*

The learned counsel for the appellant refused or neglected to file a reply brief to deal with all the new points arising from the 1st respondent's brief. The oral submissions he made on those F new points go to no issue. It must be pointed out also that the appellant failed or neglected to join the Peoples Democratic Party as a necessary party to his petition. For the above reasons and for the fuller reasons contained in the lead judgment, I too dis- G miss this appeal as it is devoid of merit.

I endorse the order on costs in the lead judgment.

AKPIROROH JCA

H

I have read in draft the lead judgment of my learned brother, Opene, JCA, just delivered and I agree entirely with his reasoning and conclusion.

My learned brother has thoroughly considered all the issues raised in this appeal. I will however consider only issue one in the 1st respondent's brief which to my mind is sufficient to dispose of this appeal even though it was well considered by my learned brother in his lead judgment. It reads as follows:

"Whether the Hon. Tribunal was right in holding that the appellant has no locus standi to present the petition."

At this stage, I consider it pertinent to reproduce section 133(1)(a) and (b) of the Electoral Act, 2002 which spells out clearly a person entitled to present election petition. It reads as follows:

"133(1) An election petition may be presented by one or more of the following persons:

- (a) a candidate at an election,*
- (b) a political party which participated at the election."*

From the above, the question to be answered is whether or not the appellant was a candidate at the election held on 12th April, 2003 into the National Assembly for the Uyo Senatorial District by the 2nd, 3rd and 4th respondents? The answer is far fetched. The Appellant not being a political party has a duty to show that he was a candidate at the election. At page 5 of the petition, the appellant pleaded thus:

"The results and/or scores in the election are as follows:
Party-PDP votes 230,411
Names - EFFIONG BOB..."

At page 6 of the petition, he pleaded thus:

"In a strange manner, your petitioner's name was allegedly substituted barely 12 hours to the election..."

Finally, at page 9 of the petition, ground IV, the petitioner pleaded thus;

"Your petitioner was validly nominated but unlawfully excluded from the election."

On the pleadings of the appellants, if his name was substituted though validly nominated but unlawfully excluded from the election, it goes to show that he was not a candidate at the election

and as such, he, has no locus to bring this petition. Unlike the previous electoral acts/decrees, the only person who can complain in an election petition of valid nomination, but unlawful exclusion is a political party having regard to the provision of section 134(1)(d) which provides as follows: B

"An election may be questioned on any of the following grounds, that is to say:

(d) that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election." C

The word its, must necessary refer to or be limited to a political party and no more.

The principle of substitution was accepted by the Court of Appeal in *Ella v. Agbo* (1999) 8 NWLR (pt.613) 139. In *Effiong v. Ikpeme* (1999) 6 NWLR (pt.606) 260 at 270 where a person who was not officially fielded as a candidate by INEC petitioned claiming that he was a candidate at the election, the court of Appeal held; D

"There was no where in all the documents i.e. exhibit EC8B where the name of the 4th respondent appeared as the candidate sponsored for the election by PDP.. It is not enough for the 4th respondent to say he contested when his name did not appear in any of exhibits N-N11 and especially when the 2nd respondent who conducted the election said that the candidate who contested for PDP was the 1st respondent." E F

It is settled law that the court will not choose a candidate for a political party; See *Onuoha v. Okafor* (1983) 2 SCNLR 244. G

From what I have said above, the tribunal was quite right in holding that the petitioner now appellant, not being a candidate at the election into the Uyo Senatorial District held on 12th day of April, 2003, has no locus standi to present the petition and accordingly the petition is incompetent. H

In the end result, the appeal lacks merits and I too dismiss it and abide by the order made as to costs in the lead judgment.