

COURT OF APPEAL
ENUGU DIVISION
7TH JULY, 2003. CA/E/EPT/85/2003
CORAM:- S. A. OLAGUNJU, J. A. FABIYI,
C. B. OGUNBIYI, JJCA

IFEANYICHUKWU E. R. OKONKWO

(The Validly Nominated Candidate of

the Nigeria Advance Party in the

Governorship Election of 19/4/03

Suing for himself and on behalf

of the Nigeria Advance Party)

..... APPELLANT

AND

1. INDEPENDENT NATIONAL

ELECTORAL COMMISSION

2. THE CHIEF ELECTORAL OFFICER

ANAMBRA STATE

3. DR. CHRIS NWABUEZE NGIGE,

(OON) (The People Democratic Party's

Candidate, Returned as Winner)

..... RESPONDENTS

ELECTION PETITIONS - Competence of - Demurrer - Irregularity of a petition - Is governed by sub-paragraph 49(5) of the Procedure for Election Petitions - Issue of demurrer raised by appellant - Is unprofitable and diversionary (H1)

APPEALS - New point - Can only be made a ground of appeal - With leave of court (H2)

APPEALS - Notice of appeal - Contradiction therein that is misleading - Makes it hollow - And the appeal based on it is incompetent (H3)

ACTIONS - Competence - Jurisdiction - Issue of - Interlocutory injunction motion - Though filed before the motion challenging court's jurisdiction - Issue of jurisdiction was rightly considered first (H4)

JURISDICTION - Lack of - Injunction - Motion for interlocutory injunction - Insisting that it to be heard - And motion challenging competence of action be struck out - Is wrong - As court that lacks jurisdiction - Cannot exercise any power in respect of such matter (H5)

PRACTICE & PROCEDURE - Motions - Jurisdiction - Priority of taking pending motions in a case - Date of filing is irrelevant - Where issue of jurisdiction is raised - In the later motion (H6)

APPEALS - Finding of trial court - Issues - Not arising from appellant's grounds of appeal - Should not be argued by the respondent - Appellate court will not disturb a finding - That is not challenged (H7)

ELECTION PETITIONS - Prescribed procedure - Where appellants petition violates the prescribed procedure - Discretion exercised in striking it out is proper (H8)

ELECTION PETITIONS - Validity of - Appellant's failure to obtain the Tribunal's approval - Before filing his petition - Will not per se invalidate it (H9)

ELECTION PETITIONS - Validity - Capacity - Where a petition is incurably bad - Considering the standing in which it is presented - Is irrelevant (H10)

FACTS

The appellant, vide a petition filed on 9-5-2003, challenged before the Election Petition Tribunal, Anambra State, the return of the 3rd respondent by the 1st and 2nd respondents as the person duly elected in the

Anambra State gubernatorial election held on 19-4-2003. Appellant contended that 3rd respondent's election is a nullity because he (the appellant) being validly nominated by Nigeria Advance Party as its candidate, was wrongly excluded from participating in the election. The appellant who filed the petition for himself and on behalf of his political party was not among the 13 candidates from different parties that contested the election.

On 21-5-03 appellant filed a motion on notice for an injunction restraining 3rd respondent and his deputy from presenting themselves before any judicial officer for swearing in as Governor. On 27-5-03 3rd respondent filed a counter-affidavit and on 28-5-03 he also filed a motion on notice challenging the competence of the petition and jurisdiction of the Tribunal to entertain the action. The Tribunal considered the later motion dealing with jurisdiction first, held that the appellant's petition is incompetent and struck it out. Dissatisfied with the ruling the appellant filed 9 grounds of appeal from which he formulated 5 issues.

ISSUES FOR DETERMINATION

1. *"In purview of Order 25 Rule 1, Federal High Court (Civil procedure) Rules 2000, applicable in relation to Election Petition Tribunal; whether the Honourable Tribunal had competence and jurisdiction to have allowed the 3rd respondent raise objection, by its motion on notice, for striking-out of the petition, on any other ground, other than an abuse of process, or outside the provision in rule 2(1)(2) of Order 25, notwithstanding the fact that no statement of defence was filed, same being tantamount to reviving the extinct Demurrer Proceedings abolished under the Federal High Court Rules"*

2. *"Whether the co-existence at the tribunal below, of the 3rd respondent's counter-affidavit filed on 27/5/2003, against an interlocutory proceeding in the petition, and the motion of preliminary objection a Demurrer Proceeding of 28/5/2003, without the withdrawal of the earlier process, did not amount to an abuse of court process by the deployment of a pre-emptor process in anticipation of an unfavourable ruling?"*

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

ELECTION PETITIONS - Competence of

1. By that analysis of the mechanics of the controlling legislation it has
 B come out clearly that sub-paragraph 49(5) of the Procedure for Election
 Petitions is the determining authority over when the irregularity or com-
 petence of an election petition may be challenged. The process has noth-
 ing to do with the Federal High Court (Civil Procedure) Rules by which
 C the modality about how to bring the matter before the tribunal is regu-
 lated operating through rule 2 of Order 9 as a procedural medium. As
 neither the right to challenge the competence of an election petition nor
 the method for doing so rubs on the doctrine of demurrer or proceedings
 in lieu of demurrer under Order 25 of the Federal High Court Rules all the
 D elaborate but winding debates about demurrer are idle pastime, diversion-
 ary and unprofitable. Indeed, it is drawing redherrings across the trail.
 That will be sufficient to resolve issues 1 and 4 against the appellant and
 I do so. (p. 835 A)

E

APPEALS - New point

2. Therefore, if the 3rd respondent in his motion did not raise demurrer
 as a plea in his challenge of the competence of the appellant's election
 F petition, either directly or by a clear implication from Order 25 of the
 Federal High Court Rules, and if the plea was not canvassed at the trial
 and the ruling of the tribunal did not refer to the plea it is a new point
 which can be made a ground of appeal only with leave of this court: see
 Fasoro v. Beyioku (1988) 2 NWLR (pt.76) 263. Therefore, the appellant
 G goofed for not obtaining leave of this court before filing grounds of ap-
 peal Nos. 1, 5 & 6 from which he distilled issues 1 and 4 which had
 argument been taken on them would have, from the reasoning underlying
 the foregoing exposition, been declared incompetent. (p. 836 B)

H

Notice of appeal - Contradiction therein that is misleading

3. I agree entirely with the view expressed in those decisions about the
 paramountcy of notice of appeal as the fountain-head of an appeal which

is indispensable to its validity. Therefore, the contradiction in the notice of appeal filed by the appellant containing misleading particulars about the membership of the tribunal which decision is being challenged is defective in material respects that rendered the notice of appeal hollow and nugatory and the appeal based on it incompetent. That, in my judgment, is sufficient to vitiate the appeal ab initio as one predicated on a false premise and that will dispose of the appeal as incompetent and liable to be struck out. (p. 838 B)

ACTIONS - Competence - Jurisdiction

4. It is basic as learned counsel for the respondents argued in unison that the competence of an action which determines the capacity or jurisdiction of the court or tribunal to entertain the action must be pruned first before considering the action. In that sequence, the appellant's motion for an injunction was based on the premise that the tribunal had the jurisdiction to entertain the petition. It follows logically that the jurisdiction of the tribunal as manifested by the competence of the petition must first be examined so that where the petition is found to be incompetent the substratum on which the motion for an interlocutory injunction can be erected has been destroyed. Consequently, any argument against taking the motion challenging the competence of the petition before the motion for an injunction on which the respondent had joined issue is facile betraying lack of elementary knowledge of the fundamentals of jurisdiction. (p. 840 C)

JURISDICTION - Lack of - Injunction

5. The insistence by the appellant that his motion for an injunction ought to be heard and the 3rd appellant's motion challenging the competence of the action be struck out on the ill-conceived reason that the respondent was pre-empting the consequence of an injunction ignores the principle that where a court has no jurisdiction to entertain an action it has no juridical basis to exercise any power in respect of such matter: see *Ajomale v. Yaduat* (No.2) (1991) 5 NWLR (pt.191) 266. (p. 841 A)

Priority of taking pending motions in a case

6. A situation in which a court or a tribunal must make a pronouncement on the competence of an action which bounces back upon its jurisdiction to entertain the action the question of priority of taking motions pending before a court or tribunal according to the due date of filing must be subordinated to the higher need of probing the competence of the action with a view to determining whether the court or tribunal is vested with jurisdiction to entertain the action. (p. 842 F)

APPEALS - Finding of trial court

7. With due respect, argument by learned counsel for the 1st and 2nd respondents of the tribunal's finding on sub-paragraph 4(1)(a) of the Prescribed Procedure is a serious mistake as there is no appeal on that finding.

Firstly, such as the issues formulated by an appellant must arise from the ground of appeal filed by him issue formulated by a respondent in his brief of argument or matters argued in the brief cannot go outside the grounds of appeal filed by the appellant unless the respondent cross-appealed or filed a respondent's notice: see *Eze v. Federal Republic of Nigeria* (1987) 1 NWLR (pt.51) 506. As the respondents neither cross-appealed nor filed a respondent's notice any argument on sub-paragraph 4(1)(a) of the Prescribed Procedure is, pro tanto, ineffectual and must be ignored.

Secondly, it is a fundamental principle of law which follows as a corollary that where a finding or decision of a trial court is not challenged in an appeal such a decision, rightly or wrongly, cannot be disturbed by an appellate court. See *Oshodi v. Eyifunmi* (2000) 13 NWLR (pt.684) 298, 332, by the Supreme Court following its earlier decision in *Nwabueze v. Okoye* (1988) 4 NWLR (pt.91) 664, the rationale for that principle having been put more colourfully in the earlier decisions of that court propounding that no court has jurisdiction to decide a point not subsumed as a ground of appeal for in no sense is an appellate court a knight-errant looking for skirmishes all over the record of appeal. (p. 844 E & H)

ELECTION PETITIONS - Prescribed procedure

8. The upshot of the foregoing analysis is that the tribunal having come to the conclusion on the evidence before it that the appellant's petition is in violation of sub-paragraph 4(1)(a) of the Prescribed Procedure, a finding against which the appellant did not appeal, the consequence must follow, ineluctably, that the tribunal was freely entitled to invoke the sanction provided for such a violation by sub-paragraph 4(6) of the Prescribed Procedure. And if in so doing the tribunal struck out the petition as it has the discretion to do the decision cannot be faulted as judging from the major defaults by which the petition is riddled the inference is justified that the discretion was exercised judiciously and judicially. Those are the only constraints on the exercise by the tribunal of its discretion under paragraph 4(6) of the Prescribed Procedure the legal import of which was expounded in *University of Lagos v. Olaniyan* (1985) 1 NWLR (pt.1) 143. (p. 845 G)

ELECTION PETITIONS - Validity of

9. Applying that flexible approach by the Supreme Court to this case I will not regard as fatal to the appellant's petition his failure to obtain the tribunal's approval before filing his petition as in all probability the political party which sponsored him to contest the election is not likely to deny his mandate to represent the party to contest the outcome of the election which has gone against its aspirant to the elective office. Therefore, failure of the appellant to get the approval of the tribunal before presenting his petition as a representative of his sponsor, the Nigeria Advance Party, does not invalidate his petition if it is in other respects valid. (p. 847 E)

ELECTION PETITIONS - Validity - Capacity

10. Thus, in sum, on issue 5, the appellant's petition having been found to be incompetent as in violation of sub-paragraph 4(1)(a) of the Prescribed Procedure and, so rightly, as justifying the sanction of being struck out under sub-paragraph 4(6) thereof the question of whether he could bring the petition as a candidate is of no avail to the intrinsic incom-

petence of the petition any more than the conclusion by this court that his petition is not vitiated by his failure to get the tribunal's approval before presenting the petition. In other words, the appellant's petition having been found to be incompetent in conception the defect cannot be cured by any of the capacities in which it might be presented. Being incurably bad in conception the standing in which the petition is presented becomes absolutely irrelevant. (p. 848 C)

NOTABLE POINTS OF INTEREST

OLAGUNJU JCA

1. Appeals - Litigant - Should not insult a judicial panel in his appeal
Let me pause here to deprecate the torrent of invectives in which a litigant with pretensions to a smattering of the law is vilifying a judicial panel in the culture of a street urchin, a style in which the gentlemen of the bar are not nurtured and doing so with a didactic and insufferable poise to which the bench is unaccustomed. The appellant's predilection for disparagement is nauseating and in poor taste; he is advised to come down from his high horse. (p. 842 B)

2. Need for litigants to engage the services of qualified lawyers
Before I bring down the curtain on this appeal, it behoves me to observe what I consider to be an eclipse of what ordinarily would have been a stimulating legal contest in a familiar terrain of the law. This is a simple and straightforward appeal that is befogged by a crass misconception of the law on the part of the appellant and punctuated by irrelevances with a savour of presumption by the appellant which prevented him from coming into terms with the reality that he is operating within an unfamiliar turf where he has to plod through a mass of technical legal labyrinth without the requisite equipage other than pretensions. Dabbling into the doctrine of demurrer with the depth of his learning not going beyond what he could glean from the Federal High Court (Civil Procedure) Rules is enough disservice but raising that point in an underhand manner to confound this appeal is a disaster. His failure to appeal against the most damning finding on the content of his petition leaving aside the shoddy

composition of the petition is the most devastating error that brought his appeal face to face with its Waterloo and sang the funeral dirge over the appellant's appellate misadventure. (p. 848 F)

FABIYI JCA

3. Appellant has no locus standi to file the petition

The appellant herein conceded the point that he was not a candidate in the gubernatorial election conducted in Anambra State of Nigeria on 19th April, 2003. Since he was not a candidate, it appears glaring that he had no locus standi to personally file the petition since his main complaint is that he was validly nominated by his party to wit: Nigeria Advance Party but he was unlawfully excluded from the election. Instead of allowing his party to question the election as dictated by section 134(1)(d) of the Act, the appellant, who has no locus standi, filed the petition 'suing for himself and on behalf of the Nigeria Advance Party'. That was not proper since a person who has no locus standi cannot sue for himself, talkless of suing on behalf of another person. B

The trial tribunal found that the appellant had no locus standi to sue. That stance is correct on a proper construction of section 133(1)(a) and (b) of the Act. It made the proper order striking out the petition and not dismissing it since in strict sense, the petition had not been tried. (p. 850 E) D

REPRESENTATION

Ifeanyichukwu E. R. Okonkwo Esq. for himself.

Ikechukwu Ezechukwu Esq. for the 1st and 2nd respondents.

G. C. Igboke Esq. for 3rd respondent. F

CASES REFERRED TO

Jimoh v. Starco Nigeria Ltd. (1998) 7 NWLR (pt. 558) 523, 535-536.

Fadare v. Attorney-General of Oyo State (1982) 4 SC 1 H

Brawal Shipping Ltd. v. F.O. Onwadike Co. Ltd. (2000) 11 NWLR (Pt.678) NWLR 387

Eravwodoke v. University of Benin Teaching Hospital Management Board

(1993) 2 NWLR (pt.277) 590

Madu v. Ononuju (1986) 3 NWLR (Pt. 26) 23, 24

African Insurance Development Corporation v. Nigeria Liquified Natural Gas Ltd. (2000) 4 NWLR (pt.653) 494

B Mobil Oil Nigeria Plc v. I.A.L. 36 Inc. (2000)6 NWLR (pt.659) 146

Omaliiko v. Awachie (2002) 12 NWLR (pt.780) 1, 26

Bakare v. Attorney-General of the Federation (1990) 5 NWLR (pt.152) 516

Jeric (Nig.) Ltd. v. U.B.N. Plc (2000) 15 NWLR (pt.691) 447

C University of Lagos v. Olaniyan (1985) 1 NWLR (pt.1) 143; (1985) 16 NSCC (pt.1) 98, 113

Eronini v. Iheuko (1989) 2 NWLR (pt.101) 46; (1989) 20 NSCC (pt.1) 503, 513

D Mohammed v. Commissioner of Police (1999) 12 NWLR (pt.630) 331, 340

Eba v. Ogbodo (1984) 1 SCNLR 372; (1984) 15 NSCC 255, 265

Adeyemi v. Olakunri (1999) 14 NWLR (pt.638) 204, 213

E Dauda v. Bamidele (2000) 9 NWLR (pt.671) 199, 212-213

Assam v. Okposin (2000) 10 NWLR (pt.676) 659, 675

UBN plc. v. Ayo Dare & sons (Nig.) Ltd. (2000) 11 NWLR (pt.679) 644, 656

F

STATUTES & RULES REFERRED TO

Federal High Court (Civil procedure) Rules 2000 O. 25 rr. 1, 2(1)(2), O. 12 r.8

G Procedure for Election Petitions paragraph 50

Electoral Act, 2002, ss. 133(1)(a) (b), 134(1)(a)-(d), 136(3), and sub-paragraphs, 4(6), 4(1)(a) of the First Schedule to the Act

Court of Appeal Act, Cap. 75 of the Laws of Federation of Nigeria, 1990,

H s. 25(1)

Court of Appeal Rules, 2002 Order 3, sub-rules 2(1) & (7)

LEAD JUDGMENT BY OLAGUNJU JCA

The appellant in a petition filed on 9/5/03 challenged before the Election petition Tribunal, Anambra State, the return of the 3rd respondent by the 1st and 2nd respondents as the person duly elected in the gubernatorial election held in Anambra State on 19/4/03 on the ground that the election of the 3rd respondent is a nullity because he, the appellant, was the person validly nominated by Nigeria Advance Party as its candidate but was wrongly excluded from participating in the election by the 1st and 2nd respondents, the INEC and ‘the Chief Electoral Officer, Anambra State.’

The appellant was not among the 13 candidates from different political parties who contested the election on 19/4/03 a number which included the 3rd respondent and the petition was brought by the petitioner ‘for himself and on behalf of the Nigeria Advance Party’, a registered political party.

On 21/5/03, the appellant filed a motion on notice praying for an injunctive order restraining the 3rd respondent and one other person who is not a party to the petition from presenting themselves before any judicial officer on 29/5/03 for swearing in as the Governor and Deputy Governor of Anambra State, respectively. The petition and the motion were served on the 3rd respondent by substituted process of DHL Courier Despatch through a proxy on 23/5/03 in circumstances in which there was a little delay before the processes were delivered to the 3rd respondent. On 27/5/03 the 3rd respondent filed a counter affidavit to the appellant’s motion of 21/5/03 and on 28/5/03 he also filed a motion on notice challenging the competence of the petition and the jurisdiction of the Election Petition Tribunal to entertain the action.

In a brief ruling on the preliminary objection to the competence of the petition and ‘the Election Petition Tribunal’, hereinafter called ‘the tribunal’, the tribunal held that the petition was incompetent because (a) it was filed by the petitioner (i) for himself when he was not a candidate at the election; and (ii) as a representative of the Nigeria Advance Party

without leave of the court and (b) of failure to join the other interested parties in the matter including the other contestants apart from the 3rd respondent as enjoined by sub-paragraph 4(1)(a) of the First Schedule to the Electoral Act, 2002. Dissatisfied with the ruling the petitioner herein-
 B after called ‘the appellant’ filed 9 grounds of appeal from which he formulated the following five issues for determination:

1. *“In purview of Order 25 Rule 1, Federal High Court (Civil
 C procedure) Rules 2000, applicable in relation to Election Petition Tribunal; whether the Honourable Tribunal had competence and jurisdiction to have allowed the 3rd respondent raise objection, by its motion on notice, for striking-out of the petition, on any other ground, other than an abuse of process, or outside the provision in rule 2(1)(2) of Order 25, notwithstanding the fact that no statement of defence was filed, same
 D being tantamount to reviving the extinct Demurrer Proceedings abolished under the Federal High Court Rules”*

2. *“Whether the co-existence at the tribunal below, of the 3rd respondent’s counter-affidavit filed on 27/5/2003, against an interlocutory
 E proceeding in the petition, and the motion of preliminary objection a Demurrer Proceeding of 28/5/2003, without the withdrawal of the earlier process, did not amount to an abuse of court process by the deployment of a pre-emptor process in anticipation of an unfavourable ruling?”*

3. *“Whether the learned trial tribunal below, having not taking
 F together the 3rd respondent’s demurrer application for striking-out the petition, which was never served on the 1st and 2nd respondents, and the petitioner’s motion for injunction, an act that left the said petitioner’s interlocutory application undisposed of, before deciding the petition is
 G not a violation of the petitioner’s right of fair hearing, coupled with the lack of service on the 1st and 2nd respondents aforementioned, did not render the entire proceedings of 28/5/2003 a nullity?”*

4. *“Assuming, without conceding the fact that demurrer, proceed-
 H ing is condoned in election petition tribunal, whether the 3rd respondent’s demurrer application for striking out the petition a demurrer proceeding filed with affidavit did not render same incompetent, null and void constituting an abuse of process of court, warranting its being dis-*

countenanced, or struck out by the tribunal?”

5. “Whether the election tribunal below, was justified when it upheld the demurrer proceedings of the 3rd respondent, and struck-out the petition, notwithstanding that issues were never joined in the pleadings, without considering that the issue of “locus standi” at that early stage can only be decided upon the statement of claim, the statute creating the cause of action and the reliefs sought by the petitioner?” B

The 1st and 2nd respondents also formulated 4 issues for determination to meet the material points raised by the appellant while in response to the matters raised by the appellant the 3rd respondent also framed 3 issues for determination. The issues formulated by the respondents will be taken at the appropriate points to match them up with the points raised by the appellant with a view to resolving the controversy arising from those issues. D

Issue one in the appellant’s brief which is distilled from grounds of appeal 1 and 6 and should be taken together with issue 4 framed from ground 5 deals with challenge by the appellant of the competence of the preliminary objection to the petition raised by the 3rd respondent that led to the ruling under review. It is the appellant’s contention that the objection is on demurrer and was brought under ‘proceedings in lieu of Demurrer’, a caption of Order 25 of the Federal High Court (Civil procedure) Rules, 2000, by which, whenever the need arises, the proceedings by the tribunal are to be regulated (see paragraph 50 of ‘Procedure for Election petitions’, set out as First Schedule to the Electoral Act, 2000). The appellant contended that the 3rd respondent’s motion challenging the competence of the petition is itself incompetent having been brought under rule 1 of Order 25 of the Federal High Court Rules that has abolished demurrer expatiating that the doctrine of demurrer having been abolished it has become extinct and it was, therefore, wrong for the tribunal to have entertained the 3rd respondent’s preliminary objection to the petition that led to the petition being struck out in limine. H

It is the essence of the appellant’s opposition to the motion that the 3rd respondent’s preliminary objection ‘must have been founded’ on demurrer because objection ‘in lieu of demurrer’ under rule 2 of Order 25

must be raised in the pleading and not by a motion. The 3rd respondent's motion, the appellant argued, cannot be maintained on the doctrine of demurrer within the ambit of the definition of which the motion for preliminary objection fell because filing a motion supported by an affidavit
 B deposing to facts is a negation of the essence of the doctrine of demurrer that assumed that the 3rd respondent, qua the defendant, raising the plea admitted all the allegations of the petitioner as the plaintiff in the context as no evidence to contradict the allegations is allowed. The appellant
 C conceded as an exception to the rule that a petition may be attacked on the ground that it is an abuse of court process justifying an invitation to the tribunal to strike out the petition but argued that the respondent having made no allegation of abuse of the court process it was wrong for the tribunal to have struck out the appellant's petition on an objection that
 D was founded on the doctrine of demurrer that has been abolished. He relied on the decision of this court in *Jimoh v. Starco Nigeria Ltd.* (1998) 7 NWLR (pt. 558) 523, 535-536.

Emphasizing the error of filing an affidavit in support of the motion that is conceived to be a preliminary objection based on the doctrine of demurrer the appellant stressed in issue 4 that the affidavit evidence accompanying the respondent's preliminary objection on the ground of demurrer invalidates the objection that is thereby rendered null and void
 F thus impacting upon the jurisdiction of the tribunal that lacked the capacity to entertain the preliminary objection. In other words, it is the appellant's thesis that the 3rd respondent having admitted the facts relied upon by the petitioner that respondent must abide by those facts and cannot adduce affidavit evidence to contradict it. He relied for that proposition of the law upon *Fadare v. Attorney-General of Oyo State* (1982) 4
 G SC 1; *Brawal Shipping Ltd. v. F.O. Onwadike Co. Ltd.* (2000) 11 NWLR (Pt.678) NWLR 387; and *Boothia Maritime Inc. v. Fareast Merc. Co. Ltd.* (2001) 9 NWLR (pt.719) 572; (2001) FWLR (pt.50) 1713.

H The appellant underscored as a serious error failure of the tribunal to make a finding on the issue of abuse of court process and the competence of the 3rd respondent's demurrer application which he submitted is a clear violation of his right of fair hearing on the precedent of the deci-

sion of this court in *Eravwodoke v. University of Benin Teaching Hospital Management Board* (1993) 2 NWLR (pt.277) 590. Finally, the appellant submitted that in a petition before an election petition tribunal objection to the competence of the action cannot be raised except through a reply to the petition, qua a statement of defence, which he said the respondents did not file and argued from that premise that the 3rd respondent's motion challenging the appellant's petition is tantamount to a plea of demurrer which has been abolished under the Federal High Court (Civil Procedure) Rules, 2000, controlling the proceedings before the tribunal but which was applied erroneously by the tribunal to strike out the appellant's petition. On that score, he urged this court to resolve issues 1 & 4 in favour of the appellant by reversing the decision of the tribunal which upheld the plea of demurrer against the appellant citing in support of his argument a host of judicial authorities a random of which include *Madu v. Ononuju* (1986) 3 NWLR (Pt. 26) 23, 24; *African Insurance Development Corporation v. Nigeria Liquified Natural Gas Ltd.* (2000) 4 NWLR (pt.653) 494; *Mobil Oil Nigeria Plc v. I.A.L. 36 Inc.* (2000) 6 NWLR (pt.659) 146; *Okere v. Nwaigwe* (2002) FWLR (Pt.127) 1101, 1118; and *Omaliko v. Awachie* (2002) 12 NWLR (pt.780) 1, 26.

Replying to the argument of the appellant learned counsel for the 3rd respondent contended that there is a failure on the part of the appellant to draw a distinction between demurrer procedure and objection to the jurisdiction of the court, which he compared. On the one hand, he argued, issue of jurisdiction can be taken at any stage of the proceedings and should be taken as soon as the factors that deprive the court of jurisdiction are discovered so that precious judicial time should not be wasted reinforcing his submission with the decisions in *Western Steel Works Ltd. v. Iron and Steel Workers Union* (1986) 3 NWLR (pt.30) 617; *Bakare v. Attorney-General of the Federation* (1990) 5 NWLR (pt.152) 516; and *Jeric (Nig.) Ltd. v. U.B.N. Plc* (2000) 15 NWLR (pt.691) 447.

On the other hand, the learned counsel contrasted, demurrer proceedings are based on the assumption that the court has jurisdiction to entertain the action but the defendant contending that even if the plaintiff's case as pleaded is correct it cannot, on the ground of law, fix the

defendant with liability on the facts pleaded by the plaintiff. It is thus vital that the plea must be raised on the ground of law for instances of the application of which he referred to Williams v. Williams (1987) 2 NWLR (pt.54) 66; FCDA v. Naibi (1990) 3 NWLR (pt.138) 270; Akpan v. Utin B (1996) 7 NWLR (pt.463) 634.

The learned counsel expatiated that the issue of jurisdiction involves what will enable the plaintiff to seek a hearing in court over his grievances and get it resolved if he is able to show that the court is empowered to entertain the subject-matter emphasizing for amplification that 'it does not always follow that he (the plaintiff) must plead first in order to raise the issue of jurisdiction' citing in buttress of his point NDIC v. C.B.N. (2002) 7 NWLR (pt.766) 272, (2002) 18 WRN 1, 17-18. The learned counsel submitted that the 3rd respondent's motion D challenging the competence of the appellant's petition does not touch upon proceedings in lieu of demurrer provided by Order 25 of the Federal High Court Rules, 2000, adding as a prop of the argument about the competence of the motion that the validity of an election can be challenged under sub-section 136(3) of the Electoral Act or paragraph 4(6) E of the 1st Schedule to the Act. He concluded that the 3rd respondent's motion of 28/5/03 is competent and that the Election petition Tribunal had the jurisdiction to entertain the objection.

Learned counsel for the 1st - 2nd respondents in rebuttal of the appellant's argument submitted that the tribunal's proceedings of 28/5/2003 are not proceedings in lieu of demurrer under Order 25 of the Federal High Court Rules, 2000, because the Rules of that court or any part thereof are applicable only where the Electoral Act and the procedure for election petitions, First Schedule thereto, do not provide for a particular procedural matter. Consequently, where adequate provisions are made in the Act or the procedure thereunder the provisions of the Federal High Court (Civil Procedure) Rules 2000, are excluded, he further expatiated. G In furtherance of his argument, the learned counsel referred to paragraph H 49(5) of the Procedure for Election Petitions in the First Schedule to the Act which allows objection to the competence of an election petition to be raised as a preliminary matter and enjoined that any objection to a

petition must be disposed of before any further steps are taken in the proceedings. He submitted that the issue raised about the competence of the appellant's petition being fundamental as impinging upon the jurisdiction of the tribunal the 3rd respondent as one of the defendants before the tribunal was freely entitled to raise it before pleadings were settled, i.e. before he replied to the petition. Winding up on that note the learned counsel concluded that the preliminary objection by the 3rd respondent was well within what is permitted by the Electoral Act and the procedure stipulated thereunder and that it was competent for the tribunal to entertain the objection.

The objection by the appellant to the competence of the preliminary objection raised by the 3rd respondent to the appellant's petition before the Election Petition Tribunal leading to the striking out of the petition is one of a kind. It is a wild goose chase into which the respondents had been lured which, strangely enough, learned counsel for the respondents could not contain or nip in the bud before the avoidable controversy degenerated into an open-ended argument in which the appellant revelled with riotous gusto. I will return to the point later.

In the meantime, the answer to the question whether the 3rd respondent's motion challenging the competence of the appellant's petition before the Tribunal is one raising the plea of demurrer or one based on proceedings in lieu of demurrer' under Order 25 of the Federal High Court (Civil Procedure) Rules, 2000, can be contained within a limited compass given an understanding of the mechanics of the two main legislations involved, viz, the Electoral Act, 2002, with the 'Procedure for Election Petitions' subjoined to the Act and the Federal High Court (Civil Procedure) Rules, 2000. Paragraph 50 of Procedure for Election Petitions provides for the application of the Federal High Court Civil Procedure Rules on the following terms:

"50. Subject to the express provisions of this Act, the practice and procedure of the tribunal or the court in relation to an election petition shall be as nearly as possible, similar to the practice and procedure of the Federal High Court in the exercise of its civil jurisdiction, and the Civil Procedure Rules shall apply with such modifications as may be necessary

to render them applicable having regard to the provisions of this Act, as if the petitioner and the respondent were respectively the plaintiff and the defendant in an ordinary civil action.”

The phrase ‘subject to the express provisions of this Act’ in the opening part of paragraph 50, reproduced above, has been interpreted as an expression of limitation meaning that the express provisions of the Electoral Act which qualify the application of the Rules of the Federal High Court shall govern, control and prevail over what follows in that paragraph of the enactment: see *Oke v. Oke* (1974) 1 All NLR (pt.1) 443, 450; *LSDPC v. Foreign Finance Corporation* (1987) 1 NWLR (pt.50) 413, 461; *Aqua Ltd. v. Ondo State Sports Council* (1988) 4 NWLR (pt. 91) 622; (1988) 19 NSCC (pt.111) 22, 46; *Tukur v. Government of Gongola State* (1980) 4 NWLR (pt.117) 517, 580; and *Orji v. Anyaso* (2000) 2 NWLR (pt.643) 1, 22. In other words, the application of the Federal High Court Rules adopted as part of the procedure of the Election Petition Tribunal is operational only where there are no provisions in the Electoral Act or the procedure enumerated in the First Schedule to the Act on any given point. Conversely, the application of the Federal High Court Rules becomes inapplicable to any matter which is expressly provided for in the Act or the Procedure laid down in the First Schedule thereto.

It follows from the foregoing analysis that the provision of the Federal High Court Rules on when, vis-a-vis how, a preliminary objection to a petition may be raised becomes inapplicable where sub-paragraph 49(5) of the Procedure for Election Petitions in the First Schedule to the Electoral Act provides as follows:

“An objection challenging the regularity or competence of an election petition shall be heard and 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.”

Obviously, the above provision is silent on the procedure about how the preliminary objection may be raised, a point on which no provision is contained in the Act or procedure for Election Petitions in the First Schedule to the Act. The lacuna justifies a recourse to the Federal High

Court Civil Procedure Rules as sanctioned by paragraph 50 of the Procedure for Election Petitions thereby allowing the application of rule 2 of Order 9 of the Rules of the Federal High Court that enables application to the court or to a Judge in Chambers to 'be made by motion'. **By that analysis of the mechanics of the controlling legislation it has come out clearly that sub-paragraph 49(5) of the Procedure for Election Petitions is the determining authority over when the irregularity or competence of an election petition may be challenged. The process has nothing to do with the Federal High Court (Civil Procedure) Rules by which the modality about how to bring the matter before the tribunal is regulated operating through rule 2 of Order 9 as a procedural medium. As neither the right to challenge the competence of an election petition nor the method for doing so rubs on the doctrine of demurrer or proceedings in lieu of demurrer under Order 25 of the Federal High Court Rules all the elaborate but winding debates about demurrer are idle pastime, diversionary and unprofitable. Indeed, it is drawing red herrings across the trail. That will be sufficient to resolve issues 1 and 4 against the appellant and I do so.**

But that leaves unanswered the nagging quandary over how the learned counsel fell prey to the appellant's ingenuity of raising as grounds of appeal the doctrine of demurrer to rationalize the 3rd respondent's motion before the tribunal when such a plea does not arise from either the motion or in the argument of the motion or from the ruling by the tribunal. The 3rd respondent's motion, on page 39 of the record, was brought under sections 133(1)(a) and (b), 134(1)(a)-(d) and 136(3) of the Electoral Act, 2002, and sub-paragraph 4(6) of the First Schedule to the Act and was argued along that line by the parties without express mention of demurrer as a plea by the 3rd respondent. The only reference to Order 25 of the Federal High Court (Civil Procedure) Rules by the appellant in his reply to the submission by learned counsel to the 3rd respondent is on page 47 of the record. Even then Order 25 was raised in support of the appellant's submission that 'a preliminary point of law cannot be raised by affidavit' in buttress of which he also cited the deci-

sion of this court in *Akinade v. NASU* (1999) 2 NWLR (pt.592) 570. But that is a far cry from raising as a point in an argument demurrer as a plea or proceedings in lieu of demurrer under Order 25 of the Federal High Court Rules.

Therefore, if the 3rd respondent in his motion did not raise demurrer as a plea in his challenge of the competence of the appellant's election petition, either directly or by a clear implication from Order 25 of the Federal High Court Rules, and if the plea was not canvassed at the trial and the ruling of the tribunal did not refer to the plea it is a new point which can be made a ground of appeal only with leave of this court: see *Fasoro v. Beyioku* (1988) 2 NWLR (pt.76) 263; *Adejumo v. Ayantegbe* (1989) 3 NWLR (pt.110) 417; *Agbaka v. Amadi* (1998) 11 NWLR (pt.572) 16; *Iweka v. SCOA* (Nig.) Ltd. (2000) 7 NWLR (pt.664) 325, 338. Therefore, the appellant goofed for not obtaining leave of this court before filing grounds of appeal Nos. 1, 5 & 6 from which he distilled issues 1 and 4 which had argument been taken on them would have, from the reasoning underlying the foregoing exposition, been declared incompetent.

However, having resolved issues 1 and 4 against the appellant the purpose of this exercise is admonition of learned counsel for the respondents about the need to be on their guard to contain at the outset unnecessary argument on a point such as demurrer in this appeal which the appellant made the centrepiece of the appeal.

One other crucial point on threshold matter is the submission by learned counsel for the 3rd respondent in his oral argument of the baffling discrepancy in the particulars of the members of the tribunal between the names of the members (other than the Chairman) given in the notice of appeal on page 51 of the record and corresponding names of the members who heard the petition and gave the ruling as shown on pages 44-45 and 50 of the record, respectively. Whereas in the notice of appeal the name of the members who heard and deliberated on the appeal are given as 'Hon. Justice D. T. Ahura; Hon. Justice A. A. Elelegu; Hon. Kadi T. Mahmud; and O. J. Isede (C.M.)' in Petition No. EPT/AN/GOV/14/2003 considered by this court as Appeal No. CA/E/EPT/85/2003 heard

by the tribunal on the 28/5/2003 (see pages 44-45 of the record) and on which ruling was given on page 50 of the record on 28/5/2003 the names of the members of the tribunal were enumerated as 'I. I. Agube, J. B. Kaladejana, P. A. Onamade and A. I. Maru'. The result is that as regards the membership of the panel of Judges the difference between the decision on appeal and the decision being appealed from is so glaring so as to depict two separate cases which are totally unrelated, that is to say, the membership of the tribunal which decision is being challenged (by the notice of appeal) does not match up with the membership of the tribunal which decision is proffered here for a review.

To the submission of learned counsel for the 3rd respondent that the mis-representation by the notice of appeal of the decision being appealed against the particulars of which are false or non-existent is fatal to the purported appeal offered for a review the appellant has replied with glee that the error about giving wrong particulars in the notice of appeal is a mere irregularity which is excusable and urged this court to excuse the conflict as sheer human laps that is not sufficient to vitiate the appeal.

With respect to the appellant he took a simplistic view of the fundamentals of notice of appeal in appellate scheme as outlined in subsection 25(1) of the Court of Appeal Act, Cap. 75 of the Laws of Federation of Nigeria, 1990, and Order 3, sub-rules 2(1) & (7) of the Court of Appeal Rules, 2002. The crucial position of a notice of appeal was succinctly expounded by Supreme Court in *Anadi v. Okoli* (1977) 7 SC 57, where the court per Idigbe, JSC., at page 58 stated that:

"The notice of appeal is a very important document because it is the foundation of the appeal and if it is defective the Court of Appeal has inherent power to strike it out on the ground that it is incompetent..."

The same view was expressed by this court in *Akinloye v. Adelakun* (2000) 5 NWLR (pt.657) 530, 535 where it was held that a valid notice of appeal is a sine qua non to the competent...; of an appeal. Similarly, in *Bilam Dambam v. Ardo Lele* (2000) 11 NWLR (pt.678) 413, expatiating upon the cardinal position of a notice of appeal this court, per Chukwuemeka-Eneh, JCA, explicated, on page 427, that

"The crucial position of this document (Notice of Appeal) in our

appeal system is akin to the position the writ of summons occupies in ordinary civil action. It (i.e. notice of appeal) initiates appeal and where it suffers from any serious defect the appeal itself becomes defective and subject to be struck out as incompetent. See Anadi v. Okoli (1977) 7 SC B 57 at page 58 ...

I agree entirely with the view expressed in those decisions about the paramountcy of notice of appeal as the fountain-head of an appeal which is indispensable to its validity. Therefore, the contradiction in the notice of appeal filed by the appellant containing misleading particulars about the membership of the tribunal which decision is being challenged is defective in material respects that rendered the notice of appeal hollow and nugatory and the appeal based on it incompetent. That, in my judgment, is sufficient to vitiate the appeal ab initio as one predicated on a false premise and that will dispose of the appeal as incompetent and liable to be struck out.

However, if on another view of the matter the notice of appeal is considered on equitable ground to be adequate to accommodate examination of the appeal on the merits I will take a quick look at issues Nos. 2, 3 and 5 canvassing the correctness of the decision of the tribunal having disposed of issues 1 and 4 on purely preliminary matter about the competence of the 3rd respondent's motion before the tribunal from which this appeal stemmed.

The substance of the argument in issue 2 is that it was erroneous on the part of the tribunal to have entertained the 3rd. respondent's motion of 28/5/2003 challenging the competence of the appellant's petition when on 27/5/2003 that respondent had joined issue with the appellant on his motion for an interlocutory injunction by filing a counter-affidavit. This is coupled with the fact that the tribunal refused to first dispose of the appellant's motion for an injunction before entertaining the respondent's motion that was later in time. The co-existence of the two motions and taking the one that is later in time while leaving the one that is earlier in time to lapse amounts to an abuse of court process as the 3rd respondent's motion is a process designed to pre-empt the consequence that may

arise from the appellant's motion for an injunction the appellant argued citing a number of cases in support buttressed by the opinion from the works of a living author on 'Injunction and Enforcement of Orders'. Rebutting the argument of the appellant learned counsel for the 1st and 2nd respondents submitted that the 3rd respondent's motion which chal- B
lenged the competence of the appellant's petition impacts upon the juris-
diction of the tribunal to entertain the petition and takes precedence over
any other matter. The legal position, he submitted, is reinforced by the
provision of sub-paragraph 49(5) of the 1st Schedule to the Electoral C
Act, 2002.

Arguing along the same line as the 1st and 2nd respondents' coun-
sel learned counsel for the 3rd respondent submitted that the law is trite
that a challenge of the court's jurisdiction comes first and must be taken D
before the determination of any other matter. Arguing further he empha-
sized the commonplace axiom that where a court lacks jurisdiction to
entertain a matter any decision rendered by it is null and void with the
corollary that an aggrieved defendant is entitled to challenge the jurisdic-
tion of the court. He concluded that the competence to entertain the E
appellant's petition being in issue it was proper for the tribunal to have
considered the 3rd respondent's motion first.

The drawback of the argument of the appellant on the sequence in
which the motions before the tribunal were taken stemmed from a scanty F
appreciation of the authority of the tribunal to entertain a petition brought
before it as contained within the four walls of the Electoral Act, 2002,
and the Procedure for Election Petitions subjoined as the 1st Schedule to
the Act. Where the competence of a petition is challenged the tribunal like G
the regular courts is obliged to inquire as a primary matter whether or not
the action is competent because it is upon the competence of a petition
that rests the tribunal's competence to entertain it.

The direct authority on the right to challenge a petition and the H
tribunal's duty to examine the challenge is contained in sub-paragraph
49(5) of the First Schedule to the Electoral Act reproduced elsewhere in
this judgment. The provision allows the regularity of competence of an
election petition to be challenged and imposed upon the tribunal the duty

to hear and determine an objection ‘before any further steps in the proceedings’ are taken. The provision is modelled on the general principle of law on the issue of jurisdiction which must first be resolved before examination of the merit of an action: see *Oloba v. Akereja* (1988) 3 NWLR (pt.84) 508; and *Orhionmwon Local Government v. Ogieva* (1993) 4 NWLR (pt.288) 69.

With the position of the law so clearly mapped out the wind has been taken out of the sail of the appellant’s argument that is wrapped up in the principles governing the grant of an injunctive order, a convenient diversion that put the cart before the horse. **It is basic as learned counsel for the respondents argued in unison that the competence of an action which determines the capacity or jurisdiction of the court or tribunal to entertain the action must be pruned first before considering the action. In that sequence, the appellant’s motion for an injunction was based on the premise that the tribunal had the jurisdiction to entertain the petition. It follows logically that the jurisdiction of the tribunal as manifested by the competence of the petition must first be examined so that where the petition is found to be incompetent the substratum on which the motion for an interlocutory injunction can be erected has been destroyed. Consequently, any argument against taking the motion challenging the competence of the petition before the motion for an injunction on which the respondent had joined issue is facile betraying lack of elementary knowledge of the fundamentals of jurisdiction.**

On the argument of the appellant that stressed ad nauseam the priority of the motions before the tribunal it will be well to recall the basic principles that a court is bound to put an end to any proceeding if at any stage it becomes manifest that it is incompetent and this it can do on its own initiative: see *Katto v. CBN* (1991) 9 NWLR (pt.214) 126. It is a responsibility about which the court has no choice since mere acquiescence by parties cannot confer jurisdiction on the court: see *Nnonye v. Anyichie* (1989) 2 NWLR (pt.101) 112. Nor can active support, ignorance or silence by the parties vest a court with jurisdiction: see *Ijebu-Ode Local Government v. Adedeji Balogun & Co. Ltd.* (1991) 1 NWLR

(pt.166) 136. Therefore, **the insistence by the appellant that his motion for an injunction ought to be heard and the 3rd appellant's motion challenging the competence of the action be struck out on the ill-conceived reason that the respondent was pre-empting the consequence of an injunction ignores the principle that where a court has no jurisdiction to entertain an action it has no juridical basis to exercise any power in respect of such matter: see Ajomale v. Yaduat (No.2) (1991) 5 NWLR (pt.191) 266; and Road Transport Employers Association v. Nigeria Union of Road Transport Workers (1992) 2 NWLR (pt.224) 318; (1992) 8 LRCN 442. Lastly, with the consequence of a court hearing a matter when it has no jurisdiction to do so well spelt out in Madukolu v. Nkemdilim (1962) 2 SCNLR 341, (1962) 1 All NLR 587; Skenconsult (Nig.) Ltd. v. Secondy Ukey (1981) 1 SC 6; and NEPA v. Atukpor (2001) 1 NWLR (pt.693) 96; (2000) FWLR (pt.20) 625, the tribunal has come to the correct conclusion by leaving the appellant's motion for injunction in limbo to wither away as a juridical gate-crasher that has, by operation of the law, been consigned to a forlorn heap of legal fossil. Therefore, I will resolve that issue against the appellant.**

Issue 3 in the appellant's brief of argument overlaps issue 2 that has just been disposed of which, in the main, is a recycling of the arguments in the earlier issue in which it was canvassed that the appellant's motion for an interlocutory injunction against the 3rd respondent was not heard by the tribunal; that the appellant's motion filed on 21/5/2003 on which the 3rd respondent joined issue by filing a counter-affidavit was put in abeyance by hearing on the same day the 3rd respondent's motion filed on 28/5/2003 introducing as a new point that the notice of the motion was not served on the 1st and 2nd respondents who were parties to the petition.

The appellant criticized the lapses which he argued is in complete breach of the appellant's right of fair hearing and rendered null and void the tribunal's proceedings of 28/5/2003 that is also smeared by failure to give the appellant 48 hours' notice before the 3rd respondent's motion was heard. The appellant contended that he was prejudiced by the ab-

sence in court of the 1st and 2nd respondents as the only persons who could provide the answer to the question whether he was unlawfully excluded from contesting the election. He described in paragraph 3.11 of his brief the decision of the tribunal with the unflattering flourish of being based on ‘Machiavellian principle’ and the Panel of Judges who rendered the decision as a ‘Kangaroo court’ having earlier described in paragraph 3.04 the enrolled order of the tribunal at the end of the proceedings as ‘a dummy meant to confuse the uninitiated’.

Let me pause here to deprecate the torrent of invectives in which a litigant with pretensions to a smattering of the law is vilifying a judicial panel in the culture of a street urchin, a style in which the gentlemen of the bar are not nurtured and doing so with a didactic and insufferable poise to which the bench is unaccustomed. The appellant’s predilection for disparagement is nauseating and in poor taste; he is advised to come down from his high horse.

Be that as it may, since the facts and points of law being agitated by the appellant in this issue are substantially similar to those canvassed in issue 2 above I will adopt the stand taken in issue 2 on the points which are in *pari materia* in order to save avoidable repetition. On the argument about the breach of the appellant’s right of fair hearing woven round failure to put the 1st and 2nd respondents on notice of the 3rd respondent’s motion or to give the appellant 48 hours’ notice of the motion submissions which are dressed up as cosmetics to embellish application of another facet of the law to the same set of facts it will be enough to say that **a situation in which a court or a tribunal must make a pronouncement on the competence of an action which bounces back upon its jurisdiction to entertain the action the question of priority of taking motions pending before a court or tribunal according to the due date of filing must be subordinated to the higher need of probing the competence of the action with a view to determining whether the court or tribunal is vested with jurisdiction to entertain the action.**

In addition to the authorities on the point which are galore in election petition cases the general principle is further strengthened by sub-

paragraph 49(5) of the 1st Schedule to the Electoral Act, 2002, which, as demonstrated in examination of the point in issue 2, puts a bar on taking any further steps in proceedings until the competence of the action is resolved. Against this background, issue 3 is a rehearsal of the points canvassed in issue 2 draped with flourish for effect. Apart from ruffling B judicial feathers it does not make any dent on the decision of the Tribunal and is, therefore, resolved against the appellant.

That brings me to issue 5 which is the focus of this appeal on the merits. On this issue, the controversy revolves round the competence of the petition filed by the appellant to challenge the election of the Governor C of Anambra State where the petition was filed by the appellant who did not contest the election for himself as a Validly Nominated Candidate of Nigeria Advance Party and on behalf of Nigeria Advance Party and where he joined among other respondents only the 3rd respondent out of the 12 D other contestants who vied for the office. The 3 questions arising and on which his petition was struck out by the Election Petition Tribunal are whether (a) the appellant is a candidate at the election within the meaning of that expression in sub-section 13(1)(a) of the Electoral Act, 2002; (b) E he can bring a petition as a representative of his political party without the prior approval of the court as stipulated by a combination of paragraph 50 of the Procedure for Election Petition and Order 12 rule 8 of Federal High Court (Civil Procedure) Rules, 2000; and (c) the appellant's failure F to specify the parties interested in the election petition' as enjoined by sub-paragraph 4(1)(a) of Procedure for Election Petitions, hereinafter called 'the Prescribed Procedure'.

The three points any one of which carries a sanction against non-observance will be examined in ascending order beginning with the last G point which is confined intrinsically to the composition of the petition without consideration of any extrinsic matter such as sanction of another person or body.

Sub-paragraph 4(1) of the prescribed Procedure enumerated four H important matters which an election petition must contain the first of which is relevant to the present appeal stipulates that an election petition must:

“(a) Specify the parties interested in the election petition.”

Sanction for non-compliance with the conditions stipulated in sub-paragraph 4(1) is provided by sub-paragraph 4(6) which enjoins that:

“An election petition which does not conform with sub-paragraph B (1) of this paragraph or any provision of that sub-paragraph is defective and may be struck out by the tribunal or court.”

The provision of sub-paragraph 4(1)(a) of the Prescribed Procedure was considered by the tribunal which came to the conclusion, on page 50 of the record, that:

“... the petition offends paragraph 4(1)(a) of the 1st Schedule to C the Electoral Act, 2002 because if (sic, for ‘it’) failed to state all the interested parties in this matter including contestant, other than the 3rd respondent.”

D There is no appeal from that finding though the 1st and 2nd respondents, on pages 6 and 7 of their brief of argument, argued the point at some length while the 3rd respondent noted the point in passing on page 4 of his brief to expatiate his argument on power of the tribunal E under subsection 136(3) of the Electoral Act to strike out a petition for non-compliance with the provisions of Part V11 of the Act.

With due respect, argument by learned counsel for the 1st and 2nd respondents of the tribunal’s finding on sub-paragraph F 4(1)(a) of the Prescribed Procedure is a serious mistake as there is no appeal on that finding. This is because grounds of appeal ‘G’, ‘H’ and ‘J’ from which issue 5 in the appellant’s brief was formulated do not contain a complaint against the finding of the tribunal on sub-paragraph G 4(1)(a) of the Prescribed Procedure. Nor was such a complaint contained in any of the 6 grounds of appeal from where the appellant distilled the 4 other issues the source of the ground of appeal referred to as ‘Ground 1’ from where the 1st and 2nd respondents formulated their issue 1 on page 2 of their brief is mysterious as one existing in the imagination of H their counsel since the notice of appeal contains no such ground.

In any case, two related consequences follow from the error of the learned counsel. **Firstly, such as the issues formulated by an appellant must arise from the ground of appeal filed by him issue**

formulated by a respondent in his brief of argument or matters argued in the brief cannot go outside the grounds of appeal filed by the appellant unless the respondent cross-appealed or filed a respondent's notice: see *Eze v. Federal Republic of Nigeria* (1987) 1 NWLR (pt.51) 506, 521-522; *Idika v. Erisi* (1988) 2 NWLR (pt.78) 563, 579; and *Atanda v. Ajani* (1989) 3 NWLR (pt.111) 511, 543-544. As the respondents neither cross-appealed nor filed a respondent's notice any argument on sub-paragraph 4(1)(a) of the Prescribed Procedure is, pro tanto, ineffectual and must be ignored.

Secondly, it is a fundamental principle of law which follows as a corollary that where a finding or decision of a trial court is not challenged in an appeal such a decision, rightly or wrongly, cannot be disturbed by an appellate court. See *Oshodi v. Eyifunmi* (2000) 13 NWLR (pt.684) 298, 332, by the Supreme Court following its earlier decision in *Nwabueze v. Okoye* (1988) 4 NWLR (pt.91) 664, the rationale for that principle having been put more colourfully in the earlier decisions of that court propounding that no court has jurisdiction to decide a point not subsumed as a ground of appeal for in no sense is an appellate court a knight-errant looking for skirmishes all over the record of appeal. See *Eba v. Ogbodo* (1984) 1 SCNLR 372; (1984) 15 NSCC 255, 265; and *Adeyemi v. Olakunri* (1999) 14 NWLR (pt.638) 204, 213. For pronouncements on the same principle that a finding or decision not appealed against remains valid and cannot be disturbed by an appellate court reviewing the decision on other grounds, see *Dauda v. Bamidele* (2000) 9 NWLR (pt.671) 199, 212-213; *Assam v. Okposin* (2000) 10 NWLR (pt.676) 659, 675; and *UBN plc. v. Ayo Dare & sons (Nig.) Ltd.* (2000) 11 NWLR (pt.679) 644, 656.

The upshot of the foregoing analysis is that the tribunal having come to the conclusion on the evidence before it that the appellant's petition is in violation of sub-paragraph 4(1)(a) of the Prescribed Procedure, a finding against which the appellant did not appeal, the consequence must follow, ineluctably, that the tribunal was freely entitled to invoke the sanction provided for such a violation by sub-paragraph 4(6) of the Prescribed Procedure. And if in so

doing the tribunal struck out the petition as it has the discretion to do the decision cannot be faulted as judging from the major defaults by which the petition is riddled the inference is justified that the discretion was exercised judiciously and judicially. Those are
 B the only constraints on the exercise by the tribunal of its discretion under paragraph 4(6) of the Prescribed Procedure the legal import of which was expounded in *University of Lagos v. Olaniyan (1985) 1 NWLR (pt.1) 143*; (1985) 16 NSCC (pt.1) 98, 113; *Eronini v. Iheuko*
 C (1989) 2 NWLR (pt.101) 46; (1989) 20 NSCC (pt.1) 503, 513; and *Mohammed v. Commissioner of Police (1999) 12 NWLR (pt.630) 331, 340*.

That will be sufficient to settle issue 5 against the appellant with the decisive legal effect of sub-paragraph 4(6) of the Prescribed Procedure that sanctions the striking out of the petition and that will also be
 D enough to dispose of this appeal on the merits having received a lethal blow from the crippling preliminary and peripheral matters on other issues.

However, as the question of the appellant's capacity to present the petition either in a representative capacity or personally as of right has also been agitated the two points must be considered. The argument about whether the appellant can bring his petition on behalf of Nigeria
 F Advance Party which is the political party sponsoring him to contest the election has been intense on all sides-between the appellant who contended that he can present a petition as a candidate validly nominated by a registered political party to contest the election and the respondents who argued that the appellant cannot present a petition in a representative
 G capacity without the prior approval of the tribunal as enjoined by rule 8 of Order 12 of the Federal High Court (Civil Procedure) Rules, 2002 that is made applicable to the tribunal proceedings by paragraph 50 of the Prescribed Procedure. Without dabbling into the argument of the appellant
 H on whether the order for substituted service of the originating processes on the respondents granted to him by the tribunal on 25/5/2003 does not render failure to obtain leave of the court to be a mere irregularity by operation of sub-rule 1(1) of Order 3 of the Federal High Court Rules or

whether filing a counter-affidavit by the 3rd respondent to join issue with him on his motion for an interlocutory injunction does not amount a waiver by the respondents of the appellant's failure to obtain the tribunal's approval I will be guided by the pragmatic approach to such an issue by the Supreme Court in *Jack v. Whyte* (2001) 6 NWLR (pt.709) B 266, 275, that:

"... where a representative order would have been granted had it been asked for failure to obtain it will not vitiate the action - see Bulai v. Omoyajowo (1968) 1 All NLR 72. It is not compulsory for a party wishing to sue or defend in a representative capacity to get an order of court before filing his suit. The attitude this court adopts in matters of this nature is not a rigid one. It depends on the facts and circumstances of the case. If there is evidence that the parties appear to possess representative capacity and act of presumably act on the authority of those they represent, this court does not and will not upset on a bare objection of failure to obtain the approval of the court. see Wiri & ors. v. Wuche & ors. (1980) 1-2 SC 1."

Applying that flexible approach by the Supreme Court to this case I will not regard as fatal to the appellant's petition his failure to obtain the tribunal's approval before filing his petition as in all probability the political party which sponsored him to contest the election is not likely to deny his mandate to represent the party to contest the outcome of the election which has gone against its aspirant to the elective office. Therefore, failure of the appellant to get the approval of the tribunal before presenting his petition as a representative of his sponsor, the Nigeria Advance Party, does not invalidate his petition if it is in other respects valid.

As regards the alternative question of whether the appellant is 'a candidate at an election' within the intendment of that phrase in sub-section 133(1)(a) of Electoral Act, my finding on whether the appellant can bring a petition as a representative of his political party has rendered any examination of that question to be superfluous. This is because eligibility to present an election petition under sub-section 133(1) (a) of the Electoral Act, is expressed in the alternative as either by a candidate or a

political party. Therefore, if the appellant is found to be eligible to present the petition on behalf of his political party the question of whether he is a candidate becomes academic as what is important, in view, is whether the petition he presented satisfies one of the capacities in which he offered to present the petition. It becomes barren where the petition has been found to incompetent regardless of the capacity in which it was represented, that is to say, either as a candidate at the election, a 'Validly Nominated Candidate' of his political party or a representative of the party.

Thus, in sum, on issue 5, the appellant's petition having been found to be incompetent as in violation of sub-paragraph 4(1)(a) of the Prescribed Procedure and, so rightly, as justifying the sanction of being struck out under sub-paragraph 4(6) thereof the question of whether he could bring the petition as a candidate is of no avail to the intrinsic incompetence of the petition any more than the conclusion by this court that his petition is not vitiated by his failure to get the tribunal's approval before presenting the petition. In other words, the appellant's petition having been found to be incompetent in conception the defect cannot be cured by any of the capacities in which it might be presented. Being incurably bad in conception the standing in which the petition is presented becomes absolutely irrelevant. As I have said earlier, that resolves issue 5 against the appellant and with the resolution against the appellant of virtually all the 5 issues formulated by the appeal fails.

Before I bring down the curtain on this appeal, it behoves me to observe what I consider to be an eclipse of what ordinarily would have been a stimulating legal contest in a familiar terrain of the law. This is a simple and straightforward appeal that is befogged by a crass misconception of the law on the part of the appellant and punctuated by irrelevances with a savour of presumption by the appellant which prevented him from coming into terms with the reality that he is operating within an unfamiliar turf where he has to plod through a mass of technical legal labyrinth without the requisite equipage other than pretensions. Dabbling into the doctrine of demurrer with the depth of his learning not going

beyond what he could glean from the Federal High Court (Civil Procedure) Rules is enough disservice but raising that point in an underhand manner to confound this appeal is a disaster. His failure to appeal against the most damning finding on the content of his petition leaving aside the shoddy composition of the petition is the most devastating error that B brought his appeal face to face with its Waterloo and sang the funeral dirge over the appellant's appellate misadventure.

It is a treat watching the appellant ploughing a lonely furrow through an appellate track that is paved with esoteric mores and fads and which is laden with bends and twists that what it takes to accomplice the task brings to mind the concern of the Supreme Court in *Dr. Iweka v. S.C.O.A. (Nig.) Ltd.* (2000) 7 NWLR (pt.664) 325, in circumstances not dissimilar from the mirage in the present appeal in which the appellant, a professional in his own right, picked up as a sideline legal practice without D grounding in law only to mess up his own case. The court, per Ogundare, JSC., at pages 347-348 of the reports, dealt out to him a measure of home-truth in the following strain:

"I must pause here to make a short observation. It may be that the E plaintiff is an intelligent and able medical practitioner. One thing is clear to me, he is not wise in the nuances of the legal profession. It is not enough to read up cases in the law reports and to cram up rules and legal principles read in the books, the correct application of these cases, rules F and principles to given situation is what makes the difference between the legal practitioner and the able medical practitioner. I doubt it much if the plaintiff is doing justice to his cause by conducting these proceedings himself given the intricacies of the questions he has himself raised. G His notice and grounds of appeal and other papers that have since been filed by him and his prolix, and for the most part irrelevant, arguments in his 'briefs' of arguments both in this court and in the court below bear testimony to this observation."

That observation is a fitting caution to the genre of swashbucklers H who take delight in fishing in troubled waters as far as legal business is concerned. In particular, I will endorse, mutatis mutandis, the admonition which I find to be apposite to Mazi Ifeanyichukwu E.R. Okonkwo,

an avowed ‘political Careerist’, and if I may add a visionary and a simulator of legal practice. But for the health of the legal profession it may be wondered for how long would the bar and the bench continue to allow such a liberty being taken with the noble profession by one without a shadow of claim to having a grounding in law but a consummate narcissist imbued with his notion of being versatile in his egotrip with the law taking cover under the pliable constitutional right of fair hearing.

However that may be, in the last analysis, the appeal fails and it is dismissed as without an atom of merit. I award N2,000 costs to each of the three respondents against the appellant.

FABIYI JCA

Section 133(1) of Electoral Act, 2002 provides in clear terms 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.”*

The appellant herein conceded the point that he was not a candidate in the gubernatorial election conducted in Anambra State of Nigeria on 19th April, 2003. Since he was not a candidate, it appears glaring that he had no locus standi to personally file the petition since his main complaint is that he was validly nominated by his party to wit: Nigeria Advance Party but he was unlawfully excluded from the election. Instead of allowing his party to question the election as dictated by section 134(1)(d) of the Act, the appellant, who has no locus standi, filed the petition ‘suing for himself and on behalf of the Nigeria Advance Party’. That was not proper since a person who has no locus standi cannot sue for himself, talkless of suing on behalf of another person.

The trial tribunal found that the appellant had no locus standi to sue. That stance is correct on a proper construction of section 133(1)(a) and (b) of the Act. It made the proper order striking out the petition and not dismissing it since in strict sense, the petition had not been tried. See

Otapo v. Sunmonu (1987) 2 NWLR (pt.58) 587; Oloriode v. Oyebe (1984) 1 SCNLR 390; (1984) 5 SC 1.

The appellant was not happy with the fact that the trial tribunal first dealt with the motion of the 3rd respondent which relates to incompetence of the petition and afortiori - jurisdiction of the tribunal. He felt that his own application for an order of injunction which was first in time should have been taken. The appellant needs to know that jurisdiction is very vital in the realm of administration of justice. It is the bed-rock of all trials. A trial without jurisdiction, however well conducted, is a nullity. Refer to Madukolu v. Nkemdilim (1962) 2 SCNLR 341. Any final pronouncement by a court or tribunal without jurisdiction is an exercise in futility. One should not attempt to put something upon nothing as it will collapse. See MacFoy v. U.A.C. (1962) AC 152.

Issue of jurisdiction should be raised timeously and dealt with expeditiously as done by the tribunal so as to save time and cost. Such obviates the chance of being dragged into a melee. As soon as an issue touching on jurisdiction is raised, a trial court or tribunal should immediately assume jurisdiction to ascertain whether or not it really has jurisdiction to hear and determine the matter as rightly done by trial Tribunal. Refer to NEC & Anor. v. Nzeribe (1991) 5 NWLR (pt.192) 458 at 460.

The appellant dealt with his raked up issue touching upon demurrer almost up to the point of boredom. The trial tribunal was in order when it considered at the earliest opportunity the issue of competence of the petition and how same touched upon its jurisdiction. This has nothing to do with demurrer. The tribunal was mindful of the dictates of paragraph 49(5) of First Schedule to the Act. It provides that 'an objection challenging the regularity or competence of an election petition shall be heard and 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 is clear that appellant's petition was not filed with due process of law. It is incompetent. See Madukolu v. Nkemdilim (supra) once more. The trial tribunal acted in the right direction by striking out same.

One point more and I shall be done. At the hearing of this appeal,

Mr. G.C. Igbokwe, learned counsel for the 3rd appellant noted that tribunal panel members on pages 44 and 50 of the record are not the same as those in the notice of appeal on page 51 of the same record of appeal. At pages 44 and 50 of the record, the tribunal is composed of G.M. Nabaruma as chairman and I.I. Agube, J.B. Aladejana, P.A. Onnamade and A.I. Maru as members. On page 51 of the transcript record of appeal, it is extant therein that the notice of appeal complains about the ruling of G.M. Nabaruma as chairman and D.T. Ahura, A.A Elelegu, T. Mahmud and O.J. Isede as members. The appeal appears to be a non-starter as it targeted against the ruling of another panel, it seems. The validity of the appeal hangs in the balance. An appeal must be directed at the real ruling under fire. In effect, there appears to be no valid appeal herein.

For the reasons adumbrated above and of course the fuller ones contained in the lead judgment of my learned brother, Olagunju, JCA, I agreed during our conference that this appeal is devoid of merit and should be dismissed. I order accordingly and abide by all consequential orders contained in the lead judgment; that relating to costs inclusive.

E _____

OGUNBIYI JCA

The appellant in the matter at hand filed the petition No. EPT/AN/GOV/14/2003 on the 9th day of May, 2003 at the Election Petition Tribunal Awka, Anambra State challenging the election of the 3rd respondent on the ground that the said election of 19th April, 2003 in which the 3rd respondent was returned by the 1st - 2nd respondents as the winner, was a nullity in that, he the petitioner/appellant was a person validly nominated by a political party to wit, Nigeria Advance Party, as its candidate but was wrongfully excluded from participating in the said election. The petitioner brought the said petition for himself and on behalf of his party - The Nigeria Advance Party and prayed at pages 7 and 8 of the record as follows:

“WHEREFORE YOUR PETITIONERS PRAY: That it may be determined.

(i) A declaration that the petitioner, Mr. Ifeanyichukwu E.R.

Okonkwo, the validly nominated gubernatorial candidate of the Nigeria Advance party, in Anambra State for the above election, was unlawfully excluded from the 19th April, gubernatorial election in Anambra State, by the 1st and 2nd respondents.

(ii) *An order that the gubernatorial election purportedly conducted on 19th April, 2003 by the 1st and 2nd respondents which unlawfully excluded Mr. Ifeanyichukwu E.R. Okonkwo, the validly nominated candidate of Nigeria of Advance party, wherein the 3rd respondent, Dr. Chris Nwabueze Ngige (P.D.P), the peoples Democratic Party's candidate, was (declared) purportedly and returned as the winner, is null and void, ab initio and of no legal effect, and same ought to be set aside.*

(iii) *An order for the WITHDRAWAL/CANCELLATION OF RETURN, in respect of the 19th April, 2003 election issued to the 3rd respondent pursuant to section 66 of the Electoral Act, 2002 as same is unlawful null and void.*

(iv) *An order directing the 1st respondent to act upon, and accept the nomination of Mr. Ifeanyichukwu E.R. Okonkwo, the validly nominated candidate of the Nigeria Advance Party for the above election.*

(v) *An order directing the 1st and 2nd respondent to conduct a fresh gubernatorial election in Anambra State inclusive of the petitioner as the validly nominated candidate of the Nigeria Advance Party.*

(vi) *An order directing the 1st respondent to pay the petitioner the sum of N250 million as EXEMPLARY DAMAGES."*

With reference to page 24 of the record, and per the affidavit of the application at paragraph 9, there was 13 candidates who contested the said election, and excluding the petitioner's name. Apart from the 3rd respondent who was one of the 13 candidates who contested the election, the petitioner did not sue any of the rest contestants as necessary parties. There was also no record of their respective scores in the said election. Pages 1 and 24 of the record refer.

During the pendency of the said petition, the petitioner filed a motion per page 18 of the record for an interlocutory order of injunction urging the tribunal to restrain the 3rd respondent from presenting himself to any judicial official for the purposes of being sworn - in as the Governor of

Anambra State amongst other prayers. A counter-affidavit was filed by the 3rd respondent in response and along side which a motion on notice was filed challenging the competence of the petition and consequently the jurisdiction of the tribunal to hear and determine the petition for non-compliance with the relevant sections and paragraphs of the schedule to the Electoral Act. The grounds of objection on the motion at page 39 are as follows:

“GROUNDS OF OBJECTION

1. *The tribunal lacks jurisdiction to entertain the suit.*
2. *The petitioner was not a candidate at the 2003 governorship election in Anambra State.*
3. *The petition is brought in a representative capacity contrary to the provision of Electoral Act and without leave of the Honourable Tribunal.*
4. *Other candidates in the said elections excepting the 3rd respondent were not joined in the petition.*
5. *And for such further orders as the Honourable court may deem fit to make in the circumstances.”*

With arguments having been taken on the objection, the tribunal on the 28th day of May, 2003 struck out the appellant’s petition. Consequent to the ruling and being dissatisfied therewith the appellant has now appealed to this court by notice of appeal dated 30th day of May and filed on the 4th June, 2003. The appellant filed nine grounds of appeal A, B, C, D, E, F, G, H and I with their particulars of error. From the said grounds of appeal, the appellant distilled five issues for determination, while the 1st - 2nd and 3rd respondents formulated four and three issues respectively.

Having regard to an extensive analysis of the issues raised by all parties, it is apparent that the questions raised on the appellant’s grounds of appeal are all embraced and condensed in the four issues raised by the 1st - 2nd respondents. The convenience of the consideration of this appeal in my humble view therefore is that which would be best met if the determination is based on the issues raised by the 1st - 2nd respondents which same reproduce are as follows:

“(i) Whether the petition of the appellant as presented to the tribunal is competent having regard to its non-compliance with the Electoral Act and rules of the Federal High Court and if the answer is in the negative, has the tribunal jurisdiction to entertain same.

(ii) Whether the proceedings of the 28th day of May, 2003 leading to the striking out of the petition of the petitioner strictly speaking be said to be a demurrer having regard to the fact that the issue of law raised went to the fundamental issue of jurisdiction which must be raised not just at any stage but can be timeously raised at the earliest opportunity and also have regard to the express provisions of paragraph 49(5) of the 1st Schedule to the Electoral Act.

(iii) Whether taking up issue of jurisdiction before taking any other issue in the petition, as in the instant case, the issue of interlocutory injunction amounted to a pre-emptor proceeding and therefore an abuse of the process of the court or breach of fair hearing particularly having regard to paragraph 49(5) of 1st Schedule to the Electoral Act.

(iv) Whether the petitioners participation in the proceedings of 28th day of May, 2003, even though the mandatory period of 48 hours notice was not given to him, without his objection not amount to a waiver of his right of protest in the light of the fact that requirement being complained of is a requirement of rule of practice and particularly so when the issue raised in the said motion is that of jurisdiction which can be raised even vivo voce and coupled with the fact that the 1st - 2nd respondents have not complained of the infraction of their right to notice of 48 hours. If the answer to the question above is in negative, then can non-compliance with such rule of procedure/practice render the proceedings of 28th day of May, void having regard to paragraph 49(1) of the Electoral Act.”

The 1st issue raised pertains to the jurisdiction of the tribunal, which the respondents argued cannot be sustained as a result of the incompetence of the petition consequent upon both the standing of the petitioner as well as the propriety of the nature of the petition itself.

It is obvious and without question that the basis and reason of a court entertaining any case at all is dependant upon jurisdiction, which

serves a bedrock of such. Without jurisdiction, a court or tribunal has no business to handle and talk less of entertaining the adjudication of a case. The emphasis on jurisdiction is very fundamental in nature and which goes to the root of that before the court. Any act performed in disregard of same where none exists amounts to a sheer waste of time and an exercise in futility. The pre-requisite essential requirements before a court can validly assume jurisdiction are without compromise and well re-stated in the renowned authority of *Madukolu & Ors. V. Nkemdilim* (1962) 2 SCNLR 341, (1962) ANLR 587 wherein their Lordships of the then Federal Supreme Court per Bairamian, F.J. on the importance of jurisdiction held among others that any defect in the competence of a court renders the proceeding before it a nullity. At page 595 their Lordships had this to say therefore on jurisdiction and the competence of a court.

D “A court is competent when:

(1) it is properly constituted as regards members and qualifications of the members of the bench, and no member is disqualified for one reason or another;

E (2) the subject-matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and

The concept of jurisdiction in the foregoing context therefore is that which encompasses proper constitution of court membership, subject-matter within jurisdiction and initiated by due process of law upon fulfilment of all conditions precedent. The said requirements which must all however, co-exist conjunctively before the right to the exercise of jurisdiction can be met.

G By the very nature of the Electoral Act, 2002 same contains some mandatory provisions giving rise to a competent petition and thus conferring the tribunal with the requisite jurisdiction to entertain a matter before it. It follows therefore that any breach of the mandatory provisions divests H the tribunal of jurisdiction and the issue which should be taken up timeously especially where the court is duty bound, consequent to the effect of such, to put an end to a proceeding in the light of manifest incompetence. The authorities of *Westminster Bank Ltd. V. Edwards* (1942) 1 All

ER 270 at 473 and *Kasikwu Farms v. A.-G., Bendel State* (1986) 1 NWLR (Pt.19) 695 are in point and support.

One of the factors raised by the respondent's brief and which touches on jurisdiction is the issue of locus standi, which counsel submitted the petitioner lacked and therefore was not competent to have initiated that which was and subsequently now gives rise to what is before this court. Black's Law Dictionary Fifth Edition at page 848 defines locus standi as: "A place of standing; standing in court. A right of appearance in a court of justice..."

the question for determination at this point is whether or not the petitioner now appellant was competent in filing the petition? While the appellant argued that he was a candidate, at the April, 19th Governorship Elections in Anambra State and relied on section 134(1)(d) of the Electoral Act, the respondents submitted the contrary and relied on section 133(1)(a) and (b) of the same Act.

The provision of section 133(1)(a) and (b) of the said Electoral act, 2002 states:

"(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."

Section 134(1)(d) of the same Act also states:

"(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 nominated but was unlawfully excluded from the election."

It is apparent that while section 133 reproduced relates to person entitled to present election petition. Section 134 also reproduced supra, is in respect of ground for petition. The two are not one and the same but are distinctively expressing two different situations. Section 134 as correctly positioned can only become relevant after the initiation pursuant to section 133. In other words, it is the party permitted per section 133 that can proceed upon section 134 to put forth, the grounds complained of.

Contrary to the appellant's bone of contention in my humble view there-

fore, the Act does not accord him the right to present under section 134(1)(d) as contemplated.

Furthermore, and with reference to the record page 2 at the second paragraph, the petitioner by his own presentation did specifically aver that he was not made a candidate but excluded from the Governorship Election in Anambra State, which was held on Saturday, the 19th day of April, 2003.

In the Court of Appeal decision of *Tsoho v. Yahaya* (1999) 4 NWLR (Pt. 600) p.657 his Lordship Muhammad. JCA at pp. 671 and 672 had this to say:

“Nomination is an act of suggesting or proposing a person by name to an election body as a candidate for an elective office. This certainly forms part of the preliminary matters before the actual election is conducted. The person nominated has not yet come to occupy that office. So he is not yet to be vacated and not ripe to be contested. If he jumps the hurdle of nomination, his next Herculean task is to possess the mandatory qualifications which will admit him to contest the election. Once he stands for the election, he can now be properly petitioned before the tribunal or he can himself petition others on any of the grounds upon which petitions can be filed to the tribunal as provided under the Decree.”
(Italics is for emphasis.)

Having regard to the provision of section 133(1)(d) of the Electoral Act read in conjunction with the authority in the case of *Tsoho v. Yahaya* (supra) the term candidate in my humble opinion and also as rightly submitted by the respondents, can be none other but that which contemplates only a person who contested an election.

The appellant to buttress his position relied on the authority of *Effiong v. Ikpeme* (1999) 6 NWLR (Pt. 606) p. 260. It is pertinent to restate that the said case was decided under the 1999 Decree No. 6. Section 50(1)(a) of the said Decree states a person with mandate to present an election petition can also include:

(a) “a person claiming to have had a right to contest or be returned at an election”

In the case under reference and in construing the combined effect of

section 84(1)(d) vis-à-vis paragraph 7(2) of Schedule 4 of the said Decree, his Lordship Obadina, JCA held that a candidate who has been screened and cleared to contest an election but was unlawfully excluded from such contest can present an election petition against the commission for his unlawful exclusion; he could not however file a civil suit or action for damages. B

The same principle was also applicable in the authority of *Egolum v. Obasanjo* (1999) 7 NWLR (Pt. 611) 423 at 431.

Having regard to the authority of *Effiong v. Ikpeme* relied upon by the appellant, same is distinguishable from the matter at hand. This is especially in view of the fact that while a person who was not a candidate but had a right to contest or be returned at an election can present a petition, the same cannot be said of section 133 (1)(a) and (b) of the electoral Act, of 2002. C D

The next point relates to the representative capacity contention contemplated by the respondents. With reference to the record before us, the petition in question was brought in a representative capacity whereby the petitioner at page 1 was acting for himself and on behalf of “the (party), Nigeria Advance Party”. By the contention of paragraph 50 of the 1st Schedule to the electoral Act, the absence of express provision in the act or its Schedule for doing an act permits the tribunal to have recourse to the Federal High court Rules. E F

It is pertinent to mention that the schedule to the Electoral Act lays down the procedure regulating the election petition. It follows therefore that the absence of representative capacity provision in the schedule to the act permits the application of Order 12 rule 8 of the Federal High Court Rules. The said rule requires the petitioner to obtain leave or approval of the court (tribunal) in order to be authorized by his party to sue and also a further subsequent authority from the same party for the bringing of the action in a representative capacity. The authority to act is therefore a condition precedent and cannot be dispensed with. The Court of Appeal H authority in the case of *Adesanya v. Olayeni* (1999) 2 NWLR (Pt. 592) p.558 at p. 568 is in point. In a further authority of *Egwu v. Okotie-Eboh* (1986) 1 NWLR (Pt. 16) 264 per Karibi-Whyte, JSC held that the appro-

priate order to make in a situation where a petitioner lacks locus standi in an election petition, is that of a dismissal. Having regard to the record of appeal before us. It is not shown that any compliance had been made with the requirement of the said provision of the law. The consequence B therefore and having regard to the authority of *Egwu v. Eke* (supra) is to make an order of a dismissal.

Further still and by the provision of paragraph 4 of the 1st schedule to the electoral Act, same lays and spells out the contents of an election petition. Subsection (i) to the said paragraph specifically states as C follows:

“(1) An election petition under this Act shall:

- (a) Specify the parties interested in the election petition;
- (b) Specify the right of the petitioner to present the election petitions:
- D (c) State the holding of election, the scores of the candidates and the person returned as the winner of the election; and
- (d) State clearly the facts of the election petition and the ground or grounds on which the petition is based and the relief sought by the petitioner” E

“(4) At the foot of the election petition there shall also be stated an address of the petitioner for service at which address documents intended for the petitioner may be left and its occupier”

F With reference to the petitioner’s petition the record reveals that his complaint is against three respondents, with the 3rd being the only governorship candidate as opposed to making all the thirteen candidates at the said April, 10 2003 Governorship Election, as parties. The Chief Electoral Officer of Anambra State, appearing in the said capacity as the G 2nd respondent, is also an unknown person to law. The petitioner therefore and as rightly submitted by the respondents, neither joined the proper parties nor did he join all the necessary parties as expected. The respective scores of the candidates as required by paragraph 4(1)(c) of schedule 1 to the act was also not stated. The authorities of *Ikeh v. Njoku* (1999) 4 NWLR (Pt.598) p. 263 and *Umar v. Onikata* (1999) 3 NWLR (Pt. 596) p. 558 are trite and restate the necessity of the need for compliance. Further authorities in support are *Gbadamosi v. Azeez* (1998) 9 H

NWLR (Pt. 566)p.471 at 542; Tafida v. Bafarawa (1999) 4 NWLR (pt. 597) 70; Ozobia v. Anah (1999) 5 NWLR (Pt.601) 1.

I would also wish to re-state that by the use of the word shall at paragraph 4(1) of the 1st Schedule, same signifies the mandatory nature of the strict compliance requirements. B

One further pre-requisite to a valid petition is the necessity to exhibit all documents intended to be used as exhibits. In the absence of express provision in the act to that effect, Order 6 rule 8 of the Federal High Court (Civil Procedure) rules applies. The petitioner's failure to accompany the documents with his petition therefore violates the provision of the said Federal High Court Rules. C

The schedule to the electoral Act, 2002 stipulates and lays down the procedure for valid election petitions, the compliance with which is a matter of necessity and mandatory and giving no lee way for doing otherwise. D

It is further significant to restate that by the provision of paragraph 49 of the schedule on non-compliance with the schedule or Rule of practice sub paragraph (1) would not come to the petitioner's rescue. The intention of the said sub-paragraph in my humble opinion relates to any other defect otherwise than those expressly stated or implied. E

It is obvious that the contemplation by appellant that the issue of locus standi can only be decided upon the statement of claim is not tenable. In other words, the joining of issues is not a pre-requisite to raising the issue of competence of a court, as to jurisdiction. F

With the issue of jurisdiction being so fundamental, it can be raised at any stage of the proceedings in the court of first instance or even for the 1st time in the appeal courts. The issue which can either be raised by any of the parties or the Court suo motu. The Supreme Courts' authority in the case of Oloba v. Akereja (1988) 3 NWLR (Pt. 84) p. 508 at 520 per Obaseki, JSC, is in points and relevant. G

The issue of jurisdiction is a matter of what the statute says about a particular subject i.e. to say whether the matter could be subject to trial in the particular court of law. It is obvious and only reasonable therefore to embark on a trial where there is certainty, or if there appears to be H

certainty that the court has jurisdiction. It is in the interest of parties to a case to first of all decide the issue of jurisdiction once it arises. The decision in the case of *Kasikwu Farms Ltd. v. A.-G Bendel State* (1986) 1 NWLR (Pt. 19) p. 695 is relevant on the principles enunciated.

B Deducing from the foregoing, it is my humble opinion, I hold, that the absence of the non-compliance with certain provisions of the electoral Act and Rules of the Federal High Court has robbed the tribunal of jurisdiction to entertain the petition in respect of this appeal. Consequently, it is my humble view therefore that the Tribunal, in respect of the 1st issue raised did act within the limits of the law in declining jurisdiction as it did.

C The 2nd and 3rd issues raised relate more to a demurrer concept upon which the appellant dwelt so much as clearly shown on all the five issues he raised on his brief of arguments. On his submission the appellant argued and emphatically re-iterated that the provision of Order 25 of the Federal High Court (Civil Procedure) Rules had abolished demurrer. As rightly argued by the appellant it is not in dispute that courts or tribunals are governed and regulated by the appropriate rules of court. It is further trite that the court is also duty bound to give effect to the provisions of the rules. However, in the exercise of the interpretation of the provisions of the laws applicable, same cannot be made in isolation to the other related provisions, which must all be taken together for proper and objective understanding of the context with a view to giving effective application thereto.

With regard to the appeal before us, while the appellant pleads same as that amounting to a demurrer proceeding giving rise to an abuse of court process and therefore liable to a dismissal, the respondents denied and submitted that the concept is inapplicable and relied on paragraph 49(5) of the 1st Schedule to the act. The said paragraph reproduced states as follows:

G “An objection challenging the regularity or competence of an election petition shall be heard and determined before any further steps in the proceedings if the objection is brought immediately the defect on the fact of the election petition is noticed.”

H Having regard to the combined effect of paragraph 49(5) of the 1st sched-

ule reproduced supra and taken together with paragraph 50 of same, it would appear and as rightly submitted in my view, by the respondents that Order 25(1) and (2) of the federal High Court (Civil Procedure) rules, 2000 which abolished demurrer is in operative in an election petition. This is clearly confirmed per the re-statement on paragraph 49(5) B of the Electoral Act wherein the proceedings contemplated by the said order had been provided therein. The immediate nature of the objection to be raised on the defect does not contemplate the raising of same by either pleadings or any specific format and thus defeating the arguments C by the appellant wherein he makes pleadings a pre-requisite and a necessity.

It is further pertinent to re-state that a demurrer proceeding is based on an initial assumption that the court has jurisdiction but however contends that even if the plaintiff's pleading/statement of facts are correct, that they do not place duty on the defendant for any legal liabilities. D Unlike in demurrer proceeding, where the plaintiff must plead and upon which the defendant will contend no cause of action or where appropriate other incompetence, the issue of jurisdiction is more fundamental E than demurrer proceedings. It does not therefore always follow that pleadings must first be a pre-requisite to raising the issue of jurisdiction. Jurisdiction involves what will enable the plaintiff to seek a hearing in court because he is able to show that the court is empowered to entertain the F subject matter. Jurisdiction is a compelling necessity and a pre-requisite to the consideration of demurrer proceedings. The latter has no place in the absence of the former. The following authorities are trite and in support of the foregoing deductions: *F.C.D.A. v Naibi* (1990) 3 NWLR (Pt. 138) p.270; *Williams v. Williams* (1987) 2NWLR (Pt.54) 66; *Akpan v. Urim* (1996) 7 NWLR (Pt.463) 634; and *N.D.I.C. v.C.B.N.* (2002) 7 NWLR (Pt. 766) 272,(2002)18 WRN P.I. G

Demurrer proceedings would not lie where there is no jurisdiction. H Jurisdiction goes to the root of the matter and rendering the entire proceeding thereon a complete nullity and an exercise in futility. The authority of *Western Steel Works Ltd. V. Iron & steel workers Union* (1986) 3 NWLR (Pt. 30) 617 is also relevant in support wherein Oputa.

JSC (as he then was) had this to say:

“A court has to be competent in the sense that it has jurisdiction before it can undertake to probe and decide the rights of the parties.”

But because it is regarded as a threshold issue and a lifeline for continuing
 B any proceedings, objection to jurisdiction ought to be taken at the earliest
 opportunity if there are sufficient materials before the court to consider it
 and a decision reached on it before any other step in the proceedings is
 taken because if there is no jurisdiction, the entire proceedings are a
 nullity no matter how well conducted. In my humble opinion and contrary
 C to the submission made by the appellant, the 3rd respondent’s motion
 on notice and filed on the 28/5/2003, and praying the court for an
 order striking out the appellant’s petition, did not amount to a demurrer
 proceedings, which same has no place, having regard to the want of
 D jurisdiction as the overriding factor and therefore paramount. The concept
 of demurrer extensively raised by the appellant did not give any
 credence to his appeal, which has no status for lack of jurisdiction by the
 Tribunal.

E In the same vein, by the tribunal first taking the issue of jurisdiction
 before any other consideration did not amount to either an abuse of
 process of court and/or a breach of fair hearing contrary, I hold again, to
 the contention by the appellant. This is having regard to the premium and
 F significance placed on jurisdiction and also the need for its quick dispensation
 in order to safe guard an exercise in futility if the tribunal is found
 wanting in jurisdiction thereon.

On the reliance made by the appellant to the Court of Appeal decision
 of the case of *Ndika v. Chiejina* (2003) 1 NWLR (Pt. 802) 451.
 G (2002) FWLR (Pt.117) p. 1178 per Olagunju. JCA. Same is, in my opinion,
 distinguishable from the matter under consideration. In the case under
 reference for instance, the motion was set down for hearing on the
 16th September 1996 while the continuation and conclusion in the substantive
 H case was adjourned to 9th July 1996. The judgment was therefore delivered
 before the motion was heard. The motion in the case was for an order setting
 aside the ruling earlier delivered. Consequently, it did not relate to issue of
 jurisdiction thereby depriving the court from first

taking the motion and hence the holding that the act was, “calculated to frustrate the hearing of the motion that became abated after the delivering of the judgment of the court on 30/7/96. It is a denial of fair hearing ...and is a fatal error which vitiates the decision of the learned trial Judge.”

Unlike the case under reference, in the matter at hand, in the absence of jurisdiction, the tribunal had no further reason or business to have anything to do with the petition whatsoever. It ought to completely hands off as it rightly did. The argument of denial of fair hearing by the appellant does not in any way avail him. This is so because it was no longer relevant to consider the position of the petitioner’s motion in the absence of jurisdiction as a mandate. B
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The 4th and last issue relates to the proceedings of the 28th May, 2003 as to whether the petitioner’s participation amounted to a waiver. D

It is trite law and as rightly submitted by the appellant that evidence of adequate service of process on all parties to an action is a mandatory requirement, failure of such compliance which evidently would rob the court or tribunal of jurisdiction. The petitioner was in court on the 28th May, 2003 when the 3rd respondent’s motion on competence of jurisdiction was heard. By him having conceded to participate in the motion, he cannot now therefore be heard to complain on failure to be given 48 hours notice especially where he did not indicate his ignorance of such a right. In respect of the 1st and 2nd respondents however, even in the absence of any complaint by them against service, by the very nature of the application which touches on jurisdiction the question of service or not is not relevant especially where it would not have altered the situational out come at the end of the day. In other words, the same also is applicable to the appellant, wherein whether or not he was given 48 hours notice was not relevant. It sufficed that without jurisdiction, the tribunal had no mandate to have anything to do whatsoever in relation to the petition. E
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It is further significant to state that the learned 3rd respondent’s counsel Mr. G.C. Igbokwe in his oral argument before us referred to pages 44, 50 and 51 of the record in respect of the membership of the tribunal panel which are remarkably different from the panel complained against and same also conceded to by the appellant himself. H

Having regard to the record therefore and to further compound and confirm the incompetent nature of the appeal before us, at page 51 of the record the petitioner is appealing against the ruling of a tribunal whose membership, with the exception of the chairman, has no bearing or correlation whatsoever to those at pages 44 and 50. The said appeal as far as the record before us is concerned is against a non-existent tribunal. There can be no appeal in a vacuum but that, which must be predicated on record of proceedings.

C In the result and having regard to the foregoing deductions and more particularly on the fuller reasoning and conclusions reached by my learned brother, Olagunju JCA on the lead judgment, I also agree that this appeal lacks merit. Consequently, it should and is therefore dismissed. I also abide by the consequential orders as to costs.

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