

COURT OF APPEAL
ENUGU DIVISION

15TH MARCH, 2006. CA/E/EPT/5A/2005, CA/E/EPT/5B/2005, CA/
E/EPT/5C/2005, CA/E/EPT/5D/2005, CA/E/EPT/5E/2005
CORAM:- R. D. MUHAMMAD, P. O. ADEREMI, A. A. AUGIE, S. S.
ALAGOA, J. OMOKRI, JJCA

DR. CHRIS NWABUEZE NGIGE APPELLANT
AND

1. MR. PETER OBI

2. INDEPENDENT NATIONAL

ELECTORAL COMMISSION RESPONDENTS

3. RESIDENT ELECTORAL

COMMISSIONER, ANAMBRA STATE

& 447 OTHERS

CONSTITUTIONAL LAW - Appeal - Right of to the Court of Appeal - Is
as provided by s. 243 (a) of 1999 Constitution - Available to a party to the
proceedings - Or with leave - To any other person having direct interest
in the matter (H1)

APPEALS - Grievance - Right of appeal - Election petitions - Where a
person is a party to the proceedings - But the decision did not wrongfully
affect him - He has no right of appeal (H2)

ACTIONS - Appeal - Definition - A party is confined to his case as
pleaded in the lower court - And is not allowed to make a new or differ-
ent case on appeal (H3)

ELECTION PETITIONS - Appeals - Justice - Making of a new and
different case by 2nd respondent - Vide appeal filed by it - Is condemned
as unfair - And its appeal struck out (H4)

ELECTION PETITIONS - Parties - Electoral Act 2002 s. 133 (1) & (2)
- Where there is no complaint against the conduct of the electoral officer

- There is no need to make him a party (H5)

PLEADINGS - Election petitions - Admission - Where parties joined no issue on a subject - Because it was admitted in the amended reply - Court cannot consider that issue (H6)

APPEALS - Grounds of appeal - Competence - A ground that does not challenge any ratio decidendum - Will be struck out as incompetent (H7)

PLEADINGS - Issues - Joinder of - Question of fact on which no issues were joined - Will not be considered by court (H8)

ELECTION PETITIONS - Waiver - Irregularity - In giving the tribunal a wrong title - Is deemed waived by appellant - Who failed object within a reasonable time (H9)

ELECTION PETITIONS - Election tribunal - Quorum - Judgment delivered by a tribunal where quorum is not consistent - Is not a nullity but may be unsatisfactory - Present judgment is not shown to have occasioned miscarriage of justice (H10)

ELECTION PETITIONS - Amendments - That are not substantial - Were rightly allowed by the election tribunal (H11)

PLEADINGS - Function of - Is to define the issues to be resolved - Facts are to be pleaded not evidence - Court is to read and consider totality of the pleadings - In order to avoid injustice (H12)

ELECTION PETITIONS - Pleadings - Expert opinion - Issues of multiple entries, etc.- Were rightly testified upon by handwriting analyst PW 15 - Whose evidence was not discredited - And falls within the pleadings (H13)

EVIDENCE - Expert opinions - Courts - Opinions of handwriting experts

- How treated by court - A court is not bound by evidence of an expert witness - It has power to compare signatures and documents - Before forming an opinion (H14)

ELECTION PETITIONS - Invalidation - Evidence - Witnesses - Disbelieving evidence of a credible witness in some aspects - Is not perverse - The tribunal rightly invalidated some election results (H15)

ELECTION PETITIONS - Pleadings - Duly - Meaning - Petitioner's claim to be duly elected - Means in accordance with legal requirements - As provided in s.179(2)(a) & (b) of 1999 Constitution - And he need not plead law nor evidence (H16)

ELECTION PETITIONS - Judgments - Justification - Appendix 4 being a chart emanating from the Tribunal's evaluation of evidence - Is part of the judgment - Declaring petitioner the person duly elected as Governor - Is proper in this case (H17)

APPEALS - Judgments - Obiter - Meaning - Ground of appeal that is based on an obiter dictum - Is incompetent and liable to be struck out (H18)

EVIDENCE - Admissibility - Newspaper - Presumption of genuineness - Oneh case - Production from proper custody s. 116 Evidence Act - Is necessary before a newspaper - Not published by Government printer - Will be admitted in evidence (H19)

EVIDENCE - Admissibility - Document - Once tendered but was rejected and marked so - Cannot subsequently be tendered - And admitted in that case (H20)

EVIDENCE - Secondary evidence - Admissibility - Receipts that are secondary evidence vide ss.97, 98 & 210 EA - Proper foundation must be laid - As to whereabouts of the originals - For them to become admissible (H21)

ELECTION PETITIONS - Tribal and religious politics - Being criminal allegation - Must be proved beyond reasonable doubt - The Tribunal rightly held that appellant - Failed to prove the allegation (H22)

B

ELECTION PETITIONS - Pleadings - Joinder of issues - Documents of election results - In respect of Local Government Areas that are not in issue - Were rightly not admitted by the trial tribunal (H23)

C

FACTS

Before the National Assembly/Governorship and Legislative Houses Election Petition Tribunal holden at Awka, Anambra State, the 1st respondent/petitioner filed a petition against the 1st-4th appellants/respondents. 1st respondent contested the gubernatorial elections conducted on 19-4-2003 by the Independent National Electoral Commission (INEC) as the All Progressive Grand Alliance (APGA) Anambra State candidate, while appellant contested as the candidate for the Peoples Democratic Party (PDP). At the conclusion of the election, INEC declared appellant as the winner with 452,850 votes. 1st respondent presented a petition challenging the election results. He sought a declaration that appellant was not duly declared elected, and that he (1st respondent) be declared as duly elected. His alternative prayer that the election be nullified and fresh election be conducted was withdrawn, and struck out.

After a marathon trial, spanning over two years in which a total number of 482 witnesses testified, the Tribunal delivered its judgment and held that the petitioner/1st respondent has proved his case and was accordingly entitled to the reliefs sought. Being dissatisfied appellant has now appealed to the Court of Appeal on forty grounds of appeal from which he raised thirteen issues for the Court's determination. 2nd appellant (INEC) also filed an appeal in which it canvassed that the election be nullified because it was marred by widespread irregularities and malpractices, a stance the court deprecated as an abuse of trust and the judicial process. Three other appeals were filed by various segments of INEC Staff/officials. Pursuant to preliminary objections that were raised, the

other four appeals though consolidated for hearing with the main appeal, were struck out as incompetent.

ISSUES FOR DETERMINATION

1. "Whether upon a proper construction of section 133(2) of the Electoral Act, 2002 and having regard to the petitioner's pleadings and evidence particularly the "facts/particulars relied upon" in his petition, the tribunal below was justified in entertaining the petition in spite of the fact that the presiding officers who produced the Forms EC8A (1) at the various polling booths within the wards in the 13 Local Government Areas challenged by the petitioner as well as the Ward and Local Government Collation Officers indicted by the petitioner were not joined as parties."

2. "Whether upon a proper construction of section 133(2) of the Electoral Act, 2002, and in a view of the petitioner's pleadings and evidence particularly the pleadings under "facts/particulars relied upon" including paragraph 9 thereof, the tribunal below was justified in holding that policemen, soldiers and other security agents involved in the conduct of the election and indicted by the petitioner were not necessary parties and ought not to have been joined in the proceedings."

3. "Whether the tribunal was justified in refusing to sustain or validate the results for all the wards to which the petitioner ascribed wrong names."

4. "Whether the 'National Assembly/Governorship and Legislative Houses Election Petition Tribunal' which heard and determined the petition now challenged in this appeal is known to the 1999 Constitution of Nigeria and is the Tribunal created under the said Constitution to determine petitions concerning gubernatorial elections." Etc.

HELD (Unanimously dismissing the appeal per MUHAMMAD JCA)

Appeal - Right of to the Court of Appeal

1. The right of appeal is a constitutional right which cannot be restricted or expanded by any other law. The Constitution also, provides who can exercise the right of appeal. S. 243(a) of the 1999 Constitution states that any right of appeal to the Court of Appeal conferred by the Constitution

shall be:

“(a) *Exercisable in the case of civil proceedings at the instance of a party thereto, or with leave... at the instance of any other person having an interest in the matter.*”

B It could be seen that any right of appeal to the Court of Appeal can only be exercised by:

(i) a party to the proceedings or

C (ii) person who was not a party to the proceedings but has an interest in the matter, with the leave of the court. A party to the proceedings has been construed by the courts to mean a person aggrieved i.e. a person against whom a decision has been pronounced which deprived him of some right.

D Any other person having interest in the matter can, with leave, appeal to the Court of Appeal. To exercise this right of appeal, the interest contemplated can only be that of those directly and not obliquely affected by the adverse decision. It is not a general interest which every person has in seeing that justice is done to a party. The interest must be E a genuine and legally recognizable interest in respect of a decision which prejudicially affects such interest.

F For a person having interest in the matter to succeed in getting leave to appeal he must show that he has interest in the matter and his grounds of appeal are substantial. The test to be applied is whether such person could have been joined as a party. Such person includes a person affected or aggrieved or likely to be affected or aggrieved or likely to be aggrieved. (p. 3755 E/3756 F/3757 A)

G ***APPEALS - Grievance - Right of appeal***

2. A person having an interest in the matter has been held to be synonymous with a person aggrieved which means a person who has suffered a legal grievance, a man against whom a decision has been pronounced H which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.

The appellants in appeals Nos. 5C, 5D and 5E were parties to the proceedings at the tribunal. However, being parties to the proceedings,

without more, does not confer on them the right to appeal. They must be aggrieved parties. The question is, are the appellants aggrieved parties? I have earlier in this judgment gave the meaning of an aggrieved person as

“a person who has suffered a legal grievance, a person against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something or wrongfully affected his title to something”.

A party will become aggrieved only where there is a decision which wrongfully deprived him of an entitlement or something which he had a right to demand. I have very carefully gone through the judgment of the tribunal and the orders it made, there is no pronouncement made against any of the three sets of appellants. There is no pronouncement in the tribunal’s judgment that wrongfully deprived them of something or wrongfully refused them something or wrongfully affected their title to something. All the three sets of appellants were either staff or ad-hoc staff of INEC and they were made parties as such. They were sued in their official capacities as staff of INEC. They have no personal or private legal right in the matter distinct and separate from that of INEC. In the circumstance, I hold that the three sets of appellants are not aggrieved persons. It therefore follows they have no right to appeal and I so hold. (p. 3757 B)

ACTIONS - Appeal - Definition

3. An appeal is generally regarded as a continuation of the original suit rather than the inception of a new action. As such in an appeal, parties are normally confined to their case as pleaded in the court of first instance. Neither the appellate court nor the parties are allowed to raise or examine a new and different case on appeal without express leave of court or to proffer new evidence without such leave.

A party will not be allowed to make a case on appeal which is diametrically opposed to the case they strenuously espoused in the lower court because a party will not be allowed to raise a different case on appeal. It could be seen that it is now well settled that a party in an appeal is confined to his case as pleaded in the lower court and is not allowed to

make a new and different case on appeal. (p. 3760 C/ 3761 B/F)

Making of a new and different case by 2nd respondent

4. In short, at the tribunal, INEC asked it to uphold the election because
 B it was conducted in substantial compliance with the provisions of the
 Electoral Act and devoid of any irregularities and/or corrupt practices
 while on appeal it asked us to nullify the election because it was marred
 by widespread irregularities and malpractices and was not conducted in
 C substantial compliance with the Electoral Act.

It is manifest that INEC is making a new and different case before
 us as opposed to the case they espoused at the tribunal. This they cannot
 be allowed to do. Justice is not a game of hide and seek. A party must be
 consistent in stating his case and as stated by Oputa, JSC in *Ajide v.*
 D *Kelani (supra)*.

*“Justice is not interested in scoring debating points. The defen-
 dant cannot make one case in his pleadings and an entirely different and
 inconsistent case by his sworn testimony and hope to win on appeal. No,
 E he cannot.”*

INEC’s behaviour makes mockery of the judicial process and is
 capable of undermining the credibility of the entire legal system. It should
 be condemned.

F In the result, I hold that the preliminary objection succeeds. Ap-
 peal No. CA/E/EPT/5B/2005 filed by INEC is hereby struck out.
 (p. 3762 H)

Parties - Electoral Act 2002 s. 133 (1) & (2)

G 5. Section 133 of the Electoral Act, 2002 has specified the persons en-
 titled to present election petitions and the persons who could be made
 respondents. The section provides:

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

(a) a candidate at an election;

(b) a political party which participated at the election.

(2) The person whose election is complained of is, in this Act,

referred to as the respondent, but 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 this 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.” B

The above provision has been judicially considered by me Court of Appeal and the Supreme Court in several cases that it is now settled that where there is a complaint against the conduct of an electoral officer, a presiding officer or a returning officer, such officer must be made a party to the proceeding because he is a necessary party. Failure to join these election officers and other persons whose conduct of the election was complained of was fatal to the paragraphs of the petition relating to these officers. The paragraphs must be struck out. Similarly any evidence adduced in support of such paragraphs must of necessity be dis- C D
countenanced.

To determine the election officials who must be joined as necessary parties because the petitioner has complained about their conduct at the election, it is necessary to examine the complaints of the petitioner by reading the petition as a whole. I have very carefully gone through the further amended petition and I have not seen where the petitioners complained against the conduct of the presiding officers. E F

From the above, it could be seen that the petitioner did not complain against the conduct of the presiding officers directly or by inference. His grudge was against the supervisory presiding officers, ward returning officers and electoral officers. Where the conduct of a presiding officer at an election is not impugned, there is no need to make him a party to an election petition.(p. 3769 A/H 3770 G) G

Election petitions - Admission

6. Before a court decides whether or not there is an admission in the statement of defence or reply to a petition in respect of an averment in a statement of claim or petition, the court must consider the entire pleadings of the parties as a whole. H

I have carefully gone through the entire further amended petition and the 1st respondents further amended reply and it is my considered opinion that the appellant has admitted paragraph 3 of the further amended petition. There is nothing in the amended reply to the contrary. The admission is direct, unqualified and total. The appellant therefore agreed that the 3rd to 450th respondents were officials/officers of the 2nd respondent (INEC). He also agreed that all of them took part in the conduct of the governorship election and that the complaints in the petition relate to the conduct of these officers. This means that the parties did not join issues on this matter and as such it was not an issue for determination before the tribunal.

A court cannot consider issues not joined by the parties in their pleadings, to do so might result in denial of justice to one or the other of the contesting parties. I therefore hold that the tribunal was right when it held that, this is not an issue for determination in this matter. (p. 3772 B)

Grounds of appeal - Competence

7. It could be seen that the tribunal did not hold that policemen and soldiers involved in the conduct of the election and indicted therein by the petitioner were not necessary parties and ought not to have been joined in the proceedings as claimed by the appellant.

A ground of appeal against a decision must relate to the decision and should be a challenge to the validity of the ratio of the decision.

A ground of appeal is always directed against a *ratio decidendi* of a lower court. There is no such thing as appeal at large.

An appeal presupposes the existence of a court decision appealed against.

A ground of appeal that is not related to nor challenges the validity of any *ratio decidendi* in the judgment on appeal is incompetent and is liable to striking out.

In our present case, ground 5 has no relation whatsoever to nor does it challenge the validity of any *ratio decidendi* in the judgment on appeal. It is incompetent.

An issue for determination can only be formulated from a competent ground of appeal. An issue for determination formulated from the

incompetent ground of appeal must be struck out.

In the circumstance, ground 5 of the grounds of appeal, issue No. 2 arising there from as well as the argument preferred in support are struck out. (p. 3775 B)

B

PLEADINGS - Issues - Joinder of

8. It is the contention of the appellants that the existence of an electoral ward is a matter of law and not a matter of fact. With due respect I disagree with this statement. Surely the existence or non-existence of a thing is a question of fact. This is the same with an electoral ward. It either exists or it does not exist. The petitioner has pleaded these wards in his petition. If the respondents deny the existence of these wards, it is incumbent on them to challenge the existence in their reply to the petition. There is nowhere in their pleadings the respondents deny the existence of these wards. It therefore follows that the parties did not join issues as to the existence or non-existence of the wards. A court cannot consider issues not joined by the parties in their pleadings. (p. 3777 F)

E

Waiver - Irregularity - In giving the tribunal a wrong title

9. I am afraid it is too late in the day for the appellant to complain about the name or title the petitioner gave the tribunal. The appellant filed a reply to the petition without raising any objection as to the title of the tribunal. The appellant fully participated in the hearing of the petition to the end i.e. until judgment was delivered without raising any objection as to title of the tribunal. By his conduct, the appellant is deemed to have waived the objection. This is more so if we considered paragraph 49(2) of the 1st Schedule to the Electoral Act, 2002. It provides:

“(2) *An application to set aside an election petition or a proceeding resulting there from for irregularity or for being a nullity, shall not be allowed unless made within a reasonable time and when the party making the application has not taken any fresh step in the proceedings after knowledge of the defect.*”

As could be seen the appellant is enjoined by law to raise the objection within reasonable time. Certainly waiting until after judgment is

delivered, to raise the objection could not be said to be within reasonable time. By participating fully in the proceedings up to when judgment was delivered meant that the appellant has taken steps in the proceedings. He is deemed to have waived his right of complaint. (p. 3780 E)

B

Election tribunal - Quorum

10. The law is clear where the chairman of an election tribunal sits with two other members a quorum is formed. The appellant's complaint is not on the tribunal's quorum *per se*. It is not in dispute that the chairman of the tribunal always sits with either two or three members. There was always a quorum.

It could be seen that a judgment delivered by a tribunal whose quorum is not consistent is not a nullity. A complaint which is based on the inconsistent sitting of the tribunal's quorum is a complaint that the judgment could not be satisfactory on the ground that those who gave it had not heard all the witnesses, and did not pertain to any matter of jurisdiction. In our present case, I therefore hold that the appellant's complaint is on the soundness of the judgment and does not pertain to any matter of jurisdiction.

Any variations in the quorum does not make the judgment a nullity. They only made the judgment unsatisfactory and could be set aside for that reason. Whether or not to set aside the judgment depends on the peculiar circumstances of each case.

The evidence adduced before the tribunal is mainly documentary and the decision of the tribunal is based largely on its evaluation of documentary evidence i.e. the results sheets in Form EC8A (1), exhibits B to N series and exhibits Q to AD series. Apart from the complaint of inconsistency in the quorum, the appellant has failed to show how the inconsistency affected the judgment or that the inconsistency in the quorum of the tribunal has occasioned a miscarriage of justice. I resolve this issue against the appellant. (pp. 3786 C/3787 G/3789 B)

Amendments - That are not substantial

11. The provisions of paragraph 14 (2) is clear and unambiguous. No

amendment will be allowed which will introduce new parties to the petition, alter the right of the petitioner to present the petition, alter the holding of the election, the scores of the candidates and the person returned as the winner of the election or alter the facts of the election petition or the ground or grounds on which the petition is based or the relief sought by the petitioner. In effect, any amendment which is substantial which alters the grounds for or the prayer in the election petition will not be allowed.

I have very carefully gone through the amendments sought and granted by the tribunal. It is my considered opinion that the amendments were inconsequential. A random picking of the amendments granted will illustrate what I mean.

As could be seen the amendments are not substantial at all. They are minor amendments that did not introduce new parties to the petition, alter the right of the petitioner to present the petition or alter the holding of the election. The amendments did not alter the scores of the candidates nor the person returned as winner of the election nor did it alter the facts of the petition, the grounds on which it is based and the relief sought by the petitioner. I therefore hold that the amendments are inconsequential and not substantial. They did not offend against paragraph 14(2) of the First Schedule to the Electoral Act, 2002. The tribunal was right in granting the amendments. (pp. 3792 D/3793 G)

PLEADINGS - Function of

12. The main function of pleadings is to ascertain with precision the various matters that are actually in dispute and the points on which they agree and thus to arrive at certain and clear issues on which both parties desire a judicial decision. Each party must give his opponent a sufficient outline of his case. It could be seen that the purpose of pleadings is to bring the parties to issues that arise so that either party may know the real point or points to be discussed and decided when the case comes on for trial i.e. the issues to be resolved are defined before hand.

Pleadings also should not plead evidence but facts. Parties must only plead in such a way as to prevent surprise when leading evidence in

support of their case.

In dealing with pleadings, a court must read all the paragraphs together to get a flowing story of the parties and not a few paragraphs in isolation. It is the totality of the pleadings, whether it is the statement of claim or the statement of defence that states the case of the party and it will be injustice to invoke only a few paragraphs to come to a conclusion. (p. 3798 A)

Pleadings - Expert opinion - Issues of multiple entries

13. I have gone through all the paragraphs of the petition and the cumulative effect of these paragraphs, in my opinion, is that the issues of multiple entries, alteration of figures, overwriting or super-imposition of figures were raised in the petition. I am therefore in full agreement with the tribunal that the evidence of PW15 fell squarely within the petitioner's pleadings.

The tribunal was therefore right when it held:

"We have been guided by the decision of the Court of Appeal and we also bear in mind the duty of the Judge in respect of expert opinion as enunciated in A.D. v. Fayose (2005) 10 NWLR (Pt. 932) 151 at 199. We therefore made our own findings in respect of the opinions expressed by PW15 by believing or disbelieving him where the circumstances arose. We did our duties with respect to the opinions of the expert by examining the documents and agreeing or disagreeing with the expert opinion in the light of other credible evidence offered on the exhibits."

In the circumstances, I answer the seventh issue in the affirmative i.e. the tribunal was justified in holding that the evidence of PW15 was not discredited and that his evidence fell squarely within the petitioner's pleadings. (pp. 3798 G/3800 D)

Opinions of handwriting experts - How treated by court

14. The opinions of handwriting experts are admissible to decipher words beneath obliterations, erasures or alterations, although it is for the court to determine what the words are. Experts may also give their opinions as to whether handwriting is natural or imitated and whether it shows points

of comparison, but it is for the court to determine whether a particular piece of writing is to be assigned to a particular person, and documents may be submitted to the court for comparison to be made. The weight to be attached to any expert evidence depends upon the skill of the expert.

A court is entitled to accept the evidence of an expert if it is credible, particularly if it is not controverted or challenged and comes from an expert with demonstrable skill. However, the evidence of an expert is generally an aspect of the entire evidence to be evaluated by a court. The trial court must fully be in control of all the evidence before it and must not abdicate its role to perform its primary duty of assessing the evidence and forming its clear opinion in relation thereto including any expert evidence. A court is not bound by evidence of an expert witness. The court has an option in the matter, an option which it has to exercise judicially and judiciously in the light of other available evidence. The court has inherent power to examine and compare disputed signatures against other relevant documents before forming an opinion which cannot be said to be improper. (p. 3799 F)

Disbelieving evidence of a credible witness in some aspects

15. Issue No. 7 dealt with the credibility or otherwise of PW15. The tribunal held in its judgment that the evidence of PW15 has neither been discredited nor controverted and that the evidence of PW15 fell squarely within the petitioner's pleading. I am in full agreement with this holding. However, the tribunal did not swallow the evidence of PW15 hook, line and sinker. It stated:

“We therefore made our own findings in respect of the opinions expressed by PW15 by believing him or disbelieving him where the circumstances arose.”

Which the tribunal is entitled to do. There is nothing wrong, in a tribunal believing the evidence of a witness in certain aspects of his evidence and disbelieving him in other aspects of his evidence. This is not perverse.

It therefore follows that the tribunal did not discredit the results based on issues not pleaded.

In the result, I answer issue No. 8 in the affirmative. The tribunal was justified when it proceeded to invalidate INEC results in the various wards in the various local government areas. (p. 3806 B/H)

B Pleadings - Duly - Meaning

16. In Black's Law Dictionary 8th Edition, the word "duly" was defined at page 540 as:

"In a proper manner; in accordance with legal requirements."

C This means that where a petitioner claims he is duly elected it means that he is elected in a proper manner, in accordance with legal requirements. In our present case, since the 1st respondent has pleaded that he was duly elected, it therefore follows that he was elected in accordance with legal requirements i.e. he was elected in accordance with D the requirements of S. 179(2) (a) and (b) of the 1999 Constitution. The effect of pleading that he was duly elected is that the 1st respondent has satisfied the requirements of S. 179(2) (a) and (b) that he has the highest number of votes cast at the election and has not less than $\frac{1}{4}$ of all the E votes cast in each of at least $\frac{2}{3}$ of all the Local Government Areas in Anambra State.

I therefore hold that by his pleading, the 1st respondent has pleaded that he has scored the highest number of votes cast at the election and F has not less than $\frac{1}{4}$ of all the votes cast in each of at least $\frac{2}{3}$ of all the Local Government Areas in Anambra State. It is trite law that a party needs not plead law nor is he required to plead evidence. Where a petitioner has pleaded that he was duly elected, he needed not quote subsections (a) and (b) of S. 179(2) of the Constitution as those subsections G provided for what has to be fulfilled for a candidate for the office of Governor of a State to be duly elected. (p. 3817 G)

Judgments - Justification

H 17. Appendix 4 is a chart made by the Tribunal in its judgment. It is part of its judgment. The chart was made from the exhibits, Forms EC8A (1) which were tendered and admitted by the Tribunal. There was extensive cross-examination in open court, in respect of all the exhibits. Learned

counsel for all the parties also extensively addressed the Tribunal in respect of all the exhibits. It is my considered opinion that appendix 4 was a product of public demonstration and testing in open court by witnesses and their cross-examination. It was an evaluation of what was contested, demonstrated and tested in open court. It cannot be regarded as an investigation in the chambers of the Tribunal. B

The Tribunal was right to have done the arithmetical calculation in appendix 4. The argument that the appellant was denied the opportunity to comment or react to appendix 4 is clearly misconceived because appendix 4 constitutes part of the judgment of the Tribunal. C

In view of what I have said above, my answer to issue No. 9 is in the affirmative. The tribunal was justified in declaring the petitioner as the person duly elected as Governor of Anambra State. D

(pp. 3818 G/ 3819 D/ 3820 E)

Judgments - Obiter - Meaning

18. A comment or statement of the court which is not necessary for the determination of the issues joined in the parties pleadings, is an *obiter*. It has no binding authority and cannot be the subject of an appeal. In our present case, the comment by the tribunal quoted above, on the refusal of 2nd and 3rd respondents to obey the petitioner's subpoena to produce certain documents at the hearing of the petition was not necessary for the determination of the petitioner's petition because it related to the conduct of INEC in the course of the trial of the petition as opposed to its role in the conduct of the election, which was the subject of the petition. In the circumstance, the comment was *obiter* and therefore could not be the subject of an appeal. F G

For a ground of appeal to be competent, it must be a challenge of the *ratio decidendi* of the judgment appealed against. Accordingly, a ground of appeal based on an *obiter dictum* in a judgment is incompetent.

The tribunal's comment is *obiter* and as such cannot be subject of an appeal. In the circumstance, the ground of appeal No. 37 is incompetent and is accordingly struck out. (pp. 3821 H/ 3823 B) H

Newspaper - Presumption of genuineness

19. All the other documents purported to be documents directed by any law to be kept by any person must be produced from proper custody before they could be presumed genuine by the court. It should however
B be noted that the documents that shall be presumed genuine must be printed by the Government Printer. It therefore follows that a newspaper or a journal must be printed by the Government Printer before they could be presumed genuine otherwise they must be produced from proper custody.

C It could be seen that *Ogbuanyinya's case (supra)* limited itself to official gazette only. The issue of newspaper was not before it. The case is therefore distinguishable and not applicable to our instant case. The case which is apposite for our present purposes, which is binding on me
D and which I consider as good law is *Oneh v. Obi* (1999) 7 NWLR (Pt. 611) 487 where it was held at page 499:

“By the provision of section 116, a document such as exhibit F is admissible if produced from proper custody which in this case will be the
E publishers of the newspapers or registrar of newspapers.”

It is therefore my considered opinion that the tribunal was right in rejecting the said Newspaper. (p. 3826 B/G)

F **Document - Once tendered but was rejected and marked so**

20. I respectfully agree that once a document was tendered in court and it was rejected and marked rejected, it cannot subsequently be tendered and admitted in evidence as exhibit in the case. The tribunal acted rightly in rejecting the said newspaper a second time since it was earlier
G tendered and rejected by the tribunal. (p. 3827 F)

Secondary evidence - Admissibility

21. Having considered the provisions of Ss. 97, 98 and 210 of the Evidence Act, I come to the inescapable conclusion that the receipts are
H secondary evidence and for them to become admissible, proper foundation must be laid as to the whereabouts of the originals. In our present case, no such foundation was laid. I therefore agree with the tribunal that

the said receipts are inadmissible. My answer to the eleventh issue is in the affirmative. The tribunal was right in rejecting the various copies of Vanguard Newspapers tendered by the appellant as well as the official receipts showing the payment for the publications and that the rejection did not occasion a miscarriage of justice. (p. 3828 C) B

Tribal and religious politics - Being criminal allegation

22. There is no doubt as to the fact that the allegations contained in paragraphs 20, 21 and 23 of the appellant's further amended reply to the petition are criminal in nature. It is trite law that whoever alleges the commission of a crime must prove the allegation beyond reasonable doubt. Also, it must be established that the persons who were said to be campaigning for the 1st respondent in Catholic Churches were doing so with the consent and/or authority of the 1st respondent. There must be a nexus between the said persons and the 1st respondent. C D

I have considered the evidence on this issue and it is my opinion that the appellant failed to establish any nexus between the persons alleged to have campaigned for the petitioner and the petitioner himself. It was also not established that the appellant or indeed any of the candidates who contested for the governorship of Anambra State on 19th April, 2003 was not an Igbo man or not a Christian as to have been placed at a disadvantage in the said election as a result of the alleged tribal and religious campaign of the 1st respondent. Also it was not established by the appellant that individual voters were influenced as a result of 1st respondent's alleged involvement in tribal and religious politics. E F

I am in complete agreement with the above findings and reasonings of the tribunal. My answer to the twelfth issue is therefore in the affirmative. The tribunal was justified when it held that the appellant did not prove the allegation of tribal and religious politics and inducement of voters which he made against the petitioner. (pp. 3830 D/G/3831C/3833A) G

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Pleadings - Joinder of issues - Documents of election results

23. I have very carefully gone through the further amended petition, the further amended reply by the appellant and the further amended reply by

the 2nd to 450th respondents especially those paragraphs highlighted in the tribunal's ruling and in the appellant's brief and it is my considered opinion that issues were not joined by the parties in respect of the seven local government areas. The 1st respondent has no quarrel with the results announced by the 2nd to 5th respondents in respect of the said seven local government areas. Indeed, it is because he has agreed with the results in respect of the seven local government areas as announced by INEC officials that he produced the results of only fourteen Local Government Areas. Since issues were not joined by the parties, there is nothing to be determined by the tribunal and as such the tribunal was right in rejecting the polling booth and ward results tendered by the appellant in respect of the seven Local Government Areas and the rejection of the said documents did not occasion any miscarriage of justice. (p. 3835 D)

NOTABLE POINTS OF INTEREST

ADEREMI JCA

1. Relief that is withdrawn - Is no longer grantable

I am not unmindful of the fact that this is an election petition; election petitions are *sui generis*. It has however been held that this fundamental principle, which is that a court will not grant a relief not claimed before it, is also applicable to election petitions.

Having fortified myself with the above judicial decisions, I hold that the relief for nullification having been withdrawn voluntarily cannot at this stage, be entertained. The result is that the provision of section 136(1) of the Electoral Act is not applicable to this case, relief number three which is the prayer for nullification having been voluntarily withdrawn.

(p. 3845 F)

2. Attitude of court to testimony of experts and other witnesses

It is now a well established principle of our procedural law that a court of law can believe a witness in part and disbelieve him in part. This time-honoured principle applies to the evidence of experts as well as the testimonies of ordinary witnesses.

After all, an expert witness is in the same position as a witness of

fact. It must however be always remembered that an expert evidence is necessarily founded on his training and experience both of which entail the acceptance of hearsay information. Judicial authorities are *ad idem* that experts may be called to give evidence; they do not decide issue; for the trial Judge retains the power of decision, which he must not abdicate. B

The opinion of an expert, in my view is not usually determinative of a question posed in the trial court. Perhaps, I should further add that the trial Judge is bound to act in accordance with the evidence placed before him while the power of the appellate court, in that direction is to C correct perverse verdicts. (p. 3851 E)

3. Need for INEC to be impartial

This somersaulting must necessarily erode the confidence, which the generality of the populace must have in a body like INEC. It was the Commission that voluntarily announced the results, which became the subject of contest at the tribunal below. The results are now being discredited by the same Commission. *It is a shame!* A man, which in this contest, includes INEC, shall not be permitted to blow hot and cold with reference to the same transaction; or insist, at different times, on the truth of each of two allegations or contentions, according to the prompting of his private interest. Indeed, he who alleges contrary things in the manner done by INEC, shall not in the interest of the society, be heard. F The well-known maxim is “*allegans contraria non est audiendus.*”

Let it be said loud, and I do hope that INEC will ponder sincerely and seriously on it that, no sane person who claims to be a part of or charged with performing serious function of conducting an election in a decent society shall be allowed to go whimsically, against his own deed, as was done here. I do appreciate that what I have just said is a doctrine of *estoppel* as applied to matter contained in a valid sealed instrument. I shall also liken the publication of election results through a document or documents signed by its accredited officials as a “valid sealed instrument.” The moment INEC publishes the result of an election; it is *estopped*, forever, from denying the authenticity, the genuineness and the truth of all therein contained in the document voluntarily released by it G H

(INEC) relating to the information or figures pertaining to the results. The *estoppel* subsumed in the release of the sheet or sheets containing the results is a conclusive admission, or if I may put it in another way, something which the law treats, in absolute term, as equivalent to an admission.

By this appeal, INEC has shot its own leg. For the sake of the well being of this great country of ours, I pray and do hope that INEC will from now on allow truth, integrity and above all fear of God to have absolute impact in discharge of its all important functions. (p. 3857 B)

OMOKRI JCA

4. Judgment of the Tribunal is based on who had majority of the votes

It is also significant to note that the judgment of the tribunal was not based on irregularities, malpractices and non-compliance with the provisions of the Electoral Act, 2002. The judgment which is at pages 6568 - 7270 (volume 7) of the record declared as follows:

“1. That the first respondent (Dr. Chris Nwabueze Ngige) was not duly declared elected or returned and should not have been declared as duly returned or duly elected by the 2nd to 4th respondents.

2. And we hereby declare the petitioner (Mr. Peter Obi) as validly and duly elected and returned as Governor of Anambra State having scored/pollled the highest/majority of lawful votes cast at the 19th April, 2003 gubernatorial election.”

It is clear from the above that decision of the tribunal is essentially based on who had the majority of lawful votes cast at the said election. The claim of the 1st respondent is limited and confined to the issue of lawful votes which clearly and unequivocally is within the ambit of section 136(2) of the Electoral Act, 2002 and not section 136(1). (p. 3888 B)

5. The petition is the pleading binding on the parties & court

The petition in an election petition is the pleading of the petitioner. It is well-settled law that parties as well as the court are bound by the pleadings. It is therefore not open to a court to violate the pleadings of the parties and make a case for them different from that which they have

pleaded. (p. 3899 C)

6. Need to Conclude petitions before swearing in elected officers

I think the time has come for the Electoral Act to be amended so that election petition may be held not less than 4 months and not more than B six months to the date on which the house stands dissolved or upon which the term of the office of the last holder of an elective office expires as the case may be. The essence of this is to give enough time for any election petition proceedings to be concluded before a person declared winner is sworn in. We can borrow a leaf from the American C electoral process whereby all election petitions proceedings are concluded before the president is sworn in. This, I believe will be in consonance with sound democratic principles and the expectation of the Nigerian D society. (p. 3904 B)

REPRESENTATION

J.H.C. Okolo, SAN (*with him*, G. N. Uwechue, SAN; J. K. Gadzama, SAN; Emeka Ngige, SAN E

Mamman Mike Osuman, SAN; Yahaya Mahmood; H. Balogun; E. C. Uzoka; B. N. Nwachukwu [Mrs.]; Jesse Balonwu [Mrs.]; Nonye Nwangwu [Mrs.]; P. N. C. Ibeneme; P. E. Okoye; Uche I. Obi; Chijioke Nwakor and F. O. Oboli) - *for the Appellant in CA/E/EPT/5A/2005* F

Charles C. Okaa - *for the Appellants in Appeal No. CA/E/ EPT/5C72005*
G. C. Igbokwe (with him, V. I. Obi and E. Adigwe) - *for the Appellants in Appeal No. CA/E/EPT/5D/2005*

Chief Wole Olanipekun, SAN (*with him*, Gabriel Uduafi) - *for the Appellant in Appeal No. CA/E/EPT/5 E/2005* G

Senator N. N. Anah, SAN (*with him*, Dr. Onyechi Ikpeazu, SAN; Chuma Mbonu; P. A. Atuba; O. J. Nnadi; Ben Osaka; Emeka Etiaba; T. U. Oguji; V. E. Okonkwo; C. N. Abiakam; Chisom Okafor, C. I. Meze and Okpalanozie Nkiru) - *for the 1st Respondent* H

Dr. B. O. Babalakin, SAN (*with him*, O. Oladele; O. Akoni; A. S. Oyinloye; B. A. Oguntoye; O. Oni and S. Awonuga) - *for the 2nd to 450th Respondents and Appellants in Appeal No. CA/E/EPT/5B/2005*

CASES REFERRED TO

- Ajadi v. Ajibola (2004) 16 NWLR (Pt. 898) 91
 Akinola v. V.C. Unilorin (2004) 11 NWLR (Pt. 885) 616
 B Brawal Shipping (Nig.) Ltd. v. Aphrodite (Nig.) Ltd. (2004) 9 NWLR (Pt. 879) 462
 A.-G., Abia State & Ors. v. A.-G., Federation (2002) 6 NWLR (Pt. 763) 264
 Adekanye v. *F.R.N.* (2005) 15 NWLR (Pt. 949) 433
 C *D.P.P. v. Akozor* (1962) 1 SCNLR 356
 Akinbiyi v. Adelabu (1956) SCNLR 109
 Ikonne v. C.O.P. (1986) 4 NWLR (Pt. 36) 473
 Ojukwu v. Gov., Lagos State (1985) 2 NWLR (Pt. 10) 806
 D Akande v. General Electric Co. (1979) 3 - 4 SC 115
 Mbanu v. Mbanu (1961) All NLR 652
 Ebosie v. Ebosie (1976) 6 UILR (Pt. 11) 217
 Abdulkareem v. Incar (Nig.) Ltd. (1984) 10 SC 1
 E Atolagbe v. Shorun (1985) 4 SC (Pt. 1) 250
 Uku & Ors. v. Okwmagba & Ors. (1974) 3 SC 35
 Jidda v. Kachallah & Ors. (1999) 4 NWLR (Pt. 599) 426

STATUTES REFERRED TO

- F Court of Appeal Act, Cap. 75 LFN 1990, s. 16
 Electoral Act, 2002, Ss. 47(1)(2)(3)&(4), 50, 54(2), 60.86(1)&(2), 87, 120(1) (5), 127, 132, 133(1) & (2), 134(1) (c), 135(1) (2) (6), 136-139, 150, 1st Schedule, paras. 9, 14, 15, 47 and 49
 G Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990, Ss. 94, 97, 98, 115, 116, 132(1), 135, 136, 210
 Constitution of the Federal Republic of Nigeria, 1999, Ss. 36(7), 133(2), 134, 179(2), 192(2), 243-246, 285(2) (4), 6th Schedule,
 H paras. 2(1)
 Local Government (Basic Constitutional & Transitional Provisions) Decree No. 36 of 1998, S. 8
 Interpretation Act, Cap. 192, Laws of the Federation of Nigeria,

1990, S. 22

Independent National Electoral Commission (Establishment)

Decree No. 17 of 1998, S. 4(2)

Court of Appeal Rules, 2002, O. 1 r. 2, O. 3, r. 2

B

BOOK REFERRED TO

Black's Law Dictionary 8th Edn. p. 540

LEAD JUDGMENT BY MUHAMMAD JCA

On the 19th day of April, 2003, the Independent National Electoral Commission (hereinafter referred to as "INEC") conducted gubernatorial elections in all the 36 States of Nigeria. In Anambra State fourteen political parties presented candidates to contest the election. Among those who contested the election were Dr. Chris Nwabueze Ngige, the candidate presented by the Peoples Democratic Party (hereinafter referred to as "PDP") and Mr. Peter Obi the candidate presented by All Progressive Grand Alliance (hereinafter referred to as "APGA"). At the conclusion of the election INEC declared Dr. Chris Ngige as the winner of the Anambra State gubernatorial election with 452,850 votes. Mr. Peter Obi (hereinafter referred to as the petitioner) not satisfied with the INEC's return; he therefore presented a petition challenging the results declared by the INEC. In his further amended petition, the petitioner prayed the National Assembly/Governorship and Legislative Houses Election Petition Tribunal to declare as follows:

"(a) That the said 1st respondent (Dr. Chris Ngige) was not duly declared elected or returned and should not be declared as duly returned or duly elected by the 2nd to 4th respondents.

(b) That the Honourable Tribunal declares the petitioner as validly and as duly elected or returned having scored/ polled the highest/ majority of lawful votes cast at the said election.

(c) Alternatively that the election be nullified and a fresh election into the office of Governor Anambra State be conducted by the 2nd respondent for substantial irregularities and corrupt practices which marred the said election."

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The petitioner however withdrew prayer (c) i.e. the alternative prayer and it was accordingly struck out. The grounds upon which the petitioner relied were:

B “(i) *That the 1st respondent was not elected by majority of lawful votes cast at the gubernatorial election held on 19th April, 2003 having not polled the highest number/ majority of lawful votes cast at the said election.*

C (ii) *That the 2nd to 4th respondents should not have duly returned or declared as elected Dr. Chris Nwabueze Ngige as the winner of the election.*

D (iii) *The election or return of the 1st respondent is invalid by reason of corrupt practices and non-compliance with the provisions of the Electoral Act, 2002.”*

E After a marathon trial, spanning over two years, a total number of 482 witnesses testified before the tribunal. The petitioner called 45 witnesses. The 1st respondent called 425 witnesses while the 2nd respondent called 12 witnesses. The tribunal delivered its judgment on 12th day of August, 2005 in which it held that the petitioner has proved his case and was accordingly entitled to the reliefs sought. In its judgment of over 700 pages, the tribunal said *inter alia*:

F “*After proper consideration of the evidence led by the parties including the documents tendered, we put them on an imaginary scale as required by law as enumerated in Mogaji v. Odofin (1978) 4 SC 91 at 93 and it weighs in favour of the petitioner.*

G *We therefore held that the petitioner has proved his claims and is accordingly entitled to the reliefs he is seeking since he has discharged the burden of proof cast on him by law. Accordingly we hereby declare as follows:*

H (1) *That the first respondent (Dr. Chris Nwabueze Ngige) was not duly declared elected or returned and should not have been declared as duly returned or duly elected by the 2nd to 4th respondents.*

(2) *And we hereby declare the petitioner (Mr. Peter Obi) as validly and duly elected and returned as Governor of Anambra State having scored/polled the highest/ majority of lawful votes cast at the 19th April,*

2003 Gubernatorial election.”

The 1st respondent is aggrieved by this decision, he therefore appealed to this court. He filed forty grounds of appeal from which he distilled thirteen issues for the determination of the appeal. The 2nd respondent i.e. INEC was also not satisfied with this decision. It also appealed to this court. Its notice of appeal contained three grounds of appeal. It formulated a single issue for the determination of its appeal. The returning officer Anambra East Local Government Area together with 182 other respondents also filed a separate appeal from INEC. They filed 28 grounds of appeal. They identified seven issues for the determination of their appeal. The returning officer Aguata Local Government Area together with 168 other respondents broke away from INEC and filed their own separate appeal. Their notice of appeal contained twelve grounds of appeal. They formulated six issues in respect of their own appeal. The returning officer, Anambra State gubernatorial election also broke away from the INEC main appeal and filed his own separate appeal. He filed 18 grounds of appeal from which he formulated five issues for the determination of the appeal.

We therefore have five appeals arising from the judgment of the tribunal. The appeal filed by Dr. Chris Nwabueze Ngige is No. CA/E/EPT/5A/2005, INEC’s appeal is No. CA/E/EPT/5B/2005; the appeal filed by the returning officer Anambra East Local Government Area and 182 others is No. CA/E/EPT/5C/2005. The appeal filed by the returning officer Aguata Local Government Area and 168 others is No. CA/E/EPT/5D/2005, while the appeal of the returning officer Anambra State Gubernatorial Election is No. CA/E/EPT/5E/2005. At the hearing of the appeal, with the consent of all the counsel to all the parties, these appeals were consolidated.

Meanwhile, INEC, through its counsel, filed notices of preliminary objection in respect of appeals Nos. CA/E/EPT/5C: CA/E/EPT/5D/2005 and CA/E/EPT/5E/2005: for orders dismissing the said appeals on the grounds that the entire appeals were incompetent. The objections were brought on the following grounds:

“(1) *The appellants do not have any personal or private right (as*

distinct and separate from the right of the commission) entitling them whether jointly or individually to institute this appeal.

(2) *It is only the 3rd respondent (the Independent National Electoral Commission) and counsel appointed by the Commission that can B institute and/or maintain any proceedings connected with or related to an election petition.*

(3) *The Commission has not authorized the bringing or continuation of this appeal.*

C (4) *The Commission has instructed applicants' counsel to appeal against the judgment of the trial tribunal on behalf of itself, and all its officials involved with the subject election and sued as respondents at the tribunal and the said appeal has been duly filed.*

D (5) *The appellants lack the requisite locus standi to institute this appeal, as they do not have any interest or right to protect or pursue in this appeal.*

(6) *The above appeal constitutes a gross abuse of the process and procedure of this Honourable Court."*

E Also the 1st respondent filed a notice of intention to rely upon preliminary objection in respect of appeal No. CA/E/EPT/5C/2005 that the appeal is an abuse of the process of the Court of Appeal and is incompetent not having been initiated by due process of law. The grounds for the F objection are:

G *"(1) The notice of appeal and the appellant's brief of argument filed on behalf of Independent National Electoral Commission and 450 Ors. by Dr. B. O. Babalakin, SAN was for all INEC ad-hoc staff including the appellants over the same decision of the tribunal and therefore this appeal filed by some of those INEC ad-hoc staff constituted an abuse of process of this Honourable Court.*

H (2) *Without the consent of the Attorney General of the Federation there is no separate right of appeal by INEC ad-hoc staff to file an appeal contrary to the position of INEC either through a counsel of their choice or one appointed by the Attorney General of the State."*

The 1st respondent also filed notices of preliminary objections against appeals No. CA/E/EPT/5B/2005 and appeal No. CA/E/EPT/5C/2005 as

being incompetent and abuse of the court's processes should be struck out. We took all the preliminary objections at the hearing of the appeal. All the appellants in appeals 5B, 5D and 5E filed counter-affidavits to the preliminary objections filed. They also filed notices on motion praying that their names be struck out from the appeal filed by INEC i.e. appeal B No. 5B.

In moving the preliminary objections, Dr. B. O. Babalakin, SAN learned senior counsel for INEC submitted that the appellants in appeals Nos. 5C, 3D and 5E had no right to file any appeal in this matter based on the interpretation of the Electoral Act, 2002. He referred to paragraph 47 of the Electoral Act and submitted that only three persons could represent the Commission or its office. He further submitted that the section does not envisage concurrent representation. He contended that he was the only person selected to represent INEC. He referred to the letter written by the Chairman of INEC appointing him to represent INEC in this appeal. He also referred to another letter written by INEC in which the Commission disassociated itself from and disclaimed any other notice of appeal purportedly filed on behalf of its officials and confirmed that only Dr. Babalakin's firm was briefed to act on behalf of all its officials. He also submitted that based on priority the Commission was the one with the greatest interest and when it exercised its right to appoint a counsel, none of the other parties named in paragraph 47(3) of the Electoral Act could appoint any other counsel. It was further submitted that where the Commission failed to appoint a counsel, the only person authorized to do so, are the Attorney General of the Federation or the Attorney General of a State. He maintained that the provision does not contemplate the issuance of fiat by the Attorney General of a State and that the issuance of that fiat by the Attorney General of Anambra State was illegal and absurd. He also submitted that a private legal practitioner has no right under the law to appear. He referred to S. 133(2) of the Electoral Act and submitted that only INEC could appoint counsel for its officials. He submitted that since the officials were not joined in any private capacity, they have no interest that is different from that of the Commission. He submitted that the officials have no capacity to appoint lawyers to

represent them. He urged the court to strike out appeals Nos. 5C, 5D, and 5E.

Dr. Onyeachi Ikpeazu, SAN learned senior counsel for the 1st respondent, submitted that the three appeals were incompetent and should be struck out. He urged the court to take judicial notice of the fact that Dr. B. O. Babalakin. SAN has filed an appeal for INEC and all the INEC staff who were respondents at the tribunal. He submitted that the appellants in appeals Nos. 5C, 5D and 5E have no personal stake in the subject matter of the appeal. It was submitted that an appreciation of paragraph 47(1), (2), (3) and (4) of the Electoral Act collectively would reveal that the intention of the lawmakers was to ensure that the Commission and all other officers who took part in the election should maintain a common purpose and objective in approaching a petition filed against Commission and that no staff of INEC could decline from opposing the petition except with the written consent of the Attorney-General of the Federation and without the express written consent of the Attorney-General of the Federation, not that of a state, no staff of the Commission sued in a petition in his official capacity can file process in that petition. It was further submitted that the law never envisaged a situation where INEC staff will be pitched in court against the position of the Commission. It was further submitted that the Attorney General of Anambra State has no power to authorize or give fiat to appellant's counsel to file notice of appeal. It was submitted that it was abuse of process to engage in multiplicity of proceedings against the same parties over the same subject matter. The following authorities were cited in support: *Ajadi v. Ajibola* (2004) 16 NWLR (Pt. 898).91; *Akinola v. V.C. Unilorin* (2004) 11 NWLR (Pt. 885) 616; *Brawal Shipping (Nig.) Ltd. v. Aphrodite (Nig.) Ltd.* (2004) 9 NWLR (Pt. 879) 462. It was also submitted that the said appellants were not sued in their private capacities but in their official capacities within the purview and context of S. 133(2) and paragraph 47(1) of the Electoral Act. It was submitted that the election into the office of Governor of Anambra State and the conduct of the election were matters within item 22 of the Exclusive Legislative List which was dealt with by the Supreme Court in the case of *A.-G., Abia State & Ors. v. A.-G., Federa-*

tion (2002) 6 NWLR (Pt. 763) 264. It was therefore submitted that any purported power given by the Attorney General of Anambra State was unconstitutional, null and void. In support of this submission we were referred to the cases of *Anyebe v. State* (1986) 1 NWLR (Pt. 14) 39; *Green v. Owoh* (1962) 1 All NLR 659. The powers of the Attorney General of the Federation and INEC are said to be superior and override the power of the Attorney General of a State in matters concerning the Electoral Act and Staff of INEC made parties to an election petition in their official status, in an election conducted by INEC. It was then submitted that the law did not give the appellants right of counsel of their own choice save with the consent of the Federal Attorney General since the ad-hoc staff are staff of INEC and not of the state. Since INEC has appointed a legal practitioner to represent them, it would be absurd to contend that a State Attorney General who did not appoint them would appoint legal practitioners to dislodge the person appointed by their employers.

It was further submitted that paragraph 47(3) did not authorize the Attorney General of a State to engage the services of any private legal practitioner but to act by himself or through any of his legal officers. It was contended that since this is not a criminal prosecution, the powers of the Attorney General of a State to delegate or retain a private legal practitioner under the 1999 Constitution and as decided in the cases of *Adekanye v. F.R.N.* (2005) 15 NWLR (Pt. 949) 433 and *D.P.P. v. Akozor* (1962) 1 SCNLR 356 do not apply. It was also submitted that paragraph 47(3) did not authorize the Attorney General of a State to prosecute or give fiat to prosecute an appeal over the matter of an election conducted by INEC in which the State Electoral Commission took no part and that the power given in paragraph 47(3) is to defend the officers at the tribunal or court as respondents and never as appellants and as such paragraph 47(3) could not be relied on by the appellants as authority for the fiat purportedly given by the Anambra State Attorney General. It was finally submitted that paragraph 47(4) puts it beyond peradventure that it is only INEC that can engage private legal practitioners and that a community reading of paragraphs 47(3) and 47(4) clearly shows that it is

only the Commission that is authorized to engage a private legal practitioner and not the Attorney General of a State. We were urged to dismiss the three appeals as incompetent.

Chief Wole Olanipekun, SAN Senior counsel in appeal No. 5E said
B that paragraph 47(3) restricts itself to the tribunal or court. He then referred to Ss. 137, 138 and 139 of the Act and submitted that Rules or Procedure are excluded from Schedule 1 and that was why the President
C of the Court of Appeal made Practice Direction No. 2. He further submitted that the Act does not define an appellant and that it is only the Court of Appeal Rules that define an appellant. He referred to Order 3 rule 2 of the Court of Appeal Rules and submitted that the appeal was not being prosecuted on the narrow confines of the Electoral Act, 2002 in support of this submission he referred to the case of *Buhari v. Obasanjo* (2005) 13
D NWLR (Pt. 941) 1 at 180. He then referred to paragraphs 9, 10, 11, 12 and 13 of their supporting affidavit. He submitted that since their appeal was first in time, the appeal by INEC was an abuse and should be struck out. We were referred to the case of *Okorodudu v. Okoromadu* (1977) 3
E SC 21. He referred to paragraph 47(1) and submitted any official of INEC cannot ask the court to nullify an election and that it would be scandalous if it were allowed. He then submitted that the right of appeal is a constitutional right which enures to anybody and is based on the right
F to fair hearing. The case of *Ohuta v. Okigbo* (1995) 4 NWLR (Pt. 389) 352 was referred to.

He further submitted that by the combined effect of Ss. 243, 244 and 245 of the 1999 Constitution read together with S. 36(1) of the Constitution, the appellant has right to appeal as of right. We were then
G referred to the following cases: *N.U.R. v. N.R.C.* (1996) 9 NWLR (Pt. 473) 490 and *Ndukauba v. Kolomo* (2005) 4 NWLR (Pt. 915) 411. The learned Senior Counsel then submitted that by virtue of paragraph 9(1) of the 1st Schedule, each party can appoint his counsel to represent him.
H The appellant personally bears criminal responsibility for his action, he then referred to S. 120(1) of the Act. He finally submitted that the appeal filed by INEC is illegal and the appellant can refuse to participate. He referred to the case of *Abiola v. F.R.N.* (1997) 2 NWLR (Pt. 488) 439

and urged the court to hold that the appeal is proper before this court.

Charles Okaa, Esq., learned counsel for the appellant in appeal No. 5C said they filed a counter-affidavit in response to the objection filed by the 1st respondent. He said they adopt and rely on the counter-affidavit. He said they align themselves with the submissions of Chief Wole B Olanipekun, SAN. On the issue of fiat issued by the Attorney General of Anambra State he referred to the cases of *Eriobuna v Ezeife* (1992) 4 NWLR (Pt. 236) 417 and *Salim v. Ifenkwe* (1996) 5 NWLR (Pt. 450) 564. He urged the court to overrule the preliminary objections.

G. C. Igbokwe, Esq. learned counsel for the appellants in appeal No. 5D said they filed a counter-affidavit in response to the preliminary objection filed by INEC and also filed a motion on notice disassociating themselves from the appeal filed by INEC. He said they adopt the submissions of Chief Wole Olanipekun, SAN. He then submitted that the issue of appeal is not narrowed by the Electoral Act. He further submitted that it is a constitutional matter and urged the court to dismiss the objection of INEC. With regards to the 1st respondent objection, he submitted that the 1st respondent lacked the competence to challenge their appeal. He urged the court to dismiss the preliminary objection and allow their appeal.

The right of appeal is a constitutional right which cannot be restricted or expanded by any other law. The Constitution also, provides who can exercise the right of appeal. S. 243(a) of the 1999 Constitution states that any right of appeal to the Court of Appeal conferred by the Constitution shall be:

“(a) Exercisable in the case of civil proceedings at the instance of a party thereto, or with leave... at the instance of any other person having an interest in the matter.”

It could be seen that any right of appeal to the Court of Appeal can only be exercised by:

- (i) a party to the proceedings or
- (ii) person who was not a party to the proceedings but has an interest in the matter, with the leave of the court. A party to the proceedings has been construed by the courts to mean a person aggrieved i.e. a person against whom a decision has been pronounced

which deprived him of some right. See *Akinbiyi v. Adelabu* (1956) SCNLR 109. See also *Mobil Producing Nigeria Unlimited v. Chief Simeon Monokpo* (2003) 18 NWLR (Pt. 852) 346 at page 398-399 where Uwaifo, JSC stated:

B “It is true that the judgment of the trial court which was affirmed
by the court below was given against only the second defendant. In
effect, the first defendant is not an aggrieved party that can appeal against
the judgment of the court below to this court *simply on the basis that it*
C *was a party to the proceedings* in which judgment was given in reliance
on the provision of section 233(5) of the 1999 Constitution which says
that: “Any right of appeal to Supreme Court from the decision of the
Court of Appeal conferred by this section shall be exercisable in the case
of civil proceedings at the instance of a party thereto.” That provision
D must be understood to apply to an aggrieved person or party.

A party to proceedings cannot appeal a decision arrived thereat
which does not wrongfully deprive him of an entitlement or something
which he had a right to demand. Unless there is such a grievance, he
E cannot appeal against a judgment which has not affected him since the
whole exercise may turn out to be academic.

“Under no circumstances can it be argued that a party to proceed-
ings who has not been affected by a decision may nevertheless appeal
F *against it merely as a party.* See, for instance, *Akinbiyi v. Adelabu* (1956)
SCNLR 109 where it was recognized that a party entitled to appeal is a
person aggrieved by a decision i.e. a person against whom a decision has
been pronounced which deprived him of some right.” (*Italics is mine*).

Any other person having interest in the matter can, with
G **leave, appeal to the Court of Appeal. To exercise this right of ap-**
peal, the interest contemplated can only be that of those directly
and not obliquely affected by the adverse decision. It is not a gen-
eral interest which every person has in seeing that justice is done
H **to a party. The interest must be a genuine and legally recognizable**
interest in respect of a decision which prejudicially affects such
interest. See: In re *Ugadu* (1988) 5 NWLR (Pt. 93) 189 and *Ikonne v.*
C.O.P. (1986) 4 NWLR (Pt. 36) 473.

For a person having interest in the matter to succeed in getting leave to appeal he must show that he has interest in the matter and his grounds of appeal are substantial. The test to be applied is whether such person could have been joined as a party. Such person includes a person affected or aggrieved or likely to be affected or aggrieved or likely to be aggrieved. See *Ojukwu v. Gov., Lagos State* (1985) 2 NWLR (Pt. 10) 806; *Akande v. General Electric Co.* (1979) 3 - 4 SC 115 and *Mbanu v. Mbanu* (1961) All NLR 652.

A “person having an interest in the matter has been held to be synonymous with a person aggrieved which means a person who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.

The appellants in appeals Nos. 5C, 5D and 5E were parties to the proceedings at the tribunal. However, being parties to the proceedings, without more, does not confer on them the right to appeal. They must be aggrieved parties. The question is, are the appellants aggrieved parties? I have earlier in this judgment gave the meaning of an aggrieved person as “a person who has suffered a legal grievance, a person against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something or wrongfully affected his title to something”.

A party will become aggrieved only where there is a decision which wrongfully deprived him of an entitlement or something which he had a right to demand. I have very carefully gone through the judgment of the tribunal and the orders it made, there is no pronouncement made against any of the three sets of appellants. There is no pronouncement in the tribunal’s judgment that wrongfully deprived them of something or wrongfully refused them something or wrongfully affected their title to something. All the three sets of appellants were either staff or ad-hoc staff of INEC and they were made parties as such. They were sued in their official capacities as

staff of INEC. They have no personal or private legal right in the matter distinct and separate from that of INEC. In the circumstance, I hold that the three sets of appellants are not aggrieved persons. It therefore follows they have no right to appeal and I so hold.

Having arrived at this decision, there is no need to consider and decide upon the fiat given by the Attorney General of Anambra State to the appellants. It is the Constitution that specified who can exercise the right of appeal. The Attorney General's fiat cannot override a constitutional provision.

I therefore hold that the appeals Nos. CA/E/EPT/5C/2005; CA/E/EPT/5D/2005 and CA/E/EPT/5E/2005 are incompetent and are accordingly struck out.

I now come to appeal No. CA/E/EPT/5B/2005 i.e. the appeal filed by INEC. The 1st respondent herein i.e. Mr. Peter Obi filed a notice of preliminary objection in respect of this appeal as being incompetent and should be struck out. Dr. Ikpeazu learned counsel for 1st respondent submitted that at the tribunal the stance of INEC was that the election was free and fair and was devoid of any irregularities and/or corrupt practices on the part of INEC. He referred to paragraph 22 of INEC further amended reply. He then submitted that INEC cannot change its stance on appeal by making a summersault and ask for the nullification of the election. He further submitted that none of the parties canvassed or addressed the issue of nullification of the election because the prayer for nullification of the election was withdrawn by the 1st respondent without objection by any of the parties including the appellants. Since the issue of nullification was not canvassed at the tribunal and on which the tribunal had an opportunity to make any pronouncement, the issue cannot now form the subject matter of an appeal. He referred to the following cases: *Adegoke Motors Ltd. v. Adesanya* (1989) 3 NWLR (Pt. 109) 250; *Ajide v. Kelani* (1985) 3 NWLR (Pt. 12) 248; *Akuneziri v. Okenwa* (2000) 15 NWLR (Pt. 691) 526; *Edem v. Akamkpa L.G.* (2000) 4 NWLR (Pt. 651) 70; *Edebiri v. Edebiri* (1997) 4 NWLR (Pt. 498) 165 and *Ige v. Olunloyo* (1984) 15 NSCC 102. (1984) 1 SCNLR 311. It was also submitted that

for INEC at this stage to maintain a prayer for nullification of the election, they must have prayed for nullification in the first instance. INEC elected not to challenge the return and did not file a petition or cross petition within the statutorily prescribed time. INEC cannot therefore at this stage seek a relief which is statute barred. B

He submitted that parties are bound by their pleadings and that a court cannot grant what is not prayed for. It was also submitted that the contention that a withdrawal of a prayer leaves the arbiter with the option to pronounce on the relief as long as the issue was made a ground in the petition is a misconception of the principle of law that a court cannot grant in a case a remedy which has not been asked for by any of the parties because it has no power to do so. The following cases were cited in support of this submission: *Ekpenyong v. Nyong* (1975) 2 SC 71; *Kalio v. Kalio* (1915) 2 SC 15; *Olurotimi v. Ige* (1993) 8 NWLR (Pt. 311) 257 and *Odejide v. Fagbo* (2004) 8 NWLR (Pt. 874) 1. He urged the court to strike out the appeal. D

Chief Emeka Ngige learned senior counsel for the 1st respondent submitted that the issue of nullification was never canvassed at the tribunal below. He said the relief for nullification was withdrawn by the petitioner. He submitted that INEC's stand at the tribunal was that the election was free and fair, however on appeal INEC has done a summersault and is now seeking for nullification. He submitted that INEC could not take such a stand without the approval of the Attorney General of the Federation. It was also submitted that in election petitions, courts or tribunals do not give or award reliefs not claimed by the petitioner. We were referred to the following cases: *Kaugama v. N.E.C.* (1993) 3 NWLR (Pt. 284) 681; *Opia v. Ibru* (1992) 3 NWLR (Pt. 231) 658 and *Fabunmi v. Oyewusi* (1992) 3 NWLR (Pt. 215) 35. The case of *Ige v. Olunloye* 1 SCNLR 158 was referred to and it was submitted that where there is no prayer in the petition to the effect that the election be declared void, the court cannot entertain an appeal seeking such relief because no court has the power to grant reliefs or remedies not claimed before it since both the parties as well as the courts are bound by their pleadings. It was further submitted that a defendant in a suit could not ask for a relief in that suit H

when he has no counter claim. We were referred to the case of *Okechukwu v. Okechukwu* (1989) 3 NWLR (Pt. 108) 234.

It was finally submitted that the courts never make a habit of ever granting to a party what he claimed initially but later abandoned and that a judgment must be claimed or never. The following cases were referred to: *Ebosie v. Ebosie* (1976) 6 UILR (Pt. 11)217; *Kalio v. Kalio* (1975) 2 SC 15; *Ekpenyong v. Nyong*; (1975) 2 SC 71; *Akpapuna v. Nzeke* (1983) 2 SCNLR 1; *Akile v. Amos* (1975) 2 SC 51 *Abdulkareem v. Incar (Nig.) Ltd.* (1984) 10 SC 1 and *Atolagbe v. Shorun* (1985) 4 SC (Pt. 1) 250.

An appeal is generally regarded as a continuation of the original suit rather than the inception of a new action. As such in an appeal, parties are normally confined to their case as pleaded in the court of first instance. Neither the appellate court nor the parties are allowed to raise or examine a new and different case on appeal without express leave of court or to proffer new evidence without such leave. See *Adegoke Motors Ltd. v. Adesanya* (1989) 3 NWLR (Pt. 109) 250 at 266 Oputa, JSC stated:

“Generally, an appeal is regarded as a continuation of the original suit rather than the inception of anew action, Because of this, in an appeal, parties are normally confined to their case as pleaded in the court of first instance. They are not allowed to make a new and different case on appeal. They are not allowed to raise in such appeal new issues without the express leave of court or to proffer new evidence without such a leave. An appeal, being a judicial examination by a higher court of the decision of an inferior court, it follows that such examination should normally and more appropriately be confined to the facts and issues that came before the inferior court for decision.”

See also *Ajide v. Kelani* (1985) 3 NWLR (Pt. 12) 248 where the Supreme Court stated at page 269 that:

“A party should be consistent in stating his case and consistent in proving it. He will not be allowed to take one stance in his pleadings; then turn somersault during the trial; then assume non chalant attitude in the Court of Appeal; only to revert to his case as pleaded in the Supreme Court. Justice is more than a game of hide and seek. It is an attempt, our

human imperfections notwithstanding, to discover the truth. Justice will never decree anything in favour of so slippery a customer as the present defendant/appellant.”

The Supreme Court then concluded:

“Justice is not interested in scoring debating points. The defendant cannot make one case in his pleadings and an entirely different and inconsistent case by his sworn testimony and hope to win on appeal. No, he cannot.”

A party will not be allowed to make a case on appeal which is diametrically opposed to the case they strenuously espoused in the lower court because a party will not be allowed to raise a different case on appeal. See: *Akuneziri v. Okenwa* (2000) 15 NWLR (Pt 691) 526 where Ayoola, JSC said at page 551:

“In the present case, the 1st set of defendants brazenly, had set out by their brief to challenge the position they have taken in the two lower courts, even on issues of fact. Such unexplained volte face by the 1st set of defendants tends to make a farce of judicial process and is capable of undermining the credibility of the legal profession. It deserves, in my opinion, condemnation. I venture to think that the wise course for persons in the position of the 1st set of defendants, who can appropriately be described as respondents, pro-forma, should have been to be passive in the ensuing proceedings, instead of, embarrassingly, espousing a cause which they had all along strenuously opposed and challenged at the trial and in the Court of Appeal.”

It could be seen that it is now well settled that a party in an appeal is confined to his case as pleaded in the lower court and is not allowed to make a new and different case on appeal. I will now consider INEC’s stance at the tribunal to determine whether or not it is making a new and different case on appeal. By paragraphs 4 and 22 of its further amended reply to the further amended petition. INEC denied any knowledge or any corrupt practices and or non-compliance with the provisions or the Electoral Act, and averred that the election was conducted in substantial compliance with the provisions of the Electoral Act devoid of any irregularities and/or corrupt practices on the part of the respon-

dents. Paragraphs 4 and 22 of the further amended reply state:

“(4) *The respondents deny paragraph 6(i-iii) of the further amended petition and put the petitioner to strict proof. The respondents specifically deny knowledge of any alleged corrupt practices and or non-compliance with the provisions of the Electoral Act, 2002 as alleged. The respondents aver further that the 1st respondent scored the majority of lawful votes cast at the election and was duly returned or declared by the 2nd – 4th respondents as the winner of the election.*

“(22) *The respondents deny paragraph 23(a-c) at page 40 of the further amended petition dated 12th September, 2003 and shall urge the Honourable Tribunal to dismiss the further amended petition dated 12th September, 2003. The election was conducted in substantial compliance with the provisions of the Electoral Act 2002 devoid of any irregularities and or corrupt practices on the part of the respondents.”*

At the tribunal INEC strenuously defended the petition. It maintained that the election was free and fair and that it was conducted in substantial compliance with the provisions of the Electoral Act, 2002 and that the election was devoid of any irregularities or corrupt practices. In its effort to establish that the election was free and fair and was conducted in substantial compliance with the provisions of the Electoral Act, 2002, it called twelve witnesses who testified on its behalf and tendered many documents. The clear stand of INEC at the tribunal was that the election was free of any irregularities and/or corrupt practices and that the election was conducted substantially in compliance with the Electoral Act and as such the election should be upheld.

On appeal INEC made a *volte-face*. It is now asking us to hold that the April 19, 2003 gubernatorial election in Anambra State was marred by widespread irregularities and malpractices and for this reason, was conducted in substantial non-compliance with the Electoral Act, 2002. It also urged us to hold that the lower tribunal having found that 371,970 votes from 90 wards out of the 208 wards in the 14 Local Governments were void, the only alternative open to the lower tribunal is to have outrightly invalidated the entire elections and order a fresh election.

In short, at the tribunal, INEC asked it to uphold the elec-

tion because it was conducted in substantial compliance with the provisions of the Electoral Act and devoid of any irregularities and/or corrupt practices while on appeal it asked us to nullify the election because it was marred by widespread irregularities and malpractices and was not conducted in substantial compliance with the Electoral Act. B

It is manifest that INEC is making a new and different case before us as opposed to the case they espoused at the tribunal. This they cannot be allowed to do. Justice is not a game of hide and seek. A party must be consistent in stating his case and as stated by Oputa, JSC in *Ajide v. Kelani* (*supra*). C

“Justice is not interested in scoring debating points. The defendant cannot make one case in his pleadings and an entirely different and inconsistent case by his sworn testimony and hope to win on appeal. No, he cannot.” D

INEC’s behaviour makes mockery of the judicial process and is capable of undermining the credibility of the entire legal system. It should be condemned. E

In the result, I hold that the preliminary objection succeeds. Appeal No. CA/E/EPT/5B/2005 filed by INEC is hereby struck out.

I now come to appeal No. CA/E/EPT/5A/2005 i.e. the appeal filed by Dr. Chris Nwabueze Ngige. As I have earlier said in this judgment, the appellant filed 40 grounds of appeal from which he distilled thirteen issues for the determination of the appeal. The 1st respondent also filed his brief of argument in which he identified seven issues for determination of the appeal. The 2nd to 450th respondent filed a joint brief. They formulated only one issue for the determination of the appeal. In the determination of this appeal, I will adopt the issues formulated by the appellant. At the hearing of the appeal. Chief J. H. C. Okolo learned senior counsel for the appellant adopted and relied on the appellant’s brief. He also proffered oral arguments to expatiate on some issues raised in their brief. Dr. Onyechi Ikpeazu learned senior counsel for the 1st respondent also adopted their brief and preferred oral argument in expatiation of some points raised in their brief. Dr. B. O. Babalakin learned senior counsel for the 2nd to F G H

450th respondents also adopted their brief and preferred oral submissions.

The first issue for determination as formulated by the appellant is:

"Whether upon a proper construction of section 133(2) of the Electoral Act, 2002 and having regard to the petitioner's pleadings and evidence particularly the "facts/particulars relied upon" in his petition, the tribunal below was justified in entertaining the petition in spite of the fact that the presiding officers who produced the Forms EC8A (1) at the various polling booths within the wards in the 13 Local Government Areas challenged by the petitioner as well as the Ward and Local Government Collation Officers indicted by the petitioner were not joined as parties."

It was stated on behalf of the appellant that the tribunal in both its interlocutory ruling and in its judgment took the view that the petitioner made no complaints against the presiding officers and therefore did not need to join them and that in *Buhari v. Yusuf* (2003) 14 NWLR (Pt. 841) 446 the Supreme Court held that conduct in the context of S. 133(2) of the Electoral Act means behaviour as opposed to management. The tribunal then concluded that in the absence of an allegation touching on the behaviour of presiding officers, such presiding officers are not necessary parties. It was then submitted that the narrow view taken by the tribunal as to the criteria for deciding whether presiding officers are necessary parties is undue, unwarranted and insupportable. It was also submitted that the reference made to "conduct" in contradiction to management is *non sequitur* because the Supreme Court never made any such distinction in *Buhari v. Yusuf* (*supra*). It was submitted that the true position of the law are settled in the following cases: *Moghalu v. Ngige* (2005) 4 NWLR (Pt. 914) 1; *Haruna v. Modibbo* (2004) 16 NWLR (Pt.900) 487 and *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1.

After referring to the judgment of the tribunal, it was submitted that the tribunal clearly missed the point and came to erroneous conclusions. It was submitted that the petitioner made clear allegations in his pleadings against presiding officers and proceeded to give evidence in line with the facts pleaded by him. It was stated that in paragraph 6(4) (e) of the petition, the petitioner clearly stated that he was challenging all the

results in all polling units within the 13 Local Government Areas whose results he challenged. It was submitted that since the petitioner put in issue all the results from the polling units, all the presiding officers in those polling units became necessary parties to the petition. Similar examples were given in respect of paragraphs 6(10); 6(14); 15-16 and 18. B After referring to some of the pronouncements of the tribunal, it was submitted that the tribunal could not have been right in the conclusions it reached because (i) the petitioner clearly pleaded allegations of dereliction or omission to perform their duties against the presiding officers and gave evidence challenging results produced by the same presiding officers, (ii) The purport of the pleadings properly appraised is that presiding officers either failed or refused or neglected to conduct the election or that they wrote results outside election venues or that they produced questionable results, (iii) It is perverse and totally erroneous to hold that the petitioner's case was based on a set of results accepted by the petitioner, (iv) The Supreme Court did not define conduct to mean behaviour as opposed to management in *Buhari v. Yusuf supra*). It was also submitted that the tribunal was in grave error to assume that the evidence adduced by the petitioner could be overlooked when considering the issue of non-joinder. The case of *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1 was referred to. It was further submitted that the need for joinder of presiding officers was clearly brought to the fore in the evidence-in-chief and cross-examination of some of the presiding officers who testified at the trial. D E F

It was then submitted that the effect of the non-joinder of presiding officers was that all the paragraphs of the further amended petition where allegations are made against the presiding officers went to no issue and ought to have been either struck out, expunged or ignored and that when these paragraphs are struck out for non-joinder of presiding officers, there would be nothing left in the petition to sustain it. The petition ought to have been dismissed. In support the following cases were referred to; *Uzodinma v. Udenwa* (2004) 1 NWLR (Pt. 854) 303 and *Arubo v. Aiyeleru* (1993) 3 NWLR (Pt. 280) 126. G H

It was stated that for gubernatorial elections, wards and Local

Government “returning” officers had no function to perform. It is the ward and local government ‘collation’ officers that took part in the conduct of election. The tribunal was therefore in error when it decided that there were no distinctions between ward and local government returning officers and ward and local government collation officers. It was submitted that it was this error that led the tribunal to hold the failure by the petitioner to have joined the petition. We were referred to S. 120(5) of the Electoral Act and the case of *Onakoya v. F.R.N.* (2002) 11 NWLR (Pt. 779) 595. The tribunal was also wrong in holding that the respondents admitted that ward and Local Government returning officers took part in the gubernatorial election because it is not a matter of fact capable of admission in the pleadings but a matter of law. It was submitted that the tribunal was wrong to have made recourse to the provisions of S. 127 of the Electoral Act to come to the conclusion that for the purposes of gubernatorial elections, ward returning officers are synonymous with ward and Local Government collation officers. It was the collation officers that conducted the gubernatorial proceedings at the Local Government collation centres. They were not joined in the petition, therefore any complains about the elections at the Local Government collation centres went to no issue. It was finally submitted that the tribunal was not justified in entertaining the petition when the presiding officers as well as the ward and Local Government collation officers were not joined as parties. We were urged to resolve this issue in favour of the appellant.

On the other hand it was submitted on behalf of the 1st respondent that for a presiding officer to be a necessary party, there must be complaint in the petition against the behaviour of such presiding officer. It was further submitted that to determine who are necessary parties to an election petition, it is only the petition itself that should be considered because the petition takes the place of pleadings. The court should not consider the evidence led because it will be contrary to both the statutory law as well as judicial pronouncements on the matter. The cases of *INEC v. Ray* (2004) 14 NWLR (Pt. 892) 92; *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1; *Yahaya v. Aminu* (2004) 7 NWLR (Pt. 871) 159 were referred to. In determining whether or not the petition contains any

complaint against the conduct or behaviour of presiding officers, we were urged to read the petition as a whole as advised by the Supreme Court in the case of *A.-G. Ekiti State v. Daramola* (2003) 10 NWLR (Pt. 827) 104. The 1st respondent's pleadings in the petition were extensively examined in the brief. It was then submitted that from the pleadings, B election did not take place in some of the polling stations because election materials never got to the polling stations and the persons responsible were supervisory presiding officers, the electoral offices and agents of the 1st respondent. The complaints of election or voting not holding in C some polling stations, from the state of pleadings, could not therefore be said to have anything to do with the conduct of presiding officers. The case of *Nnadi v. Ezike* (1999) 10 NWLR (Pt. 622) 228 was referred to and it was submitted that where the conduct of presiding officer at an D election is not impugned there is no need to make him a party to an election petition. It was also submitted that the case of *Kallamu v. Guriu* (2003) 16 NWLR (Pt. 847) 493 cannot apply to our present case because the facts are radically different from the facts of our present case. In *Guriu's case (supra)* the malpractices complained of took place at the E polling stations unlike in our present case where elections could not hold because the materials never got to the polling stations.

It was submitted that the persons the petitioner complained against were the ward returning officers, supervisory presiding officers, elec F toral officers as well as 2nd to 6th respondents. Therefore, the question of joining presiding officers by inference could not arise. Even where complaints were made that election did not take place because materials or result sheets never reached the polling stations, it was a complaint which G by inference could only be ascribed to the electoral officers and the supervisory presiding officers whose duty it was to provide election materials but not the presiding officers. It was also submitted that the appellant did not join issues in his pleadings with the 1st respondent as to the H officials of INEC whose conduct the petitioner complained of. We were urged to hold that the decision of the tribunal to the effect .that the petitioner did not indict presiding officers but rather relied on the results produced by the presiding officers at the polling stations, cannot be as-

sailed.

The 1st respondent stated that it was the contention of the appellant that the petitioner failed to join wards and Local Government collation officers. It was also the contention of the appellant that the wards and Local Government returning officers who were joined as respondents were not the same with wards and Local Government collation officers. It was submitted on behalf of the 1st respondent that from the pleadings the appellant never traversed the fact that Local Government returning officers took part in the Governorship election. It could therefore not have been an issue for determination in the tribunal and the tribunal was right in holding that the existence of Local Government returning officers was not disputed anywhere in the replies of the respondent. This is because any fact averred in the pleadings which is not denied is deemed to be admitted as was held in *Usman v. Abubakar* (2001) 12 NWLR (Pt. 728) 685. It was then submitted that having been admitted same would no longer be an issue for determination before the tribunal, same having been settled by the pleadings. In support of this admission the case of *Abu v. Ogli* (1995) 8 NWLR (Pt. 413) 353 was referred to. It was further submitted that the admission is direct, unequivocal, unqualified and total. The tribunal was therefore right to hold that in the light of the admission by the appellant, that this is not an issue for determination in this matter.

It was submitted that ward returning officer as well as Local Government Returning Officer did in fact take part in the conduct of the governorship election. The provisions of S. 17(2) of the Electoral Act, 2002 was then extensively discussed in the 1st respondent's brief and was submitted that the appellant was not misled by the use of the terms ward returning officer and Local Government returning officer. The officers were sued in their official capacities, testified before the tribunal in defence of the allegations made against them in the petition notwithstanding the fact that they answered ward collation officers and Local Government collation officers. It was finally submitted that since no miscarriage of justice occurred and this being an election petition which is *sui generis*, the court will not be fettered from having the petition on its

merits by undue technicalities. The case of *Anosike v. Emodi* (unreported) CA/E/EPT/19/2004 of 21/2/2005. We were urged to resolve this issue against the appellant.

Section 133 of the Electoral Act, 2002 has specified the persons entitled to present election petitions and the persons who could be made respondents. The section provides:

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

(a) a candidate at an election;

(b) a political party which participated at the election.

(2) The person whose election is complained of is, in this Act, referred to as the respondent, but 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 this 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.”

The above provision has been judicially considered by me Court of Appeal and the Supreme Court in several cases that it is now settled that where there is a complaint against the conduct of an electoral officer, a presiding officer or a returning officer, such officer must be made a party to the proceeding because he is a necessary party. Failure to join these election officers and other persons whose conduct of the election was complained of was fatal to the paragraphs of the petition relating to these officers. The paragraphs must be struck out. Similarly any evidence adduced in support of such paragraphs must of necessity be discountenanced. See *Egolum v. Obasanjo* (1999) 7 NWLR (Pt. 611) 423 and *Buhari v. Yusuf* (2003) 14 NWLR (Pt. 841) 446 and *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1.

To determine the election officials who must be joined as necessary parties because the petitioner has complained about their conduct at the election, it is necessary to examine the complaints of the petitioner by reading the petition as a whole. I have very

carefully gone through the further amended petition and I have not seen where the petitioners complained against the conduct of the presiding officers. In the petition, paragraphs 8 and 9 of “*facts/particulars relied upon* “, it was averred:

B “(8) *Not all the parties had candidates in the said gubernatorial election with the result that not all the three top copies meant for use by the ward returning officers were used.*

C (9) *It is this loophole (sic) that some ward returning officers, supervisory presiding officers and electoral officers exploited to add up figures in the original or top copies of Form EC8A (1) and collate figures in Form EC8B (1) which is different from the actual and lawful votes cast at the polling unit by electors and as truly reflected in the Form EC8A (1) given to party agents. Evidence shall be led in the wards where*
D *supervisory presiding officers did not submit all the three top copies to the presiding officer for collation of scores of candidates at the polling station/unit. Evidence will also be led of how the returning officers of various wards in all the Local Government Areas of Anambra State added*
E *up figures as scores of the candidates in the said election in Form EC8B(1) as ward results, when in fact the scores or the results did not reflect the true and lawful votes cast for each candidate at the said election. Evidence will also be led of how some ward returning officers, outrightly did*
F *not come to the ward collating station/units nor collated results of the polling station/units at the ward collating station/units nor collated results of the polling station/units yet scores were entered for candidates in Form ECSB(1) by the ward returning officers. Evidence will also be led*
G *as to how the returning officers who never appeared at the ward collating station/units or who appeared without collating the results suddenly appeared at the local government headquarters of the 21 local government areas and submitted a colourable ward result in Form EC8B(1) ...”*

H **From the above, it could be seen that the petitioner did not complain against the conduct of the presiding officers directly or by inference. His grudge was against the supervisory presiding officers, ward returning officers and electoral officers. Where the conduct of a presiding officer at an election is not impugned, there is**

no need to make him a party to an election petition. See *Nnadi v. Ezike* (1999) 10 NWLR (Pt. 622) 228. I am therefore in agreement with the tribunal when it stated in its judgment that:

“The petitioner clearly is not making allegations against the presiding officer whose both results he says are genuine and he is thus relying upon, and maintained throughout, were written at the polling stations. Rather the petitioner is impugning the set of results tendered by INEC as not being those written by presiding officers at the polling stations. The petitioner had averred that these set of results were arbitrarily written at venues other than the polling stations by named election personnel. See Yahaya v. Aminu (2004) 7 NWLR (Pt. 871) 159 at 183.”

It was also the contention of the appellant that the petitioner failed to join wards and Local Government collation officers and that wards and Local Governments returning officers who were joined as respondents are not the same with wards and Local Government collation officers and that wards and Local Government returning officers do not exist. The 1st respondent’s response was that the appellant never traversed the fact that Local Government returning officers took part in the governorship election. It could therefore not have been an issue for determination in the tribunal. The tribunal agreed with the 1st respondent that the existence of Local Government returning officers was not disputed anywhere in the replies of the respondent.

I will now consider the further amended petition and the appellant’s further amended reply to determine whether the appellant actually never disputed the existence of the wards and Local Government returning officers. It was averred in paragraph 3 of the further amended petition that:

“The 2nd respondent is the body charged with the statutory function of inter alia organizing and conduct of elections into the office of President, Governor, National Assembly and State House of Assembly in Nigeria and in fact conducted the election of 19th April 2003. The 3rd to 450th respondents are officials/officers of the 2nd respondent who took part in the conduct of the said election and whose conduct your petitioner complains of.”

The appellant in the 1st respondent's further amended reply to the further amended petition averred in paragraph 2 of the said reply that:

"The 1st respondent admits paragraphs 2, 3 and 4 of the further amended petition but adds that the petitioner was not declared winner at the said election as he did not score the majority and lawful votes cast in the said election."

Before a court decides whether or not there is an admission in the statement of defence or reply to a petition in respect of an averment in a statement of claim or petition, the court must consider the entire pleadings of the parties as a whole. See *A.-G, Anambra State v. Onuselogu Ent. Ltd.* (1987) 4 NWLR (Pt. 66) 547; *Titiloye v. Olupo* (1991) 7 NWLR (Pt. 205) 519; *Ugochukwu v. Co-op Commerce Bank Ltd.* (1996) 6 NWLR (Pt. 456) 524 and *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941)1. **I have carefully gone through the entire further amended petition and the 1st respondents further amended reply and it is my considered opinion that the appellant has admitted paragraph 3 of the further amended petition. There is nothing in the amended reply to the contrary. The admission is direct, unqualified and total. The appellant therefore agreed that the 3rd to 450th respondents were officials/officers of the 2nd respondent (INEC). He also agreed that all of them took part in the conduct of the governorship election and that the complaints in the petition relate to the conduct of these officers. This means that the parties did not join issues on this matter and as such it was not an issue for determination before the tribunal see *Abu v. Ogli* 11995) 8 NWLR (Pt. 413) 353 and *Temile v. Awani* (2001.) 12 NWLR (Pt. 473) 726. A court cannot consider issues not joined by the parties in their pleadings, to do so might result in denial of justice to one or the other of the contesting parties. I therefore hold that the tribunal was right when it held that, this is not an issue for determination in this matter. I therefore resolve the first issue in favour of the 1st respondent.**

The second issue is.

"Whether upon a proper construction of section 133(2) of the Elec-

toral Act, 2002, and in a view of the petitioner's pleadings and evidence particularly the pleadings under "facts/particulars relied upon" including paragraph 9 thereof, the tribunal below was justified in holding that policemen, soldiers and other security agents involved in the conduct of the election and indicted by the petitioner were not necessary parties and ought not to have been joined in the proceedings." B

It was submitted in the appellant's brief that the petitioner in his further amended petition as well as in the charts indicted the conduct of policemen, soldiers and other security agents involved in the conduct of the election and that the tribunal ought to have taken judicial notice of the fact that policemen and soldiers on official duty earned their name tags and force numbers clearly emblazoned on their uniform. They cannot therefore be said to be unknown. It was also submitted that the petitioner and some of his witnesses gave evidence clearly indicting these officers in the course of their duties at the election venue. It was submitted that since the tribunal had entertained testimonies from the petitioner through his witnesses in relation to the alleged misconduct of these security agents engaged in the conduct of the election, it was perverse for the tribunal to then later hold that these security officers were unidentified for the purposes of S. 132(2) of the Electoral Act 2002. C D E

It was also submitted that the decision in *Buhari v. Obasanjo* (2003) 17 NWLR (Pt. 850) 423 could not offer refuge to the petitioner because in that case, no allegation was made specifically that the policeman who were allegedly flogging people were on election duties. Whereas in this case, the petitioner clearly pleaded that the policemen and soldiers whom he indicted were stationed at the local government collation centres on election duty. It was then submitted that all allegations connected with paragraph 9 of the petitioner's pleadings ought to have been ignored and the paragraph ought to have been struck out for non-joinder of the law enforcement officers indicted. The appellant then urged the court to sustain this issue by deciding that upon a proper construction of S. 133(2) of the Electoral Act, 2002 and in view of the petitioner's pleadings and evidence, the tribunal was not justified in holding that policemen, soldiers and g other security agents involved in the conduct of the election and F G H

indicted by the petitioner were not necessary parties and ought not to have been joined in the proceedings.

The 1st respondent challenged the competence of ground 5 of the appellant's grounds of appeal on the ground that it did not arise from the judgment appealed against and should be struck out. It was submitted that a ground of appeal must be an attack on an adverse finding or decision in the judgment appealed against. A ground of appeal must relate to a specific finding or decision of the lower court. It was submitted that in the present appeal, ground 5 of the appellant's grounds of appeal does not relate to any finding or decision of the tribunal. The court is urged to strike out ground 5 as being incompetent on the authorities of *Alubankudi v. A.-G., Fed.*, (2002) 17 NWLR (Pt. 796) 338; *Lawson v. Afani Continental Co. (Nig.) Ltd.* (2002) 2 NWLR (Pt. 752) 585; *Owena Bank Plc. v. Olatunji* (2002) 12 NWLR (Pt. 781) 259.

Shorn of its particulars, ground 5 of the notice and grounds of appeal read:

“(5) *Ground five error in law.*

The learned members of the tribunal erred in law when, having regard to the averments in the pleadings and evidence led, they held that policemen, soldiers and other security agents involved in the conduct of the election and indicted therein by the petitioner were not necessary parties and ought not to have been joined in the proceedings.”

With due respect to the learned Senior Counsel, the tribunal made no such holding, this is what the tribunal said:

The next sub-head of the issue is the non-joinder of Policemen and soldiers who were said to have shot in the air to scare away people or used horse whip to flog party agents other than those of P.D.P. The respondents have stated that the policemen and soldiers ought to have been joined as statutory respondents. The petitioner has replied that they were not identifiable and that they were there to disrupt the election. He relied on the case of Buhari v. Obasanjo (2003) 17 NWLR (Pt. 850) 423 at 482-483. We hold the view that any allegation against those Police-men and soldiers against whom allegations were made but who were not identified as persons who took part in the conduct of the election, it is

not necessary, on the authority of *Buhari v. Obasanjo* (*supra*) to have joined them as respondents. And in respect of those Policemen and soldiers who were identified but were not joined as respondents, any allegation against them goes to no issue”.

It could be seen that the tribunal did not hold that policemen and soldiers involved in the conduct of the election and indicted therein by the petitioner were not necessary parties and ought not to have been joined in the proceedings as claimed by the appellant.

A ground of appeal against a decision must relate to the decision and should be a challenge to the validity of the ratio of the decision. See A.-G., *Oyo State v. Fairlakes Hotel Ltd.* (1988) 5 NWLR (Pt. 92) 1. **A ground of appeal is always directed against a *ratio decidendi* of a lower court. There is no such thing as appeal at large.** *Saraki v. Kotoye* (1990) 4 NWLR (Pt. 143) 144. **An appeal presupposes the existence of a court decision appealed against.** *Egbe v. Alhaji* (1990) 1 NWLR (Pt. 128) 546. **A ground of appeal that is not related to nor challenges the validity of any *ratio decidendi* in the judgment on appeal is incompetent and is liable to striking out.** *Ogunbiyi v. Ishola* (1996) 6 NWLR (Pt. 452) 12. **In our present case, ground 5 has no relation whatsoever to nor does it challenge the validity of any *ratio decidendi* in the judgment on appeal. It is incompetent.**

An issue for determination can only be formulated from a competent ground of appeal. An issue for determination formulated from the incompetent ground of appeal must be struck out.

In the circumstance, ground 5 of the grounds of appeal, issue No. 2 arising there from as well as the argument preferred in support are struck out.

I now come to the third issue which is:

“Whether the tribunal was justified in refusing to sustain or validate the results for all the wards to which the petitioner ascribed wrong names.”

It was submitted that the tribunal without any lawful justification refused to sustain or validate the results for some wards to which the

petitioner ascribed wrong names in spite of the evidence and documents tendered by the respective electoral officers covering the said wards and showing that the wards exist *de jure et de facto* but were wrongly named by the petitioner. It was further submitted that contrary to the tribunal's conclusion, the existence of an electoral ward is a matter of law and not a matter of fact to be pleaded or traversed. We were referred to S. 4(2) of INEC (Establishment) Decree No. 17 of 1998 as well as S. 8 of Local Government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1998 which empowered INEC to divide each Local Government Area in Nigeria into such number of wards. It was also submitted that the petitioner had no excuse for assigning wrong names to the various wards because the information was clearly available to him from the official Gazette or from guide to polling/registration centres made by INEC. It was submitted that issues were joined by the parties as to names of wards in various charts embedded in their pleadings. Examples of the wrong names assigned by the petitioner to some of the wards were given in the brief. The evidence of certain witnesses were also referred to as well as exhibits "ACA-ACJ". It was then submitted that by refusing to validate these results, the tribunal had occasioned miscarriage of justice and the computation it made in appendix 4 could not stand for the purpose of determining who won the election within the context of S. 136 of the Electoral Act.

It was submitted that the tribunal was in error when it refused to attach probative value to exhibits "ACA-ACJ" being documents tendered by the electoral officers showing the statutory names of the wards in their respective Local Government areas and which names all consistent with the names in the relevant statutory instruments and were also clearly pleaded in the various charts in the respondents' replies. It was then submitted that the duty which the tribunal carried but which it failed to perform was to determine the proper names of the wards in question and assign probative value to the results therefrom. By failing to do so, it was contended, the tribunal failed the electorates by disenfranchising them and also rendered appendices 3 and 4 drawn up by it untenable. The case of *Kalu v. Uzor* (2004) 12 NWLR (Pt. 886) 1 was referred to. We were

urged to hold that the tribunal was not justified in refusing to sustain or validate the results from all the wards to which the petitioner ascribed wrong names in spite of the evidence and documents tendered by the respective electoral officers covering the said wards and showing that the wards exist *de jure et de facto* but were wrongly named by the petitioner. B

The 1st respondent on the other hand submitted that the evidence adduced by the appellant purporting to show that the said electoral wards were either not recognized by INEC or do not exist are inadmissible. It was submitted that the existence or non-existence of any electoral ward is a question of fact. It was contended that the petitioner stated the names of electoral wards in respect of which results of the election were questioned. The appellant did not in any paragraph of his reply traverse the fact of existence of any of these wards. It was submitted that the appellant could not be heard to contend that the traverse is contained in his own chart. It was not averred anywhere in the appellant's reply that the said wards do not exist. It was therefore never an issue before the tribunal. D E

The 1st respondent then urged us to up-hold in its entirety, the finding of the tribunal and to hold that the evidence adduced at the trial in the attempt to show that the wards in question do not exist were inadmissible and went to no issue. F

It is the contention of the appellants that the existence of an electoral ward is a matter of law and not a matter of fact. With due respect I disagree with this statement. Surely the existence or non-existence of a thing is a question of fact. This is the same with an electoral ward. It either exists or it does not exist. The petitioner has pleaded these wards in his petition. If the respondents deny the existence of these wards, it is incumbent on them to challenge the existence in their reply to the petition. There is nowhere in their pleadings the respondents deny the existence of these wards. It therefore follows that the parties did not join issues as to the existence or non-existence of the wards. A court cannot consider issues not joined by the parties in their pleadings. See *Temile v. Aweni* (su- G H

pra). I therefore agree with the tribunal when it held:

“We hold the view that the existence or non-existence of the ward is a matter of fact and material fact alleged by the petitioner. Yet the respondent did not deny the existence of such wards in their pleadings.

B Consequently no issue was joined as to the existence or otherwise of the affected wards. In any case it is settled law that where facts are alleged and are not controverted, no further proof of such fact is required. See Buhari v. Obasanjo (2005) 2 NWLR (Pt. 910) 241. Having found that issues were not joined in respect of the existence or otherwise of some wards, this sub-head of issue No.1 does not arise for determination.”

I therefore resolve issue No. 3 in favour of the 1st respondent. The fourth issue is:

D “Whether the ‘National Assembly/Governorship and Legislative Houses Election Petition Tribunal’ which heard and determined the petition now challenged in this appeal is known to the 1999 Constitution of Nigeria and is the Tribunal created under the said Constitution to determine petitions concerning gubernatorial elections.”

E It was the contention of the appellant that a tribunal is said to have jurisdiction over a case when it is properly constituted as was held in the case of Madukolu v. Nkemdilim (1962) 1 All NLR 587. It was submitted that an election tribunal is a corporate entity created by the Constitution and like all corporate bodies it is only known by the name ascribed to it
F by the Constitution or the enabling statute which created it and by no other name. The cases of Njemanze v. Shell B.P. (1966) 1 All NLR 8 and Agbonmagbe Bank v. G. B. Ollivant (1961) All NLR 116 were referred to. It was submitted that both the 1999 Constitution and the Electoral Act
G made provisions for Electoral Tribunals to handle election related matters. Section 285 of the Constitution and S. 132(1) and (2) of the Electoral Act were quoted and considered in the appellant’s brief and it was submitted that the National Assembly/Governorship and Legislative Houses
H Election Petition Tribunal that gave judgment in this case is unknown to the Constitution and to the Electoral Act. It was further submitted that the tribunal was not the “competent tribunal” envisaged/created by S. 285(2) of the 1999 Constitution to determine gubernatorial election under

the Constitution. We were then invited to take judicial notice of the fact that it was this tribunal that heard and determined all the National Assembly Election Petitions in Anambra State.

We were also invited to depart from this court's decision in *Bayo v. Njidda* (2004) 8 NWLR (Pt. 876) 544 and *Ajadi v. Ajibola* (2004) 16 NWLR (Pt. 898) 91 which were *decided per incuriam* and are inconsistent with the Supreme Court position in *Buhari v. Yusuf* (2003) 14 NWLR (Pt. 841) 446 to the effect that an election petition is heard and determined by a competent tribunal as specifically provided by the Constitution. It was also submitted that the facts in *Bayo v. Njidda (supra)* and *Ajadi v. Ajibola (supra)* are distinguishable from the facts in the instant case. It was then prayed that this court answer issue No. 4 in the negative by deciding that neither the National Assembly/Governorship and Legislative Houses Election Tribunal which heard and determined the petition, nor National Assembly Election Tribunal/Governorship and Legislative Houses Tribunal, shown on the originating process filed by the petitioner is known to 1999 Constitution and therefore none of them is the tribunal created under the said Constitution to determine election petitions concerning gubernatorial elections. It was submitted that the result of so holding would be that the election petition filed by the petitioner is fundamentally incompetent having been filed in a non-existent tribunal. The determination of the tribunal, which was improperly constituted was therefore an exercise without jurisdiction. The petition should be struck out.

The 1st respondent in his brief submitted that the Governorship/Legislative Houses Election Tribunal is created by S. 285(2) of the 1999 Constitution. We were asked to take judicial notice of the fact that this panel which heard the governorship petition in the State also heard all the National Assembly petitions in the State. It was also submitted that even if the petition was wrongly headed the appellant participated fully in the proceedings before the tribunal and the wrong heading neither misled the appellant nor occasioned any miscarriage of justice. S. 22 of the Interpretation Act (Cap. 192 Laws of the Federation of Nigeria) was referred to. The following cases were also referred to: *Bucknor-Maclean v. Inlaks*

Ltd. (1980) All NLR 184, (1980) 8-11 SC 1; *Adejumo v. David Hughes & Co. Ltd.* (1989) 5 NWLR (Pt. 120) 146 and *N.I.C.O.N. v. Power & Industrial Engineering Co. Ltd.* (1986) 1 SC 1.

It was also submitted that there was nothing in the records of appeal suggesting that the members of the tribunal who heard the petition were not duly appointed to sit in the Governorship and Legislative Houses Election Tribunal in Anambra State. It was therefore submitted that the Tribunal which heard the petition at the trial stage was properly, regularly and validly constituted as required by law. It was further submitted that it has not been shown that the tribunal was an illegal one; it has not been shown that the tribunal was not properly constituted, it has not been shown that the members were not qualified and as such it could not be seriously argued that the Tribunal which heard the petition and gave the judgment from which this appeal emanated is unknown to law. It was submitted that even if there was any defect in the title or heading of the petition as is being alleged, the appellant cannot raise such an issue as the present one at this stage of the proceedings.

I am afraid it is too late in the day for the appellant to complain about the name or title the petitioner gave the tribunal. The appellant filed a reply to the petition without raising any objection as to the title of the tribunal. The appellant fully participated in the hearing of the petition to the end i.e. until judgment was delivered without raising any objection as to title of the tribunal. By his conduct, the appellant is deemed to have waived the objection. This is more so if we considered paragraph 49(2) of the 1st Schedule to the Electoral Act, 2002. It provides:

“(2) An application to set aside an election petition or a proceeding resulting there from for irregularity or for being a nullity, shall not be allowed unless made within a reasonable time and when the party making the application has not taken any fresh step in the proceedings after knowledge of the defect.”

As could be seen the appellant is enjoined by law to raise the objection within reasonable time. Certainly waiting until after judgment is delivered, to raise the objection could not be said to be

within reasonable time. By participating fully in the proceedings up to when judgment was delivered meant that the appellant has taken steps in the proceedings. He is deemed to have waived his right of complaint. See *Uzodinma v. Udenwa* (2004) 1 NWLR (Pt.854) 303 and *Abubakar v. I.N.E.C.* (2004) 1 NWLR (Pt. 854) 207. B

The appellant also asked us to depart from this court's decision in *Bayo v. Njidda (supra)* and *Ajadi v. Ajibola (supra)* because they were decided per *incuriam* and are inconsistent with the Supreme Court position in *Buhari v. Yusuf (supra)*. It is my considered opinion that the said two decisions of this court were not reached per *incuriam* neither are they inconsistent with the position of the Supreme Court in *Buhari v. Yusuf's* case. The issue of wrong title was never before the Supreme Court in the said case and as such the Supreme Court did not determine the issue of wrong title even *obiter*. What the Supreme Court did in that case was to highlight the peculiar nature of an election petition. That an election petition is seen not as a civil proceedings in the ordinary sense nor a criminal proceeding. That it is regarded as a proceeding *sui generis*. D

I therefore regard the two cases as good law. The two cases deal with the issue of wrong title of a tribunal. In *Ajadi v. Ajibola* (2004) 16 NWLR (Pt. 898) 91, Ikongbeh, JCA stated at page 207: E

“The Constitution certainly knows the two tribunals, the National Assembly Election Tribunal and the Governorship and Legislative Houses Tribunal, because it created them. The fact that the secretary wrote the two names and separated them with a slash (/) instead of an “and” as I have just done, is no reason to conclude that reference is to one entity known by the combined names. It is common knowledge that the slash is sometimes used as a substitute for “and” or “or”. I think the more reasonable conclusion reach from the conjoining of the two names by a slash is that the tribunal doubles as the National Assembly Election Tribunal and the Governorship and Legislative Houses Tribunal as the occasion requires. Learned counsel has not drawn our attention to any law that prevents the president of this court... from assigning the duties of one or more of the tribunals to it. At the very worst, the ascription of a wrong name to tribunal can be regarded as a mistake by the secretary, which, as F G H

the learned Adekeye, JCA pointed out, is a matter of mere form, which does not go to the competence of the tribunal.”

In *Bayo v. Njidda* (2004) 8 NWLR (Pt. 876) 544, Sanusi, JCA has this to say with regards to giving a tribunal wrong title. He stated at pages 615 to 616 that:

“The petitioner/2nd respondent in this cross-appeal is therefore wrong in the heading he gave to his petition. However could that mean that the tribunal, which despite noting the mistake took cognizance of the case, be said to lack jurisdiction to adjudicate on the matter because of that wrong heading? I think not. For to hold so is to recognize mere technicality to defeat the course of justice... The petitioner had admittedly goofed in giving his petition a wrong heading of the tribunal. The tribunal despite the wrong name ascribed to it in the petition accepted the petition to be filed, heard the petition and determined it. Also all the respondents the second cross-appellant included, submitted to the jurisdiction of the lower tribunal and participated in the proceedings up to its logical end. I think wrong naming of the tribunal cannot and should not be allowed to be a basis on which a petition could be struck out as that has not been envisaged by the Electoral Act. The wrong naming of the tribunal did not in any way deceive the 2nd cross-appellant neither did it show that injustice was occasioned to it. The wrong naming of the tribunal by the 2nd respondent therefore did not also lead to any miscarriage of justice to any of the parties to the proceeding or petition. The tribunal therefore had jurisdiction to adjudicate in the matter despite the wrong title given to it. It, as such rightly assumed jurisdiction to entertain, hear and determine the petition.”

Needless to say, I agree with the two dicta. In the result, my answer to issue No. 4 is in the affirmative. Despite the wrong title ascribed to it by the 1st respondent, the tribunal rightly assumed jurisdiction and determined the petition.

The next issue, which is issue No. 5, is:

“Whether the judgment delivered by the tribunal below is valid when Some of the members who sat and delivered the judgment did not take part in the hearing of the petition and were not present when all the

witnesses testified.”

It was submitted that the complaint under this issue is that with the exception of the chairman of the tribunal all the other members of the tribunal came in and out of the proceedings and were at one time or the other in the course of the proceedings absent from the sittings of the tribunal when various witnesses for either the petitioner or for the 1st respondent gave evidence. It was submitted that S. 285(4) of the 1999 Constitution provides the quorum of an election tribunal which is the chairman and two other members. It was submitted that “the chairman and 2 other members” envisaged by the Constitution are the chairman and two other members who participated in the hearing of all the witnesses that testified in the case from the beginning to the end and that it also includes the chairman and two other members who heard the submissions of counsel before adjourning for judgment, We were referred to the unreported decision of the Enugu Division of this court in *Hon. Emma Anosike v. Chief (Mrs.) Joy Emodi No. CA/E/EPT/19/2004 delivered on 21/2/2005*. S. 28 of the Interpretation Act Cap. 123 Vol. 8 Laws of the Federation of Nigeria and it was submitted that the import and purport of this provision is that whichever quorum that began the proceeding must end it. There could be no change in the quorum.

Members were not permitted to come in and out of the proceedings as they pleased. Specifically, no member of the panel who did not hear all the evidence may take part in the delivering the judgment. The following cases were referred to: *Chief Yaw Damoah & Ors. v. Chief Kofi Taibil & Ors.* (1947) 12 WACA 167; *Wayo Ubwa v Tiv Area Traditional Council & Ors.* (2004) 11 NWLR (Pt. 884) 427.

It was submitted that once it is established that any member of the panel who sat at judgment and did not hear all the evidence, there is an infraction of the audi alteram partem rule and a miscarriage of justice is presumed and that it is an indispensable requirement of justice that the party who has to decide shall hear both sides, given each side an opportunity of being heard. The case of *Francis Shanu v. Afribank Nig. Plc.* (2002) 17 NWLR (Pt. 795) 185 was referred to where the dictum of Uwaifo. JSC on 225 to 226 was extensively quoted and the case of

Eghobamien v. F. M. B. N. (2002) 17 NWLR (Pt.797) 488.

It was asked how could Chief Magistrate A. I. Maru who neither saw, watched nor heard 28 witnesses testify, append his signature to the judgment when issue of credibility of witnesses were in issue? How could
 B Hon. Justice Agube who was absent when at least 3 of the petitioner's witnesses testified take part in writing and delivering the judgment? How could Hon. Justice Onamade who for two days was absent when PW5 was being cross-examined. It was submitted that the only person who
 C could lawfully have delivered the judgment was the chairman but the provision of S. 285(4) of the 1999 Constitution could not be side tracked. He required at least two other consistent members to join him in writing and delivery of the judgment. It was submitted that none of the three
 D members who signed the judgment or the fourth member who did not sign, was qualified to sit in judgment with him having not participated fully in the taking of all witnesses testimony. It was further submitted that the appellant has conclusively shown that all the four members in the
 E tribunal neither saw nor heard all the witnesses and their testimonies before the three out of four members joined the chairman in rendering the judgment appeal against. This court is urged to resolve issue No. 5 in favour of the appellant by holding that the judgment delivered by tribunal is invalid when four of the members who sat and delivered the judgment
 F did not take part in hearing of the petitioner and were not present when all the witnesses testified.

It was submitted on behalf of the 1st respondent that the allegation that the tribunal never sat with consistent quorum throughout the proceedings has not been substantiated and is not borne out of the records
 G of the tribunal. It was also submitted that by the provision of paragraph 2(1) of the sixth Schedule to the Constitution, the Governorship and Legislative Houses Election Tribunal shall consist of the chairman and two other members and S. 285(4) of the Constitution provides that the
 H quorum for an election tribunal shall be the chairman and two other members. It was also submitted that by making provision for quorum, there is a clear indication that the Constitution contemplates that all the five members of the tribunal need not be present during the hearing of an election

petition and that it is the chairman that the Constitution makes it mandatory that he must be present before the tribunal can, with any other two members, form a quorum. It is submitted that the allegation of inconsistent quorum to be founded, must be borne out from the records of the tribunal and that the records of the tribunal is the proceedings as recorded by the chairman. In considering this allegation of inconsistent quorum, we were urged to have recourse to the official records of the tribunal as kept by the chairman. It is submitted that a careful study of the records of the tribunal readily shows that the allegation of inconsistent quorum was not made out. There was nothing in the records which supports the allegation that save the chairman the sittings of other members of the tribunal were inconsistent during the hearing of the petition. It was further submitted that the records of the tribunal showing that the tribunal was properly constituted at all times is presumed to be correct and the parties are bound by the records, in support, the following cases were referred to: *Agwarangbo v. Nakande* (2000) 9 NWLR (Pt. 672) 341 and *Abatan v. Awudu* (2004) 17 NWLR (Pt. 902) 430. Also there was no affidavit sworn filed and properly served, challenging the records of the tribunal.

It was submitted in the alternative that even if there was any variation in the composition of the tribunal during the hearing (which is not conceded) that would still not vitiate the decision of the tribunal. This is because this case being an election petition it must be considered and resolved on its own facts. In the present petition, the decision of the tribunal turned in the main on the tribunal's evaluation of documentary evidence. It was further submitted that in a situation such as the present case, even if it is shown that there was some inconsistency in the quorum of the tribunal, such inconsistency will not necessarily affect the decision of the tribunal. Apart from the unsubstantiated allegation of inconsistency in the quorum of the tribunal, the appellant has not gone further to show how the alleged inconsistency has affected the decision of the tribunal or that any miscarriage of justice has occurred thereby. This is more so in the present case being an election petition which is *sui generis*. We were then referred to the unreported case of *Hon. Emma*

Anosike v. Chief (Mrs.) Joy Emodi (supra). We were urged to resolve this issue against the appellant.

Paragraph 2(1) of the Sixth Schedule to the 1999 Constitution prescribes the membership of the Governorship and Legislative Houses Election Tribunal. It provides:

“A Governorship and Legislative Houses Election Tribunal shall consist of a Chairman and four other members”

S. 285(4) of the 1999 Constitution then prescribes the quorum for an election tribunal. It provides:

“(4) The quorum of an election tribunal established under this section shall be the chairman and two other members.”

The law is clear where the chairman of an election tribunal sits with two other members a quorum is formed. The appellant’s complaint is not on the tribunal’s quorum *per se*. It is not in dispute that the chairman of the tribunal always sits with either two or three members. There was always a quorum. The appellant’s complaint is that apart from the chairman all the other members of the tribunal came in and out of the proceedings and were at one time or the other in the course of the proceedings absent from the sittings of the tribunal. In short the appellant is complaining about inconsistent quorum. It is the contention of the appellant that sitting with inconsistent quorum vitiates the trial.

I will now consider the law to determine whether or not sitting with an inconsistent quorum affects the jurisdiction of the tribunal and renders the proceedings a nullity. In the case of *Adeigbe & Anor. v. Kusimo & Ors.* (1965) 1 All NLR 248, Ademola, CJN said at page 263:

“We are in no doubt about the correctness of what the learned appeal Judge said in his judgment that there are abundant decision in the High Court and West African Court of Appeal on the point that where a court is differently constituted during the hearing of a case, or on various occasions when it met, or where one member did not hear the whole evidence, the effect on the proceedings is to render them null and void.

The learned Judge obviously had in mind, among others, the following cases:

Agba N.A. v. Adeyanju (1936) 13 NLR 77; *Tawiah III v. Ewudzi* (1936) 3 WACA 52; *Otwiwa v. Kwaseko* (1937) 3 WACA 230; *Damoah v. Taibil* (1947) 12 WACA 167; *Runka v. Katsina N.A.* (1950) 13 WACA 98. In the first of these cases, in which the defendant witnesses were not heard by two members of the court, the principle was enunciated that a judgment could not be allowed to stand which was given by Judges who had not heard all the evidence; in the other four cases, the appeal court held expressly that the proceedings were a nullity on that account. *There seems to be a confusion of thought between jurisdiction and regularity:* between the competence of the court to hear the case and the propriety of a bench who had not heard all the evidence adjudicating on the case. This matter was aptly put in a judgment of this court in the appeal *Gabriel Madukolu v. Johnson Nkemdilim* FSC 344/1960 (unreported) decided on the 12th day of November, 1962, (1962) 2 SCNLR 341 where Bairamian, F.J. put it thus...

"A complaint against a hearing that was not always before the same bench does not pertain to any matter that *goes to the jurisdiction of the court*. It is at bottom a complaint that the judgment cannot be satisfactory on the ground that as the persons who gave it had not seen and heard all the witnesses, they could not appraise the evidence as a whole and decide the facts properly. Thus it is a complaint on the soundness of the judgment itself, and not a complaint that is extrinsic to the adjudication, which is the test to apply when considering a submission on jurisdiction. We are therefore of the opinion that variations in the bench do not make the judgment a nullity; they may make it unsatisfactory, and it may have to be set aside for this reason, but whether they do or not depend on the particular circumstances of the case." (*Italics mine*).

It could be seen that a judgment delivered by a tribunal whose quorum is not consistent is not a nullity. A complaint which is based on the inconsistent sitting of the tribunal's quorum is a complaint that the judgment could not be satisfactory on the ground that those who gave it had not heard all the witnesses, and did not pertain to any matter of jurisdiction. In our present case, I therefore hold

that the appellant’s complaint is on the soundness of the judgment and does not pertain to any matter of jurisdiction.

In the case of *Hon. Emma Anosike v. Chief (Mrs.) Joy Emodi (unreported)* decision of this division of this court, the same issue as in our present case came before a panel of five justices of this court in CA/E/EPT/19/2004. The judgment was delivered on 21st February, 2005.

One of the issues before the court in the above quoted appeal was:
“Whether the entire proceedings and judgment of the lower tribunal are not a nullity considering the fact that only the tribunal’s chairman was consistent in sitting throughout the hearing and judgment.”

Delivering the leading judgment of the court, Adekeye, JCA, after considering the interpretation and effect of S. 285(4) of the Constitution said that:

“A situation where members of a tribunal swap positions during the hearing of a single case cannot bring out the best in the performance of their duties as adjudicators. I always believe however that each case must be decided according to its peculiar circumstance. The question which arises is what is the nature of the petition before the tribunal and the evidence led by the parties.

After considering the evidence adduced before the tribunal the learned Justice concluded:

*“In my view the evidence is purely documentary against the background that the chairman sat throughout the proceedings. Secondly the quorum - panel of three members was maintained daily. I have considered all the cases cited by the counsel. I have to point out that the matter of quorum of the election tribunals is a creation of statute, the Constitution. A case law cannot override the Constitution. Finally the way and manner the inconsistency has affected the judgment or how it has occasioned a miscarriage of justice to the parties, have not been emphasized in the issues for determination other than the fact that it is a procedural defect which has rendered the judgment a nullity. I cannot but invoke the judgment of *Nwobodo v. C. C. Onoh (1984) 1 SC 1 at 195* which states that:*

‘Election petitions are by their nature peculiar from the point of

public policy. It is the duty of the court therefore to endeavour to hear them without allowing technicalities to unduly fetter their jurisdiction.’ I resolve the issue against the appellant”.

As I have earlier held in this judgment, a complaint against the sitting of inconsistent quorum does not pertain to the jurisdiction of the tribunal. **Any variations in the quorum does not make the judgment a nullity. They only made the judgment unsatisfactory and could be set aside for that reason. Whether or not to set aside the judgment depends on the peculiar circumstances of each case.**

The evidence adduced before the tribunal is mainly documentary and the decision of the tribunal is based largely on its evaluation of documentary evidence i.e. the results sheets in Form EC8A (1), exhibits B to N series and exhibits Q to AD series. Apart from the complaint of inconsistency in the quorum, the appellant has failed to show how the inconsistency affected the judgment or that the inconsistency in the quorum of the tribunal has occasioned a miscarriage of justice. I resolve this issue against the appellant.

I now come to the sixth issue i.e.:

“Whether at the time the tribunal permitted the petitioner to further amend his petition and to file his further amended petition upon which the petitioner canvassed his case, the tribunal was justified in doing so having regard to the provisions of paragraph 14(2) of the First Schedule to the Electoral Act, 2002 and also having regard to the nature of the amendment then made by the petitioner to his petition.”

After considering the provision of paragraph 14(2) of the First Schedule to the Electoral Act, 2002, it was submitted that any amendment which sought to alter the figures upon which the petitioner based his grounds, and any amendment which alters the wards or polling stations in respect of which the petitioner complained in the petition are material and substantial and therefore ought not to be allowed after the time for filing the petition had expired. It is the contention of the appellant that the tribunal was in error to have allowed the amendment at so late a stage. The substantial amendment granted was therefore granted without jurisdiction and the further amended petition was incompetent and should

not have been used to decide the petition. It was also submitted that once the petitioner complained in his petition that the 1st respondent did not score a majority of lawful votes cast at the election the question of the votes cast at the election becomes a material and substantial issue which cannot be amended after time for filing the petition had elapsed. It was stated that in this case the votes scored at each polling booth, each ward and each local government area were material and after time had expired for filing the petition the petitioner should not have been allowed to amend the scores pleaded by him upon which he had premised his petition *ab initio*. It was further submitted that the amendments introduced radically altered the figures and facts earlier relied upon by the petitioner.

After giving seven examples of the amendments granted, it was the contention of the appellant that the radical departures from the facts and figures affected all the wards in ten out of fourteen local governments in respect of which the petitioner complained. It was submitted that paragraph 14(2) of the First Schedule to the Electoral Act is both mandatory and peremptory. It admits of no exercise of discretion on the part of the tribunal. Any material alteration out of time is prohibited absolutely. That there had been alleged “typographical error” cannot be an excuse to radically depart from the case originally put out. It was therefore submitted that the amendment as allowed by the tribunal was utterly unwarranted and not permissible. To introduce scores where there were none or to remove scores where scores had been pleaded or to alter the scores as pleaded after issues had been joined by the parties could not be anything less than substantial alteration to the petitions. We were then referred to the following cases among others: *Hashidu v. Goje* (2003) 15 NWLR (Pt. 843) 352; *Udonte v. Bassey* (1999) 5 NWLR (Pt. 604) 610; *Opia v. Ibru* (1992) 3 NWLR (Pt. 231) 658; *Jang v. Dariye* (2003) 15 NWLR (Pt. 843) 436 and *Yusuf v. Obasanjo* (2003) 16 NWLR (Pt. 847) 554. The court was urged to decide that at the time the tribunal permitted the petitioner to further amend his petition and to file his further amended petition upon which the petitioner canvassed his case, the tribunal was not justified in doing so having regard to the provisions of paragraph 14(2) of the First Schedule to the Electoral Act and also having regard to

the nature of the amendment. It was submitted that the tribunal lacked the jurisdiction to grant the amendments and ought to have upheld the application to set aside the said amendments and dismiss the petition in its final judgment. We were asked to dismiss the petition.

It was submitted on behalf of the 1st respondent that in allowing the amendment, the tribunal did not transgress any law on amendment of a petition and accordingly acted properly. It was contended that based on the motion for amendment, which the tribunal granted, what the 1st respondent sought to amend were mere typographical errors i.e. juxtaposition of wards and results which when corrected did not alter the total scores pleaded. All the amendments granted by the tribunal were considered in the 1st respondent's brief. Also paragraph 14(2) of the First Schedule to the Electoral Act was considered. It was submitted that in our present case the alteration did not affect the total scores and that in the charts when altered by the amendment the total scores remained the same implying that the alteration could not have been substantial. It was also submitted that no evidence or pleadings can alter the contents of a declared result. If the amendment was to bring the pleadings in line with the only legal evidence on the issue of scores i.e. Form EC8A (1) then they are mere consequential amendments which the tribunal is duty bound to effect at any time. The case of *Anigala v. Abeh* (1999) 7 NWLR (Pt.611) 454; *Ojah v. Ogboni* (1976) 4 SC 69; *Okafor v. Ikeanyi* (1979) 3-4SC 99 and *Igweshi v. Atu* (1993) 6 NWLR (Pt. 300) 484 were referred to. It was finally submitted that the Forms EC8A (1) were not only pleaded but were tendered. All that was desired by the amendment was to correct some minor misstatement of their contents as a result of wrong tabulation and oversight by the typist that constructed the charts. We were urged to hold that the amendments introduced were not substantial at all and therefore did not violate paragraph 14 of the First Schedule. Paragraph 14(1) and 14(2) of the First Schedule to the Electoral Act, 2002 provides:

“14(1) Subject to sub-paragraph (2) of this paragraph, the provisions of the Civil Procedure Rules relating to amendment of pleadings shall apply in relation to an election petition or a reply to the election

petition as if for the words “any proceedings” in those provisions there were substituted, the words “the election petition or reply.”

(2) *After the expiry of the time limited by -*

(a) *Section 154 of this Act for presenting the election petition, no amendment shall be made.*

(i) *introducing any of the requirements of sub-paragraph (1) of paragraph 9 of this Schedule not contained in the original election petition filed, or*

(ii) *effecting a substantial alteration of the ground for, or the prayer in the election petition: or*

(iii) *except anything which may be done under the provisions of sub-paragraph (3) of this paragraph effecting a substantial alteration of or addition to the statement of facts relied on to support the ground for or sustain the prayer in the election petition.”*

The provisions of paragraph 14 (2) is clear and unambiguous.

No amendment will be allowed which will introduce new parties to the petition, alter the right of the petitioner to present the petition, alter the holding of the election, the scores of the candidates and the person returned as the winner of the election or alter the facts of the election petition or the ground or grounds on which the petition is based or the relief sought by the petitioner. In effect, any amendment which is substantial which alters the grounds for or the prayer in the election petition will not be allowed.

I have very carefully gone through the amendments sought and granted by the tribunal. It is my considered opinion that the amendments were inconsequential. A random picking of the amendments granted will illustrate what I mean. The 1st amendment sought was:

“To amend page 26 of the petition at item No. 04 in the chart by bringing down the figure 948 in Akpo down to item 05 Amesi to read 05 Amesi APGA 948 and PDP 43 in line with evidence of PW1, it being a typographical error which does not affect the total scores for Aguata Local Government Area as pleaded by the petitioner and as pleaded that there was no result for Akpo ward at the foot of page 26 of the petition.

3(ii) To bring the result of Alor Ward II at the said page 27 of the petition which is 117 for APGA and 3718 for PDP wrongly placed in Alor Ward I (where no result was obtained as pleaded at page 28 of the petition) to correct the typographical error.

4. To amend the word “North” to read “South” at page 32 of the petition at the 9th line of the paragraph immediately following the chart for Onitsha South Local Government Area headed “further particulars” so that Onitsha “North” Local Government Area will read Onitsha “South” Local Government Area.

9. To amend Okija Ward IV in the chart at item 12 of page 28 of the petition to read Okija Ward v which is a typographical error that does not affect the scores of the parties.

12. To amend at page 29 of the petition in the chart for Njikoka Local Government Area item 02 Abba Ward I to read Abba Ward II.

13. To amend at page 33 of the petition for Ogbaru Local Government Area at column 01 for Iyiowa/Odekpe/Ohita the scores for the petitioner (APGA) from 1728 to read 1771 votes and for the 1st respondent (PDP) to amend the votes from 247 to 273 which does not affect the total scores for the Local Government Area (Ogbaru Local Government Area).

16 To amend column 13 of the same page 33 of the petition by adding the following votes APGA 226, PDP 67 which are typographical omissions that will not affect the total scores for the Local Government.

17. To amend at page 34 of the petition column 17 for Ezira Ward in Orumba South Local Government Area the PDP score from 1068 to 1086 which is a typographical error that will not affect the scores of the Local Government.”

As could be seen the amendments are not substantial at all. They are minor amendments that did not introduce new parties to the petition, alter the right of the petitioner to present the petition or alter the holding of the election. The amendments did not alter the scores of the candidates nor the person returned as winner of the election nor did it alter the facts of the petition, the grounds on which it is based and the relief sought by the petitioner. I therefore

hold that the amendments are inconsequential and not substantial. They did not offend against paragraph 14(2) of the First Schedule to the Electoral Act, 2002. The tribunal was right in granting the amendments. My answer to issue No. 6 is therefore in the affirmative.

B Issue No. 7 which is distilled from grounds of appeal Nos. 8 and 27 reads:

“Whether having regard to the evidence of PW15 and DW53 and the specific pleadings by the petitioner the tribunal was justified in holding that the evidence of Edward Kolawole, PW15 was not discredited and that his evidence fell squarely within the petitioner’s pleadings.”

C PW15 was a handwriting analyst. In his testimony he told the tribunal that his brief was to examine the handwriting in the photocopies of INEC result forms with a view to ascertaining whether there were
D multiple entries or alteration of figures or overwriting or superimposition of figures. It was the contention of the appellant that PW15’s brief has not been pleaded. Paragraphs 14 and 15 of the petition were then reproduced in the brief and it was submitted that all the paragraphs alleged was
E that election did not take place in some polling stations and wards and yet figures were entered as scored by the petitioners and 1st respondent and that in wards where no scores were entered in the data. It was then submitted that the tribunal was in serious error in holding that the facts of
F which PW15 gave evidence were pleaded. It was also stated that it was surprising that the tribunal held that the evidence of PW15 was not discredited because the tribunal itself discredited the evidence of PW15 and parted ways with him. Seven instances were given in the brief where the tribunal disbelieved the evidence of PW15. It was further submitted that
G it was perverse, indefensible and unduly patronizing for the tribunal to say that the evidence adduced by PW15 fell squarely within the petitioner’s pleading. The petitioner, it was contended, did not plead overwriting; he did not plead multiple entries; he did not plead alteration of figures and he
H did not plead super-imposition of figures. It was said what he pleaded was wrongful adding up of figures, failure to submit results, entering of fictitious results, non-holding of elections and hijacking of results. It is therefore wrong on the part of the tribunal to overlook the specific mat-

ters pleaded and proceed to make extraneous findings on matters which were neither based on the pleadings nor sustainable in the light of the evidence of PW15. The unreported appeal of *Onwudingo v. Dimobi (CA/E/EPT/33/2004)* delivered on 19/5/2005 was referred to.

It was also submitted that it was noteworthy that PW15 claimed B in his evidence that he received certified true copies of certain documents which formed the basis of his expert opinion. These certified true copies examined by PW15 were never tendered in evidence for the tribunal to see. Instead PW15 was confronted with original INEC result documents tendered by PW2 and he confirmed them as the original copies of C what he examined. This evidence, it was submitted was worthless when what PW15 purported to examine was not produced.

It was further submitted that PW15 was thoroughly discredited D especially by the evidence of DW53 a forensic handwriting analyst from USA who testified that no expert worth his salt would use photocopies of documents as basis for determining issues of disputed or questioned handwriting. It was submitted that the tribunal was in error to say that PW15 was not discredited. It was finally submitted that since the certified true E copies which PW15 claimed to have examined in his laboratory were not produced and tendered in evidence, there was no basis for crediting him with regard to documents which were shown to him for the first time in the witness box and which the tribunal had no opportunity to compare F with that he claimed to have examined in his laboratory i.e. that since the evidence of PW15 as to handwriting was never pleaded it went to no issue.

We were urged to resolve issue No. 7 in favour of the appellant by G deciding that having regard to the evidence of PW15 and DW53 and the specific pleadings by the petitioner, the tribunal was not justified in holding that the evidence of PW15 was not discredited and that his evidence fell squarely within the petitioner's pleadings.

It is the contention of the 1st respondent that pleadings are state- H ment of facts that a party relies upon to prove his claim and it is always meant to give sufficient notice to the other party of the case he is being called upon to face. Every pleading must therefore contain a statement of

all material facts on which a party based his claim. It contains only facts and not the evidence by which those facts are to be proved. In support the following cases were referred to: *Esin v. Matzen and Timm (Nig.) Ltd.* (1966) 1 All NLR 233; *Adisa Thanni v. Yaya Lemomu* (1977) 2 SC B 894; A.-G., *Anambra State v. Onuselogu Enterprises Ltd.* (1987) 4 NWLR (Pt. 66) 547. It was submitted that the evidence of PW15 was copiously supported by the facts pleaded, it was submitted that a good look at the totality of the pleadings would reveal that the conclusion reached by the C tribunal that the evidence of PW 15 was supported by pleaded facts was correct.

Paragraph 9 of the further amended petition was reproduced in the brief and it was submitted that in paragraphs 4, 5, 6, 7, 8 and especially paragraph 9 were found substantial facts grounding the evidence D that same or few writers wrote multiple results and that when a party in his pleadings specified that (1) electoral officers, (2) returning officers and (3) supervisory presiding officers added up figures in top copies of Forms EC8A(1) meant ordinarily to be entered by the multiple presiding E officers designated for distinct polling stations, evidence of how many of such results each person filled or entered could clearly be led. To do otherwise would do violence to the rule of pleading to the effect that only material facts and not evidence by which they ought to be proved should F be pleaded. Reliance was also put on paragraphs 10, 11 and 13 of the further amended petition which are said to provide adequate foundation on which the evidence of PW15 could comfortably rest. Reliance was further placed on paragraph 15 of the averment below the chart at page G 25 of the further amended petition where it was specifically set out by way of further particulars that result sheets and other electoral materials were taken to the home of one Chief Celestine Tagbo where few persons wrote the results. It was contended that the 1st respondent supplied sufficient particulars to alert the appellant as to the case the 1st respondent H was presenting. The law does not require that the parties shall plead their witnesses and the evidence they will be invited to tender. It was further contended that the 1st respondent pleaded that copies of the result sheet were deliberately removed in exploitation of a loophole and results arbi-

trarily added up. The INEC results were pleaded by all the parties to the petition. As a result no one was surprised by the evidence which went to establish that the INEC results were written by the ward returning officers and electoral officers who added up figures in the original or top copies of Form EC8A(1) as pleaded in paragraph 9 of the further amended B petition.

It was then submitted that the role of an expert is to assist the court in reaching a conclusion as to a matter in controversy as it is ultimately the function of the court to draw inferences and arrive at a determination on authenticity or otherwise of a questioned handwriting. We C were referred to the following cases: *Wilcox v. Queen* (1961) 2 SCNLR 296; *Aina v. Jinadu* (1992) 4 NWLR (Pt. 233) 91 and *U.T.B v. Awanzigana Ent. Ind.* (1994) 6 NWLR (Pt. 348) 56. It was submitted that the 2nd to 450th respondents offered no expert evidence to counter the evidence of D PW15. It was submitted that there was no law which restricts a witness to testify based only on an inquiry made before such witness is summoned to court. As long as the evidence related to pleaded facts, it is novel to insist that the evidence of a witness must be restricted to what E he was initially instructed outside the court to do in a laboratory. The test to be applied in considering whether evidence is admissible is, according to the 1st respondent, whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how the evidence is F obtained. The following cases were referred to: *Torti v. Ukpabi* (1984) All NLR 185, (1984) 1 SCNLR 214; *Ogbunyiya v. Okudo* (1976) 6/9 SC 32.

After referring extensively to the evidence-in-chief and the cross-examination of D53, it was submitted that D53 has been proved to be G incompetent and his evidence thoroughly discredited under cross-examination.

The main complaints of the appellant in this issue are that the evidence of PW15 went to no issue because he gave evidence of facts H not pleaded by the petitioner and that PW15 was discredited. It was the appellant's contention that the tribunal was wrong to have relied on the evidence of PW15. We have to consider the pleadings and the evidence

adduced by PW15 to determine whether or not the evidence of PW15 falls squarely within the petitioner's pleadings as held by the tribunal.

The main function of pleadings is to ascertain with precision the various matters that are actually in dispute and the points on which they agree and thus to arrive at certain and clear issues on which both parties desire a judicial decision. Each party must give his opponent a sufficient outline of his case. It could be seen that the purpose of pleadings is to bring the parties to issues that arise so that either party may know the real point or points to be discussed and decided when the case comes on for trial i.e. the issues to be resolved are defined before hand. See *Eke v. Okwaranyia* (2001)12 NWLR (Pt. 726) 181; *Okagbue v. Romaine* (1982) 5 SC 133; *Katto v. Central Bank of Nigeria* (1991) 9 WLR (Pl.214) 126 and African Continental Bank v. Gwagwada (1994) 5 NWLR (Pt. 342) 25. Pleadings also should not plead evidence but facts. Parties must only plead in such a way as to prevent surprise when leading evidence in support of their case.

In dealing with pleadings, a court must read all the paragraphs together to get a flowing story of the parties and not a few paragraphs in isolation. It is the totality of the pleadings, whether it is the statement of claim or the statement of defence that states the case of the party and it will be injustice to invoke only a few paragraphs to come to a conclusion.

It is the contention of the appellant that ascertaining whether there were multiple entries, alteration of figures, overwriting or super-imposition of figures all issues on which PW15 gave evidence were not pleaded by the petitioner. **I have gone through all the paragraphs of the petition and the cumulative effect of these paragraphs, in my opinion, is that the issues of multiple entries, alteration of figures, overwriting or super-imposition of figures were raised in the petition. I am therefore in full agreement with the tribunal that the evidence of PW15 fell squarely within the petitioner's pleadings.**

It was also submitted that PW15 has been thoroughly discredited by the evidence of DW53. DW53 is said to be a forensic handwriting

analyst from U.S.A. who testified that no expert worth his salt would use photocopies of documents as basis for determining issues of disputed or questioned handwriting. By this it is meant that PW 15 was wrong by using photocopies to determine the disputed handwriting. I have very carefully considered the evidence of DW53 and I am of the opinion that he has not in anyway discredited or controverted the evidence of PW15. If anything, I think it is DW53 who has been discredited under cross-examination. One incident will show what I mean. When giving evidence DW53 was asked to give expert opinion based on exhibit Y I (i) to (viii) originals of which he received in court and photocopies which were given to him. He looked at the originals and based on his recollection of the photocopies he came to the conclusion that the exhibit contained the handwriting of eight writers. When he was asked, under cross-examination how he arrived at that conclusion. He answered that his conclusion was based on what he was told by one of the counsel to the appellant. I therefore agree with the tribunal that:

“The respondent in an attempt to controvert the evidence of PW15 called PW53 (sic) who having said he could not express opinion on a document in open court went ahead to express such opinion. And, eventually under cross-examination he conceded his expertise to one of the counsel to the 1st respondent. All these he did without discrediting PW15 or controvert his testimony.”

The opinions of handwriting experts are admissible to decipher words beneath obliterations, erasures or alterations, although it is for the court to determine what the words are. Experts may also give their opinions as to whether handwriting is natural or imitated and whether it shows points of comparison, but it is for the court to determine whether a particular piece of writing is to be assigned to a particular person, and documents may be submitted to the court for comparison to be made. The weight to be attached to any expert evidence depends upon the skill of the expert.

A court is entitled to accept the evidence of an expert if it is credible, particularly if it is not controverted or challenged and comes from an expert with demonstrable skill. However, the evidence of

an expert is generally an aspect of the entire evidence to be evaluated by a court. The trial court must fully be in control of all the evidence before it and must not abdicate its role to perform its primary duty of assessing the evidence and forming its clear opinion in relation thereto including any expert evidence. A court is not bound by evidence of an expert witness. The court has an option in the matter, an option which it has to exercise judicially and judiciously in the light of other available evidence. The court has inherent power to examine and compare disputed signatures against other relevant documents before forming an opinion which cannot be said to be improper. See: *Wilcox v. The Queen* (1961) 2 SCNLR 296 *Ania v. Jinadu* (1992) 4 NWLR (Pt. 233) 91 and *U.T.B. v. Awanzigana Ent. Ltd.* (1994) 6 NWLR (Pt.348) 56.

The tribunal was therefore right when it held:

“We have been guided by the decision of the Court of Appeal and we also bear in mind the duty of the Judge in respect of expert opinion as enunciated in A.D. v. Fayose (2005) 10 NWLR (Pt. 932) 151 at 199. We therefore made our own findings in respect of the opinions expressed by PW15 by believing or disbelieving him where the circumstances arose. We did our duties with respect to the opinions of the expert by examining the documents and agreeing or disagreeing with the expert opinion in the light of other credible evidence offered on the exhibits.”

In the circumstances, I answer the seventh issue in the affirmative i.e. the tribunal was justified in holding that the evidence of PW15 was not discredited and that his evidence fell squarely within the petitioner’s pleadings.

Issue No. 8 was distilled from grounds of appeal Nos. 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 29 and it reads:

“Whether having regard to the petitioner’s pleadings and evidence called by him, as well as the appellant’s rebuttal evidence, the tribunal was justified when it proceeded to invalidate INEC results from various wards within:

(i) Aguata,

- (ii) Ogbaru,
- (iii) Orumba South,
- (iv) Onitsha South,
- (v) Onitsha North,
- (vi) Anambra East,
- (vii) Anambra West,
- (viii) Njikoka,
- (ix) Idemili South.
- (x) Ihiala and
- (xi) Oyi Local Government Areas”

B

C

It was submitted on behalf of the appellant that a community reading of the provisions of Ss. 54(2), 135(2) and 150 of the Electoral Act, 2002 would show that an election result could not be invalidated for the mere fact that it was undated, wrongly stamped, wrongly dated, wrong addition of scores, non-filling of all columns or for duplications of serial number. It was submitted that ail these defects without more, were of minor significance and could not lead to invalidation of results once it has been shown that there was substantial compliance with the electoral process. *The case of Buhari v. Obasanjo (supra)* was referred to. It was further submitted that since none of the presiding officers who produced or were supposed to have produced and/or signed the Forms EC8A (1) being attacked by PW15 and the petitioner were joined as parties, all the averments in the petition relating to these results ought to have been ignored and discounted.

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The appellant then considered extensively the decision of the tribunal in respect of all the Local Government Areas in issue. The submissions of the appellant could be summarized as follows:

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(a) The failure to join the respective presiding officers was fatal to the petitioner’s case.

(b) The tribunal having itself discredited the evidence of PW15 in various wards within the respective Local Government Areas, it was clearly perverse for the tribunal to believe PW15 in respect of other wards when there were no other cogent or credible evidence offered to validate the views of PW15 in respect of the questioned wards.

H

(c) Since the petitioner did not plead that any set of results were written by one person and did not prove any such allegation beyond reasonable doubt, it was not open to the tribunal to use the unpleaded facts as basis for a finding invalidating the results of the questioned wards within the local government areas particularly when the presiding officers whose results were being jeopardized were not joined as parties.

(d) The case of the petitioner being that no election took place at the questioned wards it was not open to the tribunal to discredit the results based on other issues not pleaded such as over voting, duplication of serial numbers, colour of serial numbers, on-stamping of result sheets and arrangement of parties etc. It was not open to the tribunal to even investigate this complaint when the presiding officers were never made parties.

(e) The tribunal failed to consider the provisions of sections 135(1) and (2) and 150 of the Electoral Act in relation to the questioned wards.

(f) The tribunal having used and applied the correct names of the wards as statutorily provided rather than the wrong names by the petitioner in its judgment and in the appendixes, ought to have validated the results for those wards as it did in other wards.

In conclusion it was submitted that it is the petition and the facts pleaded therein that defines the jurisdiction of the tribunal. But the jurisdiction of the tribunal to entertain and investigate the facts pleaded is circumscribed by the provisions of S. 133(2) of the Electoral Act. Where the complaints in the petition concern statutory necessary and mandatory parties to the petition, the tribunal lacks the jurisdiction to entertain those complaints. In support of this submission, the case of *Buhari v. Obasanjo (supra)* was referred to.

It was also submitted that the appellant has demonstrated that with respect to the complaints concerning Aguata Local Government Area, Ogbaru Local Government Area, Orumba South Local Government Area, Onitsha South Local Government Area, Onitsha North Local Government Area, Anambra East Local Government Area, Anambra West Local Government Area, Njikoka Local Government Area, Idemili South Local Government Area, Ihiala Local Government Area and Oyi Local Govern-

ment Area, the petitioner had extensively challenged the election process from the polling stations to the collation centres. The failure of the petitioner to join all the presiding officers who manned the relevant polling booths is fatal to the case of the petitioner, and the tribunal lacked the jurisdiction to investigate the complaints at all. B

It was submitted that for the foregoing reasons and the other weighty reasons adduced in this brief in respect of the relevant Local Government Areas, paragraph 17(b) of the facts/particulars relied upon in the petition cannot stand and the tribunal lacked the jurisdiction to investigate the complaint in the paragraph when presiding officers were not made parties. Furthermore, all the other observations made by the tribunal as basis for invalidating the results in the local governments in issue are tortuous and insupportable. It was then submitted that it was for these cumulative reasons that the court is invited to resolve issue No. 8 in the negative by deciding that having regard to the petitioners pleadings and evidence called by him as well as the appellant's rebuttal evidence the tribunal was not justified when it proceeded to invalidate INEC results from various wards within the various local governments in issue. C D E

After referring to S. 136(2) of the Electoral Act, 2002, it was submitted on behalf of the 1st respondent that the duty of a tribunal faced with an election petition is bifurcated. In the first instance, the tribunal must make a determination based on the election results tendered before it as to which candidate secured the majority of lawful votes cast at the election. Secondly, is to determine that the candidate who secured the majority of the lawful votes also satisfied the Constitutional requirements. It was therefore maintained that it is imperative that the results must be scrutinized. The tribunal was therefore called upon to make definite pronouncements on the results and it would be idle to contend that in so doing, the tribunal embarked on its own calculations, when what the tribunal did was to make definite and specific findings on the credibility of the results tendered before it, as directed by the pleadings, evidence and submissions of 1st respondent. F G H

It was also submitted that it was immaterial that the tribunal did

not accept the evidence of PW15 wholly and entirely. Where the tribunal did not accept the evidence of PW15, it gave reasons which were either related to the quality of the 1st respondent's pleadings or failure to read adequate evidence. It was further submitted that the evidence of PW15 related to documentary matter on which the tribunal as well as this court can examine and arrive at their own determination.

It was stated that the case of the 1st respondent in summary is that INEC through the returning officers, electoral officers and supervisory presiding officers removed top copies of the result sheets intended for the election and wrote the results in disclosed and undisclosed locations. It was 1st respondent's case that INEC results were not the accurate results of the election. 1st respondent tendered APGA results as well as ANPP results to show that the results distributed at the booths after the election to the agents of the parties were different from the INEC results emanating from non-designated areas. The following cases were referred to, to show how a case which is centred on both documentary evidence as well as oral evidence ought to be approached: *Fashanu v. Adekoya* (1974) 6 SC 83 and *Kimdey & Ors. v. Military Governor of Gongola State* (1988) 1 NSCC 827, (1988) 2 NWLR (Pt.77) 445. And that the combined effect of Ss. 132(i), 94(i) and 96 of the Evidence Act allow only such evidence to counter documentary evidence as are rendered pursuant to the proviso to S. 132(1) of the Evidence Act. It was submitted that the tribunal was properly guided and arrived at a proper decision.

It was stated that the law is that evaluation of evidence and the ascription of probative value to such evidence are the primary function of a trial court which saw, heard and assessed the witnesses. Where a trial court evaluates the evidence and makes definite findings of facts which are fully supported by the evidence, and are not perverse, an appellate court could not substitute its own views for those of the trial court. The following cases were referred to: *Ebba v. Ogodo* (1984) 1 SCNLR 372 and *Agbonifo v. Aiwereoba* (1988) 1 NWLR (Pt. 70) 325. It was submitted that there were ample materials upon which the tribunal arrived at its conclusion and it would be inappropriate for the Court of Appeal to interfere. Moreso, since the tribunal dealt extensively on the

credibility of the witnesses and made specific findings.

It was further submitted that with regards to S. 135(1) and (2) of the Electoral Act, it is manifest that the irregularities which were highlighted by the tribunal were very substantial which affected the result of the election as well as validity of the results. It was also submitted that S. 50 of the Electoral Act could not be employed by a party to validate acts of INEC which were inconsistent with the law itself, as well as the instruction for the election. If stretched too far, it means S. 50 would validate every wrong in an election in which case no grounds of non-compliance which by S. 135(1) (6) is a recognized ground for challenging an election under the Electoral Act. After dealing very extensively with the wards in all the local government areas in issue discussing the tribunal's findings, it was submitted that the tribunal was right when it invalidated the INEC's results.

It could be seen that the complaints of the appellant in respect of this issue are:

(1) The presiding officers whose booths results were being questioned were not joined as parties and as such the tribunal could not pronounce on the petitioner's complaints.

(2) The tribunal having itself discredited the evidence of PW15 in various other wards, it was perverse for the tribunal to believe PW15 in respect of other wards.

(3) The petitioner did not plead that any set of results were written by one person and did not prove any such allegation beyond reasonable doubt and that it was not open to the tribunal to use unpleaded facts as basis for a finding invalidating the results of certain wards.

(4) The tribunal was wrong to discredit the results based on issues not pleaded.

(5) The tribunal failed to consider the provisions of Ss. 135(1) (2) and 150 of the Electoral Act in relation to any non-compliance affecting the results produced in relation to the questioned wards.

Some of these matters were earlier raised by the appellant in some of the issues I dealt with in this judgment. The issue of non-joinder of the presiding officers was the complaint in issue No.1. In resolving issue

No. 1. I held that there was no need to join the presiding officers because the petitioner had no complaint against them and as such they were not necessary parties. His complaint was against the supervisory presiding officers, returning officers and electoral officers whom the petitioners made parties to the petition. I still hold that the presiding officers were not necessary parties and there was no need to make them parties. The tribunal was therefore right to make some pronouncements on the petitioner's complaint.

Issue No. 7 dealt with the credibility or otherwise of PW15. The tribunal held in its judgment that the evidence of PW15 has neither been discredited nor controverted and that the evidence of PW15 fell squarely within the petitioner's pleading. I am in full agreement with this holding. However, the tribunal did not swallow the evidence of PW15 hook, line and sinker. It stated:

"We therefore made our own findings in respect of the opinions expressed by PW15 by believing him or disbelieving him where the circumstances arose."

Which the tribunal is entitled to do. There is nothing wrong, in a tribunal believing the evidence of a witness in certain aspects of his evidence and disbelieving him in other aspects of his evidence. This is not perverse.

The issue that the petitioner did not plead that any set of results were written by one person also arose in issue No. 7. My answer to that was that considering the petition as a whole, it could be deduced that this was pleaded by the petitioner. The tribunal therefore did not use unpleaded facts as basis for invalidating certain results.

It was also alleged that the tribunal was wrong to discredit the results based on issues not pleaded. I have dealt with the issue of pleadings in issue No. 7. I have held that the matters which the appellant alleged were not pleaded, were actually pleaded considering the petition as a whole. **It therefore follows that the tribunal did not discredit the results based on issues not pleaded.**

In the result, I answer issue No. 8 in the affirmative. The tribunal was justified when it proceeded to invalidate INEC results

in the various wards in the various local government areas.

I now come to issue No. 9 which is distilled from grounds of appeal Nos. 10. 11. 12, 13, 14. 15. 29, 30, 31 and 32. The issue reads:

"Whether upon proper construction of sections 60 and 136 (1) and (2) of the Electoral Act read together with c section 172(2) of the Constitution and in view of the pleadings and the evidence, the tribunal was justified in declaring the petitioner as the person duly elected as Governor of Anambra State."

It was submitted that at paragraph 12 of his petition, the petitioner averred that the 1st respondent "obtained an apparent and colourable majority over the petitioner, whereas in truth and in fact the petitioner had a majority of lawful votes of elections in Anambra State who voted at the said election of 19th April. 2003 and who were at the time duly qualified by law to vote. It was contended that in the face of this pleading, it was mandatory for the petitioner to place before the tribunal as evidence the full booth to booth results from all the polling booths at which the said electors voted. The cases of *Adun v. Osunde* (2003) 16 NWLR (Pt. 847) 643 and *Nwobodo v. Onoh* were referred to. It was therefore the onus of the petitioner to show that he produced sufficient booth results to enable the tribunal determine who won the majority of lawful votes. The results tendered by PW1 did not satisfy the requirements.

S. 136(1) and (2) of the Electoral Act, was then considered and it was submitted that the tribunal did not nullify the election which meant that the tribunal found that the petitioner did not make out a case under S. 136(1) of the Electoral Act. The petitioner, it was contended must succeed under S. 136(2) by showing that he scored the highest number of valid votes cast at the election and satisfied the requirements of S. 179 of the Constitution. We were referred to the following cases: *Ajadi v. Ajibola* (2004) 16 NWLR (Pt. 898) 91 and *Ige v. Olunloyo* (1984) 1 SCNLR 158. It was then submitted that without placing all the valid votes cast at the polling booth in all the 21 local government areas before the tribunal as evidence, the tribunal could not calculate who scored the highest number of votes.

It was also the contention of the appellant that since the petitioner

failed to satisfy S. 60 of S. 136(2) of the Electoral Act read together with S. 179(2) of the Constitution by not pleading and proving facts relevant to spread, and placing all the polling booths results in all the twenty one local government areas in Anambra State before the tribunal as evidence B in order to enable the tribunal make a credible decision, the petitioner had failed to prove his case and the tribunal was in error to have found for him. It was further contended that the petitioner did not plead and did not establish through evidence including evidence of the booth results in all C the twenty one local government areas that he scored one quarter of the votes cast in two thirds of the local government areas in Anambra State. It was also submitted that the tribunal could not use documentary evidence tendered in respect of specific pleadings in the petition to determine other issues which were not pleaded in the petition. If it was the D intention of the petitioner that the documents tendered by him should be used to determine the scores for other candidates, he should have made that an issue. The following cases were referred to: *G.N.I.C Ltd. v. Ladgroups Ltd.* (1986) 4 NWLR (Pt. 33) 72; *Onwumere v. Agwunedu* E (1987) 3 NWLR (Pt. 62) 673 and *Omega Bank (Nig.) Plc. v. O.B.C. Ltd.* (2005) 8 NWLR (Pt. 928) 547.

It was pointed out that the scores tendered by the petitioner did not cover the whole State so as to enable the tribunal arrive at a decision F on where the majority votes laid. The tribunal it was stated relied on claims made in charts supplied as part of address by petitioner's counsel when the contents of the charts were not tested in court by evidence. The charts were made part of the petitioner's reply to the respondent's address filed at a time when 1st respondent would not join any issues with G the facts therein. It was submitted that it was wrong for the tribunal to have acted on those charts and computations in arriving at judgment. The case of *Haruna v. Modibbo* (2004) 16 NWLR (Pt. 900) 487 was referred to. It was then submitted that the tribunal's finding that there H was nothing from respondent's counsel to discredit the petitioner's results is perverse. The evidence adduced by PW1, PW4 and PW45 were extensively considered in the appellant's brief and it was submitted that the tribunal was unduly patronizing to the petitioner when it said that their

evidence were not totally discredited. It was contended that the tribunal shut its eyes to obvious defects in the petitioner's results as highlighted in the course of the trial and admitted by the petitioner himself under cross-examination. The purported computation done by the tribunal in appendix 2 was at variance with the figures and charts in the petitioner's pleadings upon which issues were joined by the respondents in their respective replies. It was alleged that the petitioner's results were not authentic as no single polling agent was called to identify any of the said results. The petitioner could not use this unvouched results produced by PW1 to discredit INEC results produced by the petitioners PW2. It was then submitted that the proper conclusion which the tribunal failed to draw was that the genuine results could only be the INEC results produced by PW2 and that the petitioner failed to prove his case. It was also stated that appendix 4 was compiled by the tribunal *suo motu* out of court and after the suit had been adjourned for judgment thereby denying the appellant of the opportunity to react or comment on it. It contained purported scores in respect of local government areas whose results were not in evidence because the petitioner did not produce any booths results relating to them. In the absence of the booths results in Forms EC8A (1) in respect of the seven Local Government Areas. Appendix 4, it was submitted was repugnant in every sense because the tribunal had no jurisdiction to adduce evidence in the form of appendix 4. By adducing evidence, the tribunal descended into the arena and indulged itself in cloistered justice. The cases of *Haruna v. Modibbo* (2004) 16 NWLR (Pt. 900) 487; *Adun v. Osunde* (*supra*); *Wilcox v. Queen* (1961) 2 SCNLR 296 and *Duriminiya v. C.O.P.* (1961) NRNLR 70 were referred to.

The tribunal's conclusion that the petitioner has proved his claim, it was stated, was based upon appendixes 1 to 4 which were incompetent and void. It was also contended that the conclusion could not stand in the face of S. 136(2) of the Electoral Act, when the entire booth results for the 21 Local Government Areas were not, placed before the tribunal as evidence. In undertaking computation of the results, it was submitted that the tribunal exceeded its bounds and violated the presumption of authenticity accorded the results as declared by the electoral authority.

The petitioner had called PW2 to tender the INEC results. The tribunal had no warrant to permit the petitioner to begin to disparage the same results using matters not pleaded and particularly when the presiding officers who made the results were never joined as parties to the petition.

B It was also submitted that the tribunal was not justified to hold that the petitioner scored one quarter of the total valid votes in eighteen and fifteen local government areas out of the twenty one local government areas in Anambra State using the limited polling booth results at its disposal.

C It was further submitted that the facts relating to constitutional requirements of spread were neither pleaded nor adduced in evidence and can never be done by inference and that this defect in the pleading and the evidence is enough to deprive the tribunal of the jurisdiction to grant relief (23)(b) of the petition. It was submitted that in governorship

D election petition cases, where issues of attainment of majority of votes cast in the election is in contest as provided under S. 134(1)(c) of the Electoral Act, it is incumbent on the petitioner asserting that he scored the majority of votes cast in the said election to go further and show in

E his pleading and evidence that the constitutional requirement of spread in the State Constituency were met. The following cases were referred to: *Nwobodo v. Onoh* (1984) 1 SCNLR 1; *Omoboriowo v. Ajasin* (1974)

NSCC 81(1984) 1 SCNLR 108; *Ige v. Olunloyo* (1984) All NLR 150; F (1984) 1 SCNLR 158. Without an averment and evidence that the petitioner obtained one quarter of the votes at the election in at least two-thirds of the Local Government Areas, the tribunal was in serious error in over looking this defect and declaring the petitioner winner on grounds

G of attainment of majority of votes scored. It was also contended that the tribunal legitimized two sets of conflicting results and relying on them to make a declaration in breach of the principle laid down in *Sabiya v. Tukur* (1983) 7 NSCC 559 and *Ojo v. Esohe* (1999) 5 NWLR (Pt. 603) 444.

H It was finally submitted that for any or all the points argued in aid of issue no. 9 we were urged to hold that upon proper construction of Ss. 604, 136 (1) and (2) of the Electoral Act read together with S. 179(2) of the 1999 Constitution and in view of the pleadings and the evidence, the tribunal was not justified in declaring the petitioner as the person duly

elected as Governor of Anambra State. The issue ought to succeed and the verdict should be an order of this court reversing the decision of the tribunal and dismissing the petitioner's petition.

In the 1st respondent's brief, paragraphs 6 and 12 of the petition were reproduced. It was stated that from the two paragraphs it was clear B that the following were pleaded:

(a) The votes in each polling unit is recorded in Form EC8A (1) and thereafter recorded in Form EC8B (1) at the wards and in Form EC8C (1) at the Local Government Area and in Form EC8D (1) at the C State level.

(b) He scored the majority of lawful votes cast in the election by persons duly qualified by law to vote.

(c) He was duly elected as Governor of Anambra State; and

(d) He ought to have been so returned or declared as elected by 2nd D to 5th respondents.

It is submitted that a party is not required to plead law. A party is also not required to plead evidence. It was submitted that the 1st respondent pleaded that he scored the majority of lawful votes cast in the gubernatorial election of 19th April, 2003 and was duly elected and that it is E from the evidence as in Forms EC8A (1) tendered at the trial that it would be seen whether the 1st respondent was in fact duly elected as required by S. 179(2) of the 1999 Constitution and ought to have been returned as F claimed. The definitions of the word "duly" as contained in Advanced Learners Dictionary 6th Edition at page 501 were given and it was submitted that when the 1st respondent pleaded that he was duly elected, he has G pleaded that he was elected in a correct, proper and expected manner, in due or proper form or manner according to legal requirements. Regularly, properly, suitable, upon a proper foundation as distinguished from mere form, according to law in both form and substance in the instant case is as provided under S. 179(2) of the 1999 Constitution as he is not H expected to plead law. It is sufficient that he has pleaded that he was duly elected. And that since sub-sections (a) and (b) of S. 179(2) of the 1999 Constitution provide that the candidate shall be deemed duly elected where he has the highest number of votes cast and has not less than $\frac{1}{4}$ of all the

votes cast in each of at least $\frac{2}{3}$ of all the local government areas in the State, any pleading as in the instant case that the petitioner was duly elected and any prayer that he be declared as duly elected encompasses the provisions of S. 179(2)(a) and (b) of 1999 Constitution. It was further submitted that where a petitioner has pleaded that he was duly elected, he needs not quote sub-section (a) and (b) of S. 179(2) of the 1999 Constitution. It is left for the tribunal from the evidence adduced to determine whether the candidate was duly elected as provided for in S. 179(2) (a) and (b). It was submitted that the provisions of Ss. 60 and 136(2) of the Electoral Act and S. 179(2) of the Constitution were matters of law which need not be pleaded. It was a matter to be seen from the scores of candidates in Form EC8A (1) in respect of the governorship election. It is a mandatory duty imposed on the tribunal to determine same from the evidence before the tribunal. It was then submitted that there were sufficient materials and evidence before the tribunal to make necessary determination one way or the other pursuant to Ss. 59(c) and 136(2) of the Electoral Act. It was submitted that the contention of the appellant in respect of S. 179(2) (a) and (b) of the 1999 Constitution was misconceived and all the submissions of the appellant in respect thereto should be disregarded.

On whether the 1st respondent was duly elected by a majority of lawful votes cast at the election, it was submitted that it is settled law that a party is entitled to grant of what he claimed or less but certainly not more. The case of *Ekpenyong v. Nyong* (1975) 2 SC 71 was referred to. The petitioner, it was contended, did not dispute the results in seven Local Government Areas in Anambra State. It was submitted that PW2 tendered all the results in Forms EC8A(1) for all the polling units in each ward and in each of the 21 local government areas of Anambra State except the eight wards in Anambra East Local Government Area whose results were cancel led. And that it was not in doubt that the tribunal had before it exhibits in Form EC8A (1) of all the polling units in Anambra State. It was therefore submitted that the tribunal having seen the charts of the parties, having also seen the scores in all the INEC Forms EC8A (1), tendered as exhibits Q and Z, AA to AD series and having ascribed

probative value and weight to the exhibits, the tribunal was in a position to do the arithmetical calculation of the scores as indeed the tribunal did of the valid votes recorded in Form EC8A (1). We were referred to the cases of *Nwobodo v. Onoh* (1984) All NLR 1, (1984) 1 SCNLR 1 and *Terab v. Lawan* (1992) 3 NWLR (Pt. 231) 569. It was then submitted B that the tribunal was right to do the arithmetical calculation to find out who scored the majority votes cast in the election. The tribunal, it was further submitted, was right to rely on Forms EC8A (I) tendered as exhibits and the evidence of witnesses and their cross-examination as contained in the summary of the parties and comments in appendix 3. The C tribunal relied on exhibits Q to Z, AA to AD tendered by PW2 which contained all the Forms EC8A (1) used in the conduct of the gubernatorial election of 19/4/2003. The contention that the tribunal *suo motu* made D an order relying on the chart or that the tribunal *suo motu* relied on the chart was as not true. Rather the tribunal only made a finding of fact based on the evidence before it and on the addresses of counsel on the charts. The tribunal relied on INEC results to return the 1st respondent. E The tribunal did not return the 1st respondent based on exhibit B to N series. The said exhibits provided the basis for comparison of the scores of the parties. It was also the contention of the 1st respondent that a document speaks for itself. The appellant as not taken by surprise. The F appellant saw the exhibits and cross-examined extensively on the exhibits. The scores entered in the exhibit could easily be calculated. We were urged to hold that the 1st respondent scored the majority of lawful votes cast in the gubernatorial election of 19th April 2003 and was duly elected.

It was the contention of the 1st respondent that from the pleading G of the petitioner, the petitioner is not quarrelling with any presiding officer. The petitioner stated that the presiding officers did their work where the supervisory presiding officers supplied the electoral materials. And that from the state of pleadings, the presiding officers were victims as was held in the following cases: *Iwu v. Nwugo* (2004) 9 NWLR (Pt. 877) H 54 and *Enemuo v. Duru* (2004) 9 NWLR (Pt. 877) 75 and *Yahaya v. Aminu* (2004) 7 NWLR (Pt. 871) 159. It was submitted that by the review of the documents tendered by the petitioner and the 1st respon-

dent, the tribunal did what the Court of Appeal enjoined the tribunal to do in *Okafor v. Anyakora (supra)*. Appendices 1, 2 and 4 made by the tribunal was right and that this court should dismiss the appellant's complaint. The following cases were referred to: *Salawal Motor House Ltd. v. Hajji B. Lawal* (1999) 9 NWLR (Pt. 620) 692 and *Ndukwe Okafor v. Agwu Obiwo* (1978) 9-10 SC 115. It was stated that appendix 4 complained of by the appellants constitute all the results used in the conduct of the election at the polling units, which were in the custody of INEC. All C polling unit results allegedly used to enter the result of the election were tendered as exhibits Q to Z and AA to AD series with their examination in court and having regard to the principle laid down in *Adun v. Osunde (supra)* and *Sam v. Ekpelu* (2000) 1 NWLR (Pt. 642) 582. The tribunal D was therefore right to have done the arithmetical calculation in appendix 4 and that the argument that the appellant was denied the opportunity to comment or react to appendix 4 was misconceived. Appendix 4 constitutes part of the judgment of the court.

It was submitted that appendix 4 or appendices 1, 2 and 3 were E the products of a public demonstration and testing in open court by witnesses and their cross-examination. It was an evaluation of what was contested, demonstrated and tested in open court. It could not be regarded as an investigation in the chambers of the tribunal as in *Duriminiya F v. C. O. P.* (1961) NRNL 70. Unlike *Duriminiya's case (supra)* and other similar authorities, the tribunal was addressed on each and every exhibit in Form EC8A(1) tendered as a result of the election including the results in exhibits Q to Z and AA to AD which is the subject of appendix G 4. It was then submitted that the comments on the result sheets on appendix 3 which was along the line of evidence preferred at the tribunal in respect of documents tendered were misconceived and that appendix 4 was the weight attached to exhibits Q to Z. AA to AD and the scores therein by the tribunal arising from the evidence preferred and tested and H demonstrated in open court at the tribunal. As such the tribunal could not be accused of descending into the arena. It was then submitted that no rule of fair hearing was breached by the tribunal.

After considering the cases of *Nwobodo v. Onoh (supra)* and

Omoboriowo v. Ajasin (supra) it was submitted that assuming that there are paragraphs of the petition dealing with allegation of commission of crime (which is not admitted) the petition is severable and can sustain the finding of the tribunal. It was further submitted that in the light of evidence of witnesses and the finding and comments in appendix 3 by the tribunal in respect of exhibits Q to Z, AA to AD series, the 1st respondent proved his case beyond reasonable doubt. The 1st respondent then contended that the finding of fact by the tribunal based on prayer 23(a) and (b) and S. 179(2) (a) and (b) of the 1999 Constitution is unassailable. C

It was stated that from the petition, it is clear that the issue between the petitioner and the appellant is who scored the majority of lawful and valid votes cast in the election of 19/4/2003. There was no allegation made against the appellant based on falsification. It was submitted that issues were joined between the 1st respondent and the appellant on who scored the majority of lawful votes, which is proved on balance of probabilities. There was no issue joined on spread. Parties agreed that the result of the election and the person who scored the majority of lawful votes is provable based on the result of the election. Evidence was led and at the conclusion of the hearing, the tribunal evaluated evidence, looked at the exhibits in line with the evidence at the trial. The tribunal did not accept some of the results and returned the petitioner in line with the prayer of the parties and issues joined. D E F

It was submitted that the issue based on spread being a matter of law was not raised by the parties. The appellant cannot raise such issue, since it was not raised in the reply nor within the time provided by the Electoral Act. It was also submitted that evidence of over-voting at the polling unit or at wards was evidence of non-compliance with the Electoral Act. Such results could not be used to calculate the scores. The mere presence of one or two inconsistencies in the evidence proffered by a party will not necessarily lead to case failing. The trial court is to consider all the evidence together to see whether the inconsistencies notwithstanding, the story put forward by the other party. G H

We were urged not to disturb the finding of the tribunal. Section 60 of the Electoral Act, 2002 provides:

*“In an election to the office of the President or Governor (whether or not contested) and in any contested election to any other elective of-
fice, the result shall be ascertained by counting the votes cast for each
candidate and subject to the provisions of sections 133, 134 and 179 of
B the Constitution, the candidate that receives the highest number of votes
shall be declared elected by the appropriate returning officer.”*

Ss. 133 and 134 of the Constitution do not affect us. They refer to
the office of the President. The relevant provision that affects the office
C of the Governor is S. 179(2) of the Constitution which provides:

*“179(2) A candidate for an election to the office of Governor of a
State shall be deemed to have been duly elected where, there being two or
more candidates:*

- D *(a) he has the highest number of votes cast at the election; and
(b) he has not less than one-quarter of all the votes cast in each of
at least two-third of all the local government areas in the State.”*

The appellant’s complaint is that the 1st respondent did not plead
and did not establish through evidence including evidence of the booths
E results in all the twenty one local government areas that he scored one-
quarter of the votes cast in two-third of the local government areas in
Anambra State. To determine whether or not the petitioner has pleaded
that he scored $\frac{1}{4}$ of the votes cast in $\frac{2}{3}$ of the local government areas of
F Anambra State, we must look at the whole petition. After considering the
whole petition, the following paragraphs are relevant for our present pur-
poses:

*“(6) Your petitioner says that there are 21 (twenty one) local gov-
G ernment areas in Anambra State and each local government headquar-
ters was used as local government collating station/units by 2nd to 5th
respondents. The results from polling units entered in Form EC8A (1) are
collated at the ward collating station/unit in each ward in Form EC8B (i)
and thereafter sent to the local government headquarters of each of the
H 21 local government areas in Anambra State. At the local government
collating station/units, the results of the various wards in a particular
local government area are added up and collated in Form EC8C (1).
Thereafter, the results so collated in Form EC8C (1) are sent to the State*

headquarters of the 2nd respondent where the total votes collected for all the local government areas are added up and collated in Form EC8D(1). Thereafter, the 2nd to 4th respondents announce the results and declare as elected or returned the candidate with majority of the lawful votes cast at the said election of 19th April 2003 as the winner of the gubernatorial B election into the office of the Governor Anambra State.

(12) The 1st respondent obtained an apparent and colourable majority over the petitioner whereas in truth and in fact, your petitioner had a majority of lawful votes of the electors in Anambra State who voted at C the said election of 19/4/2003 and who were at the time thereof duly qualified by law to vote and was duly elected as the Governor of Anambra State and ought to have been so returned or declared as elected by the 2nd to 5th respondents.”

From the above paragraphs it could be seen that: D

(i) The votes in each polling units is recorded in Form EC8A (1) and thereafter recorded in Form EC8B (1) at the wards and in Form EC8C (1) at local government area and in Form EC8D (1) at the State E level.

(ii) The petitioner scored the majority of lawful votes cast.

(iii) The petitioner was duly elected as the Governor; and

(iv) The petitioner ought to have been returned as elected.

It is clear from the above that the 1st respondent has pleaded that F he scored the majority of lawful votes cast in the election and was duly elected. It is from the evidence adduced at the trial, that it would be decided whether or not the 1st respondent was in fact duly elected as required by S. 179(2) of the Constitution.

In Black's Law Dictionary 8th Edition, the word “duly” was defined at page 540 as: G

“In a proper manner; in accordance with legal requirements.”

This means that where a petitioner claims he is duly elected it means that he is elected in a proper manner, in accordance with H legal requirements. In our present case, since the 1st respondent has pleaded that he was duly elected, it therefore follows that he was elected in accordance with legal requirements i.e. he was elected

in accordance with the requirements of S. 179(2) (a) and (b) of the 1999 Constitution. The effect of pleading that he was duly elected is that the 1st respondent has satisfied the requirements of S. 179(2) (a) and (b) that he has the highest number of votes cast at the
B election and has not less than $\frac{1}{4}$ of all the votes cast in each of at least $\frac{2}{3}$ of all the Local Government Areas in Anambra State.

I therefore hold that by his pleading, the 1st respondent has pleaded that he has scored the highest number of votes cast at the
C election and has not less than $\frac{1}{4}$ of all the votes cast in each of at least $\frac{2}{3}$ of all the Local Government Areas in Anambra State. It is trite law that a party needs not plead law nor is he required to plead evidence. Where a petitioner has pleaded that he was duly elected,
D he needed not quote sub-sections (a) and (b) of S. 179(2) of the Constitution as those subsections provided for what has to be fulfilled for a candidate for the office of Governor of a State to be duly elected.

With regards to the evidence, the 1st respondent at the trial ten-
E dered all the results in Form EC8A (1) received by his agents and they were admitted and marked as exhibits B to N series. The 1st respondent also tendered Forms EC8A(1) of INEC which were marked as exhibits Q to Z and AA to AD series for all the polling units in each of the wards in
F each of the 21 local government areas of Anambra State. Evidence was also led by the parties and witnesses were thoroughly cross-examined on the exhibits. Expert witnesses also testified for both the 1st respondent and the appellant. Clearly there were sufficient materials and evidence
G before the tribunal to enable the tribunal to make the declaration it made.

It was also the appellant's contention that appendix 4 was compiled by the Tribunal *suo motu* out of court and after the suit had been adjourned for judgment thereby denying the appellant of the opportunity to react or comment on it. **Appendix 4 is a chart made by the Tribunal**
H **in its judgment. It is part of its judgment. The chart was made from the exhibits, Forms EC8A (1) which were tendered and admitted by the Tribunal. There was extensive cross-examination in open court,**

in respect of all the exhibits. Learned counsel for all the parties also extensively addressed the Tribunal in respect of all the exhibits. It is my considered opinion that appendix 4 was a product of public demonstration and testing in open court by witnesses and their cross-examination. It was an evaluation of what was contested, demonstrated and tested in open court. It cannot be regarded as an investigation in the chambers of the Tribunal. B

The cases of *Wilcox v. Queen* (*supra*) and *Duruminiya v. C.O.P.* (*supra*) are not applicable to our present case because in the present case the Tribunal was extensively addressed on each and every exhibit tendered including exhibits Q to Z, AA to AD from which the chart appendix 4 was made from. The chart is the weight attached to the said exhibits and the scores contained therein by the Tribunal arising from the evidence proffered and demonstrated in open court at the Tribunal. The Tribunal could not be accused of descending into the arena. **The Tribunal was right to have done the arithmetical calculation in appendix 4. The argument that the appellant was denied the opportunity to comment or react to appendix 4 is clearly misconceived because appendix 4 constitutes part of the judgment of the Tribunal.** D E

The tribunal is also right to have embarked on the computation of the results. The tribunal was in possession of all the results as contained in the Forms EC8A (1) it admitted. Where the tribunal is in possession of all the results it is duty bound to collate the results where there is proof that there was inflation with non-existent votes and/or wrong computation. See *Sam v. Ekpelu* (2000) 1 NWLR (Pt. 642) 582 at 596 where it was held that: F

“Now, what should the tribunal have done when it found that there were valid votes that the returning officer should have, but did not credit to the candidates, especially in a situation, such as this, where the petitioner/1st respondent had complained about the exclusion of votes? Should it have thrown up its hands in helplessness and simply referred the matter to the collation or returning officer for fresh collation of votes? In my view, no. The tribunal did the right thing by adding the votes, found to have been wrongly excluded, to the score by the affected candidate. The G H

mandate it has under S. 87(2) is to declare the candidate with the majority of valid votes. There is nothing in the Decree to suggest that before making the declaration the tribunal should first refer the matter to another body. After all, this was just a matter of addition. Nothing stopped B the tribunal from performing this simple arithmetical calculation. By doing it, it did not thereby usurp the functions of the collation officer. It was just following the natural course of things as the law empowered it to do.”

C See also *Adun v. Osunde* (2003) 16 NWLR (Pt. 847) 643 at 666-667 where it was also held that:

“The tribunal, I must admit, has a right and indeed a duty to compute or collate result where they have been inflated and/or wrongly computed. See *Sam v. Ekpelu* (2,000) 1 NWLR (Pt. 642) 582 at 596. The D tribunal again has powers to even add the votes found to have been wrongly excluded to the scores by the affected candidate. The mandate the tribunal has. I agree, is to declare the candidate with the majority of valid votes. By doing just that, the tribunal did not thereby usurp the E functions of the collation officer or even INEC.”

In our present case there was proof of inflation of votes and wrong computation as such the tribunal has a duty to collate the results. **In view of what I have said above, my answer to issue No. 9 is in the affirmative. The tribunal was justified in declaring the petitioner as the F person duly elected as Governor of Anambra State.** I now come to issue No. 10 which is distilled from the grounds of appeal Nos. 33, 37, 39 and 40. The issue reads:

G “Whether in any event and having regard to the pleadings and the evidence before the tribunal, the judgment of me tribunal is sustainable.”

The 1st respondent raised a preliminary objection as to the competence of ground 37 - one of the grounds from which this issue was distilled on the ground that the comment of the tribunal in the judgment H on the default of the 2nd and 3rd respondent before it to produce all the documents specified in the subpoena was mere *obiter dictum* and could not be subject of a ground of appeal. In support of the preliminary objection, the case of *Buhari v. Obasanjo* (2005) 13 NWLR (pt. 941) I

was referred to. It was submitted that the comment of the tribunal was not part of the question for determination by the tribunal as presented in the pleadings of the parties where issues were joined. The comment, it was submitted, was *obiter* and that being so, the comment could not be the subject of complaint to or decision by the Court of Appeal, the case of *Habib Nigeria Bank Ltd. v. Gifts Unique (Nig.) Ltd* (2004) 15 NWLR (Pt. 896) 408 was referred to. The court is urged to strike out the ground of appeal as being incompetent as well as issue No. 10 formulated therefrom even though the said issue is distilled from several grounds of appeal. In support, the case of *Ayalogu v. Agu* (1998)1 NWLR (Pt. 532)129. In our present case, the tribunal ordered INEC to make available to the petitioner certified true copies of several documents used for the conduct of the election. The 2nd and 3rd respondents failed to comply with the tribunal's order. The petitioner then caused to be issued and served upon INEC a *subpoena duces tecum* to produce and tender those same documents which were in their custody. PW2 produced some of the documents but not all of them. The tribunal in its judgment commented on the non-production of the documents by the 2nd and 3rd respondents. This is what it said:

“With the attitude of the 2nd and 3rd respondents on the non-production of the vital documents required by the petitioner, can the petitioner be blamed by the same respondents for not knowing the correct names given to certain wards? We think not. The 2nd to 450th respondents cannot attempt to benefit from their own default which the law frowns at... There is another argument that the petitioner could have tendered secondary evidence of those documents on the notice to produce served on the 2nd - 3rd respondents but which were not produced. To that we ask where could the petitioner have obtained secondary evidence of vital documents used in an election like the voter's registers, list of result sheets, list of ballot papers, names of wards, names of ad hoc staff who served in the conduct of the election?”

A comment or statement of the court which is not necessary for the determination of the issues joined in the parties pleadings, is an *obiter*. It has no binding authority and cannot be the subject of

an appeal. In our present case, the comment by the tribunal quoted above, on the refusal of 2nd and 3rd respondents to obey the petitioner's subpoena to produce certain documents at the hearing of the petition was not necessary for the determination of the petitioner's petition because it related to the conduct of INEC in the course of the trial of the petition as opposed to its role in the conduct of the election, which was the subject of the petition. In the circumstance, the comment was *obiter* and therefore could not be the subject of an appeal. See *Wilson v Osin* (1988) 4 NWLR (Pt. 88) 324; *Adesokan v. Adetunji* (1994) 5 NWLR (Pt. 346) 540 and *Shuaibu v. Nigeria Arab Bank Ltd.* (1998) 5 NWLR (Pt. 551) 582.

In *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1 a situation, similar to our present case, arose during the trial of the petition in the Court of Appeal. The petitioner issued notice to the 3rd respondent to produce the results of the election and other documents. These were not produced. The petitioner then applied to the Court of Appeal for the result and documents to be produced. The Court of Appeal issued to the 3rd respondent a subpoena to do so. Again the result and the documents were not produced. In its judgment, the Court of Appeal observed that the conduct of the 3rd respondent was damnable and went on to state that:

"The brazen refusal to produce the result and the other documents specified in the subpoena is a negation of INEC's claim to neutrality and impartiality."

On appeal to the Supreme Court, the above comment was made one of the grounds of appeal. In determining the issue, Uwais, CJN said at pp. 127-128:

"I quite agree with the submissions by Chief Afe Babalola and Mr. Sofunde, learned senior advocate of Nigeria. The incident which the 1st and 2nd appellants/cross-respondents raised, occurred in the course of the proceedings in the Court of Appeal in 2004. It did not occur on or before the 19th April, 2003, when the presidential election was conducted. It therefore should not have been the subject of comment during but before the judgment of the Court of Appeal. At any rate, the proper procedure,

to be followed as a result of the failure to produce the documents....Rather the court decided to comment on the default in the course of its delivery of judgment. Surely whatever the court said in that regard could not have been part of the question for determination by it as presented in the parties pleadings where issues were joined. It is therefore, obiter and cannot be the subject of complaint to or decision by us. Accordingly, the issue No. 3 fails.”

For a ground of appeal to be competent, it must be a challenge of the *ratio decidendi* of the judgment appealed against. Accordingly, a ground of appeal based on an *obiter dictum* in a judgment is incompetent.

See *Saude v. Abdullahi* (1989) 4 NWLR (Pt. 116) 387; *Egbe v. Alhaji* (1990) 1 NWLR (Pt. 128) 546 and *Ogunbiyi v. Ishola* (1996) 6 NWLR (Pt. 452) 12. **The tribunal's comment is *obiter* and as such cannot be subject of an appeal. In the circumstance, the ground of appeal No. 37 is incompetent and is accordingly struck out.**

Where an issue formulated from incompetent ground of appeal is argued in the brief of argument with those formulated from competent grounds, it is not the duty of the court to extract argument in respect of the valid grounds from the invalid ones. It will be a futile exercise to take the grounds which are incompetent and sift that which is competent therefrom because all the grounds were argued as one ground. See *Ayalogu v. Agu* (1998) 1 NWLR (Pt. 532) 129 and *S.B. Bakare v. African Continental Bank* (1986) 3 NWLR (Pt. 26) 47. Salami, JCA put the matter succinctly in the unreported appeal No.CA/1/14/92 *Korede v. Adedokun* delivered on 30th June, 1994 where he said:

“This is the mixed grill served and I am of the firm view that it is not the business of the court to sift chaff from grain by performing a surgical operation on the appellant’s brief to extract argument in respect of the 2 valid grounds from the invalid ones, as such exercise may involve the court in descending into the arena and the dust arising therefrom may of necessity becloud its judgment. The duty of the court is that of an umpire whose function in the interest of justice is to tend the rope and not to step into the brawl by exercising argument on good grounds of

appeal from those of bad ones. See Honika Sawmill (Nig.) Ltd. v. Hary Okojie Hoff (1994) 2 NWLR (Pt. 326) 252 by 262 and Nwadike v. Ibekwe (1989) 4 NWLR (Pt. 67) 718.”

Issue No. 10 is hereby discountenanced.

B Issue No. 11 is distilled from the three interlocutory appeals and ground of appeal No. 35. The issue reads:

“Whether the tribunal was right in rejecting the various copies of Vanguard Newspapers particularly the edition of 17th of April, 2003 tendered by the appellant as well as the official receipts showing the payment for the publications and whether the rejection did not occasion a miscarriage of justice.”

D In his further amended reply to the petitioner, the appellant pleaded in paragraph 21 that he would, at the trial rely on a full page advertisement in the Vanguard Newspaper of Thursday, April 17, 2003 signed by the petitioner himself. The contents of the said publication was fully set out. In paragraph 11 of the further amended reply the appellant contended that the petitioner’s advertised offer as set out was an election
E malpractice prohibited by S. 87 of the Electoral Act and in paragraph 22 the appellant averred that the said action of the petitioner made him guilty of an offence and upon conviction liable to a fine of N 100,000.00. The petitioner in his reply denied all the averments in the said paragraphs 20,
F 21 and 22.

At the trial, during the cross-examination of the petitioner, counsel to the appellant sought to tender an original copy of the Vanguard Newspaper of 17th April, 2003 through the petitioner. The petitioner’s counsel
G objected to the admission of the said Newspaper on the ground that it was not produced from proper custody. The tribunal, in its ruling rejected the Newspaper. Undeterred by this rejection, the appellant subpoenaed DW52, a legal officer from Vanguard Newspapers Ltd, the printers and publishers of Vanguard Newspaper to tender another copy of the
H Vanguard Newspaper of 17th of April 2003. Again, the petitioner objected on the grounds that it had been earlier tendered and rejected. The tribunal upheld the objection and the Newspaper was rejected.

It was submitted on behalf of the appellant that the tribunal was

wrong in rejecting the said Newspaper because the case of *Ogbuanyinya* (*supra*) did not decide that a newspaper must be produced from a proper custody before it could be admitted in evidence, and that the case of *Oneh v. Obi* (*supra*) was reached per incuriam. We were referred to “*Modern Nigerian Law of Evidence*” 2nd Edition by Mr. Fidelis Nwadialo B SAN and an article by the late Chief F.R.A. Williams. SAN titled “*Relevance of proper custody in the law of Evidence*” published in the “*Legal Practitioners’ Review*” Volume 1. 1986 page 16. It was then submitted that a newspaper does not have to be produced from proper custody C before it could be presumed genuine.

The 1st respondent’s contention is that the tribunal was perfectly right in relying on the provisions of S. 116 of the Evidence Act and the cases of *Ogbuanyinya* (*supra*) and *Oneh v. Obi* (*supra*) in rejecting the said newspaper. It was submitted that it is now settled that for a newspaper not printed by a Government printer to be admissible in evidence it must be produced from proper custody i.e. the publishers of the newspaper or registrar of newspapers. It was also submitted that *Ogbuanyinya’s* case (*supra*) was strictly limited to the issue of genuineness of an official D gazette and not newspaper and that the case did not lay as general rule E that all journals and newspapers could be tendered by any person and admitted in evidence.

Section 116 of the Evidence Act provides: F

“116. The court shall presume the genuineness of every document purporting to be the official Gazette of Nigeria or of a State or the Gazette of any part of the Commonwealth or to be a Newspaper or journal or to be a copy of the resolutions of the National Assembly printed by the Government Printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.” G

Section 116 of the Evidence Act, the way I understand it, can be split into two i.e. into documents which do not have to be produced from proper custody before they can be presumed genuine and documents which must be produced from proper custody before their genuineness H

can be presumed. A court will therefore presume the following documents genuine.

(a) Official Gazette of Nigeria.

(b) Official Gazette of a State in Nigeria.

B (c) The Gazette of any part of the Commonwealth.

(d) A newspaper or journal or a copy of the National Assembly resolutions printed by the Government Printer.

All the other documents purported to be documents directed
 C **by any law to be kept by any person must be produced from proper custody before they could be presumed genuine by the court. It should however be noted that the documents that shall be presumed genuine must be printed by the Government Printer. It therefore**
 D **follows that a newspaper or a journal must be printed by the Government Printer before they could be presumed genuine otherwise they must be produced from proper custody.**

It should be noted that the issue before the Supreme Court in *Ogbuanyinya v. Okudo* (1979) All NLR 105 was whether an official Gazette must be produced from a proper custody, as was held by the Court of Appeal. The Supreme Court held that the Court of Appeal was wrong to so hold and went on to say at page 112 that:

“*Had the Court of Appeal addressed its mind adequately to the*
 F *issue of “proper custody” of documents it would certainly have come to the conclusion that the prerequisite of production from proper custody cannot properly apply to a government printer’s copy of the official Gazette and that it could not be a sine qua non to the application of the rebuttable presumption of genuineness to the government notice in the*
 G *official gazette aforesaid.”*

It could be seen that *Ogbuanyinya’s case (supra)* limited itself to official gazette only. The issue of newspaper was not before it. The case is therefore distinguishable and not applicable to our instant case. The case which is apposite for our present purposes,
 H **which is binding on me and which I consider as good law is *Oneh v. Obi* (1999) 7 NWLR (Pt. 611) 487 where it was held at page 499:**

“*By the provision of section 116, a document such as exhibit F*

is admissible if produced from proper custody which in this case will be the publishers of the newspapers or registrar of newspapers.”

It is therefore my considered opinion that the tribunal was right in rejecting the said Newspaper.

It was also submitted by the appellant that the second rejection of B the said newspaper by the tribunal was erroneous in law and that the case of *Ita v. Ekpenyong* (2001) 1 NWLR (Pt. 695) 587 relied upon for the rejection was quoted out of context.

The 1st respondent's contention is that the second ruling of the C tribunal rejecting in evidence the Vanguard Newspaper earlier tendered and marked rejected is unassailable and that the tribunal was also perfectly right in relying on the case of *Ita v. Ekpenyong* (*supra*). It was submitted that the said Vanguard Newspaper of 17/4/2003 having been D earlier tendered, rejected and marked rejected could not be made use of again as it had lost its whole value. It has been rejected for ail purposes.

In *Ita v. Ekpenyong* (*supra*), it was held at page 617 that:

“It has been decided by this court that a document which is marked E rejected when tendered in evidence cannot subsequently be tendered and admitted in evidence as an exhibit in the case. It cannot be made use of as it has no value. See Oyetunji v. Akunni (1986) 5 NWLR (Pt. 42) 461 at page 470; Agbaje v. Adiguni (1W3.1 I NWLR (Pt. 269)261 at page 272.” F

I respectfully agree that once a document was tendered in court and it was rejected and marked rejected, it cannot subsequently be tendered and admitted in evidence as exhibit in the case. The tribunal acted rightly in rejecting the said newspaper a second time since it was earlier tendered and rejected by the tribunal. G

The appellant also complained against the rejection of the official H receipts for the payments of the advertisements in Vanguard Newspapers by the petitioner. The tribunal rejected the receipts on grounds that they were secondary evidence and that since DW52 had stated in his testimony that the name of the payer was on the original receipts that the tribunal would not look at the duplicates as they were not in evidence and that no evidence was offered as to the person in possession of the origi-

nal. It was submitted that the tribunal was in error when they rejected the documents on the aforementioned reasons.

It was submitted by the 1st respondent that the tribunal was right in relying on Ss. 97, 98 and 210 of the Evidence Act to reject the secondary evidence of receipts tendered through DW52. It was also submitted that the receipts tendered were at best secondary evidence and for it to be admissible sufficient foundations must be laid as to the whereabouts of the originals. Such foundations were not laid before the documents were sought to be tendered. The tribunal was therefore right in rejecting them in evidence.

Having considered the provisions of Ss. 97, 98 and 210 of the Evidence Act, I come to the inescapable conclusion that the receipts are secondary evidence and for them to become admissible, proper foundation must be laid as to the whereabouts of the originals. In our present case, no such foundation was laid. I therefore agree with the tribunal that the said receipts are inadmissible. My answer to the eleventh issue is in the affirmative. The tribunal was right in rejecting the various copies of Vanguard Newspapers tendered by the appellant as well as the official receipts showing the payment for the publications and that the rejection did not occasion a miscarriage of justice.

Issue No. 12 is distilled from the ground of appeal No. 34. It reads:

“Whether the tribunal was justified when it held that the appellant did not prove the allegation of tribal and religious politics and inducement of votes which he made against the petitioner.”

By paragraph 23(a)-(3) of the appellant’s further amended reply alleged that the petitioner and his party APGA, engaged in tribal and religious politics contrary to S. 86 of the Electoral Act. 2002. The 1st respondent denied the allegations. At the trial the 1st respondent called PW33 and PW34 who denied the allegation that they campaigned on behalf of the 1st respondent as the anointed candidate of the Catholic Church. The appellant also called five witnesses - DWs 40, 90, 383, 405 and 425 who testified in proof of the averments in his further amended reply to show

that the 1st respondent and his party engaged in serious religious and tribal politics.

The tribunal in its judgment held that the appellant did not prove the allegations of religious and tribal politics as well as the offer of corrupt inducement to voters as published in the Vanguard Newspaper. It was submitted that the judgment of the tribunal was not only perverse but erroneous. It was contended that the tribunal could not have been correct when it held that no witness established any nexus between the petitioner and the priests who campaigned for him. It was submitted that on tribal politics, the handbills of the petitioner soliciting for votes on tribal sentiment was linked to him because the petitioner was shown to be present at the rallies where the handbills were distributed. The tribunal has also said to be in error in holding that the appellant needed to show that any of the governorship candidates in Anambra State election belonged to a different religion or ethnic group before the allegation could be deemed established. The mere fact that the 1st respondent and his running mate were seen openly campaigning on tribal and religious sentiments is enough proof of the allegation. It was submitted that the case of *Modebe v. Okadigbo* (1992) 9 NWLR (Pt. 263) 1 relied upon by the tribunal was not applicable to the facts of the instant case.

On the issue of offer of corrupt inducement as published in Vanguard Newspaper, it was submitted that the tribunal erred in holding that the allegation was not proved because the Vanguard Newspaper in question was not in evidence. It was also submitted that having regard to *S. 86(1) and (2) of the Electoral Act and paragraph 15 of the 1st Schedule to the said Electoral Act*, the tribunal was in error in not nullifying all the votes scored by the petitioner as canvassed by the appellant. We are therefore urged to hold that the tribunal was not justified in holding that the allegations against the petitioner on religious and tribal politics as well as offer of inducement of voters were not proved by the appellant. We were further urged to invoke our powers under *S. 16 of the Court of Appeal Act and Order 1 rule 19(1) of the Court of Appeal Rules, 2002* in nullifying all the votes credited to the 1st respondent by INEC.

It was submitted by the 1st respondent that the allegations con-

tained in paragraphs 20, 21 and 23 together with their particulars of the appellant's further amended reply were criminal in nature and that being so, it is trite law that where in a civil proceedings, a party makes an allegation of crime against his opponent and the said allegation is such
 B that it forms the basis of his complaint, then he has the onus to prove the allegation beyond reasonable doubt. With respect to the allegation that the 1st respondent engaged in tribal politics, it was submitted that the tribunal was right in holding that the evidence led by DWs 405 and 425 as well as
 C exhibits "ABJ" and "ABZ" tendered by them had no evidential value. It was pointed out that the position before the tribunal was on the Governorship election and not the presidential election. It was further submitted that the appellant did not show through credible evidence that individual voters were indeed influenced as a result of the 1st respondent's
 D alleged involvement in tribal and religious politics. The court is urged not to disturb the findings of the tribunal.

There is no doubt as to the fact that the allegations contained in paragraphs 20, 21 and 23 of the appellant's further amended
 E **reply to the petition are criminal in nature. It is trite law that whoever alleges the commission of a crime must prove the allegation beyond reasonable doubt.** See *Nwobodo v. Onoh* (1984) 1 SCNLR 1; (1984) 1 All NLR 1. See also *Owoade v. Sekoni* (1998) 9 NWLR (Pt. F 565) 281 where it was held at 282 that:

*"By virtue of section 138(1)(2) of the Evidence Act, where the commission of any crime is in issue either in a civil or criminal proceeding, such commission must be proved beyond reasonable doubt and the
 G onus of or burden of establishing such poof is on the person who asserts that such a commission took place."*

Also, it must be established that the persons who were said to be campaigning for the 1st respondent in Catholic Churches were doing so with the consent and/or authority of the 1st respondent.
 H **There must be a nexus between the said persons and the 1st respondent.** See *Oyegun v. Igbiniedion* (1992) 2 NWLR (Pt. 226) 747 at 760 where it was held:

"From the above authorities, it is clear that for the appellant to be

held responsible in this appeal for the acts of Chief Isekhure it has to be proved by credible evidence that the Chief was an agent of the appellant or that the Chief (D.W.5) was acting on special or general authority of the appellant or those of somebody who was an agent of the appellant."

See also *Ayua v. Adasu* (1992) 3 NWLR (Pt. 23 1) 598 where it B was held at page 612 that:

"It is evident that mere canvassing for a candidate in whose success one is interested, is not sufficient to saddle the candidate with any unlawful act of the "canvassers" of which the candidate and his election C agent are ignorant."

I have considered the evidence on this issue and it is my opinion that the appellant failed to establish any nexus between the persons alleged to have campaigned for the petitioner and the petitioner himself. It was also not established that the appellant or D indeed any of the candidates who contested for the governorship of Anambra State on 19th April, 2003 was not an Igbo man or not a Christian as to have been placed at a disadvantage in the said election as a result of the alleged tribal and religious campaign of the E 1st respondent. Also it was not established by the appellant that individual voters were influenced as a result of 1st respondent's alleged involvement in tribal and religious politics. See *Modebe v. Okadigbo* (1992) 9 NWLR (Pt. 263) 1 where the court held at page 21 F that:

"Undue influence by intimidation is not proved until evidence is led to show that individual voters were in fact influenced... The threat should be judged by the effect on the voter threatened, not by the intention G of the person using the threat..."

In coming to the conclusion that the appellant did not prove the allegations of religious and tribal politics as well as the offer of corrupt inducement to voters as published in the Vanguard Newspaper, the tribunal evaluated and ascribed probative value to the evidence led by both H parties. This is what the tribunal said in its judgment at pages 7085 to 7086 of the record:

"After a careful consideration of the evidence adduced by both

sides on the contention that the Catholic Church through various priests campaigned for the petitioner, we hold the view that no nexus has been established between the petitioner and the priests who were said to have campaigned for him. In *Oyegun v. Igbiniedion* (1992) 2 NWLR (Pt. 226)

B 747 it is stated that a candidate cannot have his election nullified on the ground of corrupt practices or any other illegality committed in the process of the election unless it can be proved that the candidate expressly authorized the illegality. The allegation that the petitioner through the C “Vanguard” Newspaper issue of 17th April 2003 offered free transportation to Anambrians from Lagos, Port Harcourt, Kaduna, Kano and Abuja to come home and vote was not established since the “Vanguard” Newspaper by which the crime was said to have been committed is not in evidence...

D There is also the allegation that the petitioner engaged in tribal campaigns contrary to the provisions of S. 86 (1) of the Electoral Act, 2002. On this he called DW405 and DW425. The evidence of DW405 we hold the view, touches more on the presidential election on which the E parties herein have not joined issues. And if that aspect of his evidence is discountenanced, one cannot pick anything useful which advances the case of the respondent against the petitioner. Even the exhibit “ABJ” which DW405 said he kept in his purse from the year 2003 to 2005 and F produced before the tribunal was not shown to have been made by the petitioner. See again the case of *Oyegun v. Igbiniedion* (supra).

On the evidence of DW425 who testified that he recorded exhibit ABZ (video tape) at the same APGA rally in Ajali, this witness did not state what he heard Peter Obi say save that he heard Peter Obi say that G those who had earlier spoken had said what he would have said. We also noticed that when Peter Obi actually started his campaign speeches, in the video tapes, the tape was asked to be stopped.

H There is also no evidence from any of the parties that any of the governorship candidates in the April 19, 2003 election belongs to a different religion or ethnic group from the petitioner. In fact, DW425 confirmed under cross-examination that he was not aware of any candidate being from a different ethnic group from the petitioner nor was he influ-

enced to hate any religion by what he heard at the campaign rally. It is therefore curious how the allegation of ethnic or religious campaign may have arisen in this proceeding.”

I am in complete agreement with the above findings and reasonings of the tribunal. My answer to the twelfth issue is therefore in the affirmative. The tribunal was justified when it held that the appellant did not prove the allegation of tribal and religious politics and inducement of voters which he made against the petitioner.

Issue No. 13 which is the last issue is distilled from the five different interlocutory appeals filed viz:

“Whether the tribunal was right in rejecting the polling booth and ward results (i.e. Forms EC8A(1) and EC8B(1) tendered by the 1st respondent/ appellant in respect of Awka South, Ekwusigo, Ayamelum, Idemili North and Orumba North Local Government areas in his defence and whether the rejection did not occasion a miscarriage of justice.”

In the appellant’s brief, paragraphs 6(11), 15D, 20 of the further amended petition were reproduced and it was submitted that by the said quoted averments, the petitioner has pleaded all the electoral result forms emanating from the entire 21 Local Government Areas in Anambra State. It was also submitted that by paragraphs 5(10), 11(c), 19 and 22 of the further amended reply, the appellant joined issues with 1st respondent. Paragraph 14 of 2nd - 450th respondents’ reply was also quoted and it was submitted that by the pleadings of all the parties to the proceedings, each of the parties was entitled to tender polling booth, ward and Local Government results for the whole or part of the 21 Local Government Areas in Anambra State in proof of their case.

The appellant at the trial sought to tender the polling booth and ward results in respect of seven local government areas through DWG an INEC official. The petitioner objected on the ground that there was no dispute in respect of these local government areas. The tribunal upheld the objection and rejected the results on the ground that the petitioner was not contesting the results of the seven Local Government Areas as announced by INEC. It was submitted that from the pleadings exchanged by the parties with particular reference to those highlighted above, the

tribunal was wrong in rejecting the booth and ward results tendered by the appellant. It was submitted that the rejection amounted to double standards by the tribunal in allowing the 1st respondent to tender Forms EC8A (1) for 21 Local

B Government Areas and disallowing the appellant from tendering the Forms EC8A (1) and Forms EC8B (1) results. By wrongly disallowing these results, it was contended, the tribunal descended into the arena of conflict and prevented the appellant from presenting his defence to the
C petition which has occasioned a miscarriage of justice. It was further submitted that the wrongful rejection of these documents amounted to a denial of right to fair hearing which makes the judgment liable to be set aside. In support of this submission we were referred to the case of
D *Kotoye v. C.B.N* (1989) 1 NWLR (Pt.98) 419 and S. 36(1) of the 1999 Constitution. The cases of *Jang v. Dariye* (2003) 15 NWLR (Pt. 843) 436 and *Ndukaubu v. Kolomo* (2005) 4 NWLR (Pt. 915) 411 were also referred to.

E It was also submitted that if the rejected results have been admitted, the decision of the tribunal would not have been the same since those results which favoured the 1st respondent in the seven Local Government Areas in question have the same “defects” with the results of the other 14 Local Government Areas stigmatized and invalidated by the tribunal.
F It was contended that the invalidation of the various results by the tribunal was a miscarriage of justice which entitled the appellant to have the judgment set aside after admitting the rejected results in evidence. We were urged to answer issue No. 13 in the negative and declare the entire
G proceedings null and void and if necessary, the matter be remitted for retrial before another panel.

In its ruling rejecting the said documents, the tribunal said:

H “A close look at the pleadings particularly paragraphs 6(10) (a) and 17(b) of the petition, paragraphs 27 and 5(viii) of the petition and paragraph 5(viii) of the 2nd to 450th respondents reply clearly show that issues have not been joined on the documents sought to be tendered. In other words what is admitted needs not be proved.”

Relying on the decisions of the Supreme Court in *Okonkwo v.*

Kpajie (1992) 2 NWLR (Pt. 226) 633 and *African Continental Seaways Ltd. v. Nigerian Dredging Roads and General Works Ltd.* (1977) 5 SC 235, the tribunal concluded:

“Since the petitioner is not contesting the result in Awka South local government as announced by the 2nd to 5th respondents there is no valid cause to lump that local government’s result with those of the local governments he is contesting for the purpose of this trial. It amounts to trying an issue which is not live in this petition. In paragraph 22 of the 1st respondent’s reply he is not disputing the figures of the result for Awka South Local Government as announced by the 2nd to 5th respondents. His grievance in that paragraph relates to the entitlement of the petitioner to those figures because of the advertisement the petitioner is alleged to have placed in a newspaper. We therefore hold the objection is sustainable. The documents sought to be tendered have no relevance to the issues for determination in this petition and are therefore rejected in evidence.”

I have very carefully gone through the further amended petition, the further amended reply by the appellant and the further amended reply by the 2nd to 450th respondents especially those paragraphs highlighted in the tribunal’s ruling and in the appellant’s brief and it is my considered opinion that issues were not joined by the parties in respect of the seven local government areas. The 1st respondent has no quarrel with the results announced by the 2nd to 5th respondents in respect of the said seven local government areas. Indeed, it is because he has agreed with the results in respect of the seven local government areas as announced by INEC officials that he produced the results of only fourteen Local Government Areas. Since issues were not joined by the parties, there is nothing to be determined by the tribunal and as such the tribunal was right in rejecting the polling booth and ward results tendered by the appellant in respect of the seven Local Government Areas and the rejection of the said documents did not occasion any miscarriage of justice. My answer in respect of issue No. 13 is therefore in the negative.

Having resolved all the thirteen issues against the appellant, it therefore follows that the appeal fails and is accordingly dismissed. As I have earlier stated in this judgment appeals Nos. CA/E/EPT/5B/2005; CA/E/EPT/5C/2005; CA/E/EPT/5D/2005; CA/E/EPT/5E/2005; are struck out.

B The judgment of the tribunal delivered on 12th day of August, 2005 is affirmed and declared as follows;

(a) That Dr. Chris Nwabueze Ngige was not duly declared elected or returned and should not have been declared as duly returned or duly
C elected by the 2nd to 4th respondents.

(b) Mr. Peter Obi is declared as validly and duly elected and returned as Governor of Anambra State having scored/pollled the highest/majority of lawful votes cast at the 19th April, 2003 gubernatorial election.

I make no order as to costs.

D In conclusion, the chairman and members of the tribunal deserve commendation. The hearing of the petition took over two years. 482 witnesses testified before it and thousands of exhibits were tendered. Despite all that they kept their head and their cool and were able to find
E their way through this maze of evidence without their vision being clouded.

ADEREMI JCA

F I agree with my learned brother R. D. Muhammad, JCA, whose reasons, for judgment I have had the privilege of a preview that the consolidated appeals are unmeritorious and therefore, they deserved no other order than one of dismissal.

G I am in full agreement with the treatment in the lead judgment of the preliminary issues raised. I adopt the treatment accorded them as mine. I need not go over them any more. I shall now proceed to address the substantive issues of law raised in the consolidated appeals.

H In my contribution, I start by saying that it is manifest that no presiding officers were joined as parties to the petition. The appellant/1st respondent has argued that having regard to the nature and the grounds upon which the petition was founded, the non-joinder of the presiding officers as respondents to the petition was fatal to the case of the peti-

tioner. The 1st respondent/petitioner, on the issue of non-joinder of presiding officers, submitted that since no complaint were laid against any presiding officers, their non-joinder was unnecessary in law. The 7th to 37th, 39th to 59th, 147th to 173rd, 175th to 209th, 357th to 387th and 389th to 421st respondents, through their counsel, aligned themselves with the B submission of the appellant/1st respondent on this issue and further contended that for that reason the evidence of PW15 who was the star witness in the case should not be countenanced as it went into no issue.

The law is now well settled that if a petitioner complains about the C conduct of any officer, it is incumbent on him (official) to join such official in the petition as the law regards him as necessary respondent; section 133(2) of the Electoral Act, 2002 which makes the joinder mandatory, provides:

“The person whose election is complained of is, in this Act, referred to as the respondent, but if the petition complains of the conduct D 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 E person shall for the purpose of this Act be deemed to be a respondent and shall be joined in the election in his or her official status as a necessary party.”

The above provisions accord with the principle of joinder, in law, in ordinary cases, as a necessary party, a person, body or an institution F who or which the plaintiff or the petitioner must have before the court or tribunal as a defendant or respondent to enable that court or tribunal to effectively and completely adjudicate upon and settle all the questions in the suit or petition. By a number of decided cases, it has been held that G the only reason which makes it necessary to make a person or an institution a party to an action is to make him to be bound by the result of the action. The question then must be such as which the action cannot be effectually and completely settled unless that person or institution is made H a party. See (1) *Uku & Ors. v. Okwmagba & Ors.* (1974) 3 SC 35; (2) *Jidda v. Kachallah & Ors.* (1999) 4 NWLR (Pt. 599) 426. Indeed, enshrined in the provision quoted (*supra*) is the well known principle of fair hearing which enjoins the court or any adjudicating body to ensure that

nobody is heard and condemned without being heard particularly where his right would be affected by the order of the court or the tribunal. See (1) *Tafida v. Bafarawa* (1999) 4 NWLR (Pt. 579) 70 and (2) *Nnamani v. Nnaji* (1999) 7 NWLR (Pt. 610) 313. In an election petition therefore, where allegations are made against certain officials who have not been made parties to the petition, all the paragraphs of the petition containing those allegations are deemed to be incompetent and must be struck out. See (1) *Egolum v. Obasanjo* (1999) 7 NWLR (Pt. 611) 355 and (2) *Ikpatt v. Iyoho* (1999) 7 NWLR (Pt. 609) 58. The question now to be answered is: was any allegation made against any of the presiding officers? The answer to this all-important question can only be found in the petitioner's pleadings which in the instant case is the further amended petition, with the leave of the tribunal and which is dated 12th September. 2003; paragraphs 8 and 9 therefore which are germane to this issue read:

Para. 8

"Not all the parties had candidates in the said gubernatorial election with the result that not all the three top copies meant for use by the ward returning officers were used."

Para. 9

It is this loophole that some ward returning officers, *supervisory presiding officers* and electoral officers exploited to add up figures in the original or top copies of Form EC8A (5) and collate figures in Form EC8B (1) which is different from the actual and lawful votes cast at the polling unit be electors and as truly reflected in the Form EC8A (5) given to the parties agents.

Evidence shall be led in the wards where the *supervisory presiding officers* did not submit all the three top copies to the presiding officer for collation of scores of candidates at the polling station/units...

(Italics as contained in the further amended process).

From the above averments, it is beyond any argument that no allegation was made against any presiding officer: suffice it to say that it is the basic principle of procedural law that where evidence is led on issue or fact not pleaded, that evidence goes to no issue. This brings to

the fore that not all electoral officers that must be joined in an election petition to make it competent. Indeed, it is those officers against whom allegations are made in the petition that are required to be joined in the petition. In *Nze v. Nwaeze* (1999) 13 NWLR (Pt. 635) 396, it was held that since allegations were made against returning officers, it is not necessary that presiding officers be joined to the petition. The conclusion that I must reach and which I reach in line with the decision reached in the lead judgment premised on the state of the pleadings is that non-joinder of the presiding officers is not fatal to the petition. I am therefore in agreement with the submission of Dr. Ikpeazu that since no allegations were made against the presiding officers their joinder as a party to the petition was most unnecessary in law. Any contention that the non-joinder of this category of officers as party to the petition is fatal is totally misconceived. Issues Nos. 1 and 2 on the appellant/1st respondent brief of argument are consequently resolved against him. Issue No. 1 raised in the brief of the 1st respondent/appellant's brief of argument and issue No. 1 raised in the brief of argument of the 7th to 37th, 39th - 59th, 147th - 173rd, 175th to 209th, 357th to 387th and 389th to 421st are consequently resolved against them respectively.

Issue of quorum was also raised in the respective briefs of the 1st respondent/appellant, the 4th respondent and the 7th - 37th, 39th - 59th, 147th to 173rd, 175th to 209th, 357th - 387th and 389th to 421st respondents/appellants. In short, the complaint here is that some of the members who sat and delivered the judgment did not take part in the hearing of the petition and were not present when all the witnesses testified. In other words, the appellant/1st respondent is complaining that there was variation in the panel of the lower tribunal that heard the election petition.

The substance of the complaint is that with the exception of the chairman of the tribunal all the other members of the tribunal were in and out of the proceedings as and when it pleased each of them. Reference was made by the appellant to a number of pages of the record of proceedings to buttress the argument as to the alleged variation in the panel that sat over the petition and gave judgment. The provision of section 285(4) of the 1999 Constitution was also referred to and it was submit-

ted that “*the chairman and 2 other members*” envisaged by the said provision of the Constitution are, the chairman and two other members who were present at the hearing of all the witnesses that testified in the case from the beginning to the end i.e. up to judgment. A number of judicial B decisions the likes of (1) *Anosike v. Emordi & Ors.* delivered by the Enugu Division of this court in *CA/E/EPT/19/2004* on 21st February, 2005, *Damoah & Ors. v. Taibil & Ors.* (1947) 12 WACA 167; *UBWA v. Tiv Area Traditional Council & Ors.* (2004) 11 NWLR (Pt. 884)427 and C *Shanu v. Afribank (Nig.) Plc.* (2002) 17 NWLR (Pt. 795) 185, also support was found in section 28 of the Interpretation Act, Cap. 123, Vol. 88. LFN, 2004. It was finally urged on us to hold that the judgment delivered by the tribunal below based on the fundamental vice was invalid and consequently, issue No. 5 raised be resolved in favour of the appel- D lant/1st respondent.

In response to this argument, the petitioner/1st respondent submitted that this allegation was not substantiated as same was not borne but of the records of the tribunal. Also relying on section 285(4) of the (1999) E Constitution, the 1st respondent submitted that it was within the contemplation of the Constitution that five members of the tribunal need not be present during the hearing of an election petition, that it is only the chair- man that ought to be present before the tribunal can with any other two F members form a quorum, the official records of the court, it was further submitted, do not show any inconsistency in toe quorum - the onus of proof which rests on the appellant has, therefore, not been discharged while the decision in *Archibong v. Ita* (2004) 2 NWLR (Pt. 858) 590 was G founded upon.

It was his further submission that the records of tribunal showing that the tribunal was properly constituted at all times must be presumed to be correct and parties are therefore bound by such records while relying on the decisions in *Agwarangbo v. Nakunde* (2000) 9 NWLR (Pt. H 672)341 and *Abatan v. Awudu* (2004) 17 NWLR (Pt. 902)430. The appellant, it was again argued, did not show in what manner the decision was vitiated since the decision of the lower court tribunal turned on the evaluation of documentary evidence - the result sheets in Form EC8A (

1) exhibit B to N series and exhibits Q to AD series. It was urged that the issue be resolved against the appellant.

Under chapter 4 of the 1999 Constitution relating to Fundamental Rights, section 36(7) thereof courts or tribunal trying criminal cases are enjoined to thoroughly keep records of proceedings. I believe this provision is also applicable mutatis mutandi to civil proceedings as well. They cannot but be so because the record of proceedings is the only authentic account of what took place inside the courtroom - the seat of justice. Indeed, the record of proceedings is the final reference material of events, step-by-step, stage by stage of all that took place in the seat of justice. The papers later produced or tendered as “supplementary records” were not certified. They are therefore devoid of legal validity. They cannot be relied upon.

Therefore, the printed record of proceedings in a case is binding on both the court and parties to the case; it remains inviolable and sacrosanct until it is shown by positive proof by the party alleging its incorrectness. See *Ogidi v. State* (2005) 5 NWLR (Pt.918) 286. By the provision of section 285(4) of the 1999 Constitution, which both parties referred to in their respective briefs or argument, it is patently clear that the quorum of an election tribunal shall be the chairman and two other members. The appellant got one Okuye to swear to an affidavit deposing to the incorrectness of the records of proceedings with respect to the composition of the panel. But one of the members of the panel said to be absent from the sitting. Justice Agube swore to a counter-affidavit in which he denied that he was absent from the sitting of the panel, so also did Chief Magistrate Maru, another member of the panel. At the instruction of the chairman of the panel, Justice Mabaruma, one Abdullahi swore to the correctness of the record of proceedings sequel to all members of the panel and himself (the chairman) surrendering all the official processes (documents) in the respective possession, of the chairman and the members to the secretary immediately after the judgment was delivered. The appellant had referred us to page 828 of the record to buttress his contention that there was a variation in the panel as only the chairman and three other members appended their signatures against their names at

the last page of the judgment. A quick look at the said page 828 shows that it is the last page of a notice of appeal dated 5th October, 2004, which did not require the signature of the chairman and the members. That contention is false. It was only on the last page of the judgment where only the member failed to append his signature to the judgment.

In virtually all the instances of absenteeism referred to by the appellant, the chairman and at least two or three members were always present at the hearing. It is now apposite to quote the provisions of section 285(4) of the 1999 Constitution, which reads:

“The quorum for an election tribunal established under this section shall be the chairman and two other members.”

Going by the argument of the appellant, there was substantial compliance with the above provision.

The record of proceedings has therefore not been impeached. See *Ogidi case (supra)*. I even go further to say that the days of technicalities in the arena of dispensing justice are gone for good - they will never come back. A careful study of the volume of the records of proceedings reveals consistency in the record of the names of the panel. I say so because the signature of the chairman is found on the pages of the proceedings either where an interlocutory ruling was delivered or at the close of proceedings of each day. In everywhere the panel of the membership is more than one, it is the record maintained and signed by the chairman that is binding and that is what must be first impeached. As I have said, technicalities have no place in adjudication anymore. Even if there was variation, which from the account I have given (*supra*), there was not to vitiate the proceedings and the judgment the appellant must show how it has led to a miscarriage of justice: this onerous duty the appellant has failed to discharge. I shall end this discussion of this issue by recalling what the Supreme Court said about election petition in *Nwobodo v. Onoh* (1984) 1 SCNLR 1; (1984) 1 SC 1 where at page 195 the apex court said:

“Election petitions are by their nature peculiar from other proceedings and are very important from the point of view of public policy. It is the duty of the court therefore, to endeavour to hear them without allowing technicalities to unduly fetter their jurisdiction.”

To accede to the invitation of the appellant as regards issue No. 5, is to unduly raise technicalities to high heavens. This I shall not do, that issue is therefore resolved against the appellant.

I proceed to the very crucial pan of the appeal as expressed in issues No. 7, 8, 9 and 10 identified by the appellant, issues Nos. 4 and 75 raised in the brief of the 1st respondent, issues 2, 3 and 4 identified by 7th – 37th, 39th – 59th, 147th – 173rd, 175 to 209th, 357th to 387th, 389th to 421st, respondents issue No. 5 raised by the 4th respondent/appellant, issue No. 4 on the brief of the 61st – 101st, 119th – 141st, 211th – 245th, 286th to 321st and 323rd to 355th which was distilled from the grounds of appeal contained in the notice filed by them.

The law that regulates the determination is clearly stated in section 60 of the Electoral Act, 2002 and section 179(2) of the 1999 Constitution which I shall hereunder set out as follows. *Section 60 of the Act.*

“In an election to the office of the President or Governor (whether or not contested) and in any contested election to any other elective office, the result shall be ascertained by counting the votes cast for each candidate and subject to the provisions of section 133, 134 and 179 of the Constitution the candidate that receives the highest number of votes shall be declared elected by the appropriate returning officer.”

The election in question is that of the governorship of Anambra State and therefore the relevant provision of the 1999 Constitution is section 179(2) which provides:

“A candidate for an election to the office of Governor of a State shall be deemed to have been duly elected where, there being two or more candidates:

- (a) he has the highest number of votes cast at the election; and*
- (b) he has not less than one-quarter of all the votes cast in each of at least two-third of all the local government areas in the State.”*

I hasten to say that it is not only essential that a candidate who wishes to be declared the winner must have majority of the votes cast, it is of importance that such votes are lawful and/or valid, this is (he purport of section 136 of the Electoral Act. subsection (1) and (2) of that section provides:

Section 136(1)

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

Section 136(2)

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

Before I proceed, I shall like to recall here that initially, the 1st respondent who was the petitioner at the lower tribunal claimed three reliefs which are in the following terms:

(1) *That the said 1st respondent (Dr. Chris Ngige) was not duly declared elected or returned and should not be declared as duly elected by the 2nd to 4th respondents.*

(2) *That the Honourable Tribunal declares the petitioner as validly and as duly elected or returned having scored/ polled the highest majority of lawful votes cast at the said election.*

(3) *Alternatively, that the election be nullified and a fresh election into the office of Governor Anambra State be conducted by the 2nd respondent for substantial irregularities and corrupt practices which marred the said election” (italics mine for emphasis)*

The 1st respondent/petitioner voluntarily withdrew the third leg of the reliefs, which is covered, by section 136(1) of the Act. That third relief therefore no longer calls for recognition by any court and it must never be granted. It was submitted by Mr. Akoni, one of the counsel representing the 2nd to 450th respondents that the inescapable consequences of the finding of the lower tribunal which resulted in nullifying the results of 90 wards and of 208 wards was the nullification of the entire results; reliance was placed on the provisions of section 135(1) and 136(1) of the Electoral Act, 2002. It is an entrenched part of our procedural law that if

a relief or remedy is provided for by any written law, the relief if properly claimed by the party seeking it cannot be denied to the applicant simply because he has come under the wrong law. See *Falobi v. Falobi* (1976) 9-10 SC. 1, also a court possesses the power to award less but not more than was claimed. See *Orie & Anor. v. Uba & Anor.* (1976) 9-10 SC 123, B but it is beyond any doubt that a court is without the power to award to a claimant that which he did not claim: the *locus classicus* on this point is the unequivocal statement of the Supreme Court in *Ekpenyong & Ors. v. Nyong* (1975) 2 SC 71 where at pages 80-81 the apex court observed C thus:

“It is trite law that the court is without the power to award to a claimant that which he did not claim. This principle of law has, time and again, been stated and re-stated by this court that it seems to us that there is no longer any need to cite authorities in support of it. We take the view D that this proposition of the law is not only good law, but good sense. A court of law may award less, and not more than what the parties have claimed. A fortiori, the court should never award that which was never E claimed or pleaded by either party.”

It should always be borne in mind that a court of law is not a charitable institution: its duty, in civil cases, is to render unto everyone according to his proven claim.”

I am not unmindful of the fact that this is an election petition; F election petitions are *sui generis*. It has however been held that this fundamental principle, which is that a court will not grant a relief not claimed before it, is also applicable to election petitions. See (1) *Kaugama v. N.E.C.* (1993) 3 NWLR (Pt. 284) 681 (2) *Opia v. Ibrui* (1992) 3 NWLR G (Pt. 231) 658 and (3) *Fabunmi v. Agbe* (1985) 1 NWLR (Pt.2) 299. Having fortified myself with the above judicial decisions, I hold that the relief for nullification having been withdrawn voluntarily cannot at this stage, be entertained. The result is that the provision of section 136(1) of the Electoral Act is not applicable to this case, relief number three which is H the prayer for nullification having been voluntarily withdrawn. Indeed, the contention of the 1st respondent/ petitioner as contained in this second relief is that he should be returned as validly and duly elected having

scored the highest lawful votes cast at the election. Suffice it to say that by this prayer, the provision of section 136(2) of the Act becomes applicable. I hasten to say that before a candidate could be declared as elected under this provision, there must be evidence before the tribunal that he B scored a majority of lawful votes cast at the election. This calls for a careful examination of the evidence led in line with the pleadings.

The issues distilled by the parties as could be gleaned from their respective briefs of argument and which are relevant for the consideration of this all important aspect of this appeal are: issues Nos. 8.9 and 10 C in the appellant's brief; issues Nos. 3 and 4 in the brief of the 1st respondent/ petitioner; issue No. 2 in the brief of 7th, 37th, 39th to 59th, 147th to 173rd, 175th to 209th, 357th to 387th and 289th to 421st respondents/appellants, issues Nos. 3,4 and 6 in the brief of argument of 6 1st – 101st, 119th D – 141st, 211th – 245th, 286th - 321st and 323rd - 355th appellants in appeal No. 5^D, issue No. 5 in the brief of argument of the 4th respondent/appellant. The sole issue identified by the 1st to 450th appellants in their brief of argument filed in appeal No. 5^B reads thus:

E “Whether the degree of irregularities which led to the wholesale invalidation of 371,970 (three hundred and seventy one thousand nine hundred and seventy) votes in 90 wards out of 208 wards in the 14 local government areas is substantial enough to render the entire election void F and to warrant an order of fresh election?”

This issue no doubt imports nullification, a prayer which I have said (*supra*), has been voluntarily withdrawn by the petitioner now 1st respondent and that this court is lacking in the legal power to grant a prayer not sought by a party, nonetheless, I shall consider the arguments G canvassed under that issue along the issues aforementioned. But, before then, I feel called upon and indeed it is of importance that I reproduce hereunder the provisions of section 179(2) of the 1999 Constitution which prescribes the conditionalities that a candidate, in an election petition who H would like to be declared as having won the election; it is thus:

“A candidate for an election to the office of Governor of a State shall be deemed to have been duly elected where, there being two or more candidates:

(a) he has the highest number of votes cast at the election; and
 (b) he has not less than one-quarter of all the votes cast in each of
 at least two-third of all the local government areas in the State.” It has
 been argued that by paragraph 12 of the petition, which is in the follow-
 ing terms:

“The 1st respondent obtained an apparent and colourable majority
 over the petitioner whereas in truth and in fact, your petitioner had a
 majority of lawful votes of the elections in Anambra State who voted at
 the sad election of 19/4/2003 and who were at the time thereof duly
 qualified by law to vote and was duly elected as the Governor of Anam-
 bra State and ought to have been so returned and declared as elected by
 the 2nd to the 5th respondents.”
(Italics mine for emphasis)

that the 1st respondent/appellant has admitted that the Governor of
 Anambra State (Dr. Chris Ngige) obtained a majority of the lawful votes
 cast at the election and was therefore, duly declared and/or returned as
 the winner of the election by the 3rd respondent. With due respect, I
 disagree with that argument. If the words used in couching paragraph 12
(supra) are examined and construed dispassionately, it is clear to me that
 by the afore-mentioned averment all the 1st respondent/petitioner is say-
 ing is that he as opposed to the present appellant (Dr. Chris Ngige) had a
 majority of lawful votes of the elections cast at the election of 19/4/2003
 in Anambra State. No other meaning can be ascribed to it. I have said
 somewhere in this judgment that the 1st respondent/petitioner did not predi-
 cate his case on the provision of section 136(1) of the Electoral Act,
 therefore his petition must not be viewed from the angle of that provi-
 sion.

Indeed, from a careful reading of section 136(1) of the Act, it is
 apparent that its application is subject to sub-section (2) of that section.
 For the umpteenth time, I like to say that having withdrawn leg 3 of the
 reliefs, which prays for nullification in the alternative, it is obvious that
 sub section(1) is no longer applicable. It is therefore beyond argument
 that the 1st respondent/petitioner has predicated his case on the provision
 of section 136(2) of the Act, of course in conjunction with the provision

of section 179(2) of the 1999 Constitution.

The lower tribunal in arriving at its judgment, held *inter alia*:

“In arriving at the figures which represent the votes scored by the parties, we had cause to refer to the opinions expressed by PW15 whose evidence was not discredited under cross-examination...

We have been guided by that decision of the Court of Appeal and we also bear in mind that the duty of a Judge in respect of expert opinion as enunciated in *A.D. v. Fayose* (2005) 10 NWLR (Pt. 932) 151 at 199. We therefore made our own findings in respect of opinions expressed by PW15 by believing or disbelieving him where the circumstances arose. We did our duties with respect to the opinions of the expert by examining the documents and agreeing or disagreeing with the expert opinion in the light of other credible evidence offered on the exhibits...

The respondents in an attempt to controvert the evidence of PW15 called PW53 (sic) who having said he could not express opinion on a document in open court went ahead to express such opinion. And, eventually under cross-examination he conceded his expertise to one of the counsel to the 1st respondent. All these he did without discrediting (sic) PW15 or controverting his testimony.

The counsel to the 1st respondent submitted that the evidence of PW15 falls outside the pleadings. A look at paragraph 14 on page 22 of the petition reveals that the facts on which PW15 gave evidence fall (sic) squarely within his pleadings.

In the cause of this judgment, we invalidated some ward and polling booth results on account of their recording more voters than were registered or 100% voting. It beats logic and reason for us to uphold results wherein the vote's cast exceeds the number of registered voters. In same vain we find it unrealistic and indefensible to accept results wherein all the registered voters in the ward or polling booth voted. This is because to uphold such result will amount to accepting that from the time the voters were registered in the year 2002 to the date of the election on 19th April, 2003, none of the registered voters died or migrated or abstained from voting or took ill at the time of voting.

The parties claimed to have certain scores from each of the local govern-

ment. They prepared charts of the scores in their respective pleadings.

They also tendered result sheets in support.

To verify their claims to such scores, the tribunal also made charts of such scores from the result sheets tendered by the parties...

The scores in the result sheets were also adequately examined by B all parties through the cross-examination of PW45.

And from the result sheets given to the petitioner's agents, the performance of the candidates is as follows:

Petitioner: 290,574 scores

C

1st respondent: 86,314 scores

Other candidates: 100, 283 scores

And from the result, the petitioner secure one quarter of total valid votes in 18 local government areas and of the 21 local government areas of Anambra State. The local government areas are Aguata, Awka North. Dunukofia, Idemili South, Njikoka, Nnewi South, Ogbaru, Onitsha North, Onitsha South, Orumba South, Oyi, Ayamelum, Anaocha, Ekwusigo, Idemili North, Awka South, Nnewi North and Orumba North.

D

And from the same result sheets, the 1st respondent secured one-quarters of total valid votes in 4 local government areas and of the 21 local government areas are: Idemili South, Orumba South, Oyi and Orumba North.

E

The 1st respondent tendered few result sheets to support his defence. Reasons were given on his behalf why major parts of his result sheets were not available. In the interest of justice we are making use of the INEC results tendered upon the petitioner's sub-poena. We could observe that the results tendered by PW2 from INEC represent what were pleaded by the respondents. The INEC results are in the charts in appendix 3.

G

The petitioner called on the All Nigerian Peoples Party (A.N.P.P.) to tender the result sheets given to the A.N.P.P. agents for the party's candidate in the election. The petitioner's counsel had made charts in part B, appendix 2A...

H

We verified the scores in the charts vis-à-vis the result sheets in Forms EC8A (1) tendered by ANPP, APGA and INEC. We found the

scores to be the same. We have therefore adopted the comparison of ANPP, APGA and INEC/PDP result in appendix 1.

From the charts in appendix 1, we could observe that all the ANPP and APGA result sheets tally as to serial numbers, names of polling stations, code numbers and scores for all the parties particularly ANPP APGA and PDP.

Whereas, in most cases the result sheets tendered by INEC are different as to serial numbers and even scores for the political parties.

C Since from the review of the evidence of witnesses and consideration of address of counsel on both sides, we found defects and irregularities in some of the result sheets tendered by INEC (in appendix 3), we have ignored the scores in such defective result sheets by sifting the grains from the chaff. What is left we have compiled and of the INEC result sheets in Forms EC8A (1) into charts in appendix 4 to determine the performance of the candidates in the election from the actual lawful and valid votes cast.

E We have relied on the polling booth results in Forms EC8A (1) tendered by INEC since there are too many defects in the ward results Forms EC8A (1) and the local government result Forms EC8A (1) all of which were carried into the state collated result sheet. Form EC8A (1). From appendix 4 compiled from the INEC results, we found the performance of the parties as follows: Petitioner: 241,469 votes 1st respondent: 175,241 votes Other candidates: 115,829 votes And from the INEC results the petitioner secured one-quarters of total valid votes in 15 local government areas out of the 21 local government areas of Anambra State. G The local government areas are: Aguata, Dunukofia, Idemili South, Nnewi South, Ogbaru, Onitsha North, Onitsha South, Orumba South, Ayamelum, Anaocha, Ekwusigo, Idemili North, Awka South, Nnewi North and Orumba North.

H And from the same result sheets the 1st respondent secured one-quarter of total valid votes in a local government areas out of the 21 local government areas of Anambra State.

The local government areas are: Aguata, Anambra West, Awka North, Dunukofia, Njikoka, Nnewi South, Orumba South, Oyi and

Orumba North.

We therefore hold that the petitioner has proved his claims and is accordingly entitled to the reliefs he is seeking since he has discharged the burden of proof cast on him by law.”

Apart from the documentary evidence tendered at the hearing by B both sides, both of them called one star witness on each side, for the 1st respondent/petitioner one Edward Kolawole, a deputy superintendent of police, a handwriting analyst was called as PW15, while the appellant/1st respondent called one Hans Meyer Godwin a forensic handwriting ana- C
lyst from the U.S.A. as DW53. Indeed, virtually all the parties in the consolidated appeal are *ad idem* that PW15 and DW53 is star witnesses on whose evidence the lower tribunal dwelt extensively in arriving at its conclusion. While the tribunal held, in the main, that the testimony of PW15 generally had evidential value; that of the DW53, by its evaluation, D
was not credible.

Before I go on to examine in details the testimonies of these two star witnesses alongside the documentary evidence led by the parties; let me quickly say that it is now a well established principle of our proce- E
dural law that a court of law can believe a witness in part and disbelieve him in part. This time-honoured principle applies to the evidence of experts as well as the testimonies of ordinary witnesses.

After all, an expert witness is in the same position as a witness of F
fact. It must however be always remembered that an expert evidence is necessarily founded on his training and experience both of which entail the acceptance of hearsay information. Judicial authorities are *ad idem* that experts may be called to give evidence; they do not decide issue; for G
the trial Judge retains the power of decision, which he must not abdicate.

The opinion of an expert, in my view is not usually determinative of a question posed in the trial court. Perhaps, I should further add that the trial Judge is bound to act in accordance with the evidence placed before him while the power of the appellate court, in that direction is to H
correct perverse verdicts. See *Lawal v. Dawodu & Anor.* (1972) 8-9 SC 83 and *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* (1968) 1 All E.R. 354.

Having stated the principle relating to reception of the evidence of an expert and the extent to which a trial Judge can play it up, I must at this juncture quickly dispose of a point raised by the appellant in his brief. It was contended in his brief that the lower tribunal *suo motu* prepared a B chart into which certain evidential materials or facts were inserted by the tribunal which materials or facts were eventually made use of by the lower tribunal in its judgment. The impression created by that contention is that these so-called materials are extraneous to the pleadings of the C parties and that they were the making of the tribunal. This contention is grossly incorrect. A quick reading of the pleadings of the parties shows that each of them integrated some charts in their respective pleadings and some facts and figures were inserted therein. The contents of these charts D prepared by the parties are what the lower tribunal merged together in the process of evaluation of evidence led before it and evolved a chart which it considered the justice of the case demanded. I had earlier said (*supra*) that the allegations made by the petitioner in this case were not by any strained construction, directed at the presiding officers and so the need E to join this category of electoral officers did not arise.

In the case of *Haruna v. Modibbo* (2004) 16 NWLR (Pt. 900) 487 cited by the appellant/1st respondent in support of his argument, specific allegations were made against the presiding officers and whereas in the F case at hand, the parties integrated some charts containing some materials in their respective pleadings, the parties in the *Haruna case* prepared no chart inserted into their respective pleadings, it is therefore my view that the *Haruna case* is not applicable to the case at hand. I shall now G proceed to examine the testimonies of the afore-mentioned star witnesses. In his testimony on the original Forms EC8A (1) tendered as exhibits AD1 (i to xxi). Edward Kolawole, deputy superintendent of police, a handwriting analyst testifying as PW15 said:

H “My opinion is that exhibit AD 1 (i to xvi) were written by one and the same person.”

Giving evidence on the originals of certified true copies of EC8A (1) tendered as exhibits AD2 (i - xii) he said:

“No doubt about it that one single person wrote AD2 (i - xii).”

He also said that exhibit AD3 (i - xii) was written by one person. When called upon to examine exhibits AD7 (i to xiii) he said they are the original copies of Form EC8A (1) the certified true copies of which he examined and he said those originals were written by one person. As regards the result of the analyses of his examination of the exhibits tendered, he said:

“In exhibit AA1 (viii) in column of total valid votes both in figures and in words what was formerly written was 98 in figures and words and 140 was superimposed on 98. The original figures and words are very visible even to the naked eye. In the column of words the word one was superimposed on ninety leaving behind the original TY in the ninety.”

In concluding his evidence-in-chief on the result of the examination he conducted on the exhibits shown to him, he said:

“My general observation in respect of exhibits AE 1 to AE 18 is that the writers in column of State, Code LGA, name of registration area (ward) and code and the name of collation officer are different from the writers in the main body of the forms.

The writing in these columns earlier enumerated are different from the main body of the form that is the name of the polling station and votes scored.”

Answering question under cross-examination he said:

“It was the CTC I analyzed before I identified the originals in court.”

He was subjected to copious cross-examination most of which demanded for his comments on some wards the exhibits and under re-examination he clarified this point when he said his opinion was based on those features which were unique and consistent on the totality of the exhibits analyzed.

I have examined the testimonies of DW53 - Hans Mayer Gidon, an American who is a Forensic Examiner of questioned documents who was called by the appellant/1st respondent the questions put to him were more hypothetical and the answers given by him were also in that direction and he did go into the area of forming opinions and reaching conclusions on the evidence of PW15: and this, the lower tribunal overruled, as,

according to that tribunal, it is not permissible in law, for an expert to do that. The attempt of the said witness (DW53) to pronounce upon documents not before the tribunal was ruled upon as unacceptable.

The lower tribunal did a comprehensive appraisal of the testimonies of these witnesses. Suffice it to say that the testimony of DW53 was adjudged to be lacking in evidential value. Of these pieces of testimonies of PW15 the tribunal said:

Wish respect to Ekwulobia Ward II

C “In this ward the petition again relied on the evidence of the PW15 while the respondents called DW413 who also did not dispute the evidence of the PW15 but said that the evidence of the PW35 that there was no collation in the ward was not true.

D PW15 had opined that exhibit 83(l)-(ix) and (xiii and xiv) the booth results for the ward were written by the same person. He was cross-examined by the counsel for the respondents on this set of exhibits but his testimonies remained unshaken.

E We therefore believe him and hold that the petition has proved his allegation on this ward...

F The evidence of PW15 in respect of the polling booth results (Forms EC8A (1), the foundation on which exhibit AJ xii stands, has been damaging with respect to the presumption of regularity attached to the results tendered by INEC.

The admission of DW 357 has made manifest the allegation of the petitioner that there was no collation of the polling booth results for these wards.

G We are therefore minded to find that the allegation of the petitions (sic) to the effect that there was no collation of results in these wards have been proved as required by the law...

H PW15 testified that exhibits W15 (i) - (xii) were written by one person while exhibits W15 (xvi) - (xviii), W15 (xxi) - (xxiv) were written by another person.

We have checked the result sheets and we hold the view that:

Exhibits W15 (i) - (xiii) were written by the same person.

Exhibits W15 (xvii) - (xxiv) were written by the same person.

Exhibits W15 (xiv) - (xvi) were written by the same person; and Exhibit W 15 (xv) written by another person.

To buttress the evidence of PW15 there is systematic conduct in the filling of most of the results in W15 series where instead of the total valid votes at the bottom column being the same figure as in column 6 of the result sheet, the no of rejected votes were added as the total valid votes recorded in column 6.

The testimony of PW15 was not controverted in respect of the polling booth results of Ogbunike ward two...

We have carefully considered the testimonies of the petitioner's witnesses vis-à-vis that of the respondents.

We agree with the opinion expressed by PW15 with respect to exhibits R6 (iv) and (v-vii) and based on our observation add (sic) that result R6 (i) and (ix) were written by one person."

We have considered the testimonies of the witnesses in the light of exhibits R12 (i-xi) and AQ xii. In all of exhibits R12 (i-xi) the number of registered voters is equal to the number of ballot papers issued and the total valid votes except in R12 (ii) and R12 (vii), the number of registered voters is equal to the number of ballot papers which is also equal to the total valid votes yet there is one rejected vote in each of them.

The respondents' witnesses have testified that these unrealistic scenario was what happened at the election.

These have seriously damaged their credibility and we consequently attach no weight to their testimonies."

The above, in summary, represents the findings of the tribunal.

It is now very elementary that findings of fact by the trial Judge will not be upset unless they are unreasonable and unsupported by the evidence laid before him. If an authority must be cited for this proposition, I will say the law had remained like the rock of Gibraltar in this country since 1931 by virtue of the decision in *Kponuglo v. Kodadja* (1933) 2 WACA 24.

I am not mindful that when it turns to the issue of documentary evidence in which the credibility of witnesses does not come into play, a Court of Appeal (which this court is, in the matter at hand) is in a good

position to evaluate the evidence of the court of first instance. That, the lower tribunal has done to our satisfaction. All the issues I have highlighted as arising for consideration under this part of the judgment are therefore resolved in favour of the 1st respondent. Let it be said again that B an adjudicator has the power to believe a witness in part and disbelieve him in part. Where the lower tribunal did say that it disbelieved that did not affect the judgment adversely for the portions of the testimonies of PW15 that were accepted and believed by the lower tribunal are richer in C evidential value and far out-weigh, in quantity, the areas disbelieved.

I shall be failing in my duty if I do not comment on the appeal brought by Independent National Electoral Commission along side with some of its officers.

D The conduct of election in Nigeria by force of law, is the primary responsibility of INEC. This responsibility starts with the registration of voters sequel to the registration of political parties. The holding of a general election is subject to the conclusion by the Commission of the compilation and updating of the National Voters Register. It has the sole E responsibility to organize, conduct and supervise all the elections and matters pertaining to elections into all the elective offices provided in the Constitution of the Federal Republic of Nigeria. At the conclusion of voting, the Commission collates all the results after compiling same.

F After the final conclusion of election i.e. voting, compilation and collation, the Commission through its electoral officers announces the of the election. By its enormous and onerous duties, the Commission, in the eye of the law must be an impartial body. The results so announced G must be a product of a careful and honest discharge of its functions. And once those results are announced, INEC being an impartial body must stand by those results no matter the circumstances.

H It is for all of the above that the appeal lodged by INEC which has been consolidated with other appeals, is baffling and very much capable of impugning its integrity and impartiality. Everything pertaining to the election was under the absolute control of INEC by force of law.

The results of elections published by it are its own making. It is self - discrediting for the same INEC to now invite this court, in its notice of

appeal, to hold that the April 19th, 2003 gubernatorial election held in Anambra State was invalid And to order a fresh Election on the ground, according to it, that same was marred by widespread irregularities and malpractices and therefore was conducted in substantial non-compliance with the Electoral Act, 2002. B

This somersaulting must necessarily erode the confidence, which the generality of the populace must have in a body like INEC. It was the Commission that voluntarily announced the results, which became the subject of contest at the tribunal below. The results are now being dis- C
credited by the same Commission. *It is a shame!* A man, which in this contest, includes INEC, shall not be permitted to blow hot and cold with reference to the same transaction; or insist, at different times, on the truth of each of two allegations or contentions, according to the prompt- D
ing of his private interest. Indeed, he who alleges contrary things in the manner done by INEC, shall not in the interest of the society, be heard. The well-known maxim is “*allegans contraria non est audiendus.*”

Let it be said loud, and I do hope that INEC will ponder sincerely and seriously on it that, no sane person who claims to be a part of or E
charged with performing serious function of conducting an election in a decent society shall be allowed to go whimsically, against his own deed, as was done here. I do appreciate that what I have just said is a doctrine of *estoppel* as applied to matter contained in a valid sealed instrument. I F
shall also liken the publication of election results through a document or documents signed by its accredited officials as a “valid sealed instru- G
ment.” The moment INEC publishes the result of an election; it is *es- topped*, forever, from denying the authenticity, the genuineness and the truth of all therein contained in the document voluntarily released by it (INEC) relating to the information or figures pertaining to the results. The *estoppel* subsumed in the release of the sheet or sheets containing the results is a conclusive admission, or if I may put it in another way, something which the law treats, in absolute term, as equivalent to an H
admission.

By this appeal, INEC has shot its own leg. For the sake of the well being of this great country of ours, I pray and do hope that INEC will

from now on allow truth, integrity and above all fear of *God* to have absolute impact in discharge of its all important functions. I will not want to say anything more.

For this little contribution, but most especially for the exhaustive reasoning and conclusions reached in the lead judgment of my learned brother, R. D. Muhammad, JCA, I will also and I hereby dismiss the main appeal as being unmeritorious. I affirm the judgment of the lower tribunal. I abide by all the consequential orders contained in the lead judgment including the order as to costs.

AUGIE JCA

I have read in advance the lead judgment just delivered by my learned brother, R. D. Muhammad. JCA and I agree with him. What we have before us are five appeals against the judgment of the National Assembly/ Governorship and Legislative Houses Election Petition Tribunal delivered on the 12th day of August, 2005 after a protracted trial that lasted over two years and after hearing the testimony of 482 witnesses. An appeal has been defined as an invitation to a higher court to review the decision of a lower court whether on the proper consideration of the facts placed before it, and the applicable law, that court arrived at a correct decision -see *Oredesin v. Arowolo* (1989) 4 NWLR (Pt. 114) 172. The right to appeal, and it is a right, does not exist for any person unless and until it is created by statute or the Constitution. It does not derive from any other source - neither inherent jurisdiction nor common law. No court has jurisdiction therefore to hear any appeal unless it is derived from or directly traceable to a statutory provision - see *Esuku w Leko* (1994) 4 NWLR (Pt. 340) 625; *Akande v. Nigerian Army* (2001) 8 NWLR (Pt. 714) 1; *Adeyemi (Alafin of Oyo) v. A.-G. Oyo State* (1984) NSCC 397 where the court held -

“It must be appreciated that the jurisdiction of appellate courts in our judicial system is either constitutional or statutory. The appellate powers are conferred upon the courts by the Constitution and the Federal and States legislations. No court has any inherent appellate jurisdiction. *It*

follows therefore that unless jurisdiction is specifically conferred by the Constitution or legislation, an appeal court will not entertain a particular appeal.” (Italics mine)

Dr. B. O. Babalakin (SAN), learned counsel for the Independent National Electoral Commission (INEC), the appellant in CA/E/EPT/ 5B/ 2005 in urging this court to strike out appeals Nos. CA/E/EPT/ 5C/2005, CA/E/EPT/5D/2005 and CA/E/EPT/5E/2005 submitted that based on the interpretation of the Electoral Act, particularly paragraph 47(3) of the First Schedule thereof, and other relevant laws, the said appellants have no right to file appeals in this matter. The appellants in appeals 5C & 5D, through their counsel, Charles Okaa, Esq., & G. C. Igboke, Esq. respectively, adopted the submissions of Chief Wole Olanipekun (SAN), learned counsel for the appellants in 5E, who argued that paragraph 47(3) of the First Schedule to the Electoral Act, 2002 restricts itself to the “tribunal” or “court”; that rules of procedure are excluded from the said Schedule; and that the Electoral Act does not define who an appellant is but it is defined in the Court of Appeal Rules. It was further submitted that their appeals are not being fought or confined within the narrow compass of the Electoral Act, and by the combined effect of sections 243, 244 & 245 of the 1999 Constitution read together with section 36(1) of the same Constitution, the appellants in 5C, 5D & 5E have a right to appeal as of right and that right cannot be circumvented by the Electoral Act, which will have to give way, citing *N.U.R. v. N.R.C.* (1996) 9 NWLR (Pt. 473) 490, & *Ndukauba v. Kolomo* (2005) 4 NWLR (Pt. 915) 411. An ingenious line of argument, I must say but one that will not hold water. As Dr. Babalakin (SAN) submitted, and agreed to by Chief Wole Olanipekun (SAN), the maxim is - “the express mention of one person or thing is the exclusion of another.” Clearly, the Electoral Act does not envisage a situation where staff or ad-hoc staff of INEC, like the appellants in 5C, 5D & 5E, would break away from the main Commission and file separate appeals. Paragraph 47(1) & (3) of the First Schedule to the Electoral Act, 2002, reads as follows -

“(1) Where an election petition complains of the conduct of an electoral officer, a presiding officer, returning officer or any other offi-

cial of the Commission he shall for all purposes be deemed to be a respondent and joined in the election petition as a necessary party, but an electoral officer, a presiding officer, returning officer or any other official of the Commission shall not be at liberty to decline from opposing the petition except with the written consent of the Attorney-General of the Federation.

(3) Where the Commission, an electoral officer, a presiding officer, returning officer or any other official of the Commission has been joined as a respondent in an election petition, a legal officer of the Commission or a legal practitioner engaged by the Commission, or the Attorney-General of the State concerned (acting in person or through any of his legal officers), or the Attorney-General of the Federation - (acting in person or through any of his legal officers) shall represent the Commission, electoral officer, presiding officer, returning officer or other official of the Commission at the tribunal or court.”

In other words, where an election petition complains of the conduct of an electoral officer, a presiding officer, returning officer or any other official of the Commission (i.e. INEC) that officer or other official must be joined as a respondent in the election petition, and where the Commission itself, the afore-mentioned officers or any other official are respondents, they will be represented at the tribunal or court by a legal officer of the Commission, or a legal practitioner engaged by the Commission, or the Attorney-General of the State concerned, or the Attorney-General of the Federation. By virtue of section 18(3) of the Interpretation Act, the word “or” shall, in any enactment, be construed disjunctively and not implying similarity - see also *Onakoya v. F.R.N.* (2002) 11 NWLR (Pt. 779) 595. What this means is that where the Commission and/or its officials are respondents in an election petition, they may be represented at the tribunal or court by either a legal officer of the Commission, or a legal practitioner engaged by the Commission, or the Attorney-General of the State concerned, or the Attorney-General of the Federation. In this case, the Commission chose to engage the services of a private legal practitioner. The letter to Dr. B. O. Babalakin (SAN) dated 12th August, 2005 reads as follows -

“I hereby convey approval of the Independent National Electoral Commission to you to represent it and its officials at the Court of Appeal in respect of the judgment of the Anambra State Governorship and Legislative Houses Election Petition Tribunal in Petition No....between *Peter Obi v. Chris Nwabueze Ngige & 450 others.*”

In a second letter dated 27th September, 2005 to the same Dr. B. O. Babalakin (SAN), the Commission disassociated itself from the other appeals. It reads -

“Your letter of 8th September on the above subject matter informing the Commission of other notices of appeal purportedly filed on behalf of some of its officials refers.

2. I am directed to inform you that the Commission is equally surprised at this turn of events and wishes to state for the record that *it did not instruct any other counsel to act on its behalf or on behalf of any of its official in respect of the appeal.*

3. It hereby affirms that *your firm is the only firm briefed to act on its behalf and on behalf of all its officials* in the appeal filed by Dr. Chris Ngige and in the appeal filed by it. ...

4. The Commission therefore *disassociates itself from and disclaims the other notices of appeal purportedly filed on behalf of its officials joined as respondents in the petition.*”

(Italics mine)

The point I am trying to make is that the Commission and its officials who were joined as respondents in the petition before the lower tribunal, could have been represented in this court by a legal officer of the Commission; a legal practitioner engaged by the Commission; the Attorney-General of the State concerned (acting in person or through any of his legal officers); or the Attorney-General of the Federation (acting in person or through any of his legal officers), but the Commission chose to engage the services of a private legal practitioner - Dr. Babalakin (SAN), and having done so, there was no room for either the Attorney-General of Anambra State or the Attorney-General of the Federation to come in. Certainly, it was wrong of the Attorney-General of Anambra State to rely on paragraph 47(3) of the First Schedule to the Electoral Act

to issue the “FIAT” given to learned counsel for the appellants in appeals 5C, 5D & 5E. I agree with Dr. Babalakin (SAN) that the said paragraph 47(3) “does not envisage the concurrence of representation and does not anticipate it”, and that it is absurd for the Attorney-General of a State to B issue a fiat to a legal practitioner to represent INEC in a suit where the Governor is not only a party, but was declared by the lower tribunal not to have won the election that brought him to office. The Attorney-General of Anambra State is also the Commissioner for Justice in that state C and is therefore an appointee of the Governor of Anambra State by virtue of section 192(2) of the 1999 Constitution, which provides that:

“Any appointment to the office of Commissioner of the Government of a State shall...be made by the Governor of that State...”

INEC was established by Decree No. 17 of 1998. It is saddled with the D responsibility of conducting elections into all elective offices in the 3 tiers of the Government - see *Obasanya v. Babafemi* (2000) 15 NWLR (Pt. 689) 1 at 19, where this court held -

“INEC is an organ established by the Federal Government as her E agency through which she carries out her statutory functions of ensuring the participation by the people in their governance. The establishment of INEC vide Decree No. 17 of 1998 and its amendment Decree No. 33 of 1998 are both made pursuant to the legislative powers of the Federal F Government under the Constitution or enabling Decree and by virtue of item 21 pan 1 of 2nd Schedule in the Exclusive Legislative List, 1979 Constitution and Item 22 in the same Schedule of 1999 Constitution. ... Consequently, the High Court of Lagos State or any State High Court for that matter has no jurisdiction to try any matter for a declaration or G injunction against the Federal Government or its agencies, in this case the INEC.”

In my view, the position of INEC in the scheme of things can be likened to that of the police, just as it is difficult to imagine a situation H where a Divisional Police Officer (DPO), an Area Commander or even a State Commissioner of Police, will file separate appeals different from that of the Inspector General of Police merely because they serve in a State where they receive special benefits and so do not agree with the

position taken by Force Headquarters in an appeal, so also it is unimaginable, and may the day never come, when this court will entertain an appeal such as these ones contemplated by the appellants in appeals 5C, 5D & 5E. The Electoral Act, 2002, not to mention the 1999 Constitution, does not envisage, and this court will not condone a situation where B officials of INEC will break into factions, and toe a different path from INEC that appointed them in the first place to carry out the sensitive role of ensuring a free and fair election in this country. As Afe Babalola (SAN) commented in his book - *Election Law and Practice* -

“It is an established fact that the success or otherwise of any act C will depend largely on the foundation laid for it. *Thus, the success of any election depends on how well the voters, the candidates, the Government and its machinery lay the foundation for the election. Foundation here is the preparation put in to ensure not only the conduct of a free and fair D election but also the conduct a successful election.* In order to achieve these objectives, government takes deliberate steps by way of promulgating and/or enacting laws which stipulate conditions for the conduct of elections. *Such steps include the setting up of an electoral Commission E with powers to conduct election. (Italics mine)*

This brings me to the appeal filed by INEC itself against the judgment of the lower tribunal - Appeal 5B, and here I must express my deep displeasure with the stance taken by the Commission, INEC has not only F a pivotal, but also a delicate role to play in ensuring a free and fair election in this country, and like Caesar’s wife, it must be seen to live above board. It does not speak well of INEC, in fact it is deplorable, that it can defend an election it conducted at the lower tribunal, and without shame G turn up at this court to say, “well since the lower tribunal held that the election we conducted was marred by corrupt practices and non-compliance with the provisions of the Election Act, we want you to nullify it and allow us conduct another one.”

How can we give them another chance to do what they could not H do before? There is a common saying - a house divided against itself cannot stand. How can we in clear conscience entrust INEC with another opportunity to conduct an election in the same Anambra State,

where they could not keep their own officials in check, not to mention ordinary voters who will be expected to participate in the election. It is just not possible. To whom much is given, much is expected and on INEC lies the responsibility to ensure free and fair elections. If it wants to B be taken as seriously as it should be or is expected to be taken, it must learn to do things properly and in accordance with the rule of law. It is unfortunate that because of the failure of INEC to conduct a free and fair election on the 19th of April, 2003, Dr. Chris Ngige who has been running C Anambra State as Governor for the past three years will have to be removed at this 99th hour, but out of nothing, nothing can arise - see *Macfoy v. U.A. C.* (1961) 3 WLR PC 1405 where Lord Denning said -

“You cannot put something into nothing and expect it to stay there, it will collapse.”

D At the end of the day, after listening to the petitioner’s 45 witnesses, 425 witnesses called by the appellant, and the 12 witnesses called by the 2nd respondent, INEC - the lower tribunal had a simple question to determine - who won the *Governorship election that took place on the E 19th of April, 2003?* And they found in favour of the petitioner. The lower tribunal believed the case put forward by the petitioner, and there is nothing in the record of what transpired at the lower tribunal to suggest that they were wrong to so hold. Belief can only be questioned on appeal if it F is obviously against the logical drift of the evidence considered as a whole or against the impact of the wave of possibilities disclosed by the evidence - see *Adelumola v. The State* (1988) 1 NWLR (Pt. 73) 683. My learned brother has dealt extensively with the main appeal -5A in the lead G judgment, and I hereby adopt his reasoning and conclusion therein as mine. I abide by the consequential orders in the lead judgment including the order as to no costs.

H **ALAGOA JCA**

I had a preview of the judgment just delivered by my brother Rabi Danlami Muhammad (JCA) and I agree with the reasoning and conclusion reached. A brief summation of the facts culminating in this appeal

will suffice. The Independent National Electoral Commission (INEC) conducted Governorship elections throughout Nigeria on April 19, 2003. Among the numerous contestants in Anambra State were Dr. Chris Nwabueze Ngige who contested on the platform of the Peoples Democratic Party (PDP) and Mr. Peter Obi who contested on the platform of the All Progressive Grand Alliance (APGA). INEC later released results at the end of the elections, declaring Dr. Chris Ngige as winner in that State. Dissatisfied, Mr. Peter Obi presented a petition challenging the results. His grouse is itemized hereunder as follows:

(i) That the 1st respondent (Dr. Chris Ngige) was not elected by a majority of lawful votes cast at the gubernatorial election held on the 19th April, 2003 having not polled the highest number or majority of lawful votes cast at the said election.

(ii) That the 2nd - 4th respondents (INEC and its official) should not have duly returned or declared as elected Dr. Chris Nwabueze Ngige as the winner of the election.

(iii) That the election or return of the 1st respondent is in valid by reason of corrupt practices and non-compliance with the provisions of the Electoral Act, 2002.

He therefore prayed the election petition tribunal in his further amended petition for a declaration as follows:

(a) That the 1st respondent (Dr. Chris Ngige) was not duly elected or returned and should not be declared as duly returned or elected by the 2nd - 4th respondents.

(b) That the tribunal declares the petitioner as validly and duly elected or returned having scored or polled the highest or a majority of lawful votes cast at the election.

(c) Alternatively that the election be nullified and a fresh election into the office of Governor of Anambra State be conducted by the 2nd respondent for substantial irregularities and corrupt practices which marred the said elections. This prayer was jettisoned by the petitioner and accordingly struck out.

After a long and keenly contested trial, the tribunal on the 12th August 2005 delivered judgment in favour of the petitioner Mr. Peter Obi

as per the reliefs sought by him.

In making the declaration the tribunal in its judgment stated as follows:

“(1) *That the 1st respondent (Dr. Chris Nwabueze Ngige) was not duly declared elected or returned and should not have been declared elected or returned or duly elected by the 2nd - 4th respondents.*

“(2) *And we hereby declare the petitioner (Mr. Peter Obi) as validly and duly elected and returned as Governor of Anambra State having scored/pollled the highest or a majority of lawful votes cast at the 19th April, 2003 gubernatorial election.*”

Aggrieved by the finding and judgment of the tribunal below 1st respondent (Dr. Chris Nwabueze Ngige) appealed to the Court of Appeal. Of the forty grounds of appeal which were eventually to emerge, thirteen issues were formulated for determination by the Court of Appeal and it will be unnecessarily repetitious to restate them here. It is instructive to state here that apart from the appeal filed by the 1st respondent Dr. Chris Nwabueze Ngige; four other appeals were filed following the judgment of the tribunal below. They are from the Independent National Electoral Commission (INEC), the returning officer Anambra East Local Government Area & 182 Ors., the returning officer Aguata Local Government Area & 168 Ors., and the returning officer Anambra State Gubernatorial election. These appeals which are numbered CA/E/EPT/5A/2005 -CA/E/EPT/5E/2005 were with the concurrence of all the counsel representing the parties consolidated. Preliminary objections were filed by INEC and the 1st respondent in the appeal against the other three appeals primarily *inter alia* on the basis that those appellants being ad-hoc staff of INEC and not having any personal or private right (as distinct and separate from the right of INEC), have no *locus standi* to institute their respective appeals which are a gross abuse of the process and procedure of this court as without the consent of the Attorney-General of the Federation there is no separate right of appeal by INEC ad-hoc staff to file an appeal contrary to the position of INEC either through a counsel of their choice or one appointed by the Attorney General of the State. Counter-affidavits were filed and arguments canvassed. The crucial question here is whether

the appellants in the three appeals referred to here viz appeal Nos. 5C, 5D and 5E were aggrieved parties within the connotation of the word “aggrieved”. An aggrieved person is a person having some interest in the subject matter of the action the outcome of which is certain to affect him one way or the other and which makes it imperative to join him as a party B to the proceedings. See generally the following cases -

Mobil Producing (Nig.) Unltd. v. Chief Simeon Monokpo (2003) 18 NWLR (Pt. 852) 346; *Ikonne v. C.O.P.* (1986) 4 NWLR (Pt. 36) 473; *Mbanu v. Mbanu* (1961) All NLR 652; *Ojukwu v. Gov. Lagos State* (1985) C NWLR (Pt. 10) 806. In the present appeal the appellants in appeal Nos. CA/E/EPT/5C/2005, CA/E/EPT/5D/2005 and appeal Nos. CA/E/EPT/5E/2005 in so far as they have never been deprived of any entitlement by the judgment of the lower tribunal and there was never any fear of their being so deprived even right at the outset of the commencement of the action in the tribunal below, cannot be referred to as aggrieved parties D and therefore have no right of appeal. Therefore the said three appeals are incompetent and are liable to be and are hereby struck out. Having performed the required surgical operation on the three quite unnecessary E appeals viz. CA/E/EPT/5C/2005, CA/E/EPT/5D/2005 and CA/E/EPT/5E/2005, I shall now turn my attention to appeal No CA/E/EPT/5B/2005 filed by the Independent National Electoral Commission (INEC). Learned senior counsel for the 1st respondent Dr. Ikpeazu had filed a notice of F preliminary objection urging this court to strike out the above stated appeal filed by INEC as being incompetent. Learned senior counsel Chief Emeka Ngige lent support to this proposition to have this INEC appeal struck out. Both counsel submitted that INEC had on appeal taken a G totally different stance from its position at the lower tribunal. It was also canvassed that none of the parties addressed the issue of nullification of the election, the 1st respondent having withdrawn same without any objection from any quarters and with the said withdrawal, the tribunal below was denied the opportunity of making any pronouncement on that H issue which cannot now form the subject matter of appeal before the Court of Appeal. It was again further contended that a prayer for nullification was not made at first instance by INEC and further that parties are

bound by their pleadings and that the court will not grant what is not prayed for. It is pertinent at this stage to examine the position of INEC at the tribunal below *vis-à-vis* its subsequent position before us on appeal. In this regard, recourse should be had to paragraphs 4 and 22 of INEC's further amended reply to the further amended petition. It is incumbent on me to reproduce them for their true meaning and purport.

Paragraph 4 - "The respondents deny paragraph 6(i) - (iii) of the further amended petition and put the petitioner to strict proof. The respondents specifically deny knowledge of any alleged corrupt practices and/or non-compliance with the provisions of the Electoral Act, 2002 as alleged. The respondents aver further that the 1st respondent scored the majority of lawful votes cast at the election and was duly returned or declared by the 2nd - 4th respondents as the winner of the election."

Paragraph 22 - "The respondents deny paragraph 23(a)-(c) at page 40 of the further amended petition dated 12th September, 2003 and shall urge the Honourable Tribunal to dismiss the further amended petition dated 12th September 2003. The election was conducted in substantial compliance with the provisions of the Electoral Act 2002 devoid of any irregularities and or corrupt practices on the part of the respondents.

It can thus be seen that at the tribunal below, INEC had contended that the election was free and fair and devoid of irregularities and/or corrupt practices. The same INEC on appeal is urging us to hold that the 19th April 2003 Governorship election in Anambra State was marred by widespread irregularities and malpractices and that it was conducted in substantial non-compliance with the Electoral Act, 2002 and that the entire elections be invalidated and a fresh election ordered. What a *volte face!* Having taken a stand before at the lower tribunal, INEC cannot now abandon its earlier position on appeal. See the following cases - *Ekpenyong v. Nyong* (1975) 2 SC 71; *Kalio v. Kalio* (1915) 2 SC 15; *Abdulkareem v. Incar (Nig.) Ltd.* (1984) 10 SC 1.

Parties are bound by their pleadings and cannot raise on appeal a fresh issue that was not canvassed in the court below and upon which the court or tribunal below hadn't the opportunity to make a pronouncement upon without leave of court. See *Adegoke Motors Ltd. v. Adesanya*

(1989) 3 NWLR (Pt. 109) 250. It is also well settled on the authorities that courts of law or tribunals do not award reliefs not specifically asked for. See *Fabunmi v. Agbe* (1985) 1 NWLR (Pt. 2) 299. INEC's new position on appeal is not only highly disgraceful and dishonest but is quite capable of completely destroying its credibility as an institution as it does not enhance the cause of justice. In the circumstances I also hold that the preliminary objection succeeds and appeal No. CA/E/EPT/5B/ 2005 filed by INEC be and is hereby accordingly struck out. Following the earlier striking out of appeal Nos. CA/E/EPT/5C/2005 - CA/E/EPT/5E/2005 and now also of appeal No. CA/E/EPT/5B/ 2005, what is now left is appeal No. CA/E/EPT/5A/2005 - the appeal filed by Dr. Chris Nwabueze Ngige which in the first place gave rise to the other appeals. The approach has been to deal with the thirteen issues distilled by the appellant from his forty grounds. I shall deal only with some of the issues by way only of expatiation. It was contended on behalf of the present appellant that the petition in the tribunal below should not have been heard as a result of the non-joinder of the presiding officers whose culpable conduct were brought to the fore in the evidence in chief and cross-examination of some of them who testified at the trial and other such evidence. Section 133(2) of the Electoral Act, 2002 provides as follows,

“The person whose election is complained of is, in this Act, referred to as the respondent, *but 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 purposes of this Act be deemed to be a respondent and snail be joined in the election petition in his or her official status as a necessary party.*”

(Italics mine for emphasis).

In the interpretation of statutes it is trite that words must be given their ordinary meaning.

It is clear and unambiguous that for the officers herein named to be joined as necessary parties, *the petition must complain of the conduct of such officers.*

A necessary first step would therefore be to have a community

reading of the petition. See *A.-G., Ekiti State v. Daramola* (2003) 10 NWLR (Pt. 827) 104. Examining whatever evidence is led in deciphering conduct would be to go outside the provision of section 133(2) of the Electoral Act, 2002. See *Yahaya v Aminu* (2004) 7 NWLR (Pt. 871) 159; B *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941)1.

Going through the further amended petition does not reveal any complaint on the part of the presiding officers and as such there should have been no need to join them. See *Nnadi v. Ezike* (1999) 10 NWLR C (Pt. 622) 228.

I shall now proceed to deal with the issue of inconsistent quorum during the sitting of the tribunal below. The record of the tribunal is the record of the chairman of the tribunal and none other and there is nothing in the record of the chairman in support of the contention that the tribunal sat with an inconsistent quorum. By section 115 of the Evidence Act, D there is a presumption of regularity viz a presumption that the chairman sat every time until judgment. There was no time a total of less than three members of the tribunal sat inclusive of the chairman. Section 285(4) of E the Constitution of the Federal Republic of Nigeria, 1999 provides that,

“The quorum of an election tribunal shall be the chairman and two other members.”

On the other hand, paragraph 2(1) of the Sixth Schedule to the F Constitution of the Federal Republic of Nigeria 1999 provides that the Governorship and Legislative Houses Election Tribunal shall consist of the chairman and four other members.

My understanding of the two provisions is that provided the chairman sits constantly, any two members can sit with him and such membership may vary from time to time among the four members exclusive of the chairman who must always be present to preside over the proceedings each time the tribunal sits. It must again be emphasized that the appellant has not denied that the chairman sat throughout the proceedings up to judgment and that in so doing that he sat with at least two members each time. By the provisions of sections 135 and 136 of the Evidence Act, the burden of proving that the tribunal sat with an inconsistent quorum lies with the appellant and he has not discharged same. H

See *Dr. P.A.C. Agwarangbo & 5 Ors. v. Winston Efiom Nakande* (2000) 9 NWLR (Pt. 672) 341 at page 360 where it was held that the record of proceedings of a court is presumed by law to be correct until the contrary is proved. Quite apart from all these there is nothing to show that the alleged inconsistency in the sitting of the tribunal below was ever raised in the course of the sittings of the tribunal or that it occasioned a miscarriage of justice as no member dissented.

I shall now deal briefly with the evidence of PW15. It has been contended by the appellant that his evidence at the tribunal below went outside his brief. The crucial question is whether the evidence of PW15 was relevant in relation to pleaded facts. See *Torti v. Ukpabi* (1984) All NLR 185, (1984) 1 SCNLR 214. The fact that PW15 was called upon to give expert opinion did not mean that he should have confined himself with what he did in the laboratory. As to the evaluation of his evidence it is the law that evaluation of evidence and the ascription of probative value to such evidence are the primary function of a trial court which sat, heard, and assessed the witnesses and not the duty of an appellate court. What the appellate court ought to do is to find out whether there is evidence on which the trial court arrived at its findings. Once such evidence is manifest on the record the appellate court cannot interfere. See *Ebba v. Ogodo* (1984) 1 SCNLR 372; *Agbonifo v. Aiwereoba* (1988) 1 NWLR (Pt. 70) 325.

The tribunal did such evaluation and came to its findings that the tribunal believed part of the evidence of PW15 while disbelieving others is a measure of its fairness. It found that the evidence of PW15 when placed side by side with that of DW53 was more to be believed. The tribunal made its own findings based on an analysis of the evidence adduced. There is sufficient evidence on which the tribunal arrived at its findings and it will be improper to tamper with the findings of the tribunal below. The appellant has also contended that the National Assembly/Governorship and Legislative Houses Petition Tribunal that gave judgment in this case now on appeal is unknown to the Constitution and the Electoral Act 2002. What I have to say in going through the submissions of counsel is that -

(i) There is nothing to show that the said tribunal was not properly constituted see *Madukolu v. Nkemdilim* (1962) 1 All NLR 587, (1962) 2 SCNLR 341.

(ii) Appellant participated fully in the proceedings and cannot now B on appeal after the delivery of judgment by the tribunal below be heard to complain as he is deemed to have waived his right to do so. See *Uzodinma v. Udenwa* (2004) 1 NWLR (Pt. 854) 303. £ It is too late for the appellant to raise this issue.

C (iii) Even if the petition was wrongly headed, the appellant has not shown that this wrong heading misled him or resulted in a miscarriage of justice. See *N.I.CO.N v. Power and Industrial Engineering Co. Ltd.* (1986) 1 NWLR (Pt. 14) 1, (1986) 1 SC 1

D On the propriety of allowing the further amended petition of the petitioner, it would appear to me that the amendments sought were in the main to correct typographical errors which did not alter the total scores pleaded. The amendments sought were inconsequential in so far as they E of scores. The amendments sought for are for example not to introduce fresh issues such as multiple instances of over voting which are most certainly substantial in nature. See *Jang v. Dariye* (2003) 15 NWLR (Pt. 843) 436; *Odonte v. Bassey* (1999) 5 NWLR (Pt. 604) 610; *Opia v. Ibru* F (1992) 3 NWLR (Pt. 231) 658; *Ogundiran v. Olalekan* (1998) 8 NWLR (Pt. 561) 313.

It for this and the fuller reasons contained in the leading judgment of my brother that I also dismiss the appeal and abide by the orders in the said lead judgment including order on costs. G

OMOKRI JCA

H I have had the advantage of reading in draft the judgment of my learned brother, R. D. Mohammed, JCA, and I am in entire agreement with his reasoning and the conclusions reached in the said judgment that the appeal is devoid of substance and largely unmeritorious and it should be dismissed. I, however, wish to add this bit of mine for emphasis.

When this appeal came up for hearing the learned counsel for the parties honourably consented to the consolidation of appeal Nos.CA/E/EPT/5A, 5B, 5C, 5D and 5E/2005. Moreover in practical terms and realistically this court will in the end deliver one judgment in respect of the 5 different appeals relating to one petition only. B

At the hearing, the counsel for Independent National Electoral Commission, (hereinafter called INEC) Chief B. O. Babalakin raised a preliminary objection to the competence of appeals Nos. CA/E/EPT/5C, 5D and 5E/2005. Dr. Ikpeazu, counsel for the 1st respondent also contended C by way of preliminary objection that the aforesaid appeals are incompetent. The 1st respondent also raised a preliminary objection as to the competence of the appeal filed by INEC in Appeal c No.CA/E/EPT/5B/2005. The preliminary objections were argued in the respective briefs of argument which were adopted and relied upon at the hearing of the appeals D and they argued the preliminary objections in the court.

Where a preliminary objection is raised as to the competence of an appeal, the jurisdiction of the court to entertain it becomes an issue and it becomes fundamental for the court to consider, determine or resolve it E first before going into the merits or the main issues in the appeal. See *UBA Plc. v. ACB (Nig.) Ltd.* (2005) 12 NWLR (Pt. 939) 232 at 250; *NPA v. Eyamba* (2005) 12 NWLR (Pt. 939) 409 at 433 and *NNB Plc. v. Imonikhe* (2002) 5 NWLR (Pt. 760) 294. F

I find it convenient to begin with appeal numbers CA/E/EPT/ 5C/ 2005 filed by the returning officer for Anambra East Local Government and 182 others; CA/E/EPT/5D/2005 filed by the returning officer for Aguata Local Government and 112 others; and CA/E/EPT/5E/2005 filed G by the returning officer for Anambra gubernatorial election respectively. The appellants are officials of INEC and ad hoc staff who were joined in the petition before the tribunal below in their official status pursuant to the provisions of section 133(2) of the Electoral Act, 2002. The grounds H of the preliminary objection filed by Chief Babalakin are as follows:

“(1) *The appellants do not have any personal or private legal right (as distinct and separate from the right of the Commission) entitling them whether jointly or individually to institute this appeal.*

(2) *It is only the 3rd respondent (the Independent National Electoral Commission) and counsel appointed by the Commission that can institute and/or maintain any proceedings connected with or related to an election petition.*

B (3) *The Commission has not authorized the bringing or continuation of this appeal.*

(4) *The Commission has instructed appellant's counsel to appeal against the judgment of the trial tribunal on behalf of itself, and all its*
C *officials involved with the subject election and sued as respondents at the tribunal and the said appeal has been duly filed.*

(5) *The appellants lack the requisite locus standi to institute this appeal, as they do not have any interest or right to protect or pursue in*
D *this appeal.*

(6) *The above appeal constitutes a gross abuse of the process and procedure of this Honourable Court."*

The 1st respondent in these appeals also raised a preliminary objection. To avoid prolixity I shall consider the two objections together because they are similar and identical.

The issue of the representation of INEC and its staff is founded on the provisions of paragraph 47(1), (2), (3) and (4) of the 1st Schedule of the Electoral Act, 2002. An appraisal of the provisions clearly reveal that
F the intention of the legislator is to ensure that the Commission (INEC) and all officers and *ad hoc* staff who took part in the election should maintain a common purpose and objective in approaching a petition filed against the Commission. By paragraph 47(1), no staff shall decline from
G opposing the petition except with the written consent of the Attorney-General for the Federation. This is to ensure uniformity between the Commission and its staff so as to present a common defence of a petition before the tribunal. Therefore, none of the officials or *ad hoc* staff in his official capacity can file a separate process in a petition. Now an appeal is
H expressed to be by way of re-hearing and it clearly postulates that what is true of a petition must trail the process of appeal.

The clear intention of the legislature is to avoid a situation where the house will be divided within itself. The law never envisaged a situa-

tion where ordinarily, INEC staff will be pitched in court against the position of the Commission. It goes without saying that a house divided against itself cannot stand.

Paragraph 47 of the 1st Schedule which is the relevant provision of the Electoral Act, 2002 touching on representation, contemplates a uniform process and does not envisage a situation where the appeal process is governed by rules different from that which obtains at the inception of the petition. If it is accepted that the law abhors maintenance of discord within the Commission, and that the Federal Attorney-General's consent is a *sine qua non* for presentation of divergent positions - then it must follow that in the appeal process the same rule must be applied. In other words, the staff of the INEC sued in an election petition cannot maintain their own separate positions, even on appeal, save with the express written consent of the Attorney-General for the Federation.

Presently, there is clear and uncontroverted evidence that Dr. B. O. Babalakin was engaged or appointed by INEC as the legal practitioner for the Commission, its officials and *ad hoc* staff to file and prosecute the appeal in this court. See exhibits AO1 and AO2 attached to the supporting affidavit attached to the notice of the preliminary objection. The exhibits speak for themselves and I intend to reproduce them below:

Exh. AO1:

"Independent National Electoral Commission

INEC - Headquarters

Plot 436, Zambezi Crescent, Maitama District AS

P.M.B. 0184, Abuja, Federal Capital Territory Nigeria

09-4137852-3 Fax 09-4137011

OFFICE OF THE CHAIRMAN

Ref: INEC/LEG/ES/AN/322/VOL.VI/3

Date: 12th August, 2005

Dr. B. O. Babalakin, (SAN)

Babalakin & Co. No. 8 Lake Chad Crescent, Maitama District,

Abuja.

REPRESENTATION AT THE COURT OF APPEAL IN RE-SPECT OF PETITION NO.EPT/AN/GOV/42/2003

PETER OBI V. DR. CHRIS NWABUEZE NGIGE & 450 OTHERS

I hereby convey approval of the Independent National Electoral Commission to you to represent it and its officials at the Court of Appeal B in respect of the judgment of the Anambra State Governorship and Legislative Houses Election Petition Tribunal Awka in petition No. EPT/AN/GO V/42/2003 between Peter Obi v. Dr. Chris Nwabueze Ngige & 450 Others.

C 2. The fees payable to you in respect of this appeal is N625,000.00 (Six hundred and twenty five thousand Naira) only plus N37,500.00 (Thirty seven thousand five hundred Naira) only to cover all your expenses.

3. You are required to send your letter of acceptance to the Legal Services Department, Independent National Electoral Commission (INEC) D Headquarters, Maitama, Abuja.

4. You are to contact the Resident Electoral Commissioner, Anambra State for further briefing.

SGD.

E Prof. Maurice M. Iwu
Chairman (INEC)"

EXH. A02:

"INDEPENDENT NATIONAL ELECTORAL COMMISSION

F Zambezi Crescent, Maitama District, P.M.B. 0184,
Garki - Abuja Federal Capital Territory
Ref. No.INEC/LEG/RET/AN/54/1/20

27th September, 2005

G Dr. B.O. Babalakin. (SAN)
Babalakin & Co.,
24A Campbell Street,
Lagos.

Re: APPEAL IN RESPECT OF PETITION NO. EPT.AN/GOV/H 42/2005;

PETER OBI V. CHRIS NWABUEZE NGIGE & 450 OTHERS

Your letter of 8th September, 2005 on the above subject matter informing the Commission of other notices of appeal purportedly filed

on behalf of some of its officials refers.

2. I am directed to inform you that the Commission is equally surprised at this turn of event and wishes to state for the records that it did not at any time instruct any other counsel to act on its behalf or on behalf of any of its officials in respect of the appeal. B

3. It hereby reaffirms that your firm is the only firm briefed to act on its behalf and on behalf of all its officials in the appeal filed by Dr. Chris Ngige and in the appeal filed by it.

4. The Commission, therefore, disassociates itself from and dis- C
claims the other notices of appeal purportedly filed on behalf of its officials joined as respondents in the petition.

5. I am further directed to inform you that a copy of this letter is being forwarded to the Registrar, Court of Appeal Enugu for his atten- D
tion.

SGD.

F. E. ABBE, ESQ

For: Secretary, INEC.”

Dr. Babalakin pursuant to the instructions of the INEC in exhibits E
AOI and A02 has duly and properly filed an appeal for the Commission, its officials and *ad hoc* staff before this court. INEC did not brief any other counsel and neither did it give fiat to any other person to file a separate appeal. F

Now, paragraph 47(3) of the 1st Schedule to the Electoral Act, 2002 provides as follows:

“Where the Commission, an Electoral Officer, a Presiding Officer, Returning Officer or any other official of the Commission has been joined G
as a respondent in an election petition, a Legal Officer of the Commission, or a Legal Practitioner engaged by the Commission, or the Attorney-General of the State concerned (acting in person or through any of his Legal Officers), or the Attorney-General of the Federation (acting in H
person or through any of his Legal Officers) shall represent the Commission Electoral Officer, Presiding Officer, Returning Officer or other official of the Commission at the Tribunal or Court.”

INEC having engaged a legal practitioner for itself, officials and

ad hoc staff and appeal having been filed, there is no room for any other body, office, institution, person or authority to engage any other counsel for any of its officials *or ad hoc* staff mentioned under section 133(2) of the Electoral Act and paragraph 47(3) of the 1st Schedule to the Act. It is plain and clear from paragraph 47(3) aforesaid that the provision is disjunctive following the use of the punctuation mark “comma” and the word “or”. See *Ifekwe v. Madu* (2000) 14 NWLR (Pt. 688) 459; *S.B.N. Ltd. v. S. I. O. Corpn.* (2001) 1 NWLR (Pt. 693) 194. See also section 18(3) of the Interpretation Act, Cap. 192, Laws of the Federation of Nigeria and *Kim v. Emefo* (2001) 4 NWLR (Pt.702) 147 and *Onakoya v. FRN* (2002) 11 NWLR (Pt. 779) 595. In *Mangai v. State* (1993) 3 NWLR (Pt. 279) 108 at 110, it was held that the word “or” is *prima facie* an alternative word. In the absence of a restraining context it is to be read as disjunctive.

It will lead to absurdity to conclude or to hold that all persons mentioned under paragraph 47(3) aforesaid should separately engage counsel for each and every official and *ad hoc* staff without regard to the fact that INEC had engaged counsel for itself, officials and *ad hoc* staff. That will be contrary to the spirit of paragraph 47(3) aforesaid and an unnecessary duplication of effort which will lead to confusion. The said paragraph did not envisage concurrent representation. Furthermore, it will be absurd to contend also that a State Attorney-General who did not appoint INEC officials and *ad hoc* staff could give fiat to legal practitioners to dislodge the counsel appointed by INEC who appointed the officials and *ad hoc* staff in the first place. Obviously that cannot be the intention of the legislature.

I am fortified in my view by the provision of paragraph 47(4) of the 1st Schedule to the Electoral Act. It provides:

“A private Legal Practitioner engaged by the Commission under subparagraph (3) of this paragraph shall be entitled to be paid his professional fees and a legal officer so engaged shall be paid such honorarium as may be approved by the Commission.”

From the above provision, it follows logically that the duty and indeed the responsibility of engaging a legal practitioner and payment of

his professional fees is that of INEC alone. In this situation, INEC has duly engaged the services of a legal practitioner for the Commission, its officials and the *ad hoc* staff. That settles the question of representation because there cannot be concurrent representation.

A critical appraisal of paragraph 47(1), (3) and (4) of the 1st Schedule to the Electoral Act, 2002 shows clearly that the intention of the legislature is to ensure that INEC and all its officers and *ad hoc* staff who took part in the election should maintain a common purpose and objective in approaching a petition filed against the Commission. By paragraph 47(1) no official or *ad hoc* staff of the Commission shall decline from opposing the petition except with the written consent of the Attorney-General for the Federation. This is to ensure unity between INEC and its officials and *ad hoc* staff. It is significant to note that none of the INEC officials or *ad hoc* staff declined from opposing the petition at the tribunal below neither did they maintain a position divergent from that of INEC. They maintained a common front with INEC. The question of concurrent representation is not within the contemplation of paragraph 47(1), (2), (3) and (4) of the 1st Schedule to the Electoral Act, 2002.

Moreover, the appellants are officials and *ad hoc* staff of INEC who were employed or engaged by it for the conduct of the election and who were joined in the petition as respondents in their *official status* pursuant to the provision of section 133(2) of the Electoral Act, 2002. Therefore, they cannot have an interest which is at variance with that of INEC because section 133(2) aforementioned and paragraph 47(1) and (3) of the 1st Schedule to the Act did not contemplate any break-away group. The appellants are statutory respondents and they have no personal or private interest or benefit to derive from the appeal and they cannot engage a private legal practitioner to appeal or to appear for them. See *Provost LACOED v. Edun* (2004) 6 NWLR (Pt.870) 476 at 495 - 496. From the foregoing, the conclusion I reach is that the purported fiat issued by the Anambra State Attorney-General is an exercise in futility and therefore null and void.

It should be noted that the tribunal in its judgment made no order(s) against any of the appellants personally or in their private capacity so as

to warrant their filing any appeal. There cannot be an appeal against what had not been decided against a party personally. See *Ogunbiyi v. Ishola* (1996) 6 NWLR (Pt. 452) 12 at 13; *Afoezioha v. Nwokoro* (1999) 8 NWLR (Pt. 615) 393 and *Nwidenyi v. Aleke* (1996) 4 NWLR (Pt.442) B 349.

Learned Senior Advocate of Nigeria, Chief Olanipekun, submitted that the appellant in appeal No. CA/E/EPT/GOV/5E/2005 has a right to counsel of his choice and he does not need to go through INEC because C he bears personal liability for his action or inaction by virtue of section 120(5) of the Electoral Act. This submission is misconceived and it is at variance with the provisions of paragraph 47(1), (2), (3) and (4) of the 1st Schedule to the Electoral Act which envisage a uniformity of purpose D and objective between the Commission and its officials and *ad hoc* staff. It will be preposterous to say that each and every staff employed or engaged by INEC to conduct election is on his own. It is indeed absurd and it does not stand to reason or logic. Though by virtue of section 120(5) of the Act, the appellant in question bears personal liability for his E actions or inaction, the truth here is that no order whatsoever has been made against him in the judgment of the tribunal below. So what is he appealing against. An appeal cannot be made in a vacuum and there is no provision in our law for anticipatory appeal.

F It was submitted by counsel in all three appeals that the appellants have right of appeal by virtue of the provisions of sections 243(a), 244, 245, 246(1)(a) and (b) read together with section 36 of the 1999 Constitution. I must say straightaway that the provisions of sections 244 and G 245 of the 1999 Constitution are not relevant and reference to the provisions is misleading. While section 244 aforesaid deal with the right of appeal from the Sharia Court of Appeal to the Court of Appeal, section 245 deal with appeals from Customary Court of Appeal of a State to the Court of Appeal. Obviously both provisions are not referable to the present H appeal. The provision of section 246 (1) (b) of the 1999 Constitution provides that appeal shall be as of right from decisions of the National Assembly Election Tribunals and Governorship and Legislative Houses Election Tribunals on any question as to whether:

“(i)

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

However, section 246(1) is silent as to who can exercise the right of appeal. Reference has been made to the provisions of Order 1 rule 2 of the Court of Appeal Rules, 2002 by Chief Wole Olanipekun where the word “appellant” was defined. It provides:

“Appellant” means any person who desires to appeal or appeals from a decision of the court below or who applies for leave to so appeal and includes a legal practitioner representing such a person in that behalf.”

A literary interpretation of the above definition will mean that any person can appeal from a decision of the court below or tribunal. This is too wide and there is no doubt that it will make appeals to the Court of Appeal an all comers affair. This will include busy bodies and meddlesome interlopers meddling in affairs that do not concern them.

It is trite that the right of appeal is a constitutional right which ensures on a person and the right cannot be restricted or expanded by any other law. To this extent the provisions of section 243(a) of the 1999 Constitution becomes relevant. It provides:

“S. 243 Any right of appeal to the Court of Appeal from the decisions of the Federal High Court or a High Court conferred by this Constitution shall be –

‘(a) exercisable in the case of civil proceedings at the instance of a party thereto, or with the leave of the Federal High Court or the High Court or the Court of Appeal at the instance of any other person having an interest in the matter..”

Though an election petition is *sui generis* and different from ordinary civil proceedings, it is nevertheless a civil proceeding and therefore, within the contemplation of the provisions of section 243(a). The section clearly and unequivocally provides for who may exercise a right of appeal but the right is not absolute. It is subject to the qualification that there must be in existence an appealable decision made by a court against a person seeking to appeal or affecting his interest. The right of appeal

does not exist in a vacuum. See *A.-G. Fed. v. ANPP & Ors.* 1 EPR 312 at 340, (2003) 15 NWLR (Pt.844) 600.

The right should be invoked only when there is in existence against the person wishing to exercise the right of appeal, a decision of the court. B Moreover, for an appellant to be entitled to appeal as a person having an interest in the matter under section 243(a) of the 1999 Constitution, he must show that the order made affects his interest prejudicially. See *Okonkwo v. Mode (Nig.) Ltd.* (2002) 14 NWLR (Pt. 788) 588 at 600-601; *Owena Bank (Nig.) Plc. v. N.S.E. Ltd.* (1997) 8 NWLR (Pt. 515) 1. C The “interest” referred to under section 243(a) aforesaid must be a legally recognizable interest.

A party to proceedings cannot appeal a decision arrived thereat which does not wrongfully deprive him of an entitlement or something D which he had a right to demand. Unless there is such a grievance he cannot appeal against a judgment which has not affected him. A person entitled to appeal is a person aggrieved by a decision, i.e. a person against whom a decision has been pronounced which deprives him of some E right. See *Mobil Producing (Nig.) Unltd. v. H Monokpo* (2003) 18 NWLR (Pt. 852) 346; *Akinbiyi v. Adelabu* (1956) SCNLR 109 and *U.B.A Plc. v. A.C.B (Nig.) Ltd.* (2005) 12 NWLR (Pt. 939) 232 at 262. Suffice to say that the appellants in three appeals aforementioned have not been able F to show any legally recognizable interest in their appeals, therefore they do not qualify as persons aggrieved and they have no *locus standi* to file the appeals as they did or to instruct counsel to file any appeal on their behalf.

G The issue here is not whether learned counsel for the appellants have the authority to represent them, it is that the appellants themselves have no *locus standi* to bring their respective appeals since INEC has filed an appeal for and on behalf of all its officials and *ad hoc* staff. So the cases of *Adekanye v. F.R.N.* (2005) 15 NWLR (Pt. 949) 433; *Tukur v. Gov., Gongola State* (1988) 1 NWLR (Pt. 68) 39 at 52 and *Eriobuna v. Ezeife* (1992) 4 NWLR (Pt. 236) 417 are clearly inapplicable. The provision of paragraph 48(2) of Schedule 6 to Decree 50 of 1991, which was H considered in *Eriobuna v. Ezeife (supra)* is not identical with the provi-

sions of paragraph 47(3) of the 1st Schedule to the Electoral Act. In fact, both provisions are miles apart. It is only when two statutes are similar and identical that the interpretation placed on one can be a precedent to the interpretation of the other. See *Nwobodo v. Onoh* (1984) 15 NSCC 1 at 34 - 35; (1984) 1 SCNLR 1. The provision of paragraph 48(2) of Schedule 6 to the Decree 50 of 1991 is neither similar to nor identical with the provisions of paragraph 47(3) of the 1st Schedule to the Electoral Act, 2002. In fact they are miles apart. So the case of *Eriobuna v. Ezeife* (*supra*) will not apply in the circumstance.

A careful perusal of the respective notices and grounds of appeal filed by the appellants reveal that they do not contain any grounds touching on their personal, individual or private grievance against the judgment of the tribunal below in all the grounds of appeal filed extending from pages 8181 - 8273 of the record. All the grounds of appeal merely repeated and re-echoed the grounds of appeal filed by Dr. Chris Ngige, the appellant in appeal No. CA/E/EPT/5 A/2005. In fact, apart from minor variations in grammar, style and numbering, each of the notices and grounds of appeal can be taken for the other. This amounts to an abuse of the process of this court because there is a multiplicity of appeals on the same issues by the same parties in respect of the same appeal.

Curiously enough the present appellants are also respondents in appeal No.CA/E/EPT/5A/2005 and they are also appellants in the appeal filed by INEC in appeal No.CA/E/EPT/5B/2005. Realizing the obvious confusion, the appellants filed application before this court praying that their names be struck out of the appeal filed by INEC. That application is devoid of substance, it is ridiculous because in the first place the appellants have no *locus standi* to file an appeal in this matter.

Again, the appellant in appeal No.CA/E/EPT/5A/2005 is also the 4th respondent in his notice and grounds of appeal and in his brief of argument. The appellant cannot be an appellant and a respondent at the same time in the same appeal. As at the delivery of this judgment no proper formal application was made to amend the notice of appeal or the brief of the said appellant. An amendment to the names of parties in a notice and grounds of appeal cannot be done orally, it should be by an

application supported by an affidavit.

The appellants have no personal stake in the subject matter of the appeal. Their only interest is official which cannot be different from that of INEC that employed or appointed them. The appellants therefore do not qualify as persons aggrieved as they have no legal grievance against the judgment of the tribunal below.

From the foregoing, the preliminary objection raised by INEC and the first respondent must be upheld and I hereby uphold same. Accordingly, the appeal Nos.CA/E/EPT/5C/2005, CA/E/EPT/5D/ 2005 and CA/E/EPT/5E/2005 be and are hereby struck out.

In respect of appeal No.CA/E/EPT/5B/2005, the 1st respondent, contended by way of preliminary objection that the appellant's appeal particularly ground 1 of grounds of appeal and relief 4(b), (c)and(d)of the reliefs sought are totally incompetent and ought to be struck out.

In order to appreciate the preliminary objection raised, it is necessary to refer to ground 1 in the notice and grounds of appeal filed by the appellant. Ground 1

“Error in Law

The learned Judges of the tribunal erred in law when they upheld the petition and returned the 1st respondent as the winner of the governorship election for Anambra State held on 19th April, 2003 having determined that there were widespread malpractices and non-compliance with the Electoral Act, 2002.

Particulars of Error

(a) *The tribunal found that there were widespread malpractices and non-compliance with the Electoral Act, 2002 in the 14 Local Government Areas that were in contention before it at the trial.*

(b) *These irregularities were substantial and they sufficiently made the election invalid on the grounds that it was not conducted substantially in accordance with the provisions and principles of the Electoral Act, 2002.*

(c) *By virtue of section 136(1) of the Electoral Act, 2002 the proper order for the tribunal to make, going by the circumstances and findings made in this case, is to nullify the election and order a fresh*

election.

(d) The malpractices and non-compliance were so significant as to have effectively robbed the election of its credibility and integrity.”

The reliefs sought from this court are stated under paragraphs 4(a), (b), (c) and (d). While paragraph 4(a) is not particularly germane, B paragraphs (b), (c) and (d) are very relevant and I intend to reproduce them below presently;

*“(b) An order nullifying or invalidating the governorship elections of Anambra State held on 19th April, 2003 on the ground of over- C
whelming malpractices and non-compliance with the provisions and principles of the Electoral Act, 2002.*

(c) An order nullifying or invalidating the governorship elections of Anambra State held on 19th April, 2003 on the ground of non-compliance with section 179 of the Constitution of the Federation, 1999. D

(d) An order that a fresh election in respect of the office of the Governor of Anambra State be held or conducted by the Independent National Electoral Commission.”

It will be recalled that INEC and its officials were the 2nd -450th E respondents before the tribunal and they vehemently and vigorously defended the election which they conducted and returned Dr. Chris Ngige, the 2nd respondent in this appeal as the duly elected Governor of Anambra State. F

In paragraph 22 of the further amended reply dated 16/9/03 and filed on 17/9/03 at page 735 of the record, the INEC pleaded as follows:

“22. The respondents deny paragraph 23(a)-(c) at page 40 of the further amended petition and shall urge the Honourable Tribunal to dismiss the further amended petition dated 12th September, 2003. The election was conducted in substantial compliance with the provisions of the Electoral Act, 2002 devoid of any irregularities and or corrupt practices on the part of the respondents.” G

INEC cannot violate its pleadings and derogate from performing H its duty. By its statutory existence, INEC is an independent body with constitutional powers to conduct elections in Nigeria. The function of the Commission by statutory provision is one of an umpire in the con-

duct of an election. It should never place itself in a position where imputations may be made that it supports one party or the other in an election. No matter the allegations made against it, the Commission should remain fair and focused. More importantly, INEC is not expected to appeal from B election but should leave candidates to fight their own battle. It is in the interest of the electoral process that INEC and its officials should remain as neutral as possible in election cases as its primary responsibility is to conduct free and fair elections regardless of who wins. INEC should C remain as an unbiased and impartial umpire. That is its constitutional role. See *Haruna v. Modibbo* (2004) 16 NWLR (Pt. 900) 487 at 569 and 573.

Bearing the above in mind, it is embarrassing, mischievous and scandalous for INEC to present this appeal and call for the nullification of the same election that it conducted. It is a shame.

D INEC is the body authorized by law to conduct elections in this country. Can the same body who by law is suppose to conduct the election and defend it now make a summersault and claim that the same election which it conducted was voided by malpractices, irregularities E and non-compliance with the law. That is a clear and unequivocal admission that it deliberately failed to conduct the election properly. This is a real case of loss of credibility, integrity and confidence.

By the Independent National Electoral Commission Act, and the F Electoral Act, 2002, it is the appellant's duty to defend the election which they conducted. That is its constitutional duty, therefore it cannot deviate or depart from it and press for the nullification of the same election it conducted and defended vigorously, vehemently and tenaciously at the G tribunal below. The combined effect of paragraph 47(1) and (2) of the 1st Schedule to the Electoral Act, 2002 clearly indicate that INEC and its officials and *ad hoc* staff cannot decline from defending a petition against the election it conducted. In the case of INEC, its position under the paragraph 47(1) aforesaid is not negotiable, it must oppose me petition, H in the case of its officials and *ad hoc* staff they shall not be at liberty to decline from opposing the petition except with the written consent of the Attorney-General of the Federation. INEC's appeal is therefore a violation of the mandatory provision of paragraph 47(1) aforesaid.

Secondly, the appellant did not canvass or make a case for the nullification of the same election before the tribunal and indeed none of the parties did. Therefore, the appellant cannot violate the pleading it had set up at the tribunal. In *Adegoke Motors Ltd. v. Adesanya & Anor.* (1989) 3 NWLR (Pt. 109) 250 at 266, the Supreme Court held that: B

‘Generally, an appeal is regarded as a continuation of the original suit rather than the inception of anew action. Because of this, in an appeal, parties are normally confined to their case as pleaded in the court of first instance.’ C

In *Akuneziri v. Okenwa* (2000) 15 NWLR (Pt.691) 526 at 551, Ayoola, JSC, had this to say:

“In the present case, the 1st set of defendants brazenly, had set out by their brief to challenge the position they have taken in the two lower courts, even on issues of fact. Such unexplained volte-face by the 1st set of defendants tends to make a farce of judicial process and is capable of undermining the credibility of the legal profession. It deserves, in my opinion, condemnation. I venture to think that the wise course for persons in the position of the 1st set of defendants, who can appropriately be described as respondents, pro forma, should have been to be passive in the ensuing proceedings, instead of embarrassingly espousing a cause which they had all along strenuously opposed and challenged at the trial.” D E

The above clearly and aptly describes the murky situation INEC F has now placed itself.

A careful perusal of ground 1 of the grounds of appeal and the reliefs under paragraph 4(b), (c) and (d) aforesaid clearly reveal that it would be tantamount to arguing on appeal on a totally different case from the case the parties contested before the tribunal below. *Akpa v. Itodo* G (1997) 5 NWLR (Pt.506) 589 at 604.

As I said earlier on, none of the parties canvassed or addressed the issue of nullification of the election. Though the 1st respondent initially pleaded for the nullification of the election as an alternative prayer in the petition; it was later withdrawn with the consent of other parties. So not being an issue canvassed before the tribunal, the tribunal had no opportunity to make a pronouncement on it. Therefore, the issue of nullification H

of the election did not form part of its decision and certainly cannot now form the subject matter of an appeal. No court has the power to grant reliefs on remedies not claimed before it. The duty of the tribunal is to confine its inquiry or findings to the issue raised by the petition and reply.

B See *Ige v. Olunloyo & Ors.* (1984) 1 SCNLR 158, (1984) 15 NSCC 102 at 112-113; *Ekpenyong v. Nyong* (1975) 2 SC 71 and *Odejide v. Fagbo* (2004) 8 NWLR (Pt.874) 1 at 16.

C It is also significant to note that the judgment of the tribunal was not based on irregularities, malpractices and non-compliance with the provisions of the Electoral Act, 2002. The judgment which is at pages 6568 - 7270 (volume 7) of the record declared as follows:

D “1. *That the first respondent (Dr. Chris Nwabueze Ngige) was not duly declared elected or returned and should not have been declared as duly returned or duly elected by the 2nd to 4th respondents.*

E 2. *And we hereby declare the petitioner (Mr. Peter Obi) as validly and duly elected and returned as Governor of Anambra State having scored/pollled the highest/majority of lawful votes cast at the 19th April, 2003 gubernatorial election.*”

F It is clear from the above that decision of the tribunal is essentially based on who had the majority of lawful votes cast at the said election. The claim of the 1st respondent is limited and confined to the issue of lawful votes which clearly and unequivocally is within the ambit of section 136(2) of the Electoral Act, 2002 and not section 136(1). For the avoidance of doubt and for ease of reference, it is necessary and reasonable to reproduce the provisions.

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

H (2) *If the tribunal or the court determines that a candidate who was returned as elected was not validly elected on the ground that he did not score the majority of valid votes cast at the election, the Election Tribunal or the court, as the case may be, shall declare as elected the candidate who scored the highest number of valid votes cast at the elec-*

tion and satisfied the requirements of the Constitution and this Act.”

The provisions of section 136(1) is subject to section 136(2) of the Electoral Act, 2002. It is a cardinal rule of construction of statutes that where a provision in a statute is made subject to another provision that provision must be read subordinate to the provision it is made subject to. See *NPA v. Eyamba* (2005) 12 NWLR (Pt. 939) 409 at 442; *Tukur v. Gov. Gongola Stare (No.2)* (1989) 4 NWLR (Pt. 117) 517; *Olusemo v. C.O.P.* (1998) 11 NWLR (Pt. 575) 547.

In *Yusufu v. Obasanjo* (2003) 16 NWLR (Pt. 847) 554 at 602, the Supreme Court held that:

“The expression ‘subject to’, is often used in statutes to introduce a condition, a proviso, a restriction, a limitation. The expression subordinates the provisions of the subject section to the section referred to which is intended not to be affected by the provisions of the latter.”

See also *Ezenwosu v. Ngonadi* (1992) 3 NWLR (Pt. 228) 154 and *Labiya v. Anretiola* (1992) 8 NWLR (Pt. 258) 139 -164. In sum, the phrase “subject to” indicates that the provisions of section 136(2) overrides the provision of section 136(1) of the Electoral Act. It follows therefore that since the tribunal’s judgment is based on who had the majority of lawful votes, the provisions of section 136(2) of the Act overrides that of section 136(1). That being the case nullification is not an issue.

In the circumstance, the submissions of appellants’ counsel that the substratum of the 1st respondent’s case at the lower tribunal is that the election be nullified and a fresh election into the office of Governor of Anambra State be conducted by the 2nd respondent for substantial irregularities and corrupt practices which marred the said election, is unwarranted, unsupportable, grossly speculative and it is of no moment.

In *Ige v. Olunloyo & Ors. (supra)* the Supreme Court laid it down that where there is no prayer in the petition to the effect that the election be declared void, the court cannot entertain an appeal seeking such relief because no court has the power to grant reliefs or remedies not claimed before it since both the parties as well as the court are bound by the pleadings.

There is therefore no merit whatsoever in INEC’s appeal and (lie

preliminary objection raised by the 1st respondent must be upheld and I do hereby uphold same. Accordingly, the appeal No. (CA/E/EPT/5B/2005 is hereby struck out.

In respect of appeal No. CA/E/EPT/5A/2005, I just wish to touch on some of the issues. I shall begin with the issue dealing with the heading of the tribunal i.e., *National Assembly/Governorship and Legislative House Tribunal*” I find no substance or merit in it having regard to the valid and subsisting decisions of this court. In *Ajadi v. Ajiola* (2004) 16 NWLR (Pt.898) 91 at 207 Ikongbeh, JCA, had this to say:

“*The Constitution certainly knows the two tribunals. The National Assembly Election Tribunal and the Governorship and Legislative Houses Tribunal, because it created them. The fact that the secretary wrote the two names and separated them with a slash (/) instead of an “and” as I have just done, is no reason to conclude that reference is to one entity known by the combined names. It is common knowledge that the slash is sometimes used as a substitute for “and” or “or”. I think the more reasonable conclusion reached from the conjoining of the two names by a slash is that the tribunal doubles as the National Assembly Election Triany law that prevents the president of this court, who has the responsibility of constituting the various election tribunals, from assigning the duties of one or more of the tribunals to it. At the very worst, the ascription of a wrong name to tribunal can be regarded as a mistake by the secretary, which, as the learned Adekeye, JCA, pointed out, is a matter of mere form which does not go to the (sic) competence of the tribunal.*”

The point raised by the appellant is as to form and not substance. Therefore it cannot in anyway affect the competence of the tribunal. It should be noted that the heydays of technicalities are gone for good. Courts are now more concerned in doing justice rather than giving undue prominence to technicalities. Courts are now more interested in substance than in mere form of a matter Justice can only be done if the substance of the matter is examined. Reliance on technicalities leads to injustice. See *State v. Gwonto* (1983) 1 SCNLR 142 at 160; *Nneji v. Chukwu* (1988) 3 NWLR (Pt.81) 184. In *Egolum v. Obasanjo* (1999) 7 NWLR (Pt. 611) 355 at 413, (1998) 5 SCNJ 92 all 145 where Achike,

JSC, (of blessed memory) said: *“The heydays of technicalities are now over because the weight of judicial authorities has today shifted from undue reliance on technicalities to doing substantial justice even-handedly to the parties to the case.”*

In *Nwobodo v. Onoh* (1984) 1 SCNLR 1 at 92 (1984) NSCC 1. B
The Supreme Court per Uwais. JSC, (as he then was) said;

“Election petitions are by their nature peculiar from other proceedings and are very important from the point of view of public policy. It is the duty of the courts therefore to endeavour to hear them without allowing technicalities to unduly fetter their jurisdiction.” C

See also *Chia v. Uma* (1998) 7 NWLR (Pt. 556) 95.

Moreover, there are a plethora of cases where the proceedings of the tribunal have been similarly headed and judgment of such tribunal had been heard without any objection and the decisions have been upheld. D
See *Uba v. Ukachukwu* (2004) 10 NWLR (Pt. 881) 224; *Abana v. Obi* (2005) 6 NWLR (Pt. 920) 183; *Moghalu v. Ngige* (2005) 4 NWLR (Pt. 914) 1 and *Okonkwo v. INEC* (2004) 1 NWLR (Pt. 854) 242. The wrong naming of the tribunal cannot and should not be allowed to be a basis on E
which a petition should be struck out.

*“A careful examination of the forms provided in the Schedule of the Electoral Act shows that they are similarly headed. See Form TF 001, Form TF 002, Form TF 003, Form TF 004, Form TF 005, Form TF F
006, in the second Schedule to the Electoral Act, I also observed that all the processes filed by the appellant himself were headed in the same way to wit: “National Assembly/Governorship at the Tribunal and Legisla-
tive Houses Tribunal.” So what is the appellant complaining about? G*

*I am also of the view that the appellant ought to have objected to the name of the tribunal at the initial stage when the petition was heard. This is provided under paragraph 49(5) of the 1st Schedule to the Elec-
toral Act, 2002 and it provides as follows:*

*“An objection challenging the regularity or competence of an elec- H
tion petition shall be heard and determined before any further steps in the proceedings in the objection is brought immediately the defect on the face of the election petition is noticed.”*

In the present appeal, it is very obvious that the appellant has taken many steps in the proceeding. The complaint of the appellant should have been brought timeously and in compliance with the provisions of paragraph 49(5) aforesaid. The issue raised by the appellant is very belated
B and the right of the appellant to complain must be deemed to have been waived. See *Sowemimo v. Awobajo* (1999) 7 NWLR (Pt. 610) 335; *Ngwu v. Mba* (1999) 3 NWLR (Pt. 595) 400 at 407 - 408; *Uzodinma v. Udenwa* (2004) 1 NWLR (Pt. 854) 303 at 327 and *Abubakar v. INEC* (2004) 1
C NWLR (Pt. 854) 207 at 235. What is more there is nothing to show that anyone, including the appellant, was misled by the heading of the proceedings. This issue must be resolved against the appellant and in favour of the respondents. The National Assembly/Governorship and Legislative Houses Election Petition Tribunal is known to the 1999 Constitution.
D Therefore the proceedings of the tribunal is proper, valid and competent.

On the allegation of inconsistent quorum, the appellant's case here is that the tribunal below is incompetent regard being had to the fact that it never sat with a consistent quorum throughout the proceedings. In
E other words, apart from the chairman of the tribunal who sat consistently all through the proceedings of the tribunal, the members swapped positions. The appellant has painstakingly referred to the days and dates when the members did not sit and the affected members. However, the
F onus of establishing the allegation of inconsistent quorum is on the appellant.

A careful examination of the record of appeal supplied and presented before this court does not support the allegation of inconsistent
G quorum. The main record of proceedings of the tribunal below was recorded by the chairman, Hon. Justice Nabaruma and he signed the record after the daily proceedings of the tribunal. The record did not show that there was inconsistency in the quorum each day.

Where a party intends to challenge the correctness of the record
H of proceedings the normal procedure is for that party to swear to an affidavit challenging the said record of proceedings. It is his duty to set out the facts or part of the proceedings which is wrongly stated in the record or what happened during the proceedings which is not included in

the proceedings by the trial court. The affidavit will then be served on the trial Judge and/or the registrar of the court and also counsel on the other side. When they are served it is entirely up to them to file the counter-affidavit affirming that what was recorded by the trial Judge is correct and that it reflects exactly what took place during the proceedings. *See B Idakula v. Richards* (2001) 1 NWLR (Pt. 693) 111, and *Agbeotu v. Brisibe* (2005) 10 NWLR (Pt. 932) 1 at 35.

In this appeal, I observed that the appellant challenged the record and the affidavit in support of the motion was served on the chairman and members of the tribunal. The chairman and members of the tribunal below filed their respective counter-affidavit affirming that what was recorded by the chairman. Hon. Justice Nabaruma is correct and that it reflected exactly what took place during the proceedings. The appellant also tendered supplementary record of the proceedings of the tribunal below prepared by the secretary of the tribunal but the said record was not certified as a true copy by any court official. Not even the secretary to the tribunal who compiled and forwarded the supplementary record to the Deputy Chief Registrar of this court certified the record as true copy. Apart from the original record of the court, only a secondary evidence of its contents duly certified as true copy is admissible and useful to the court. See section 132 of the Evidence Act, 1990 and *Akereja v. Oloba* (1986) 2 NWLR (Pt. 22) 257.

It is therefore abundantly clear that the purported supplementary record not having been certified has no probative value, it is inadmissible and therefore cannot be relied upon. It should be noted that the records of the tribunal is the proceedings as recorded by the chairman of the tribunal. The other members may or may not make notes in the course of the proceedings. Where such notes are made, they do not constitute part of the records of the tribunal and cannot be used. If it were otherwise then the record of the proceedings in this appeal would have been five records, one written by the chairman and one each for the four members. Apart from being cumbersome, it will definitely lead to confusion at the hearing of the appeal. In the circumstances the court and indeed parties are bound by the record as kept by the chairman of the tribunal

which record is now before this court. See *Agwarangbo v. Nakande* (2000) 9 NWLR (Pt. 672) 341 at 360 and *Abatan v. Awudu* (2004) 17 NWLR (Pt 902) 430.

After carefully perusing the record of proceedings of the tribunal below, it is my observation that there is nothing in the records supporting the allegation of inconsistent quorum. By virtue of the provisions of section 115 of the Evidence Act, 1990, there is a presumption of regularity. The presumption not having been rebutted, it must be presumed that the tribunal sat with the consistent quorum throughout the proceedings. Therefore, the record of the tribunal showing that the tribunal was properly constituted at all times is presumed to be correct and the parties are bound by the records produced and presented before this court. That being the case it is apparent and glaringly clear that the appellant has not made out a case of inconsistent quorum as it is not borne out of the printed record of appeal presented in this court. That knocks the bottom out of the complain of the appellant.

In order to fulfil all righteousness, let me also consider whether the defect in question is sufficient to render the judgment of the tribunal a nullity. This court was confronted with a similar situation in *Hon. Emma Anosike v. Joy Emodi* (unreported) Appeal No CA/E/ EFT/19/2004 delivered on 21/2/05. In that case Adekeye, JCA, held as follows:

“A situation where members of a tribunal swap positions during the hearing of a single case cannot bring out the best in the performance of their duties as adjudicators. I always believe however that each case must be decided according to its peculiar circumstance. The question which arises is what is the nature of the petition before the tribunal and the evidence led by the parties...”

In my view the evidence is purely documentary against the background that the chairman sat throughout the proceedings. Secondly the quorum panel of three members was maintained daily. I have considered all the cases cited by the counsel. I have to point out that the matter of quorum of the election tribunals is a creation of statute, the Constitution. A case law cannot override the Constitution. Finally, the way and manner the inconsistency has affected the judgment or how it has occasioned

a miscarriage of justice to the parties, have not been emphasized in the issue for determination other than the fact that it is a procedural defect which has rendered the judgment a nullity.

I cannot but invoke the judgment of *Nwobodo v. C. C. Onoh* (1984) 1 SCNLR 1, (1984) 1 SC 1 at 195 which states that:

"Election petitions are by their nature peculiar from the point of view of public policy. It is the duty of the court therefore to endeavour to hear them without allowing technicalities to unduly fetter their jurisdiction."

I resolve the issue against the appellant".

The facts and circumstances in the Emodi's case are in *pari materia* with the present appeal therefore the decision applies *mutatis mutandis* in this appeal and I rely on it fully. The cases of *Yaw Damoah & Ors. v. Chief Kofi Taibil 1 & Ors.* 12 WACA 167; *Wayo Ubwa v. Tiv Area Traditional Council & Ors.* (2004) 11 NWLR (Pt. 884) 427; *Shanu v. Afribank (Nig.) Plc.* (2002) 17 NWLR (Pt. 795) 185 and *Eghobamien v. F.M.B.N.* (2002) 17 NWLR (Pt. 797) 488, cited and relied upon by the appellant are not election petition cases and are clearly distinguishable. Election petitions are *sui generis* and it is the duty of the court to hear them without allowing technicalities to unduly fetter their jurisdiction.

In election petition cases the decision of the court, particularly when the issue is as to who had majority of lawful votes, is based largely on documentary evidence, mainly election results forms. So the question of the appraisal of the oral evidence and demeanour of witnesses is not that much in issue. Moreover, following the case of *Adeigbe & Anor. v. Kosimu & Ors.* (1965) 1 All NLR 260, a complaint against a hearing that was not always before the same bench does not pertain to any matter that goes to jurisdiction of the court, it only pertain to the soundness of the judgment. See also *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341, (1962) 1 All NLR 587. I conclude therefore that a judgment delivered by a tribunal whose quorum is inconsistent is not a nullity. Variations in the quorum do not make the judgment a nullity, they make it unsatisfactory, and it may have to be set aside for this reason. Whether they do or not depends on the particular circumstances.

It will be recalled that in *Anosike v. Emodi (supra)* this court faced with the same legal point did not declare the proceedings of the tribunal a nullity. I am persuaded by that decision and this court must be consistent in its decisions.

B From the foregoing I find no merit in this issue and I resolve it against the appellant.

On the issue of non-joinder of necessary parties, it is sufficient to say that after a careful perusal and consideration of the petition of the 1st respondent, it is clear that he did not make any complain against any of the presiding officers as alleged by the appellant. Section 133(2) of the Electoral Act, 2002 is the relevant provision in contemplation here and it calls for examination and interpretation in the determination of the issue.

The section provides:

D “(2) *The person whose election is complained of is, in this Act, referred to as the respondent, but 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*
E *person shall for the purpose of this 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.*”

The operative phrase in section 133(2) of the Electoral Act, 2002, is “but if the petition complains of the conduct”. The word “conduct” in the context in which it is used in the provision has received judicial interpretation from the Supreme Court in the case of *Buhari v. Yusufu (2003)* 14 NWLR (Pt. 841)446, (2003)14 NSCQR 1114 to mean “behaviour” as opposed to management. Relating this to the present issue on appeal, what this means is that for a presiding officer to be a necessary party, there must be some complaint in the petition against the behaviour of such presiding officer. The question that necessarily follows is whether the petitioner complained of the conduct of the presiding officers. In *INEC v. Ray (2004)* 14 NWLR (Pt. 892) 92 at 138, it was held that in coming to a conclusion that a petition complains of the conduct of any official of the 1st appellant or any other person being complained of, the court is expected to restrict itself to the averment in the petition. The first

port of call on this issue is the further amended petition filed by the 1st respondent.

A dispassionate examination and consideration of the averments in the further amended petition as a whole reveal that the conduct of the presiding officers were not impugned by the 1st respondent. In the petition, the 1st respondent clearly and specifically mentioned the officers whose conduct his complaint is directed, namely, supervisory presiding officers, ward returning officers and electoral officers. This is clear from paragraph 9, which appears at pages 657 - 658 of the record. The allegation of writing fake results in Form EC8A (1) is directed at the supervisory presiding officers, ward returning officers and electoral officers.

Similarly in paragraphs 10, 14, 15B, 16, 17B, 17C and at pages 25-40 of the petition, the 1st respondent made several allegations of unlawful votes wrongly collated and added up, over voting, excess voting falsification, manipulation, no election, no collation, irregularities and corrupt practices. However, the 1st respondent specifically identified the officers who were responsible for them. In the case of wrong collation, the 1st respondent impugned the supervisory presiding officers, ward returning officers and electoral officers that INEC used to declare the final results. Consequently all the attacks made in the petition or Form EC8A (1) which INEC used to announce the results of the election amount to complaints against those who wrote the results.

In the case of non-voting or no election particularly in Aguata and Anambra East and West Local Government Areas, the 1st respondent stated the reasons why there was no voting or why election did not hold there and the officials responsible. According to the 1st respondent there was no election in the areas aforesaid because the supervisory presiding officer did not supply result sheets to the polling stations and that election materials meant for some polling stations were diverted to other places or were hijacked by the thugs or agents of the 1st respondent. See page 25 of the petition in respect of Umueze Anam ward at page 663 of the record and page 36 in respect of Aguata Local Government Area and page 38 in respect of some wards in Anambra East Local Government Area. Not only did the 1st respondent amply provide answers so to why election did

not take place in the places complained of, he went further to pin-point those responsible. From the state of the pleadings, it is glaringly clear that the conduct of the presiding officers were not impugned by the 1st respondent.

B The appellant placed reliance on the cases of *Buhari v. Obasanjo* (2005) 13 NWLR (Pt.941) 1; *Yahaya v. Aminu* (2004) 7 NWLR (Pt. 871) 159 at 183 - 184; *Kallamu v. Gurin* (2003) 16 NWLR (Pt. 847) page 493 and submitted that the presiding officers ought to have been joined as respondents and that their non-joinder is fatal to the petition and thereby deprive the tribunal the jurisdiction to hear it. Having carefully gone through the cases, I cannot subscribe to the submissions of the appellant.

D In my humble view, the mere mention of polling booths in a petition does not necessarily mean that there is a complaint against the conduct of the presiding officers. A presiding officer no doubt is in charge of the management and control of the polling booth but if election materials are not brought to his polling booth, how can any reasonable person complain of his conduct or impugn his conduct. I rather believe that the proper person whose conduct is on line here is the supervisory presiding officer whose duty it is to supply the election materials to the presiding officer. Similarly where election materials meant for polling stations are diverted to private residences and false results are produced, how can any reasonable person hold the helpless presiding officers responsible.

Where the conduct of presiding officer at an election is not impugned there is no requirement of the law for him to be joined as a respondent in the election petition. See *Nnadi v. Ezike* (1999) 10 NWLR (Pt. 622) 228 at 238 and *Iwu v. Nwugo* (2004) 9 NWLR (Pt. 877) 54 at 71. The case of *Yahaya v. Aminu (supra)* which the appellant relied heavily upon is quite distinguishable from the facts of this petition on appeal. Firstly, in *Yahaya v. Aminu (supra)* Nzeakor, JCA, held thus:

H “Where a petitioner mentions by official title name, the person or official against whom his complaint is directed, he must join the person or official as a party to the petition...

On the other hand, where the petitioner fails to specifically men-

tion the officials or persons his allegations refer to, the petition is to be examined to infer those responsible for the alleged malpractice. This is to be determined by the nature of the assignment placed on them by the Electoral Act.”

In this appeal, it is undeniable that the 1st respondent clearly and unequivocally identified the officials responsible and against whom his complaint is directed and he mentioned them, namely, supervisory presiding officers, ward returning officers and electoral officers and that is that. The petition in an election petition is the pleading of the petitioner. It is well-settled law that parties as well as the court are bound by the pleadings. See *Adeleke v. Iyanda* (2001) 13 NWLR (Pt.729) 1 SC; *Adeniran v. Alao* (2001) 18 NWLR (Pt. 745) 361 SC and *Walter v. Sky II (Nig.) Ltd.* (2001) 3 NWLR (Pt. 701) 438. It is therefore not open to a court to violate the pleadings of the parties and make a case for them different from that which they have pleaded. See *Punch (Nig.) Ltd. v. Eyitene* (2001)17 NWLR (Pt. 741) 228; *Akpabuyo L.G. v. Duke* (2001) 7 NWLR (Pt. 713) 557 and *NDIC v. Oranu* (2001) 18 NWLR (Pt. 744) 183. The 1st respondent having mentioned the supervisory presiding officers, ward returning officers, electoral officers and INEC there is no necessity to resort to the second option indicated in *Yahaya v. Aminu (supra)*. The question of joining presiding officers by inference does not arise at all.

Secondly, in *Yahaya v. Aminu (supra)* the presiding officers were specifically indicted. See page 176 of the report where some of the paragraphs of the petition were reproduced and quoted as follows: “24. ... Consequently, presiding officers were openly seen thumb printing ballot papers for PDP candidates. ... 31. The petitioner avers that electoral materials were not secured and were freely issued by the presiding officers without any regard to laid down rules and procedure of conducting election.”

The above quoted averments are quite distinguishable from those in the petition in this appeal. Therefore, it is not applicable. It is for the same reasons that I say that the other related cases cited are not applicable. Rather I find the case of *Nze v. Nwaeze* (1999)13 NWLR (Pt.635)

396 very relevant and applicable to this petition on appeal. In that case a situation very similar to the one in this appeal was well considered. This is what Akaahs, JCA, had to say at pages 408 - 409 of the report:

“Before the ratio of this court in *Gertrude Oduka v. Ethelbert B Okwuaranyia & 2 Ors.* (1999)4 NWLR (Pt. 597) 35 inferring that those responsible for alleged malpractices would include the officials who conducted the elections in the wards in question, can be applied to this case, it will be necessary to examine the paragraphs of the petition where the allegations were made to determine whether those accused of the malpractices were specifically mentioned. If *they were not so mentioned, then the necessary inference to be drawn would be decided by the type of assignment each officer is statutorily charged to perform under the Decree...*

D With respect, I do not agree with the Tribunal’s argument that since only presiding officers produce Forms EC8A and EC8A (1), therefore, their non-joinder as necessary parties rendered the petition incompetent ... I will however wish to distinguish the case of *Oduka v. E Okwaranyia (supra)* on the facts. Whereas in the present appeal the allegations in paragraph 8 of the petition were directed against the conduct of the returning officers, the allegations contained in the petition in *Oduka v. Okwaranyia’s case (supra)* did not mention any official specifically by name and this was what led this court to infer that those responsible for the alleged malpractices would include the officials who conducted the election in the wards in question. The Tribunal was therefore wrong to have struck out the petition for being incompetent for the non-joinder of the presiding officers.” (*Italics mine*)

G It is for the above reasons that I agree with the tribunal below when it held in its judgment that:

“*The petitioner clearly is not making allegations against the presiding officer whose booth results he says are genuine and he is thus H relying upon, and maintained throughout, were written at the polling stations. Rather the petitioner is impugning the set of results tendered by INEC as not being those written by presiding officers at the polling stations. The petitioner had averred that, these set of results were arbitrarily*

written at venues other than the polling stations by named election personnel. See *Yahaya v. Aminu* (2004) 7 NWLR (Pt. 871) 159 at 183.”

On the related issue of failure to join ward and local government collation officers and that wards and local government returning officers who were joined as respondents are not the same with wards and local government officers do not exist; it is my view that it is a matter that was settled by the pleadings filed by the parties. The 1st respondent in his further amended petition pleaded under paragraph 3 as follows:

3. ... *The 3rd to 451st respondents are officials and officers of the 2nd respondent who took part in the conduct of the said election and whose conduct your petitioner complains of.* C

The appellant in his further amended reply averred as follows:

“2. *The 1st respondent admitted paragraphs 2, 3 and 4 of the further amended petition but adds that the petitioner was not declared winner of the said election as he did not score the majority of the lawful votes cast in the said election.*” D

It is clear from the above averment that the appellant admitted that each and everyone of the 3rd to 450th respondents were officials and *ad hoc* staff of INEC and more importantly that each and everyone of them took part in the conduct of the governorship election and that the complaints in the petition relate to the conduct of these officers. Curiously however, the appellant as if oblivious of his direct, unequivocal and total admission in paragraph 2 of the further amended reply, averred under paragraph 5 as follows: E F

“*The 1st respondent denies paragraph 6(7), (8) and (9) of the petition and puts the petitioner to strict proof. In further answer to paragraph 6(8) and (9) above, the 1st respondent says that there are no ward returning officers for the gubernatorial election as alleged in the petition. In further answer to paragraph 6(9) of the petition the 1st respondent specifically denies knowledge of any electoral malpractice or collation with regards to any declared results as alleged or at all or of any alleged use of force, horse whipping by Law Enforcement Agents.*” G H

Having unequivocally admitted that ward returning officers took part in the conduct of the election, the above averment of the appellant

renders the said reply inconsistent and self-contradictory. Obviously the two contradictory averments are mutually exclusive and mutually repugnant so much so that it cannot be said that the appellant traversed or controverted or denied the averment of the 1st respondent in paragraph 3 B of his further amended petition. The appellant cannot blow hot and cold or appraise and reprobate at the same time in the same pleading. Having specifically directly, unequivocally and totally admitted paragraphs 2, 3 and 4 of the further amended petition, there is no issue for determination in the matter. See *Abu v. Ogli* (1995) 8 NWLR (Pt. 413) 353 and *Temile v. Awani* (2001) 12 NWLR (Pt. 728) 726 at 751 at 752. I agree that the tribunal was right when it held that this is not an issue for determination in this matter. In the circumstances I resolve the first issue against the appellant and in favour of the 1st respondent.

D I shall now consider the appellant's issue No. 2 for determination which is distilled from ground 5 of the grounds of appeal. Issue 2 states that:

"Whether upon a proper construction of section 133(2) of the Electoral Act, 2002, and in view of the petitioner's pleadings and evidence particularly the pleadings under "facts/particulars relied upon" including paragraph 9 thereof, the tribunal below was justified in holding that policemen, soldiers and other security agents involved in the conduct of the election and indicted by the petitioner were not necessary panics and ought not to have been joined in the proceedings (-distilled from ground (5) of the final appeal)."

Let me say straight away that after painstakingly going through the judgment of the tribunal, I find that the tribunal made no such finding.

G Rather at page 514 of its judgment, the tribunal held as follows:

"We held the view that any allegation against those policemen and soldiers against whom allegations were made but who were not identified as persons who took part in the conduct of the election, it is not necessary, on the authority of Buhari v. Obasanjo (supra) to have respect of those policemen and soldiers who were identified but were not joined as respondents, any allegation against them go to no issue".

In the circumstance, ground 5 and the issue No. 2 distilled for

determination have no relationship whatsoever with the finding of the tribunal. A ground of appeal to be competent, must arise from the judgment appealed against and since ground 5 did not arise from the judgment appealed against, it must be struck out together with issue No. 2 and all the related arguments proffered by the appellant in his brief of B argument. See *Alubankudi v. A.-G., Fed.* (2002) 17 NWLR (Pt. 796) page 338 at 360 - 361; *Owena Bank Plc. v. Olatunji* (2002) 12 NWLR (Pt. 781) 259 at 302. An appeal is against the decision of a lower court and a challenge to the validity of that decision. Stretched further, an ap- C
 C appeal is always against the ratio of a lower court's decision and can never be at large. See *Saraki v. Kotoye* (1992) 9 NWLR (Pt. 264) 156, (1992) 3 NSCC 331 at 355; *Oba v. Egberongbe* (1999) 8 NWLR (Pt. 615) 485 at 489 and *Orugbo v. Una* (2002) 16 NWLR (Pt. 792) 175 at 206 - 207.

Before concluding this humble contribution, let me mention in pass- D
 ing that this appeal emanated from the petition filed by the 1st respondent, Mr. Peter Obi before the tribunal below on the 16/5/03 to hear and deter- mine the petition. The 1st respondent, as petitioner called 45 witnesses in support of the petition. The present appellant as the 1st respondent called E
 425 while the 2nd respondent called 12 witnesses, bringing it to a total of 437 witnesses for the defence of the petition. In all 482 witnesses testi- fied before the tribunal. It took the tribunal more than two years to hear all the witnesses called and to deliver its judgment on 12/8/2005. The F
 record of proceedings began from page 1 Vol. 1 of the record to page 8287. Vol. 8. The judgment of the tribunal below started at page 6568 and was concluded at 7270, that is a total of 702 pages. I must confess that the entire proceedings and the judgment is unprecedented. It is very in- G
 teresting to note, going through the judgment, that the tribunal carefully considered and evaluated the evidence of all the witnesses called before it. This is very commendable. The judgment itself is very reasonable, fair and well written in the sense that it considered every issue raised in the petition properly and it made its finding on each of them. In my humble H
 view, the tribunal below did a very thorough job which meets with my admiration and respect. The chairman and members of the tribunal richly deserve to be commended for a job well done.

Secondly, there are lessons to be learnt from the facts of this appeal. This is a petition that was filed on 16/5/03 following the result of the gubernatorial elections conducted on 19/4/03. It hung in the balance until 12/8/05 when judgment was delivered by the lower tribunal. This
B appeal came up for hearing on the 23/1/06 and judgment was delivered today. It has taken all of 35 months for the 1st respondent to receive justice in a court of law. 35 months is a very considerable portion of a 4-year term of office. Although in common parlance no journey is too far
C or too long if one gets what he seeks, I think the time has come for the Electoral Act to be amended so that election petition may be held not less than 4 months and not more than six months to the date on which the house stands dissolved or upon which the term of the office of the last
D holder of an elective office expires as the case may be. The essence of this is to give enough time for any election petition proceedings to be concluded before a person declared winner is sworn in. We can borrow a leaf from the American electoral process whereby all election petitions proceedings are concluded before the president is sworn in. This, I be-
E lieve will be in consonance with sound democratic principles and the expectation of the Nigerian society.

It is for this and the fuller reasons given in the lead judgment that I too find no merit in this appeal and I dismiss it. I abide with all the
F consequential orders made in the lead judgment.

Appeal dismissed.

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