

**SUPREME COURT OF NIGERIA**  
7TH MAY, 2004. SC. 193/2003  
**CORAM:- S.A. BELGORE, I.L. KUTIGI, U. MOHAMMED,**  
**A.O. EJIWUNMI, N. TOBI, D. MUSDAPHER,**  
**I.C. PATS-ACHOLONU, JJSC**

- |                             |                    |
|-----------------------------|--------------------|
| 1. ALHAJI MOHAMMED          | ..... PETITIONERS/ |
| DIKKO YUSUF                 | RESPONDENTS/       |
| 2. MOVEMENT FOR DEMOCRACY   | CROSS-APPELLANTS   |
| AND JUSTICE (M.D.J.)        |                    |
| AND                         |                    |
| 1. CHIEF OLUSEGUN OBASANJO  | ..... RESPONDENT/  |
|                             | APPELLANT          |
| 2. PEOPLES DEMOCRATIC PARTY | ..... RESPONDENT/  |
|                             | APPELLANT          |
| 3. GENERAL MUHAMMADU        | ..... RESPONDENTS  |
- 

ELECTION PETITIONS - Jurisdiction - Presidential Election Tribunal - Has original jurisdiction under s. 239(1) of the 1999 Constitution - Which does not include matters constitutionally assigned -To state or federal high courts (H1)

ELECTION PETITIONS - Rules & procedure - That govern an election petition - Should be the same - Whether the petition is brought under the Electoral Act - Or under the Constitution (H2)

ELECTION PETITIONS - Jurisdiction - Complaint of the petitioner - That deal with infractions of the Constitution - And Companies Act - Will be struck out (H3)

ELECTION PETITIONS - Parties - Non-joinder of necessary parties - Does not arise in paragraphs 12, 14 and 16 - As to warrant striking them out (H4)

ELECTION PETITIONS - Parties - Joinder of - Complaint that some respondents were improperly joined - Cannot be raised by another respondent (H5)

ELECTION PETITIONS - Reliefs claimed - Move by respondent to have some of them struck out - Is premature - As hearing has not taken place (H6)

ELECTION PETITIONS - Motion - Dismissal of -Is not the case here - Since the respondent's motion succeeded in Part (H7)

ELECTION PETITIONS - Parties - Misjoinder of - Where a party is struck out for misjoinder - Paragraph of the Petition relating to him - Is rightly Struck out (H8)

ELECTION PETITIONS - Stare decisis - Judgment of the Supreme court - Was not ignored by the Election Tribunal (H9)

### **FACTS**

Before the Presidential Election Tribunal, the petitioners/cross appellants filed a petition against the 1st and 2nd respondents /appellants, and other respondents seeking nullification of the 2003 presidential election that returned Chief Olusegun Obasanjo (1st respondent) as winner. Some of the respondents filed some interlocutory applications seeking various reliefs. In the present matter, the respondent prayed for the striking out of the petition and or its various paragraphs.

Their application was granted in part by the Tribunal. But they seen to misconceive the decision by raising an issue that suggested that their motion was dismissed. In their appeal to the Supreme Court, respondents have raised various issues for the determination of the Court. The petitioners also cross appealed.

### **ISSUES FOR DETERMINATION**

*1. Whether or not breaches of the Constitution and Companies and Allied Matters Act (1990) are cognizable in an election Petition*

*based, founded and rooted in the Constitution, in this case under Section 239(1)(a) of the 1999 Constitution.*

*2. Whether or not paragraphs 12, 14 and 16 of the petition in this case are not incompetent for non-joinder of necessary parties? Grounds 5,6 and 7.*

*3. Whether or not 5<sup>th</sup>-39<sup>th</sup> respondents and 42<sup>nd</sup> – 56<sup>th</sup> respondents are necessary parties to this suit? Grounds 9, 10 and 11.*

*The issue properly put should also read-*

*Whether or not 5<sup>th</sup> – 39<sup>th</sup> and 42<sup>nd</sup> – 56<sup>th</sup> respondents should be struck out from the petition, because that was the application before the Tribunal.*

*4. Whether or not reliefs in paragraphs 18, 19 and 20 can be sustained having regard to the circumstances of this case? Ground 8.*

*5. Whether or not order of dismissal of the Appellant's motion on notice by the lower court was a proper order in the circumstances of this case. This issue covers ground 12.*

*“Whether paragraphs 13 & 17 of the Amended Petition were wrongly struck-out in limine thereby occasioning a miscarriage of justice.”*

**HELD** (Unanimously dismissing the appeal save issue 1 that succeeded, and dismissing the cross appeal per **KUTIGI JSC**)

***Jurisdiction - Presidential Election Tribunal***

1. There is no doubt at all that the tribunal has original jurisdiction to hear and determine Presidential Election petitions vide Section 239(1) of the Constitution and consequently to hear all matters related to the election. But the issue here is – would that include matters specifically assigned to other courts under the Constitution? The tribunal says ‘yes’. I say ‘no’. Strictly speaking, I think matters or things which constitute infractions of the Constitution and Companies and Allied Matters Act or any Act for that matter, should go before the High Court and or Federal High Court as the case may be. The courts are vested with jurisdiction under the Constitution and the laws to listen to those infractions or complaints, and not the tribunal. (p. 1159 G)

***ELECTION PETITIONS - Rules & procedure***

2. As observed above there is no doubt at all that the Petition herein is rooted in Section 239(1)(a) of the Constitution and that some of the matters complained of related to breaches of the Constitution and Companies and Allied Matters Act which arose out of the conduct of the election. But are these facts sufficient to qualify the petition for rules, procedures and or regulations different from those that govern other petitions brought under the Act? I think not. A petitioner is certainly free to choose whether to come under the Constitution or under the Act. Once that decision is made or taken, then I believe the rules, procedures, and or regulations to govern all petitions must be one and the same. We cannot certainly afford two different types of rules, procedures and or regulations governing petitions under the Constitution and petitions under the Act respectively. It will be a cumbersome procedure for the tribunals and courts. It will certainly not be proper to permit one thing in one petition and disallow it in another for the simple reason that one is under the Constitution and the other is under the Act, even though both or all of them are seeking to achieve one and the same purpose. (p. 1160 C)

***ELECTION PETITIONS - Jurisdiction - Complaint of the petitioner***

3. A careful perusal of paragraphs 10 & 11 of the petition boldly headed “*Fundamental Unconstitutionalities as to Campaign Finance*,” and “*Fundamental Unconstitutionalities as to illegal canvassing for Votes*,” respectively show that they constitute infractions of the Constitution and Companies and Allied Matters Act and collateral issues over which the tribunal has no jurisdiction by virtue of the provisions of Sections 131-134 of the Act (see also Ezeobi v. Nzeke (1989), NWLR (Pt. 98) 478.

Paragraphs 10 & 11 of the petition are therefore in my view incompetent. They are hereby struck out.

Consequently, issue (1) must be answered in the affirmative, that is, that complaints against breaches of the Constitution and Companies and Allied Matters Act are not cognisable in an election petition brought pursuant to the provisions of Section 239 (1)(a) of the Constitution.

(p.1160 G)

***Parties - Non-joinder of necessary parties***

4. The law clearly is that if the petition complains of the conduct of an Electoral Officer, a Presiding Officer, a Returning Officer or any other person who took part in the conduct of an election, such officer or person shall for the purpose of the Act be deemed to be a respondent and shall be joined in the election petition in his or her official status as a necessary party (see Section 133(2) of the Electoral Act). Paragraphs 12 and 14 of the petition are clearly in my view complaints or allegations against the 1<sup>st</sup> respondent who is alleged to have continued to deploy Police and Army personnel not only to supervise the conduct of the election but to intimidate voters as well. The 1<sup>st</sup> Respondent is already a respondent in the petition. I do not know how the unnamed, unidentified and unassigned Police and Army personnel as well as political party agents and or thugs can be made parties in the petition. I think the Court of Appeal was right to have refused to strike out the two paragraphs. Paragraphs 12 & 14 are therefore competent.

As regards paragraph 16 of the petition, I think the tribunal rightly held that this paragraph is directed principally against the 1<sup>st</sup>, 40<sup>th</sup> and 41<sup>st</sup> respondents who are already parties to the petition. The paragraph is therefore competent.

The answer to issue (2) therefore is that paragraphs 12, 14 and 16 of the petition are competent as they have not breached Section 133(2) of the Electoral Act (see Egolum v. Obasanjo (1999) 5 S.C. (Pt. 1) 1. (p.1161 F)

***ELECTION PETITIONS - Parties - Joinder of***

5. I think the tribunal is right. If really a particular respondent feels that he or she is improperly joined, it is the prerogative of that party or person to move the court or tribunal to strike out his or its name. The petitioner can also move the tribunal to strike out a respondent that he/she feels is no longer wanted or required. The petitioner decides who to join with the statutory respondents under Section 133(2) of the Act. I do not think it is

the business of one respondent to apply that another respondent be struck out simply because he/she feels that the presence of that other respondent is unnecessary. The petitioner who joined him or her must know the reason why he or she made him/her a party in the petition.

B Issue (3) therefore fails. The named respondents remain as such respondents until if and when any of them or the petitioner applies to the tribunal for any of them to be struck out as such. (p. 1163 B)

***ELECTION PETITIONS - Reliefs claimed***

C 6. These paragraphs are substantially seeking for reliefs based on the averments in the petition. The petition is still in the process of being heard or determined by the tribunal. How could anybody then at this stage of hearing of the petition seriously or even casually be talking of  
D granting, refusing or striking out a relief claimed? It simply does not make sense. A relief may be granted, refused or struck out by a court of law or tribunal at the end of the trial in its judgment. And not before. There is however nothing stopping the petitioner from applying to the  
E court to withdraw any of the reliefs claimed. That is not the case here.

The paragraphs will remain intact to await the end of the trial when pronouncement one way or the other will be made depending on the evidence led. (p. 1163 G)

F ***ELECTION PETITIONS - Motion - Dismissal of***

7. It is glaring from the above that the tribunal did not dismiss the 1<sup>st</sup> respondent/appellant's motion in its entirety. The tribunal clearly granted the 1<sup>st</sup> respondent/appellant's objection to strike out paragraphs 13 & 17  
G of the petition. These two paragraphs were then struck-out. The objection to strike-out other paragraphs of the petition failed and was dismissed by the tribunal. The tribunal was therefore right in its ruling above. The court has the power to grant the objection in part and refuse it in  
H part. That is the position here. The tribunal as I said never dismissed the objection which had succeeded in part. Issue (5) is therefore clearly misconceived. It ought to fail. (p. 1164 G)

***Parties - Where a party is struck out for misjoinder***

8. Again I have closely read through paragraph 17 of the petition. It pleaded the non-qualification of the 3<sup>rd</sup> respondent, (Muhammadu Buhari) by reason of his membership of the Council of States and attending meetings up to and beyond 8<sup>th</sup> April, 2003. There is no doubt that 3<sup>rd</sup> & 4<sup>th</sup> B respondents (Muhammadu Buhari and A.N.P.P.) had earlier been struck out for misjoinder by the decision of this court in Buhari & Anor v. Yusuf & Anor (supra). I believe with the striking out of the 3<sup>rd</sup> respondent, paragraph 17 of the petition ceased to be material to the determination of the petition. The tribunal was therefore right to have struck-out paragraph 17 herein. (p. 1167 B) C

***Stare decisis - Was not ignored by the Election Tribunal***

9. I also as said earlier agree that the tribunal did not fail or refuse to follow our decision in Buhari & Anor v. Yusuf & Anor (supra) which was concerned only with the propriety or otherwise of joining the 3<sup>rd</sup> and 4<sup>th</sup> respondents in the petition, and not whether or not paragraph 17 should be retained or struck out which issue was never before this court. I have no doubt that if paragraph 17 was an issue in Buhari & Anor v. Yusuf & Anor (supra), this court would have struck out paragraph 17 having ruled that the 3<sup>rd</sup> and 4<sup>th</sup> respondents were wrongly joined in the petition. When a party is not properly joined in a suit and is struck out, any allegations made against him become irrelevant and incompetent. (p. 1167 D) D E F

**NOTABLE POINTS OF INTEREST****KUTIGIJSC*****1. Ratio decidendum - Is what binds the courts***

It is very important for counsel to bear in mind always, that a case is only authority for what is actually decided. In other words, it is only the "ratio decidendi" of a Supreme Court judgment that binds the court and the lower courts, and not "obiter dicta" in concurring judgments. (See for example Odiase & Anor v. Agho & Ors. (1972) ALL NLR 175. (p. 1167 F) G H

**TOBI JSC**

*2. Legislation - Courts are to interpret and not to make laws*

Legislation is an exact legislative conduct of the Legislature. Where a legislation is clear and unambiguous, the courts must interpret the legis-  
 B lature in that clear and unambiguous content and not enlarge its content to include other statutes not anticipated by the Legislature in the legisla-  
 C tion. It is a principle of legal drafting that where a legislation intends to incorporate or make cross reference to another statute, this will be clearly  
 D done in the sections of the legislation. And here I must say that I do not see any of the sections of the Electoral Act either incorporating or mak-  
 E ing cross reference to the provisions of the Constitution or the Companies and Allied Matters Act in the context of the factual situation in para-  
 F graphs 10, 11 and 12 of the Amended Petition, if I may so restrict myself.

A court which, in the exercise of its interpretative jurisdiction,  
 imports a statute to another statute when the enabling statute does not  
 anticipate such importation, will be said to be making the law in a bad  
 way because by that, it is changing places with the legislature. No court  
 E can do such a thing.

The applicable law in an action or matter is the enabling law. It is  
 the driving force of the action or matter, in the sense that it gives birth to  
 the action or matter. The duty of the court is to interpret that enabling law  
 F because it is the ‘king’ of the action or matter, if I may put it generically  
 (p. 1188 A)

*3. Pleading must be based on the applicable law*

Pleadings erect the facts on which the party or parties rely in proving  
 G their case at trial. They must be based or related to the applicable law, which is the enabling law. They cannot go outside the enabling law on a  
 voyage of discovery or on a wild goose chase. Where pleadings vest  
 such powers on the applicable law, the courts are bound to order them to  
 H hold their brakes if they have gone outside the applicable law in the judi-  
 cial process. (p. 1188 G)

*4. Jurisdiction of Courts - Electoral Act & the Constitution.*



Jurisdiction is a very hard matter of law which is donated by the Constitution and the enabling statute. It is also a very sensitive matter in the judicial process. Considering its very hard and sensitive nature, courts of law must always bow or kowtow to the provisions of the Constitution and the enabling statute. On no account should we remove from a court which has jurisdiction to hear a matter to another court which has no jurisdiction to hear. That is not right and we should not do it. B

I must pause here to say something by way of ameliorating the legal position above as it relates to the Constitution of the land. And it is this. The only time the Constitution of the land can be invoked in election matters is when a provision of the Electoral Act, 2002, is in conflict with any provision of the Constitution. In such a situation, in the exercise of the kingly position of the Constitution as the supreme law, as provided in Section 1(3) of the Constitution, courts have the jurisdiction to declare the provision of the Electoral Act in conflict with the Constitution null and void ab initio. C D

I must be quick in saying that the paragraphs mentioned above did not aver to any conflict. All they averred to is that actions of certain persons were in conflict with the provisions of the Constitution. Since the cynosure or fulcrum of the action is the Electoral Act and not the Constitution, the petitioner cannot be heard to so aver. (p. 1191 C) E

## **REPRESENTATION**

Adebayo Adenipeku, (with him, A. Akpan and Oluwole Aladedoye), for 1<sup>st</sup> Respondent/Appellant. F

Roland Otaru, (with him, M.B. Adoke), for 2<sup>nd</sup> Respondent/appellant.

A.J. Owonikoko, (with him, Felix Eki), for 1<sup>st</sup> & 2<sup>nd</sup> Petitioners/Cross-Appellants. G

Chief M.O. Ayorinde, (with him, K.F. Elelu), for 37<sup>th</sup> & 38<sup>th</sup> Respondents.

A.O. Okeaya-Inneh, for 40<sup>th</sup> – 55<sup>th</sup> Respondents. H

## **CASES REFERRED TO**

Ezeobi v. Nzeka (1989), NWLR (Pt. 98) 478

Sanyoalo v. INEC (1999) 7 NWLR (Pt. 612) 600

Anazodo v. Audu (1999) 4 NWLR (Pt. 600) 530.

Egolum v. Obasanjo (1999) 5 S.C. (Pt. 1) 1

Onojom v. Egari (1999) 5 NWLR (Pt. 603) 416)

B Yerokun v. Adeleke (1960) SCNLR 267 at pages 272 and 274

Jidda v. Kachalla (1999) 4 NWLR (Pt. 499) 426

### **STATUTES REFERRED TO**

Constitution of Nigeria 1999 ss. 239 (1), 285 (1) & (2)

C Electoral Act 2002 ss. 131 (1), 134 (1), 133 (2)

### **LEAD JUDGMENT BY KUTIGI JSC**

This is yet another interlocutory appeal against the decision of the  
D Presidential Election Petition Tribunal (hereinafter referred to as the Tribunal) delivered on 17<sup>th</sup> July, 2003 refusing to strike out the Petition and or its various paragraphs as demanded by the Motions, Applications and or Notices of Preliminary Objection filed by some of the respondents in  
E the Petition.

I shall therefore in this judgment be brief and straight to the points necessary for the disposal of the relevant issues in the appeal without attempting to prejudice any point or issue yet to be tried or decided by the Tribunal (see for example Egbe v. Enogun (1972) 1 AII NLR (Pt.1) 95;  
F Sylvanus Mortune v. Alhaji Muh. Gambo (1979) 3-4 SC. 54).

The tribunal decided to hear all the motions, applications and objections together. And in a reserved and well considered ruling the tribunal in the lead ruling of Mahmud Mohammed, JCA. (which was con-  
G curred by all the other 4 Justices), concluded as follows-

*“In the result, the application filed by the 1<sup>st</sup> respondent on 12-6-2003 raising objection to the Petition as contained in paragraphs 1 and 2 of his reply also filed on 12-6-2003, except for the striking out of  
H paragraphs 13 and 17 of the Petition has failed and the same is hereby dismissed with no order on costs.*

*Similarly the application of the 2<sup>nd</sup> respondent filed on 13-6-2003 raising objection to the Petition except for striking out paragraphs 13*

and 17 of the Petition has also failed and the same is dismissed with no order on costs. Finally, the preliminary objection by the 40<sup>th</sup> to 55<sup>th</sup> respondents seeking for the striking out of the Petition or dismissing it, has also failed except for the striking out of paragraphs 13 and 17 of the Petition. Consequently, the preliminary objection is also hereby dismissed with no order on costs.”

It is abundantly clear from the above that each of the applicants or objections succeeded in part and failed in part. Paragraphs 13 and 17 of the petition were struck-out while all the other prayers or reliefs including that of dismissal and or striking out the petition were dismissed.

Aggrieved by the ruling of the Tribunal, both the 1<sup>st</sup> and 2<sup>nd</sup> respondents have appealed separately to this court. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners have also jointly cross-appealed against the ruling. For tidiness and for the purposes of eliminating any confusion, I intend to treat together the appeals by the 1<sup>st</sup> and 2<sup>nd</sup> respondents as one appeal even though filed separately, they being respectively the candidate at the election and the political party under whose platform the 1<sup>st</sup> respondent contested. I will thereafter treat the cross-appeal of the petitioners.

#### THE APPEALS

In the 1<sup>st</sup> respondent/appellant's brief the following 5 issues have been submitted for determination-

1. Whether or not complaints against breaches of the Constitution and Companies and Allied Matters Act (1990) are cognisable in an election Petition? Grounds 1,2,3 and 4.

I think this issue as framed is too wide. This is not a court for academic exercise. The issue should be confined to the actual decision of the tribunal based on the petition in this case only. The tribunal recognised two classes of petitions. A petition under the Constitution and a petition under the Electoral Act, and held that under the former certain things are permissible but not under the latter as we shall soon find out. So the issue must be confined to petitions based on the Constitution only and not to petitions under the Act.

It was contended in the tribunal that the petition should be dismissed or struck out because the petitioner had failed to question the

election on any of the grounds permitted by the Electoral Act. In the lead ruling Mahmud Mohammed, JCA., ruled thus:

*“It is a well settled point of law that the relief claimed in a suit determines the jurisdiction of the court to adjudicate on it. This principle of law had been long settled in many cases by the Supreme Court*

*The reliefs claimed by the petitioners in their paragraph 20(1) of the petition which is relevant at this stage read:-*

*“20. WHEREFORE Your petitioners pray jointly and or severally that –*

*It may be determined that the 1<sup>st</sup> respondent was not duly or validly elected and/or returned as the President of Federal Republic of Nigeria pursuant to the election held on the 19<sup>th</sup> April, 2003.”*

*“The jurisdiction of this court to hear and determine any election petition arising out of the conduct of any presidential election conducted under the Constitution and the Electoral Act, 2002, is prescribed under Section 239 of the 1999 Constitution .....*

*Therefore on the face of the petitioners’ petition filed on 9/6/2003 in this court challenging the election and return of the 1<sup>st</sup> respondent as the President of the Federal Republic of Nigeria on the sole and single ground that the 1<sup>st</sup> respondent was not duly or validly elected and/or returned as the President of the Federal Republic of Nigeria pursuant to the election held on the 19/4/2003, is entirely within the scope or ground specified under paragraph (a) of sub-paragraph (1) of Section 239 of the 1999 Constitution and therefore within the original jurisdiction of this court. Although this ground for bringing or filing a presidential*

*election petition under Section 239 of the 1999 Constitution is not repeated under Section 134 of the Electoral Act, 2002, as one of the grounds for bringing or filing an election petition under the Act, that does not invalidate any petition filed on the single ground prescribed under the Constitution. Failure to include that ground under the Electoral Act, 2002, is quite in line with the decision of the Supreme Court in the case of A.G. Abia v. A.G. Federation (2002) 6 NWLR (Pt. 763) 264 at 373-374”*

(Emphasis is mine)

This is not therefore an issue which covers any election petition under the Electoral Act, but only a petition under the Constitution and in this case under Section 239(1)(a) of the Constitution-

I therefore re-frame issue (1) thus-

B

Whether or not breaches of the Constitution and Companies and Allied Matters Act (1990) are cognizable in an election Petition based, founded and rooted in the Constitution, in this case under Section 239(1)(a) of the 1999 Constitution.

2. Whether or not paragraphs 12, 14 and 16 of the petition in this case are not incompetent for non-joinder of necessary parties? Grounds 5,6 and 7.

C

3. Whether or not 5<sup>th</sup>-39<sup>th</sup> respondents and 42<sup>nd</sup> – 56<sup>th</sup> respondents are necessary parties to this suit? Grounds 9, 10 and 11.

D

The issue properly put should also read-

Whether or not 5<sup>th</sup> – 39<sup>th</sup> and 42<sup>nd</sup> – 56<sup>th</sup> respondents should be struck out from the petition, because that was the application before the Tribunal.

E

4. Whether or not reliefs in paragraphs 18, 19 and 20 can be sustained having regard to the circumstances of this case? Ground 8.

5. Whether or not order of dismissal of the Appellant's motion on notice by the lower court was a proper order in the circumstances of this case. This issue covers ground 12.

F

On the other hand, in the 2<sup>nd</sup> respondent/appellant's brief, 3 issues have been identified as arising for determination thus-

i. Whether an Election Tribunal is vested with jurisdiction to adjudicate on matters relating to alleged breaches or contravention of the provisions of the Constitution of the Federal Republic of Nigeria 1999 and the Companies and Allied Matters Act, Laws of the Federation, 1990, which are not relevant in an election petition.

G

ii. Whether the lower court rightly exercised its discretion when it failed to strike out the names of parties who lost the presidential election and from whom no claim was made.

H

iii. What is the effect in our adversary system of jurisprudence

when proper and necessary parties against whom allegations are made are not joined in a suit.

It is clear at once that when the two sets of issues are compared together, 1<sup>st</sup> respondent/appellant's issues 1, 2 and 3 are covered by the B 2<sup>nd</sup> respondent/appellant's issue 1, 3 and 2 in that order.

I will therefore now proceed to consider the 5 issues identified in the 1<sup>st</sup> respondent/appellants' brief which will also cover the 3 issues raised by the 2<sup>nd</sup> respondent/appellant.

#### C Issue 1

This is about whether or not complaint against breaches of the 1999 Constitution and Companies and Allied Matters Act (1990) are cognizable in an Election Petition brought under Section 239(1)(a) of the Constitution. Put bluntly, any complaint or grievance by the petitioner, D according to the 1<sup>st</sup> respondent, must be founded or based on the provision of the Electoral Act No. 4 of 2002 (hereinafter referred to as the Act) only. Anything outside the Electoral Act or anything not provided for under the Act is forever outside the Act and cannot validly be considered E by the Tribunal. In other words you are either within the Electoral Act or you are perpetually and permanently outside it. Is this stand correct? Relevant provisions of the Constitution and the Act will be examined to find out.

F Section 239 of the Constitution provides-

*"239(1) Subject to the provisions of this Constitution, the Court of Appeal shall, to the exclusion of any other court of law in Nigeria have original jurisdiction to hear and determine any questions as to whether-*

G *(a) any person has been validly elected to the office of President or Vice-President under this Constitution; or*

*(b) ....omitted*

*(c) .... Omitted*

H *(2) In the hearing and determination of an election petition under paragraph (a) of subsection (1) of this section, the Court of Appeal shall be duly constituted if it consists of at least three Justices of the Court of Appeal."*

To me, this is a clear recognition by the Constitution itself that an election petition can be brought under Section 239(1)(a) above, and not necessarily under the Electoral Act as will be seen soon.

The Electoral Act on the other hand provides as follows-

*“131(1) No election and no return at an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or undue return (in this Act referred to as an election petition) presented to the competent tribunal or court in accordance with the provisions of the Constitution or of this Act, and in which the person elected or returned is joined as a party.”*

(2) In this section “tribunal or court” means-

(a) in the case of Presidential election, the Court of Appeal; and

(b) in the case of any other election under this Act, the Election Tribunal established by the Constitution or by this Act.

*The Election Tribunals provided for under the Constitution and this Act shall be constituted not later than 14 days before the Election”.*

*“134(1) An election may be questioned on any of the following grounds, that is to say-*

(a) that the person whose election is questioned was, at the time of the election, not qualified to contest the election;

(b) that the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act;

(c) that the respondent was not duly elected by majority of lawful votes cast at the election, or

(d) that the petitioner or its candidate was unlawfully excluded from the election.

(2) An act or omission which may be contrary to an instruction or directive of the Commission or of officer appointed for the purpose of the election but which is not contrary to the provisions of this Act shall not of itself be a ground for questioning the election.”

It appears clear to me from the provisions of the Constitution and the Act set out above, that -

(a) A presidential election petition can be presented based on the sole ground stated under Section 239(1)(a) of the Constitution (see above).

(b) A Presidential election petition can also be presented on any of the four (4) grounds as prescribed under Section 134(1)(a)-(d) of the Act (see above).

B Section 131(1) of the Act (above) makes it abundantly clear that a petition may be brought or filed either in accordance with the provisions of the Constitution or of the Act.

C I would like this to be noted at once. And that is that there are the same or similar provisions under Section 285(1)(a) of the Constitution for National Assembly Election Tribunals and under Section 285(2) for the Governorship and Legislative Houses Election Tribunals. They read-

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

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

(b) omitted

E (c) omitted

(d) omitted

F (2) There shall be established in each State of the Federation one or more election tribunals to be known as Governorship and Legislative Houses Election Tribunals which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor or as a member of any legislative house.

G Again these provisions of the Constitution are not covered by any of the provisions under Section 134(1)(a)-(d) of the Act above. A petition can therefore validly be filed in accordance with the above provisions of the Constitution.

H Now, let us examine the grounds or reliefs claimed by the petitioners in their petition. Paragraph 20 thereof shows 4 reliefs, the principal being relief (1) which reads –

*“IT MAY BE DETERMINED that 1<sup>st</sup> respondent was not duly or validly elected and or returned as the President of the Federal Republic*



*of Nigeria pursuant to the election held on 19<sup>th</sup> April, 2003.*”

It is quite clear that the ground for the petition falls entirely within the scope of Section 239(1)(a) of the Constitution and is completely outside the 4 grounds provided under Section 134(1) of the Act. I think it is an act of good draftsmanship that the Electoral Act did not attempt to repeat the provision of Section 239(1)(a) of the Constitution, because if it had done so, it would have been declared inoperative, null and void (see Att. Gen. Of Abia State & Ors. V. Att.-Gen. Of Federation (2002) 3 S.C. 106; (2002) 6 NWLR (Pt. 763) 264.

In dealing with this issue, the tribunal in its lead ruling said-

*“Indeed it is true that some of the matters complained of in the paragraphs relate to breaches of the Constitution and Companies and Allied Matters Act, but the fact that these breaches related to or arose out of the conduct of Presidential election or properly linked to such election under the 1999 Constitution and the Electoral Act 2002, only this court to the exclusion of any other court in Nigeria has the original jurisdiction to hear and determine such questions under Section 239(1) of the 1999 Constitution in an election petition .....*

*The cases relied upon by the respondents in support of their objections which were decided under identical provisions of the Electoral Act and not under the 1999 Constitution are not directly relevant. For the foregoing reasons therefore I hold that paragraph 10 of the petition is competent.*

*As paragraph 11 of the Petition was challenged on the same grounds as paragraph 10 of the Petition, for the same reasons given in sustaining paragraph 10, paragraph 11 of the Petition is also hereby sustained as the matters complained of therein are within the jurisdiction of this court under Section 239(1) of the 1999 Constitution.”*

**There is no doubt at all that the tribunal has original jurisdiction to hear and determine Presidential Election petitions vide Section 239(1) of the Constitution and consequently to hear all matters related to the election. But the issue here is – would that include matters specifically assigned to other courts under the Constitution? The tribunal says ‘yes’. I say ‘no’. Strictly speaking, I**

think matters or things which constitute infractions of the Constitution and Companies and Allied Matters Act or any Act for that matter, should go before the High Court and or Federal High Court as the case may be. The courts are vested with jurisdiction under the Constitution and the laws to listen to those infractions or complaints, and not the tribunal.

It is admitted that the Constitution being the supreme law of the Country, is not subject to the Electoral Act or any law at all. Rather it is the Act that is made subject to the Constitution. The Constitution is only subject to itself.

As observed above there is no doubt at all that the Petition herein is rooted in Section 239(1)(a) of the Constitution and that some of the matters complained of related to breaches of the Constitution and Companies and Allied Matters Act which arose out of the conduct of the election. But are these facts sufficient to qualify the petition for rules, procedures and or regulations different from those that govern other petitions brought under the Act? I think not. A petitioner is certainly free to choose whether to come under the Constitution or under the Act. Once that decision is made or taken, then I believe the rules, procedures, and or regulations to govern all petitions must be one and the same. We cannot certainly afford two different types of rules, procedures and or regulations governing petitions under the Constitution and petitions under the Act respectively. It will be a cumbersome procedure for the tribunals and courts. It will certainly not be proper to permit one thing in one petition and disallow it in another for the simple reason that one is under the Constitution and the other is under the Act, even though both or all of them are seeking to achieve one and the same purpose.

A careful perusal of paragraphs 10 & 11 of the petition boldly headed “*Fundamental Unconstitutionalities as to Campaign Finance*,” and “*Fundamental Unconstitutionalities as to illegal canvassing for Votes*,” respectively show that they constitute infractions of the Constitution and Companies and Allied Matters Act and collateral

issues over which the tribunal has no jurisdiction by virtue of the provisions of Sections 131-134 of the Act (see also Ezeobi v. Nzekwa (1989), NWLR (Pt. 98) 478; Sanyoalo v. INEC (1999) 7 NWLR (Pt. 612) 600; Anazodo v. Audu (1999) 4 NWLR (Pt. 600) 530.

Paragraphs 10 & 11 of the petition are therefore in my view B incompetent. They are hereby struck out.

Consequently, issue (1) must be answered in the affirmative, that is, that complaints against breaches of the Constitution and Companies and Allied Matters Act are not cognisable in an election petition brought pursuant to the provisions of Section 239 (1)(a) of C the Constitution.

This also answers the 2<sup>nd</sup> respondent/appellant's issue (1).

Issue (2)

This is whether or not paragraphs 12, 14 and 16 of the petition are D not incompetent for non-joinder of necessary parties.

I have read through paragraphs 12, 14 & 16 of the petition on pages 12-15, 17-19, and 20-22 of the record respectively.

Paragraph 12 is about “*fundamental unconstitutionality as to E illegal deployment of Police and armed forces personnel to supervise the conduct of the elections*”, while paragraph 14 is headed “*Specific Intimidation of Voter*,” and paragraph 16 is titled “*Undue and unlawful Voting*.”

F The law clearly is that if the petition complains of the conduct of an Electoral Officer, a Presiding Officer, a Returning Officer or any other person who took part in the conduct of an election, such officer or person shall for the purpose of the Act be deemed to be a respondent and shall be joined in the election petition in his G or her official status as a necessary party (see Section 133(2) of the Electoral Act). Paragraphs 12 and 14 of the petition are clearly in my view complaints or allegations against the 1<sup>st</sup> respondent who is H alleged to have continued to deploy Police and Army personnel not only to supervise the conduct of the election but to intimidate voters as well. The 1<sup>st</sup> Respondent is already a respondent in the petition. I do not know how the unnamed, unidentified and unassigned

Police and Army personnel as well as political party agents and or thugs can be made parties in the petition. I think the Court of Appeal was right to have refused to strike out the two paragraphs. Paragraphs 12 & 14 are therefore competent.

B As regards paragraph 16 of the petition, I think the tribunal rightly held that this paragraph is directed principally against the 1<sup>st</sup>, 40<sup>th</sup> and 41<sup>st</sup> respondents who are already parties to the petition. The paragraph is therefore competent.

C The answer to issue (2) therefore is that paragraphs 12, 14 and 16 of the petition are competent as they have not breached Section 133(2) of the Electoral Act (see Egolum v. Obasanjo (1999) 5 S.C. (Pt. I) 1; (1999) 7 NWLR (Pt. 611) 355, Onojom v. Egari (1999) 5 NWLR (Pt. 603) 416)

D This also answers the 2<sup>nd</sup> respondent/appellant's issue (3)  
Issue (3)

The issue is whether or not the 5<sup>th</sup>-39<sup>th</sup> respondents and the 42<sup>nd</sup>-56<sup>th</sup> respondents should be struck out from the petition. The petitioners E have joined in the petition 5<sup>th</sup>-39<sup>th</sup> respondents and 42<sup>nd</sup>-56<sup>th</sup> respondents representing various political parties and their Presidential candidates who contested the election with the 1<sup>st</sup> respondent. The 3<sup>rd</sup> & 4<sup>th</sup> respondents have since been struck out from the petition by this court for being im- F properly joined in an earlier appeal of Buhari & Anor v. Yusuf & Anor (2003) 6 S.C. (Pt.II) 156; (2003) 14 NWLR (Pt. 841) 446.

The tribunal had this to say on the issue-

*"The objection for striking out of the names of 5<sup>th</sup>-39<sup>th</sup> Respondents from the Petition also has to fail as the case of Buhari v. Yusuf S.C 116/2003 delivered on 27/6/2003 was not decided on the issue being raised in support of the objection. The respondents therefore remain as parties to the petition. There is no basis at all for the application to strike out the names of 42<sup>nd</sup>-55<sup>th</sup> respondents from the petition in the objection G raised by the 1<sup>st</sup> & 2<sup>nd</sup> respondents. This is because by the record of this court the same respondents are being ably represented by Sir Eghobamien SAN leading other counsel in this case who had filed not only a Reply to the Petition on their behalf but also the preliminary objection on 20-6-*

*2003 which is now being determined in this Ruling. Therefore in the absence of any complaint from their learned senior counsel, there is no basis whatsoever for striking out the names of 42<sup>nd</sup>-55<sup>th</sup> respondent had been absent and not properly represented by any counsel in these proceedings, in the absence of appropriate application from her in person or through her counsel, it is difficult to see any basis for striking out her name from the Petition."*

**I think the tribunal is right. If really a particular respondent feels that he or she is improperly joined, it is the prerogative of that party or person to move the court or tribunal to strike out his or its name. The petitioner can also move the tribunal to strike out a respondent that he/she feels is no longer wanted or required. The petitioner decides who to join with the statutory respondents under Section 133(2) of the Act. I do not think it is the business of one respondent to apply that another respondent be struck out simply because he/she feels that the presence of that other respondent is unnecessary. The petitioner who joined him or her must know the reason why he or she made him/her a party in the petition.**

**Issue (3) therefore fails. The named respondents remain as such respondents until if and when any of them or the petitioner applies to the tribunal for any of them to be struck out as such.**

This also covers 2<sup>nd</sup> respondent/appellant's issue (2).

**Issue (4)**

This is whether or not the reliefs in paragraphs 18,19, & 20 of the petition can be sustained having regard to the circumstances of this case.

Paragraphs 18,19&20 of the petition are on pages 23-27 of the record. I have read them. **These paragraphs are substantially seeking for reliefs based on the averments in the petition. The petition is still in the process of being heard or determined by the tribunal.**

**How could anybody then at this stage of hearing of the petition seriously or even casually be talking of granting, refusing or striking out a relief claimed? It simply does not make sense. A relief may be granted, refused or struck out by a court of law or tribunal at the end of the trial in its judgment. And not before.**

There is however nothing stopping the petitioner from applying to the court to withdraw any of the reliefs claimed. That is not the case here.

In the lead ruling, the tribunal said as follows-

B

*“As for paragraphs 18, 19 & 20 of the Petition which are mainly asking for reliefs based on the preceding paragraphs of the petition, the paragraphs shall remain as valid paragraphs to await the outcome of the petition as to the proof or otherwise of the paragraphs supporting the reliefs being sought.”*

C

I believe the Tribunal was right. The paragraphs will remain intact to await the end of the trial when pronouncement one way or the other will be made depending on the evidence led.

D

Issue (4) also fails.

Issue (5)

This issue is about whether or not the order of dismissal of the appellant’s Motion on Notice by the lower court was a proper order in the circumstances of this case.

E

The facts are simple. The 1<sup>st</sup> respondent/appellant by Motion on Notice leading to the ruling now on appeal, prayed the tribunal inter alia to strike out a number of paragraphs in the petition. The tribunal in its ruling struck out paragraphs 13 & 17 of the petition only and refused to strike out the remaining paragraphs. In its ruling the Tribunal said-

F

*“In the result, the application filed by the 1<sup>st</sup> respondent on 12-6-2003 raising objection to the Petition as contained in paragraphs 1 and 2 of the Reply also filed on 12-6-2003 except for the striking out of paragraphs 13 and 17 of the Petition has failed and the same is hereby dismissed with no order on costs.”*

G

**It is glaring from the above that the tribunal did not dismiss the 1<sup>st</sup> respondent/appellant’s motion in its entirety. The tribunal clearly granted the 1<sup>st</sup> respondent/appellant’s objection to strike out paragraphs 13 & 17 of the petition. These two paragraphs were then struck-out. The objection to strike-out other paragraphs of the petition failed and was dismissed by the tribunal. The tribunal**

H

was therefore right in its ruling above. The court has the power to grant the objection in part and refuse it in part. That is the position here. The tribunal as I said never dismissed the objection which had succeeded in part.

**Issue (5) is therefore clearly misconceived. It ought to fail.** B

All but one of the five (5) issues having thus been resolved against the 1<sup>st</sup> respondent/appellant, the appeal succeeds in part only. It is allowed in respect of issue (1) only, and dismissed in respect of all other issues.

All but one of the three (3) issues raised by 2nd respondent/appellant having been resolved against it, the appeal succeeds in part only. It is allowed in respect of issue (1) and dismissed in respect of all other issues.

#### 1<sup>st</sup> & 2<sup>nd</sup> PETITIONERS/CROSS-APPELLANTS

The petitioners have also cross-appealed against the ruling of the tribunal. They have submitted only one (1) issue for determination in the cross-appeal. The issue reads-

*“Whether paragraphs 13 & 17 of the Amended Petition were wrongly struck-out in limine thereby occasioning a miscarriage of justice.”* E

It was contended that the two paragraphs of the petition were prima facie competent in law as they constitute the backbone of the case. That paragraph 13 complains of statutory illegalities in the conduct of the election, while paragraph 17 complains of disqualification of 3<sup>rd</sup> respondent rendering the votes cast for him invalid and void. It was also contended that the facts pleaded in the two paragraphs struck-out were such that, the petition may likely succeed upon their proof alone and so the decision to strike them out has occasioned a miscarriage of justice. That the tribunal had refused to follow the decision of this court in Buhari & Anor v. Yusuf & Anor. (supra) where it was held that the same paragraph 17 should be retained. The cross-respondent on the other hand contended that paragraph 13 which complains about “*statutory illegality in the conduct of the election*” is outside any of the grounds for challenging the election as set out in Section 134(1) of the Act. That in paragraph 17, the cross-appellant pleaded the non-qualification of the 3<sup>rd</sup> respondent,

Mohammed Buhari, by reason of his membership of the Council of States. That since the 3<sup>rd</sup> and 4<sup>th</sup> respondents (Mohammed Buhari and the A.N.P.P.) had earlier been struck out by this court for misjoinder, paragraph 17 became a headless being, which serves no useful purpose in the petition.

B It was submitted that the issue for determination in Buhari & Anor v. Yusuf & Anor (supra) was the property or otherwise of the joinder of Muhammadu Buhari and A.N.P.P. and not whether or not paragraph 17 ought to be struck out. I agree with this last submission completely having read the judgment myself. This court in fact only struck-out the 3<sup>rd</sup> and 4<sup>th</sup> respondents from the petition and said nothing about the retention or otherwise of paragraph 17. I hesitate to say that having struck out the 3<sup>rd</sup> respondent from the petition, this court could have easily struck out paragraph 17 if the issue was actually before it and it was not. The Tribunal did not therefore refuse or fail to obey any earlier decision of this court. It was also submitted that the tribunal rightly struck out paragraphs 13 & 17 of the petition which are not relevant to the determination of the petition.

E In the lead ruling of Mahmud Mohammed, JCA., he said on page 100 of the record thus-

F *“Paragraph 13 of the Petition is a complaint on statutory illegalities in the conduct of the election. It relates to the provisions of the Act alone which does not make such complain a ground for questioning an election under Section 134 of the Act. In the absence of any complaint of breach of any provision of the 1999 Constitution in the paragraph to sustain it, paragraph 13 of the Petition is hereby struck out for non-compliance with the Electoral Act, 2002.”*

G I have had a close reading of paragraph 13 of the petition myself. I am clearly of the view that none of the sub-paragraphs of paragraph 13 can be accommodated under any of the grounds specified in Section 134(1) of the Act as stated in the ruling above. The tribunal can only H exercise jurisdiction when the allegations are cognizable under the Constitution or under Section 134(1) of the Act. The tribunal was therefore right to have struck out paragraph 13 of the Petition.

Also on paragraph 17 of the petition, Mahmud Mohammed, JCA.,



again said in the lead ruling-

*“Paragraph 17 of the Petition on the other hand contains complaints against persons who are no longer parties to the Petition. The preliminary objection on the competence of the paragraph is therefore hereby sustained and paragraph 17 of the Petition is hereby struck out.”* B

**Again I have closely read through paragraph 17 of the petition. It pleaded the non-qualification of the 3<sup>rd</sup> respondent, (Muhammadu Buhari) by reason of his membership of the Council of States and attending meetings up to and beyond 8<sup>th</sup> April, 2003. There is no doubt that 3<sup>rd</sup> & 4<sup>th</sup> respondents (Muhammadu Buhari and A.N.P.P.) had earlier been struck out for misjoinder by the decision of this court in Buhari & Anor v. Yusuf & Anor (supra). I believe with the striking out of the 3<sup>rd</sup> respondent, paragraph 17 of the petition ceased to be material to the determination of the petition. The tribunal was therefore right to have struck-out paragraph 17 herein. I also as said earlier agree that the tribunal did not fail or refuse to follow our decision in Buhari & Anor v. Yusuf & Anor (supra) which was concerned only with the propriety or otherwise of joining the 3<sup>rd</sup> and 4<sup>th</sup> respondents in the petition, and not whether or not paragraph 17 should be retained or struck out which issue was never before this court. I have no doubt that if paragraph 17 was an issue in Buhari & Anor v. Yusuf & Anor (supra), this court would have struck out paragraph 17 having ruled that the 3<sup>rd</sup> and 4<sup>th</sup> respondents were wrongly joined in the petition. When a party is not properly joined in a suit and is struck out, any allegations made against him become irrelevant and incompetent. It is very important for counsel to bear in mind always, that a case is only authority for what is actually decided. In other words, it is only the “*ratio decidendi*” of a Supreme Court judgment that binds the court and the lower courts, and not “*obiter dicta*” in concurring judgments. (See for example Odiase & Anor v. Agho & Ors. (1972) ALL NLR 175.** C D E F G

The cross-appeal therefore fails. It is hereby dismissed. H

## **SUMMARY AND CONCLUSION**

1. Complaints against breaches of the Constitution and Companies

and Allied Matters Act (or any other law) are not cognizable in an election petition based, founded or rooted in Section 239(1)(a) of the Constitution. Accordingly paragraphs 10 & 11 of the petition are struck-out being incompetent.

B 2. Paragraphs 12, 14 & 16 of the petition herein are competent for non-joinder of unassigned, unnamed or unidentified Police and army personnel, politicians and or political party agents and or thugs, not being necessary parties in the petition. In fact the 1<sup>st</sup> respondent against whom these allegations are directed is already a party in the petition.

C 3. The 5<sup>th</sup>-39<sup>th</sup> and 42<sup>nd</sup> -56<sup>th</sup> respondents cannot be struck-out on the application of the 1<sup>st</sup> respondent alone. These respondents are ably represented by counsel in court and none of them has applied to be struck-out. The petitioners have not also applied for any of them to be struck-D out.

4. The reliefs claimed in paragraphs 18, 19 & 20 of the petition can only be determined by the tribunal at the end of trial in its judgment.

E 5. The dismissal of the 1<sup>st</sup> respondent/appellant's motion on notice by the tribunal with the exception of the striking out of paragraphs 13 & 17 of the petition which succeeded, was a proper order.

F 6. Paragraphs 13 & 17 of the petition which respectively failed to comply with Section 134 of the Electoral Act and directed against people who are no longer parties to the petition, were properly struck out and has not occasioned any miscarriage of justice.

7. The appeal by the 1<sup>st</sup> respondent/appellant succeeds and allowed in part (issue (1) only). It is dismissed in all other respects.

G 8. The appeal by the 2<sup>nd</sup> respondent/appellant succeeds and is allowed in part (issue (1) only). It is dismissed in all other respects.

9. The cross-appeal by the 1<sup>st</sup> & 2<sup>nd</sup> petitioners/cross- appellants also fails and it is dismissed.

10. The parties are to bear their own costs.

H \_\_\_\_\_  
**BELGORE JSC**

I agree with judgment of Kutigi, JSC., and I adopt all his reasoning and conclusions as mine. All parties to bear their own costs.

### MOHAMMED JSC

I entirely agree. The question in respect of issue 1 is whether or not complaints against breaches of the Constitution and Companies and Allied Matters Act (1990) are cognisable in an Election Petition? It is only the Court of Appeal that has original jurisdiction to hear and determine such questions under Section 239(1) of 1999 Constitution in an election petition. Section 239(1) of the Constitution reads:

*“239(1) Subject to the provisions of this Constitution the Court of Appeal shall, to the exclusion of any other Court of Law in Nigeria, have original jurisdiction to hear and determine any question as to whether-*

*(a) any person has been validly elected to the office of President or Vice President under this Constitution; or*

*(b) the term of office of the President or Vice President has ceased; or*

*(c) the office of President or Vice President has become vacant.”*

It is plain that the Court of Appeal has been empowered under Section 239(1) of the Constitution to sit as an election tribunal to hear and determine a Presidential Election Petition. The jurisdiction which the court exercises has been specifically listed in that section of the Constitution. Any jurisdiction which is outside sub-paragraphs (a), (b), or (c), is not recognized by the constitution as original jurisdiction for the determination of the Court of Appeal.

Jurisdiction is the authority which a court has to decide matters which are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Constitution, statute, character or Commission under which the court is constituted and may be extended or restricted by similar means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited.

If the language of the Constitution is clear and unambiguous the court must interpret its plain and evident meaning – Attorney-General (Bendel State) v. Attorney-General (Federation) (1981) AII NLR 1. The original jurisdiction of the Court of Appeal under S. 239(1) of 1999 Con-

stitution is very clear. All other grievances outside that provision can only be justiciable in other courts recognized for such jurisdiction in the Constitution. I therefore agree that the Court of Appeal has no jurisdiction to adjudicate on matters relating to alleged breaches or contravention of the provisions of the Constitution and the Companies and Allied Matters Act, Laws of the Federation, 1990 in an election petition, based, founded and rooted in the Constitution. Thus I therefore find paragraphs 10 and 11 of the petition incompetent. They are accordingly struck out. My answer to the first question in the first issue is therefore in the negative.

For these reasons and fuller reasons of my learned brother, Kutigi, JSC., in the lead judgment I allow the appeal of the 1<sup>st</sup> respondent/appellant in respect of issue 1 only, and it is dismissed in respect of all the rest of the issues formulated. The appeal of the 2<sup>nd</sup> respondent/appellant succeeds only in respect of issue 1. The appeal of the 2<sup>nd</sup> respondent/appellant in respect of the remaining issues has failed and it is dismissed. The cross-appeal by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners/cross-appellants also fails and it is dismissed. I too order parties to bear own cost.

E \_\_\_\_\_

### **EJIWUNMI JSC**

I have had the privilege of reading the advance copy of the judgment just delivered by my learned brother, Kutigi, JSC., and I agree with him for the reasons given for allowing the appeal in part and dismissing the cross-appeal of the petitioners/respondents. I will only add a few words of my own.

This appeal is an interlocutory appeal against the ruling of the Presidential Petition Tribunal delivered on 17<sup>th</sup> July, 2003. By the said ruling, the tribunal refused to strike out the petition and/or certain of its several paragraphs pursuant to the Motions, Applications and/or Notices of Preliminary Objection filed by some of the respondents to the petition. A careful reading of the ruling of Mahmud, JCA., shows that the application filed by the 1<sup>st</sup> respondent on 12-6-2003, except for the striking out of paragraphs 13 and 17 of the petition, has failed and the same was dismissed with no order on cost.

Similarly, the application of the 2<sup>nd</sup> respondent filed on 13-6-2003 raising objection to the petition except for striking out paragraphs 13 and 17 of the petition also failed and the same was dismissed with no order on costs. Finally, the preliminary objection by the 40<sup>th</sup>-55<sup>th</sup> respondents seeking for the striking out of the petition or dismissing it, also failed except for the striking out of paragraphs 13 and 17 of the petition. Consequently, the preliminary objection was dismissed with no order on cost. B

It is, I think, convenient at this stage of this judgment to observe that from the issues raised in this appeal and the subsequent argument thereon in the briefs filed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> appellants that their interests in the outcome are similar. For that reasons I will in the consideration of this appeal consider their arguments together. But before then, the issue raised for them in their respective briefs would be set down. For the 1<sup>st</sup> appellant the issues raised for the determination of the appeal read thus:- D

*“Issue 1.*

*Whether or not complaints against breaches of the Constitution and Companies and Allied Matters Act (1990) are cognisable in an election petition? Grounds 1,2,3, and 4.* E

*Issue 2.*

*Whether or not paragraphs 12, 14 and 16 of the petition in this case are not incompetent for non-joinder of necessary parties? Grounds 5, 6 and 7.* F

*Issue 3.*

*Whether or not 5<sup>th</sup> – 39<sup>th</sup> respondents and 42<sup>nd</sup> – 56<sup>th</sup> Respondents are necessary parties to this suit? Grounds 9, 10 and 11.* G

*Issue 4.*

*Whether or not reliefs in paragraphs 18, 19 and 20 can be sustained having regard to the circumstances of this case? Ground 8.*

*Issue 5.*

*Whether or not order of dismissal of the appellant’s motion on notice by the lower court was a proper order in the circumstances of this case. This issue covers ground 12.”* H

And for the 2<sup>nd</sup> appellant, the following are issues identified for the

determination of the appeal.

*“Issue i: Whether an Election Tribunal is vested with jurisdiction to adjudicate on matters relating to alleged breaches or contravention of the provisions of the Constitution of the Federal Republic of Nigeria B 1999 and the Companies and Allied Matters Act, Laws of the Federation, 1990 which are not relevant in an election petition (Ground 1.)*

*ii. Whether the lower Court rightly exercised its discretion when it failed to strike out the names of parties who lost the presidential election and from whom no claim was made.*

*iii. What is the effect in our adversary system of jurisprudence when proper and necessary parties against whom allegations are made are not joined in a suit.”*

These issues are clearly in tandem with the five issues identified for the D 1<sup>st</sup> appellant, which I have reiterated above.

I will now examine the argument of learned counsel for the appellant in respect of issue 1. In this regard learned counsel for the appellant referred to paragraphs 10 (c), (d) and (e) of the petition filed by the E respondent and against which objection was raised by the respondent. He also invited attention to that portion of the ruling where the court below in dismissing the objection held as follows:-

*“Indeed it is true that some of the matters complained of in the F paragraph relate to breaches of the Constitution and Companies and Allied Matters Act but the fact that these breaches related to or arose out of the conduct of presidential election or properly linked to such election under the 1999 Constitution and the Electoral Act 2002, only this Court to the exclusion of any other Court in Nigeria that has the original juris- G diction to hear and determine such questions under S. 239(1) of the 1999 Constitution in an election petition.”*

It is the submission of learned counsel for the appellant that the lower court erred in its holding above. This is because, argued learned H counsel that S. 239 of the Constitution has not created any special jurisdiction for the Court of Appeal to try in an election petition matters in respect of the breach of the Constitution and the Companies and Allied Matters Act. It is the further submission of learned counsel for the appel-

lant that the section merely gives the Court of Appeal original jurisdiction in election matters as laid down in the Electoral Act. In support of his submission, the following cases were cited: Yerokun v. Adeleke (1960) SCNLR 267 at pages 272 and 274; Sanyaolu v. INEC (1999) 7 NWLR (Pt. 612) 600 at 608; Anazodo v. Audu (1991) (Pt. 600) 530 at 547; B Ezeobi v. Nzeka (1989) 1 NWLR (Pt. 98) 478 at 490; Jidda v. Kachalla (1999) 4 NWLR (Pt. 499) 426. On the basis of the above arguments, learned counsel urged that the issue be resolved in favour of the appellants.

Responding to the argument of the appellant outlined above, it is apparent from the argument of learned counsel for the respondents set out in the respondents' brief that in his view the decision of the court below on this issue ought to be affirmed. He however concedes it that though the election petition is not directly concerned with the trial of the breach of the provisions of Companies and Allied Matters Act (CAMA), yet it is his submission that such matters become directly relevant as a subsidiary issue in the petition by virtue of Section 221 of the Constitution. He cited Tukur v. Gongola State (1989) 4 NWLR (Pt. 117) 517. E There can be no doubt from the argument of counsel and the ruling of the court below that what has to be considered is, whether the court below was right in its interpretation of the provision of Sections 239, 225(2) of the 1999 Constitution and also section 134 of the Electoral Act F and also Section 38(2) of CAMA.

These several provisions read thus:-

*"S. 239 of the 1999 Constitution:*

*(1) Subject to the provisions of this Constitution, the Court of Appeal shall, to the exclusion of any other court of law in Nigeria, have original jurisdiction to hear and determine any petition as to whether-* G

*(a) any person has been validly elected to the office of President or Vice-President under this Constitution; or*

*(b) the term of office of the President of Vice President has ceased; H or*

*(c) the office of President or Vice-President has become vacant.*

*(2) In the hearing and determination of an election petition under*

*paragraph (a) of subsection (1) of this section, the Court of Appeal shall be duly constituted if it consists of at least three Justices of the Court of Appeal.*

B *S.225 (2) Every political party shall submit to the Independent National Electoral Commission a detailed annual statement of its expenditure in such form as the Commission may require.”*

S. 134 of the Electoral Act.

C *“(1) An election may be questioned on any of the following grounds, that is to say-*

*(a) that a person whose election is questioned was, at the time of the election, not qualified to contest the election;*

*(b) that the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act;*

D *(c) that the respondent was not duly elected by majority of lawful votes cast in the election; or*

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

E *(2) An act or omission which may be contrary to an instruction or directive of the Commission or of an officer appointed for the purpose of the election but which is not contrary to the provisions of this Act shall not of itself be a ground for questioning the election.”*

F **Section 38(2) of CAMA**

*“A company shall not have or exercise power either directly or indirectly to make a donation or gift of any of its property or funds to a political party or political association, or for any political purpose...”*

G *It is also in my view desirable to quote paragraph 10 of the petition that the 1<sup>st</sup> and 2<sup>nd</sup> appellants complained of. They read:-*

*“10 (c) 40<sup>th</sup> respondent failed to monitor the campaign activities of the 1<sup>st</sup> respondent and its political party, 2<sup>nd</sup> respondent, after the date of election had been announced, contrary to paragraph 15 (c) and (f) of Part 1 of the Third Schedule to the Constitution of the Federal Republic of Nigeria, 1999.*

*(d) By reason of the failure in (c) the 1<sup>st</sup> and 2<sup>nd</sup> respondents after the nomination of the former as candidate of the latter for the presiden-*



tial election, held a fund raising at Sheraton Hotel & Towers Abuja on the 16<sup>th</sup> day of January, 2002 at which a Foreign donation of ONE MILLION EUROS, amongst OTHER SUMS in excess of One Billion Nine Hundred Million Naira was announced received from mostly undisclosed sources contrary to Section 225(2) of the 1999 Constitution, and the said money was never remitted to the 40<sup>th</sup> respondent. B

(e) By reason of the failure in (c) the 56<sup>th</sup> respondent under the aegis of Corporate Nigeria embarked on additional fund raising for the 1<sup>st</sup> respondent from registered corporate organizations in Nigeria contrary to the provisions of the Companies and Allied Matters Act (1990) which forbids the application of any funds of a NIGERIAN registered company to a political purpose.” C

It seems to me apparent that the position taken by the plaintiffs/respondents is that the Court of Appeal should be granted unfettered jurisdiction to fully determine any issue properly brought before it pertaining to a presidential election petition. Hence he placed reliance on the pronouncement of the court below which reads:- D

“Therefore on the face of the petitioner’s petition filed on 9-6-2003 in this court challenging the election and return of the 1<sup>st</sup> respondent as the President of the Federal Republic of Nigeria on the sole and single ground that the 1<sup>st</sup> respondent was not duly or validly elected and/or returned as the President of the Federal Republic of Nigeria pursuant to the election held on the 19-4-2003, is entirely within the scope or ground specified under paragraph (a) of sub-paragraph (1) of Section 239 of the 1999 Constitution and therefore within the original jurisdiction of this court. Although this ground for bringing or filing a presidential election petition under Section 239 of the 1999 Constitution is not repeated under Section 134 of the Electoral Act, 2002, as one of the grounds for bringing or filing an election petition under the Act, that does not invalidate any petition filed on the single ground prescribed under the Constitution. Failure to include that ground under the Electoral Act, 2002, is quite in line with the decision of the Supreme Court in the case of A.-G Abia v. A.-G. Federation (2002) 3 S.C. 106; (2002) 6 NWLR (Pt. 763) 264 at 373-374.” E F G H

Now, it is manifest from a close reading of the above passages from the judgment of the court below that it was recognised that the first recourse of a petitioner who seeks to challenge the results of an election must be to the section of the Electoral Act upon which he could place  
B reliance to obtain relief. I have earlier in this judgment referred to the said provisions of the Electoral Act. Now it is clear that none of the complaints in the paragraphs of the petition to which objection was taken can be found in any of the offences that could result in the invalidation of an  
C election under the Electoral Act. However, it has been argued with great force by learned counsel for the respondents that notwithstanding that, a petitioner in an election petition could quite properly make allegations as had been done in the instant case to challenge the result of the petition. His premise for this submission appears to be found in some of the pro-  
D visions set down in Sections 221 – 228 of the Constitution of 1999, and he further argued that some of these provisions were also enacted in the Electoral Act, 2002.

But it is also evident that the provisions of Sections 221-228 were  
E enacted under that part of the Constitution where it was sought to provide for the rules that would govern the formation of political parties and their continued existence as political parties under the Constitution of 1999. But there is nowhere in the Constitution where it is stated that the  
F breach of any of the provisions would constitute an electoral offence by which an election may be invalidated by reason of such breaches. The argument is that the court cannot ignore an illegality in any action before it, but the court in order to exercise that jurisdiction, must be properly  
G seised of the case, See Madukolu & Ors v. Nkemdilim (1962) 1 ALL NLR 587 at 594. It cannot be doubted that original and exclusive jurisdiction is granted to the Court of Appeal by the Constitution to hear and determine any question as to whether (a) any person has been validly  
H tion....” Must be construed strictly on the basis of what would fall to be considered to make a pronouncement on the question. And as I have stated earlier in this judgment, the offences that fall to be considered in the determination of this question has been set down under Section 134

of the Electoral Act.

It seems to me pertinent to observe that the Constitution of 1999 was already in existence at the time the Electoral Act was enacted. It must be taken that the legislature knew or must have been aware of the several provisions of the Constitution. It is indeed also relevant to observe the provisions of the Companies and Allied Matters Act, which forbid donations to political parties. It follows that in so far as the legislature did not in their wisdom think it fit to make such breaches of the Constitution and other laws of the land electoral offences, it is in my humble opinion invidious for a court to take the responsibility of erecting those breaches into electoral offences.

I will therefore for the above reasons hold that the court below was in error not to have upheld the objection of the appellants. I would therefore resolve issue (i) in favour of the appellants. As I am also in total agreement with the reasoning and conclusion reached by my learned brother, Kutigi, JSC., in his leading judgment with regard to issues (ii),(iii),(iv) and (v), I adopt his reasoning and also resolve those issues against the appellants and dismiss the appeal. The cross-appeal is also dismissed by me for the reasons also given in the said judgment. In conclusion, I abide with all the other orders made in the said lead judgment including that made as to costs in this appeal.

---

### TOBI JSC

I have read the judgment of my learned brother, Kutigi, JSC., and I agree with him. I want to make contribution of my own.

Following the return of the 1<sup>st</sup> appellant as President of the Federal Republic of Nigeria by the Independent National Electoral Commission (INEC) in the April 2003 election, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed an election petition against the appellants and other respondents. They challenged the result of the election. When the petition was served on the appellant and other respondents, the 1<sup>st</sup> appellant by a motion challenged the competence of the petition. The 2<sup>nd</sup> respondent did the same thing. So too some other respondents.

All the motions were argued on 7<sup>th</sup> and 8th July, 2003. The Court of Appeal delivered its ruling on 17<sup>th</sup> July, 2003. That court struck out paragraphs 13 and 17 of the petition and dismissed the motion of the appellant.

B Dissatisfied, the appellant has come to this court. Briefs were filed and exchanged. The appellant formulated the following issues for determination.

*“Issue 1*

C *Whether or not complaints against breaches of the Constitution and Companies and Allied Matters Act (1990) are cognisable in an election petition? Grounds 1, 2, 3 and 4.*

*Issue 2*

D *Whether or not paragraphs 12, 14 and 16 of the petition in this case are not incompetent for non-joinder of necessary parties. Grounds 5, 6 and 7.*

*Issue 3*

E *Whether or not 5<sup>th</sup> – 39<sup>th</sup> Respondents and 42<sup>nd</sup> – 56<sup>th</sup> Respondents are necessary parties to this suit? Grounds 9, 10 and 11.*

*Issue 4*

*Whether or not reliefs in paragraphs 18, 19 and 20 can be sustained having regard to the circumstances of this case? Ground 8.*

*Issue 5*

F *Whether or not order of dismissal of the appellant’s motion on notice by the lower court was a proper order in the circumstances of this case. This issue covers ground 12.”*

G The 1<sup>st</sup> petitioner/respondent adopted the above issues formulated by the 1<sup>st</sup> appellant for determination. They filed a cross-appeal and formulated the following as Issue No. 6 for determination of the cross-appeal:

H *“Whether paragraphs 13 and 17 of the Amended Petition were wrongly struck out in limine thereby occasioning a miscarriage of justice.”*

The 2<sup>nd</sup> respondent/cross appellant formulated the following issues for determination:

“ (i) Whether an Election Tribunal is vested with jurisdiction to adjudicate on matters relating to alleged breaches or contravention of the provisions of the Constitution of the Federal Republic of Nigeria 1999 and the Companies and Allied Matters Act Laws of the Federation, 1990 which are not relevant in an election petition. B

(ii) Whether the lower court rightly exercised its discretion when it failed to strike out the names of parties who lost the presidential election and from whom no claim was made.

(iii) What is the effect in our adversary system of jurisprudence when proper and necessary parties against whom allegations are made are not joined in a suit.” C

The 2<sup>nd</sup> respondent also filed a brief in respect of the petitioners/cross appellant’s brief. The following issue is formulated for determination: D

“Whether the lower court was right in striking out paragraphs 13 and 17 of the Amended Petition in the circumstances of this case.”

The 37<sup>th</sup> and 38<sup>th</sup> respondents also filed a brief. They adopted the issues formulated by the 1<sup>st</sup> appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents. E

The 40<sup>th</sup> to 55<sup>th</sup> respondents also filed a brief. They adopted the issues formulated by the 1<sup>st</sup> appellant. The 1<sup>st</sup> appellant also filed what his counsel referred to as 1<sup>st</sup> appellant’s reply/cross respondent’s brief. He adopted the following issue formulated by the cross appellant: F

“Whether paragraphs 13 and 17 of the Amended Petition were wrongly struck out in limine thereby occasioning a miscarriage of justice.”

Learned counsel for the 1<sup>st</sup> appellant, Mr. Adebayo Adenipekun, submitted on Issue No. 1 that the Court of Appeal lacks the jurisdiction to entertain any other grievances against the victorious candidate in an election petition and that all other grievances outside the provisions of the Electoral Act can only be ventilated in other courts that have jurisdiction to hear them. He referred to paragraph 10(c), (d) and (e) of the petition and submitted that the Court of Appeal erred in law in holding that Section 239(1) of the 1999 Constitution vests original jurisdiction on the court to hear the matters in the said paragraph. G H

It was the submission of learned counsel that Section 239(1) merely gives the Court of Appeal original jurisdiction in election matters and that the court was wrong to assume that since the jurisdiction of the court was provided for in the Constitution, it would then have jurisdiction to try any complaints on any aspects of the Constitution. In view of the fact that Section 239 is subject to the Constitution, it will therefore be subject to Sections 251 and 272 of the Constitution which provide for the jurisdiction of the Federal High Court and State High Courts respectively, counsel submitted. He submitted that breaches against the Constitution and Companies and Allied Matters Act are only cognisable under the various courts mentioned in the Constitution. On the special jurisdiction of the Election Tribunal or the Court of Appeal, counsel referred to Yerokun v. Adeleke (1960) SCNLR 267 at 272; Sanyaolu v. INEC (1999) 7 NWLR (Pt. 612) 600 at 608; Ezeobi. Nzeka (1989) 1 NWLR (Pt. 98) 478 at 490 and Anazodo v. Audu which counsel cited as (1991) (Pt. 600) 530 at 547, omitting the name of the Law report and the volume. He also cited Jidda v. Kachallah (1999) 4 NWLR (Pt. 499) 426.

On Issue No. 2, learned counsel submitted that the Court of Appeal was in error in not striking out paragraphs 12, 14 and 16 on ground of incompetence for non-joinder of necessary parties. He cited Section 133(2) of the Electoral Act and the following cases: Egolum v. Obasanjo (1999) 5 S.C. (Pt. 1) 1; (1999) 7 NWLR (Pt. 611) 355; Buhari v. Yusuf S.C. 116/2003 delivered on 27<sup>th</sup> June, 2003 (2003) 6 S.C. (Pt. II) 156; Nnamani v. Nnaji (1999) 7 NWLR (Pt. 610) 313 at 332; Onojom v. Egari (1999) 5 NWLR (Pt. 603) 416; Lamido v. Turaki (1999) 4 NWLR (Pt. 600) 578; Tafida v. Bafawarawa (1999) 4 NWLR (Pt. 397) 525; Maikori v. Lere (1992) 3 NWLR (Pt. 231) 525; NEC v. Izuogu (1993) 2 NWLR (Pt. 275) 270 and Oroh v. Buraimoh (1990) 2 NWLR (Pt. 134) 64.

Learned counsel submitted on Issue No. 3 that the 5<sup>th</sup> to 39<sup>th</sup> respondents and 42<sup>nd</sup> to 56<sup>th</sup> respondents are necessary parties and ought to be joined. He cited Amon v. Raphael Tuck and Sons Ltd. (1956) 1 All NLR 273 at 279; Lajumoke v. Doherty. (1969) NMCR 281 AT 287; Asanyi v. Jolayemi (2001) 10 NWLR (Pt. 722) 516 at 536; Aromire v. Awoyemi (1972) 1 All NLR (Pt. 1) 101 and Uku v. Okumagba (1974) 3 S.C. 35.

Learned counsel submitted on Issue No. 4 that paragraphs 20(3) and 20(4) of the petition are unmaintainable as they are incompetent. Citing Section 144 of the Electoral Act, 2002, counsel submitted that only the Independent National Electoral Commission has the power to recommend anybody for prosecution.

B

On Issue No. 5, learned counsel submitted that the Court of Appeal was in error in dismissing a motion which partly succeeded. He cited Emesim v. Nwachukwu (1999) 6 NWLR (Pt. 605) 156 at 168 and Egwu v. Muahinkwu (1997) 4 NWLR (Pt. 501) 574 at 584. He urged the court to allow the appeal.

C

Mr. A.J. Owonikoko, for the 1<sup>st</sup> and 2<sup>nd</sup> respondents/cross appellants, submitted on Issue No. 1 that the Court of Appeal made a very important and careful qualification, which the appellant ignored. He relied on Attorney-General of Abia State v. Attorney-general of the Federation (2002) 3 S.C. 106; (2002) 6 NWLR (Pt. 763) 264. He submitted that all the authorities cited in the appellant's brief were erroneously relied upon. He gave nine reasons at pages 8 to 10 to substantiate his submission. He cited the following cases on the issue: Unibiz. Nig. Ltd. v. C.B.C.I (2003) 2 S.C. 23; (2003) 6 NWLR (Pt. 816) 402; Obi v. Mbakwe (1984) 1 SCNLR 192 at 205; Chief Fawehinmi v. IGP (2002) 5 S.C. (Pt.1) 63; (2002) 7 NWLR (Pt. 767) 606 at 682; Shodipo v. Leminkainen OY (1986) AII NLR 78 at 98; WAB Limited v. Savannah Ventures Ltd. (2002) 5 S.C. (Pt.II) 84; (2002) 10 NWLR (Pt. 775) 401 at 429; Miscellaneous Offences Tribunal v. Okoroafor (2001) 9 – 10 S.C. 92; (2001) 18 NWLR (Pt. 745) 295 at 352; Tukur v. Government of Gongolo State (1989) S.C. 1; (1989) 9 S.C. 1; (1989) 4 NWLR (Pt. 117) 517; Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt. 135) 688. He also cited the following statutes; Section 38 of the Companies and Allied Matters Act, Laws of the Federation of Nigeria, 1990, Sections 8 – 18 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990; Section 15 of the Trade Unions Act, Cap. 437, Laws of the Federation of Nigeria, 1990.

D

E

F

G

On Issue No. 2, learned counsel submitted that paragraphs 12, 14 and 16 of the petition are not incompetent for non-joinder of parties.

Citing Nwobodo v. Onoh (1984) 1 SCNLR 1 at 54; Buhari v. Yusuf (2003) 6 S.C. (Pt. II) 156; (2003) 40 WRN 124; Ekenam v. Onyeji (1999) 12 NWLR (Pt. 631) 507 at 515; and Ifeanyi Chukwu (Osondu) Ltd. V. Soleh Boneh (2000) 3 S.C. 42; (2000) 5 NWLR (Pt. 656) 322 at 352 – 353, B counsel submitted that since the petitioners pleaded in paragraph 16(b) that the persons were unknown, they could not have joined the alleged thugs and hoodlums and illegally deployed police and army who were unknown, vide paragraph 16(6) of the petition.

C Learned counsel submitted on Issue No. 3 that the parties which were sought to be struck out from the case by the appellant are necessary parties in the extended categories under Section 133(2) of the Electoral Act, as interpreted by this court in Buhari v. Yusuf (supra). He cited Ojukwu v. Onwudiwe (1984) 15 NSCC 172 at 194; Yusuf v. Obasanjo. D SC.122/03 (2003) 9 – 10 S.C. 53) and Atake v. Afejuku (1994) 3 NWLR (Pt. 368) 379 at 408. He contended that counsel for the appellant, not briefed by the 42<sup>nd</sup> to 55<sup>th</sup> respondents, cannot be heard to raise the issue because the right of audience in a case is not at large. He cited Rule 22 of E the Rules of Professional Conduct and the case of Atake v. Afejuku (1994) 9 NWLR (Pt. 368) 379 at 408.

On Issue No. 5, learned counsel said that he did not appreciate the issue as it did not reflect the order of the court. He urged the court to F resolve the issue against the appellant.

Arguing the cross appeal, learned counsel submitted that paragraphs 13 and 17 of the Amended Petition were wrongly struck out. He cited Sections 134(1), 135(1) of the Electoral Act and the following cases: A-G Federation v. A-G Abia State (2001) 7 S.C. (Pt. 1) 32; (2001) 11 G NWLR (Pt. 725) 689, Yusuf v. Obasanjo (supra); Buhari v. Yusuf, SC. 116/03 (2003) 6 S.C. (Pt.II) 156; Cardoso v. Daniel (1986) 2 NWLR (Pt. 20) 1 at 16-17; Ebba v. Ogodo (2000) 6 S.C. (Pt. 2) 133 at 152; Ege Shipping and Trading Ind. v. Tigris Intl. Corp. (supra); Idakwo v. Ejiga H (2002) 7 S.C. (Pt. II) 168; (2002)13 NWLR (Pt. 783) 156 at 166 – 167 and Orugbo v. Una (2002) 9 – 10 S.C. 61 (2002) 16 NWLR (Pt. 792) 175 at 199. He urged the court to dismiss the appeal and allow the cross appeal.



Mr. Roland Otaru for 2nd respondent/cross appellant submitted on Issue No. 1 that from the tenor of the pleadings, breaches of the Nigerian Constitution and the Companies and Allied Matters Act, 1990 do not relate to issues which can be challenged in an election petition. He cited Section 134(1) of the Electoral Act, 2002; provisions of the Constitution and the following cases: *Afro Continental (Nig.) Ltd, v. Co-operative Association of Professionals Inc.* (2003) 1 S.C. (Pt.III) 1; (2003) 5 NWLR (Pt. 813) 303 at 318; *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341; *Matori v. Dangaladima* (1993) 3 NWLR (Pt. 281) 266; *Hon. Minister for Works and Housing v. Tomas Nigeria Limited* (2002) 2 NWLR (Pt. 752) 740 at 772; *Ogunmokan v. Military Administrator Osun State* (1999) 3 NWLR (Pt. 594) 261; *A-G Federation v. Guardian Newspapers Ltd.* (1999) 5 S.C.(Pt.III) 59; (1999) 9 NWLR (Pt. 618) without the page number; *Aiao v. Alao* (1985) 5 NWLR (Pt 45) 802 and *Tukur v. Gov. of Gongola State* (1989) 9 S.C. 1; (1989) 4 NWLR (Pt. 117) 517 at 459. B C D

Learned counsel submitted on issue No. 2 that the Court of Appeal ought to have struck out the names of the 5th to 39th and 56th respondents in the circumstances of the case because they are not necessary and desirable parties in the determination of the issues in the petition. He cited *Central Bank of Nigeria v. Qkojie* (2002) 3 S.C.99; (2002) 8 NWLR (Pt. 768) 48 at 61 and 62; *General Buhari v. Alhaji Yusuf* (2003) 6 SC (Pt.II) 156 at 174 and *Global Transport Oceanico S.A. v. Free Enterprises Nigeria Ltd.* (2001) 2 S.C. 154 (2001) 5 NWLR (Pt. 706) 426 at 441 E F

On Issue No. 3, learned counsel submitted that in view of the fact that the petitioners made very serious allegations against police officers, armed personnel and electoral officers, they ought to have been joined in the petition; and that failure to join them rendered the petition incompetent He cited *Egolum v. Obasanjo* (1999) 5 S.C. ( Pt.1) 1; (1999) 7 NWLR (Pi. 611) 353 at 397; *Buhari v. Yusuf* (supra); *A-G Lagos State v. A-G Federation* (2003) 6 S.C.(Pt.1) 24, (2003) 12 NWLR (Pt.833) 1 and Section 133(2) of the Electoral Act, 2002. He urged the court to allow the appeal. G H

Learned counsel for the 37th and 38th respondents, Chief M. O. Ayorinde adopted and relied on arguments proffered in the 1st and 2nd respondents' brief filed on 22nd October, 2003.

On Issue No. 3, counsel made the following additional submissions.

He submitted that only counsel for the 37th and 38th respondents can raise the issue of misjoinder of the 37th and 38th respondents, and that the appellant's counsel cannot raise the issue on behalf of the two respondents.

B He cited *Atake v. Afejuku* (1994) 9 NWLR (Pt 368) 379.

Learned counsel submitted that if the two respondents are left out of the substantive petition, their interests in the outcome of the petition will be irreparably prejudiced as they have already shown by the way of processes filed on their behalf that they intend to support the nullification of the election result. He cited *A-G Federation v. A-G Abia State* (2001) 4 S.C.(Pt.1) 1; (2001) 6 MJSC 89; *Green v. Green* (1987) 1 NWLR (Pt. 61) 480 at 493 and *Qdunze v. Nwosu* (2000) 20 WRN 28. He urged the court to dismiss the appeal.

D Mr. A..O. Okeaya-Inneh, counsel for the 40th to 55th respondents submitted that the decision of the Court of Appeal is wrong and cannot be supported. Citing *Kotove v. CBN* (1989) 4 S.C. (Pt.1), (1989) 1 NWLR (Pt. 89) 419; *Adefulu v. Oyeshile* (1989) 5 NWLR (Pt. 122) 377; *Lagos City Council v. Ajavi* (1970) All NLR 293 at 297; *Eliochin Nigeria Ltd. v. Mbadiwe* (1986) 1 NWLR (Pt 14) 47; *Ajide v. .Kelani* (1985) 3 NWLR (Pt. 12) 248 at 269 and *Abave v. Ofili* (1985) 1 NWLR (Pt. 15) 154, counsel urged the court to allow the appeal.

F Mr. Otaru, in his 2<sup>nd</sup> respondent's brief in respect of the petitioners/cross-appellant's brief dated 22<sup>nd</sup> October, 2003, reproduced paragraphs 13 and 17 of the Amended Petition and submitted that the paragraphs are not in relation to issues which can be adjudicated upon in an election petition. He also submitted that the averments contained in paragraph 13 do not come within the province and purview of the provisions of Section 134 of the Electoral Act, 2002. On paragraph 17, counsel submitted that the paragraph is unnecessary and therefore has become otiose. To learned counsel, the averment in paragraph 17 goes to no issue and it will be an abuse of the process of the court or tribunal for the petitioners to continue to hinge on the retention of the paragraph.

It was the submission of learned counsel that what this court said in respect to paragraph 17 in the case of Buhari v. Yusuf (supra) is inap-

plicable to this case, as the court merely held that the issue canvassed was in respect of joinder of parties. The issue relating to the paragraph has now become a live issue for the determination of this court, learned counsel reasoned.

It was the argument of counsel that in view of the fact that the person to whom paragraph 17 relates is no longer a party in the proceedings, there is no purpose for the retention of the paragraph and it has become non sequitur in the circumstances. Counsel further submitted that the retention of the paragraph will merely be an academic exercise and the courts do not or are not interested in academic pursuits in the adjudication of cases. He cited Global Transport Oceanico S.A. v. Free Enterprises Nigeria Limited (2001) 2 S.C. 154; (2001) 5 NWLR (Pt. 706) 426 at 440.

On the cross-appeal of the cross-appellant, counsel submitted that it borders on academic issues and no purpose whatsoever will be served if paragraph 17 is retained, when the person affected is no longer a respondent in the substantive petition.

Learned counsel submitted in the alternative that the objections raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents do not constitute a demurrer. He cited Section 136(3) of the Electoral Act and the cases of Arjay Limited v. Airline Management Ltd. (2003) 2-3 S.C 1; (2003) 7 NWLR (Pt. 820) 577 at 625 and Nigeria Deposit Insurance Corporation v. Central Bank of Nigeria (supra). He urged the court to dismiss the cross-appeal.

Mr. Adenipekun, in the 1<sup>st</sup> appellant's reply/cross respondents brief submitted that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners/respondents relied on the case of A-G Abia State v. A-G Federation (supra) and wrongly applied it to the facts of this case. He submitted that the decision of A-G Abia State case does not apply to this case. Counsel contended that the jurisdiction conferred on the Court of Appeal by Section 239(1) of the Constitution is not more than the jurisdiction conferred on other courts by the Constitution.

On the argument of the 1<sup>st</sup> respondent that the complaints against breaches of the Companies and Allied Matters Act were not made part of the grounds for presenting the petition, learned counsel argued that in considering whether or not a court has jurisdiction to entertain a matter,

the court is not limited to examine the grounds or the reliefs sought by the plaintiff, but will also examine both the grounds and the facts alleged in the statement of claim. It is the claim of a plaintiff as set out in his writ of summons and Statement of Claim that determines the jurisdiction of the court to adjudicate over a matter, counsel contended. He cited Wema Bank Plc v. Christorock Lab. Ind. Ltd. (2002) 8 NWLR (Pt. 770) 614 at 628 and Section 134 (1) of the Electoral Act, 2002.

On Section 221 of the Constitution, although learned counsel conceded that while the section provides a bar against any association other than a political party from contributions to the funds of any political party or to the election expenses of any candidate at an election, he argued that this is not one of the grounds for questioning the election of any candidate.

On paragraphs 12, 14 and 16 of the Amended Petition, learned counsel called the attention of the court to what Kalgo, JSC., said in Buhari v. Chief Obasanjo (supra) on Section 133(2) of the Electoral Act.

On the cross-respondent's brief of argument, learned counsel submitted that in challenging the jurisdictional power of the court to entertain a suit an appellant may predicate his opposition on any of the following points, i.e.,

- (i) that the Judge was not properly appointed;
- (ii) that the subject matter of the case is not within the territorial jurisdiction of the court;
- (iii) that the claim, the subject matter of the action, is not within the bracket of the power exercisable by the court;
- (iv) that the time or period allowed the court to enter upon the hearing of the suit has expired.

He cited Wema Bank Plc v. Christock Lab. Ind. Ltd. (supra) and Ejiofodomi v. Okonkwo (1982) 11 S.C. 74 and Sections 131 (1) and 134(1) of the Electoral Act, 2002.

Citing Ibrahim v. INEC (1999) 8 NWLR (Pt. 614) 334 at 351; National Electoral Commission v. National Republican Convention (1993) 1 NWLR (Pt. 267) 120 at 12 and Adebisi v. Babalola (1993) 1 NWLR (Pt. 267) 1 at 11, counsel submitted that the grounds recognized for purpose

of presenting an election petition are acts or omissions that were contemporaneous with the conduct of the election and that Election Tribunal has no power to investigate matters which took place before the conduct of the election.

Learned counsel apparently re-opened his arguments on paragraphs B 13 and 17 in the rest of his brief and the preliminary objection by the cross respondents. He cited Tafida v. Bafarawa (1999) 4 NWLR (Pt. 597) 70 and Ikeazor v. Elozub (1999) 8 NWLR (Pt. 618) 153. He urged the court to allow the main appeal and dismiss the cross-appeal.

In the Amended Petition, the petitioners complained against breaches C of the Constitution and the Companies and Allied Matters Act, 1990 in paragraphs 10, 11 and 12 thereof. The Court of Appeal said on the issue at pages 98 and 99 of the Record:

*“The main ground upon which paragraph 10 was attacked is that D the complaints in it only constitute infractions of the Constitution and Companies and Allied Matters Act (CAMA) and as such by virtue of Sections 131 to 134 of the Electoral Act, are not matters for Election E Petition but for the High Court and Federal High Court. Indeed it is true that some of the matters complained of in the paragraph relate to breaches of the Constitution and Companies and Allied Matters Act but the fact F that these breaches related to or arose out of the conduct of presidential election or properly linked to such election under the 1999 Constitution and the Electoral Act 2002, only this Court to the exclusion of any other Court in Nigeria that has the original jurisdiction to hear and determine such questions under Section 239(1) of 1999 Constitution in an election petition.”*

Learned counsel for the 1<sup>st</sup> petitioner/respondent drummed into G our ears that the Court of Appeal, by the above, made “very important and careful consideration” to the issue of breach. With the greatest respect, that argument does not convince me a bit. Complaints against the conduct of elections can only be found in the Electoral Act, as the Act H provides for breaches in the conduct of elections. The Electoral Act is a comprehensive Act which deals with the conduct of elections in this country. The courts are bound to look into the Act in cases of breach in

the conduct of elections.

Legislation is an exact legislative conduct of the Legislature. Where a legislation is clear and unambiguous, the courts must interpret the legislature in that clear and unambiguous content and not enlarge its content to include other statutes not anticipated by the Legislature in the legislation. It is a principle of legal drafting that where a legislation intends to incorporate or make cross reference to another statute, this will be clearly done in the sections of the legislation. And here I must say that I do not see any of the sections of the Electoral Act either incorporating or making cross reference to the provisions of the Constitution or the Companies and Allied Matters Act in the context of the factual situation in paragraphs 10, 11 and 12 of the Amended Petition, if I may so restrict myself.

A court which, in the exercise of its interpretative jurisdiction, imports a statute to another statute when the enabling statute does not anticipate such importation, will be said to be making the law in a bad way because by that, it is changing places with the legislature. No court can do such a thing.

The applicable law in an action or matter is the enabling law. It is the driving force of the action or matter, in the sense that it gives birth to the action or matter. The duty of the court is to interpret that enabling law because it is the 'king' of the action or matter, if I may put it generically.

The Court of Appeal is vested with original jurisdiction in respect of election to the office of the President. This is contained in Section 239 of the Constitution. Since the Section 239 jurisdiction is based on election, the applicable law, which is the enabling law, is the Electoral Act of 2002.

Pleadings erect the facts on which the party or parties rely in proving their case at trial. They must be based or related to the applicable law, which is the enabling law. They cannot go outside the enabling law on a voyage of discovery or on a wild goose chase. Where pleadings vest such powers on the applicable law, the courts are bound to order them to hold their brakes if they have gone outside the applicable law in the judicial process.

So much of the law. Let me take a few examples in the Amended

Petition:

*“10(a) The 40<sup>th</sup> respondent failed to exercise independence of action and judgment in the conduct of the election in that after date for the elections were announced, the 40<sup>th</sup> Respondent continued to take directions from and/or hold consultations with the executive arm of the federal government headed by the 1<sup>st</sup> respondent and his party; in contravention of the provisions of Section 158 of the Constitution and paragraph 15(a) (c) and (f) in Part 1 of the Third Schedule to the Constitution of the Federal Republic of Nigeria, 1999.*

*(c) 40<sup>th</sup> respondent failed to monitor the campaign of the 1<sup>st</sup> respondent and its political party, 2<sup>nd</sup> respondent, after the date of election had been announced, contrary to paragraph 15(c) and (f) of Part 1 of the Third Schedule to the Constitution of the Federal Republic of Nigeria, 1999.*

*(d) By reason of the failure in (c) the 1<sup>st</sup> and 2<sup>nd</sup> respondents after the nomination of the former as candidate of the latter for the presidential election, held a fund raising at Sheraton Hotel & Towers Abuja on the 16<sup>th</sup> day of January, 2002, at which a Foreign donation of ONE MILLION EUROS, AMONGST OTHER SUMS in excess of One Billion Nine Hundred Million Naira was announced received from mostly undisclosed sources contrary to Section 225 (2) of the 1999 Constitution, and the said money was never remitted to the 40<sup>th</sup> respondent.*

*(e) By reason of the failure in (c) the 56<sup>th</sup> respondent under the aegis of Corporate Nigeria embarked on additional fund raising for the 1<sup>st</sup> respondent from registered corporate organizations in Nigeria contrary to the provisions of the Companies and Allied Matters Act (1990) which forbids the application of any funds of a NIGERIAN registered company to a political purpose.”*

*11(a) 40<sup>th</sup> respondent failed to exercise independence of action and judgment in the conduct of the election in that after the date for the election were announced, 40<sup>th</sup> respondent failed to disqualify the 1<sup>st</sup> respondent for using or conniving at the using of ethnic and tribal affiliation to canvass for votes for him; and permitting and or procuring unregistered political associations to canvass for votes for him in the predomi-*

*nantly Yoruba states of Lagos, Ogun, Oyo, Ondo, Osun, Ekiti and Kwara in the election, to wit, Afenifere and Yoruba Council of Elders (YCE) under the guise of 39<sup>th</sup> respondent on the basis of ethnicity, contrary to Section 221 of the Constitution.*

B 12(a) *The 40<sup>th</sup> respondent failed to exercise independence of action and judgment in the conduct of the election in that after the date for the elections were announced, 41<sup>st</sup> respondent continued to take directions from and/or hold consultations with the executive arm of the federal government headed by the 1<sup>st</sup> respondent; in contravention of the provisions of Section 158 of the constitution and paragraph 15 (a) in Part 1 of the Third Schedule to the Constitution of the Federal Republic of Nigeria, 1999 as to deployment of police and armed forces and paramilitary personnel to supervise the conduct of the elections."*

D And so by the above averments, the petitioner contended that Sections 158, 221, 225(b) and paragraph 15(a), (c) and (f) in Part 1 of the Third Schedule to the Constitution were breached. What are the provisions of the above sections and paragraph? Section 158 (1) provides for the independence of certain bodies, including relevantly the Independent National Electoral Commission. Section 221 provides for prohibition of political activities by certain associations in the areas of canvassing for votes or contribution to the funds of any political party. Section 225(b) deals with the finances of political parties. And finally, paragraph 15(a), (e) and (f) provide for the functions of the National Electoral Commission.

G The big question is this: what is the relationship of the above provisions in terms of breach of the Electoral Act? In terms of breach of the Electoral Act, the above provisions are merely pious and cannot be invoked even in the remotest sense to sustain breach of the Electoral Act.

H What is the relevance of paragraph 10(e) to the provisions of the Electoral Act? I do not see any; and the sub-paragraph does not pretend about this. It clearly states that the conduct of the 56<sup>th</sup> respondent was contrary to the Companies and Allied Matters Act, 1990. What has that to do with the Electoral Act which the Court of Appeal can exercise original jurisdiction as it affects presidential election?



I think I can go a step further. Section 251(e) of the Constitution of the Federal Republic of Nigeria, 1999 vests original jurisdiction in the Federal High Court.

*“arising from the operation of the Companies and Allied Matters Act or any other enactment replacing that Act or regulating the operation of companies incorporated under the Companies and allied Matters Act.”* B

I therefore ask: where lies the original jurisdiction of the Court of Appeal to hear and determine the averment in paragraph 10(e) of the amended Petition? I do not see any and there is none.

Jurisdiction is a very hard matter of law which is donated by the Constitution and the enabling statute. It is also a very sensitive matter in the judicial process. Considering its very hard and sensitive nature, courts of law must always bow or kowtow to the provisions of the Constitution and the enabling statute. On no account should we remove from a court which has jurisdiction to hear a matter to another court which has no jurisdiction to hear. That is not right and we should not do it. D

I must pause here to say something by way of ameliorating the legal position above as it relates to the Constitution of the land. And it is this. The only time the Constitution of the land can be invoked in election matters is when a provision of the Electoral Act, 2002, is in conflict with any provision of the Constitution. In such a situation, in the exercise of the kingly position of the Constitution as the supreme law, as provided in Section 1(3) of the Constitution, courts have the jurisdiction to declare the provision of the Electoral Act in conflict with the Constitution null and void ab initio. F

I must be quick in saying that the paragraphs mentioned above did not aver to any conflict. All they averred to is that actions of certain persons were in conflict with the provisions of the Constitution. Since the cynosure or fulcrum of the action is the Electoral Act and not the Constitution, the petitioner cannot be heard to so aver. G

In my humble view, the paragraphs wildly went too far and I expected the Court of Appeal to tame them. Since the Court of Appeal did not do that, I will do just that. Accordingly, the following paragraphs are hereby struck out. They are paragraphs 10(a),(c),(d),(e), 11(a) and 12(a). H

Accordingly, I allow the appeal on Issue No. 1 as formulated by the 1<sup>st</sup> appellant.

And that takes me to Issue No. 2. It has to do with the non-joinder of the persons mentioned in paragraphs 12, 14 and 16 of the Amended  
B Petition. Those persons include members of the police force and the armed forces. Learned counsel for the 1<sup>st</sup> appellant heavily relied on Section 133(2) of the Electoral Act, in particular, the words “*any other person who took part in the conduct of the election*”. He further relied on Egolum v. Obasanjo; Buhari v. Yusuf (supra); and other cases mentioned  
C above.

In Egolum v. Obasanjo (supra), the petitioner made many serious allegations including fraud and other electoral offences against electoral officers, returning officers, etc. They were not joined in the petition.  
D This court held that non-joinder of the persons mentioned in paragraphs 9, 10, 12, 13, 14, 15, 16, 17, 18 and 19 made the paragraphs incompetent. Belgore, JSC., said at page 397:

*“The principle of our law is that no person shall be guilty without  
E being given an opportunity to defend himself. Every person against whom an allegation is made must be confronted with that allegation so that he can offer his defence. That is the purport of Section 50(2) of the Decree No. 6 of 1999 (supra). The petitioner who complains that Electoral Officer, a Presiding Officer, a Returning Officer or any other person involved in the election buy conduct has initiated the election must presume that officer etc, as a necessary party and must make him a party. In paragraphs 9, 10, 12, 13, 14, 15, 16, 17, 18 and 19 of the petition the petitioner made many serious allegations including fraud and other electoral offences but the electoral officers, returning officers, etc. have not  
F been made parties i.e. respondents to this petition. This shortcoming in the petition made those paragraphs incompetent.”*  
G

In the factual situation in Egolum, members of the police and armed  
H forces were not involved. This court dealt with electoral officers. In Egolum, it was Section 50(2) of Decree No. 6 of 1999 which is generally similar to Section 133(2) of the Electoral Act, 2002, that was interpreted. It is my view that the expression “*Every person*” in Section 50(2) of

Decree No. 6 of 1999 is similar to the expression “*any other person*” as the expression relates to joinder of necessary parties.

In Buhari v. Yusuf (2003) 6 S.C. (Pt.II) 156; (2003) 14 NWLR (Pt. 841) 446, the issue involved was the joinder of General Buhari and the ANPP as 3<sup>rd</sup> and 4<sup>th</sup> respondents respectively. They brought a motion to be struck out on the ground that they are not necessary parties as envisaged in Section 133(2) of the Electoral Act. This court held that the appellants, the 3<sup>rd</sup> and 4<sup>th</sup> respondents, who contested the election and lost cannot be made respondents to the petition.

In the light of the issue involved in the case, any other pronouncement of this court outside that issue will be regarded as an obiter dictum. Counsel for the 1<sup>st</sup> appellant quoted Uwaifo, JSC., in his leading judgment at pages 497 and 498 which construed Section 133(2) of the Electoral Act:

*“It seems to me that if the ejusdem generis rule were to be applicable, the expression ‘any other person who took part in the conduct of an election’ would have to be restricted to the INEC officials who took part in the conduct of the election. In my view, such restriction could not be justified in the case for example, of a police officer who was assigned the duty to ensure orderly peaceful and free conduct of an election in a constituency but assisted instead to stuff ballot boxes with unlawful ballot papers. He is a necessary party who by his role in the conduct of the election can be made a respondent even though not an INEC official because he reasonably falls into the category of ‘any other person who took part in the conduct of an election.’”*

As indicated above, learned counsel for the 1<sup>st</sup> appellant relied heavily on the above, which in my view is obiter and therefore not binding on this court. My learned brother merely gave an example and he did not pretend about it. The use of the words “*for example*” is clear on the point. Assuming that I am wrong and that the above is a ration decidendi, I can make a distinction between Buhari v. Yusuf and this case and here the operative words of my learned brother, Uwaifo, JSC., are underlined:

*“For example, a police officer who was assigned the duty to ensure orderly, peaceful and free conduct of an election in a constituency*

*but assisted instead to stuff ballot boxes with unlawful ballot papers*"

I have read paragraphs 12, 14 and 16 of the Amended Petition and I do not see any averment vindicating the position taken by my learned brother to justify the applicability of the case in this appeal. In all the three paragraphs vague averments are made in respect of the police and the armed forces without specific mention of names of the police and armed forces to make them parties.

Let me take paragraph 16(b). It averred as follows:

*In majority of local government areas in those states, election results were compiled by persons unknown other than officials of the 40<sup>th</sup> respondent and transmitted by the State Resident Electoral Commissioners to the 41<sup>st</sup> respondent."*

A person unknown is a person not known. In other words, by the averments, the petitioners did not have any knowledge by way of names or identifiable person or persons who compiled the election results in the local government areas. How will the respondents expect the petitioners to join persons the petitioners do not know? It is both a factual and legal impossibility.

That takes me to Issue No. 3. The 5<sup>th</sup> to 39<sup>th</sup> respondents are presidential candidates and their parties. The 42<sup>nd</sup> to 56<sup>th</sup> respondents are the Residential Electoral Commissioners of some of the States and Dr. Ndidi Okereke-Onyiuke, the Co-ordinator, Corporate Nigeria. Although this court held in Buhari v. Yusuf (supra) that in a case where the challenge is in respect of the validity of the entire election, there will be no need to bring into the proceedings any other unsuccessful candidate as respondent, the case here is different.

Perhaps I can bring out the difference by referring to what Coleridge, CJ., said in the Maidenhead Case, Lovering v. Dawson (No. 1) (1975) LR 10 CP 711:

*"I am of the opinion that Poulton could not be properly, be so joined. If the question now before us had been exactly the converse of that which we decided in the Oldham Case, Yates v. Leach LR 9 CO 605, it may be that our decision would be different. If Poulton had come forward to claim a seat – if he had insisted upon making himself a re-*

*spondent – it may be that we should have held that he had taken upon himself all the liabilities which attach to a respondent. But it by no means, follows that the converse of the proposition is true, that, without any act or consent on his part and against his will, a man can be made a respondent so that the petitioner may gain rights against him.”* B

In construing the above statement of the law, which Ayoola, JSC., seems to say gave birth to the proposition of law in Halsbury’s Laws of England “that an unsuccessful candidate cannot be made a respondent to an election petition against his will”, said at page 520 in the case of Buhari v. Yusuf (supra). C

*“To my mind that statement implies that an unsuccessful candidate can be made a respondent to an election petition with his consent or if he does not object to his being so made.”*

I quite agree with him. That is a correct interpretation borne out from the case of Lovering v. Dawson (supra). Although the statement of Ayoola, JSC., is an obiter, I am inclined to follow it and I hereby follow it in this case because it is apposite. D

The 5th to 39th respondents did not raise any objection to their joinder in the petition. In other words, they did not object to their joinder. As a matter of fact, they did not file replies to the petition and therefore taken as not joining any issue in the petition. In Buhari v. Yusuf, the appellant raised an objection to his joinder at the Court of Appeal, an issue which was finally resolved in this court. But in this case, the 5th to 39th respondents did not raise any objection to their joinder. In the circumstances, I am of the view that there is a tacit consent on the part of the 5th to 39th respondents. I therefore do not see my way clear in acceding to the request of the 1st appellant that they are not proper parties and should be struck out. And what is more, the 1st appellant has no locus standi to raise the issue, particularly when the 5th to 39th respondents are also in the matter and represented by counsel. It remains to add in conclusion on this aspect that the above position I have taken applies mutatis mutandis to the 56th respondent, Dr. Ndidi Okereke-Onyiuoke; as she too did not raise any objection to her joinder. E F G H

The case in respect of the 42<sup>nd</sup> to 55<sup>th</sup> respondents is a much straightforward one. It is clear from the Amended Petition that they played

different roles in the Presidential Election and therefore come within the purview of Section 133(2) of the Electoral Act, 2002. That they did not file reply to the petition is neither here nor there. After all, our civil procedure rules, including rules governing elections, do not force a defendant  
B to defend an action. He can decide not to participate in the action if he feels so. And no law can force him to defend the action.

I go to the fourth issue. It is in respect of reliefs 18, 19 and 20. Dealing with the reliefs, the Court of Appeal said at page 101 of the  
C Record:

*“As for paragraphs 18, 19 and 20 of the petition which are mainly asking for reliefs based on the preceding paragraphs of the petition, the paragraphs shall remain as valid paragraphs to await the outcome of the petition as to the proof of or otherwise of the paragraphs supporting the  
D reliefs being sought. In any case paragraph 20(4) of the petition had earlier been attacked by the 40<sup>th</sup> – 55<sup>th</sup> respondents in their preliminary objection heard and determined by this Court in its ruling delivered on 5 – 6 – 2003.”*

In my view, it will be premature to strike out paragraphs 18, 19 and 20 of the Amended Petition. The averments therein have to do with evidence which the petitioners are entitled to lead at the hearing of the petition. It will be injustice to the petitioners to stop them at this stage  
E from leading evidence in vindication of the paragraphs.  
F

That apart, it is trite law that the merits of a matter cannot be taken at an interlocutory stage because that will be tantamount to hearing the matter when it is not ripe for hearing. Again, that will be injustice to the petitioners and I cannot be a party to such injustice. And finally, in the  
G light of the position I have taken in Issue No. 3, Issue No. 4 as it relates to paragraphs 19 and 20, is no more available to the 1<sup>st</sup> appellant.

Issue No. 5 is in respect of the dismissal of the 1<sup>st</sup> appellant’s motion on notice. This is a most straight forward issue. Let me read the  
H order made by the Court of Appeal at pages 102 and 103 of the Record:

*“In the result, the application filed by the 1<sup>st</sup> respondent on 12-6-2003 raising objection to the petition as contained in paragraphs 1 and 2 of his Reply also filed on 12-6-2003, except for the striking out of para-*

graphs 13 and 17 of the petition has failed and the same is hereby dismissed with no order on costs. Similarly, the application of the 2<sup>nd</sup> respondent filed on 13-6-2003 raising objection to the petition, except for striking out paragraphs 13 and 17 of the petition has also failed and the same is hereby dismissed with no order on costs.”

The above is clear to me. It contains two orders. The first order is striking out paragraphs 13 and 17. The second order is dismissal of the application. The operative word in the order is “except”, a word which in the context means “apart from”. In other words, the order of the Court of Appeal is to the effect that apart from paragraphs 13 and 17 of the Amended Petition which are struck out, the entire application of the 1<sup>st</sup> appellant is dismissed.

And what is wrong with that? Why the storm raised by the 1<sup>st</sup> appellant? A court has the jurisdiction to strike out part or parts of relief or reliefs sought and dismiss other part or parts. I think the 1<sup>st</sup> appellant, with the greatest respect, totally misconstrued the order made by the Court of Appeal. That was why he saw an apparent contradiction. There is no contradiction at all. It was a perfect and smooth order which I cannot fault.

Learned counsel quoted what I said in the Court of Appeal in Emesim v. Nwachukwu (1999) 6 NWLR (Pt. 605) 154 at 168 as follows:

*“I have said it before and I will say it again that dismissal of an action is one of the gravest sanctions a plaintiff can face if not the gravest. Therefore a court of law should be most reluctant, loath or slow in invoking its power of dismissal.”*

I still maintain the above position. I did not take the position in Emesim that a court of law must not dismiss an action. That should be quite a new one and an obviously wrong one. A court of law is entitled to dismiss a matter if that meets the justice of the case.

I do not agree with the submission of learned counsel for the 1<sup>st</sup> appellant that the Court of Appeal “was in error to dismiss a motion which partly succeeded”. The answer is in the way the order was couched. And I have dealt with the way the order was couched. I shall not repeat

myself.

And that takes me to the only issue in the cross-appeal and it is in respect of the striking out of paragraphs 13 and 17 of the Amended Petition. While paragraph 13 deals with what the 1<sup>st</sup> and 2<sup>nd</sup> petitioners/  
B respondents/cross appellants call “*statutory illegalities in the conduct of the election*”, paragraph 17 deals with what they call disqualification of 3<sup>rd</sup> respondent “*rendering the votes cast for him invalid and void*”.

What did the Court of Appeal say in striking out the above paragraphs. Let me again take the liberty of quoting the relevant portion of the  
C ruling of that court. The court said at pages 125 and 126 of the record:

“*Paragraph 13 of the petition is a complaint on statutory illegalities in the conduct of the election. It relates to the provisions of the Act alone which does not make such complaints a ground for questioning an  
D election under Section 134 of the Act. In the absence of any complaint of breach of the 1999 Constitution in the paragraph to sustain it, paragraph 13 of the petition is hereby struck out for non-compliance with the Electoral Act, 2002... Paragraph 17 of the petition on the other hand con-  
E tains complaints against persons who are no longer parties to the petition. The preliminary objection on the incompetence of the paragraph is therefore hereby sustained and paragraph 17 of the petition is hereby struck out*”.

Can the above be faulted on any rational or legal basis? I think not.  
F The Court of Appeal correctly appreciated the legal position and rightly struck out the paragraphs. Let me take the issue a bit further. Section 134 of the Electoral Act, 2002, is the “*barometer*” for the determination of  
G grounds in which an election petition can be questioned. Although the cross-appellants titled paragraph 13, “*statutory illegalities in the conduct of the election*”, the so-called “*statutory illegalities*” are not born out from Section 134 of the Act. It is elementary law that a plaintiff, in the  
H commencement of an action, must comply strictly with the provisions of the enabling law. He cannot go outside the enabling law for redress. In view of the fact that the whole paragraph 13 which runs from pages 15 to 17 of the Record does not vindicate the law provided for in Section 134 of the Act, the Court of Appeal rightly, in my view, struck out the



paragraph.

Now, to paragraph 17. Paragraph 17 is on the 3<sup>rd</sup> respondent, General Muhammadu Buhari, who was struck out by this court in Buhari v. Yusuf (2003) 6 S.C. (Pt. II) 156; (2003) 6 S.C. (Pt. II) 156; (2003) 14 NWLR (Pt. 841) 446. Learned counsel for the cross appellant quoted B what Ayoola, JSC., and myself said in Buhari v. Yusuf on paragraph 17 of the Amended Petition and submitted that *“the afore stated decision of your Lordships in the BUHARI appeal arising from the same petition and on the propriety of the same paragraph 17, cannot be reversed by the C lower court.”*

There is a distinction between the case of Buhari v. Yusuf (supra) and this appeal. The issue before this court in Buhari was none of joinder and joinder only. It was in that circumstance that made me take the decision that it was premature to consider the paragraph as that will be tantamount to taking the merits of the matter at that stage. This appeal has passed that stage. It does not deal with the joinder of General Buhari. It deals with quite a number of issues which I have dealt with above. In my view, there is enough to take paragraph 17. The horizon or picture is clearer now on the paragraph and I therefore agree with the Court of Appeal that the paragraph should be struck out. D

In sum, the appeal on Issue No. 1 succeeds and it is hereby allowed. The appeal on Issues Nos. 2,3,4 and 5 fails. The cross-appeal F also fails. I make no order as to costs.

---

### MUSDAPHER JSC

I entirely agree. The question submitted for determination under G issue No. 1 whether or not complaints against breaches or infractions of the provisions of the CONSTITUTION and COMPANIES AND ALLIED MATTERS ACT LFN 1990 or for that matter any infraction with any enactment, are cognisable in an election petition? I have no doubt in my H mind that Section 239 of the Constitution merely clothes the Court of Appeal with jurisdiction to deal with the matter specified thereon. The section does not provide for the grounds upon which the issues stated

therein can be questioned. Sections 131 and 137 of the Constitution also merely provide for the qualification of a person to be elected as a president and disqualification of a person to be elected as president respectively. These sections will only come into play or be relevant before the  
 B election. In my view, the election to the office of the president (including the vice president) and to any political office under the 1999 Constitution and under the Electoral Act 2002 can only be questioned under Section 134 of the Electoral Act which clearly states the grounds upon which an  
 C election petition can be based. The Court of Appeal while interpreting an identical section, that is Section 41 of Decree No. 18 of 1992 in the case of Kurfi v. Mohammed (1993) 2 NWLR (Pt. 277) 602 at 616 held that:

*"In conclusion on this point it must be emphasized that every petitioner must try and bring his complaint under one of the three heads of  
 D complaint set out under section 41(1) (a)-(e). If he cannot do so it will be just too bad."*

Thus, under this decision, the provisions of Section 134 of the Electoral Act are exhaustive. An election or return cannot be questioned  
 E on any issue outside the provision of Section 134 of the Electoral Act. I agree with this interpretation. As mentioned above, the relevant Constitutional provisions can only arise before the election i.e., Section 131 of the Constitution begins:-

*"A person shall not be qualified for election to the office of president."*

While section 137 states:-

*"A person shall not be qualified for election to the office of president."*

G With reference to other legislations such as COMPANIES AND ALLIED MATTERS ACT, even if it deals with electoral matters, it usually provides for sanction for any breach and has done so. In the instant case, it has provided for punishment for anybody who made illegal dona-  
 H tions to political parties. In my view such infraction cannot be a basis for questioning an election or return. It cannot be employed to question the validity of an election.

It is for the above and the more detailed reasons in the leading

judgment of my Lord, Kutigi, JSC., which I adopt as mine, that I agree entirely with his decision and the consequential orders as to costs.

### PATS-ACHOLONU JSC

B

I have read the judgment of my learned brother, Kutigi, JSC., in draft and I agree with him. In this case, the 1<sup>st</sup> appellant and the 2<sup>nd</sup> appellant identified for the purpose of determination 5 issues and 3 issues respectively as distilled from the 2 briefs filed by the parties. As a matter of fact the 2<sup>nd</sup> appellant, which is a political party known as the P.D.P., and Chief Olusegun Obasanjo, 1<sup>st</sup> appellant have really identical interests to protect. C

The gravamen of the complaint of the petitioner is to be found in the provision of Section 239(1) of the Constitution of the Federal Republic of Nigeria which states as follows; D

239(1) Subject to the provisions of this Constitution the Court of Appeal shall to the exclusion of any other Court of Law in Nigeria have original jurisdiction to hear and determine any question as to whether; E

(a) Any person has been validly elected to the office of the president or vice president under the Constitution.

It is the joint arguments of the appellants that consideration of any matters not arising out of the purview of Section 134 of the Electoral Act cannot ground a relief for disqualifying the 1<sup>st</sup> appellant and they equally argue that the tribunal ought not to have engaged itself in analyzing on questions of any matter relating to alleged breach of the Constitution, and of the Companies and Allied Matters Act Cap 59 Laws of the “*Federation of Nigeria*”. G

The allegation in the petition speaks of the appellants’ subtle use of or reliance on methods that offend the provisions of the Constitution and CAMA to thwart the will of the people and thereby give themselves undeserved advantage over the 1<sup>st</sup> respondent and other contestants. Ex facie it would at first appear incontestable that where there are allegations of flagrant abuse of power by use of or resorting to unacceptable method by way of mobilizing corporate bodies to contribute a huge sum of money H

as election fund to an incumbent office holder, such allegations ought to be looked into by the tribunal. Attractive as this line of argument would seem, it obviously ignores the provision of Section 134(1) of the Electoral Act. There is no way this court or any court can stretch the interpretation of this Act by assuming the jurisdiction to undertake matters relating to CAMA which ordinarily is vested in the Federal High Court. Besides it is not within the contemplation of the Electoral Act that this court should strain the construction of the said section or for that matter Section 239 of the Constitution, and clothing itself with negative altruistic motive, commence to enlarge the grounds of petition set out in the Electoral Act. Where a party conceives that there has been an infringement of any law, it could decide if so motivated and aggrieved to commence actions in the Federal High Court. This court is not the right court for such a matter. Accordingly this issue is resolved in favour of the appellants.

Another matter made an issue is the complaint of non joinder of some unnamed and unknown but largely described as hordes of people such as some security officers, thugs and other interest groups whose alleged sinister acts were said to have contributed to the emergence of the appellants in the Election. It cannot be contested otherwise that the 1<sup>st</sup> respondent has the right to protest that the appellants used people who were claimed to be under their control to give them advantage in the election if they conceived that these people, whom, it is difficult to specifically identify, aided and abetted the victory of the appellants. This to my mind is a matter they have to prove in court. It is impossible to drag the unknown touts, police, army and hordes of others to court and join them. That would be bizarre. It may be regarded as crude and I dare say abysmal lack of knowledge of the necessary parties to be joined if the petitioner had to make every one within the site of the election venues and whom he did not know or can identify as a party. What matters is the ingredient of the issue complained of, id est, how it affected the result of the election, if any. In our adversary system of jurisprudence we cannot push any facts alleged under the pillow and blanket. Such allegation of incidents that occurred should be subject to proper adjudication by way

of testimonial evidence.

In relation to issue No. 3 on the refusal of the court below to strike out 5<sup>th</sup> – 39<sup>th</sup> respondents and 42<sup>nd</sup> – 56<sup>th</sup> respondents, these are parties who are directly connected with the election and who briefed counsel and are represented by counsel who have not protested their joinder or prayed the court to strike out their names. Can the appellants be heard to complain? Now it is a trite law that the only rational for a party to be joined in an action is that he shall be bound by the verdict of the court and it is reasoned that the matter in controversy cannot effectively and completely be settled in the absence of the party who shall be bound by it. See Amon Raphael Track and Sons Ltd (1956) 1 Q3. 357 at 380; Oyedeji Akanbi v. (Mogayi) & Ors. v. Okunlola Ishola Fabunmi & Ors. (1986) 2 S.C. 431 and Alhaji Raji Oduola & Ors. v. John Ibodebo Coke (1980) 5 S.C. 197. The joined defendants must have identical interests or rights. It is important to emphasise that the plaintiff prosecutes his case against those whom he joined defendants may apply to the court to strike out their names for misjoinder. See also Okafor & Ors v. Nnaife (1973) 1 NMLR 245. I really do not seem to understand the reason for the objection of the 1<sup>st</sup> appellant on this matter. This issue collapses.

On issue 4 as to whether reliefs sought in paras 18, 19 and 20 can sustain the petition it cannot be contested otherwise that it is the trying tribunal that can truly and effectively say whether the reliefs can sustain the case after hearing evidence of the parties. It must be realized that facts are the fountain spring of law. It is facts that give life and meaning to the consideration the court would carefully make before applying the laws. One of the beauties of democracy is the existence of a system that hears before it condemns. It enables the parties to marshal their case clearly before the tribunal of Justice so as to enable the court determine the matter before it forensically. The trial court should be allowed to hear the case properly before the rendition of verdict. That issue fails.

In respect of issue No. 5, I have really nothing more to add to what is contained in the lead judgment.

Now I come to the cross appeal. The grouse of the cross-appellants is the striking out of paragraphs 13 and 17 which they believe (per-

haps erroneously) that these paragraphs form the bulwark of their case. With greatest respect to the argument proffered by the cross-appellants who try to insinuate that the tribunal refused to abide by the decision of this court in Buhari and Anor. v. Yusuf and Anor. This is not so. It should  
 B be noted and dutifully emphasized that when a party's name is struck out the allegation made against that person fades and automatically dissipates as the decision of the Court in striking out the name therefore constitutes the end of that party as far as his or its involvement in the case is concerned. The name of a party is struck out on the application of the party  
 C that joined it or the affected party, and invariably it is a decision of the court after considering other factors.

The consequence of the complaint against a party whose name is struck out is that he is no longer a party as his exclusion would not affect  
 D the party who brought him adversely, particularly when that party consents to his removal from the suit either by act of commission or doing nothing i.e. by omission. It would mean too that he has no case to answer as his presence is not considered necessary for final determination  
 E of the case. The cross appeal fails and is dismissed.

In the final result, the appeal fails except for the 1<sup>st</sup> issue. I agree with the tenor of the lead judgment. I abide by the consequential orders made in the lead judgment.

F

G

H