

SUPREME COURT OF NIGERIA
18TH JANUARY, 2008 SC.252/2007
CORAM:- A. I. KATSINA-ALU, D. MUSDAPHER, G. A.
OGUNTADE, M. MOHAMMED, W. S. N. ONNOGHEN,
I. T. MUHAMMAD, P. O. ADEREMI, JJSC

RT. HON ROTIMI CHIBUIKE AMAECHI APPELLANT
AND

1. INDEPENDENT NATIONAL
ELECTORAL COMMISSION

2. CELESTINE OMEHIA RESPONDENTS

3. PEOPLES DEMOCRATIC
PARTY (PDP)

ELECTIONS - Candidates - Substitution - Political party's primary election results - Is binding on the parties vide s. 85 Electoral Act 2006 - Reason given for substituting appellant - Is untrue and unverifiable (H1)

CONSTITUTIONAL LAW - Supremacy - Elections - Political parties - Liberty to put up any candidate they deem fit - Is subject to the 1999 Constitution - And Electoral Act 2006 - Dalhatu & Onuoha cases are no longer applicable (H2)

ELECTIONS - Candidates - Substitution of - By a political party - Stating error as the reason - Did not meet requirement of s. 34 (2) of Electoral Act 2006 - That provided for cogent and verifiable reason - As held in Ugwu v. Araraume case (H3)

APPEALS - Elections - Fresh evidence on appeal - Power of Court to receive - Basis under O. 1r. 19(2) Court of Appeal Rules - Include that the evidence should be credible - Lower court was wrong in receiving fresh evidence of previous judgment - And in relying on it in this case (H4)

CONSTITUTIONAL LAW - Governor's office - Eligibility of candidates - S. 182 (1)(i) of 1999 Constitution - Should be construed along with s. 36 - To avoid politicians using s. 182 - To hinder the

emergence of their opponents (H5)

CONSTITUTIONAL LAW - Governor's office - Eligibility - Crime - Fair trial - A citizen should not be found guilty of a crime - Without being given fair trial before a court - Mere finding of guilt by a tribunal - Without prosecution in court - Does not remove eligibility to Governor's office (H6)

CRIMINAL PROCEDURE - Guilt - Courts - Indictment by a judicial commission - Is not cognizable under the law - Without trial before a court - It is not permissible to find a person guilty (H7)

CRIMINAL PROCEDURE - Crime - Investigation and prosecution of - Economic and Financial Crime Commission - Duty of - Is to prosecute before court of law - And not send case file to Government (H8)

CONSTITUTIONAL LAW - Governor's immunity - S. 308 of 1999 Constitution - Purpose of - It cannot be relied upon - Where the res in dispute will be permanently destroyed - With the effluxion of time (H9)

ACTIONS - Justiciability - Elections - Pre-election matter - Premised on breach of the Constitution and Electoral Act - Issue of wrongful substitution of party candidate - Court has a duty to enforce valid laws - A political party is bound by the Constitution and laws (H10)

ACTIONS - Declarations - Are not made by Court - On admission or in default of defence - Without hearing evidence - But absence of viva voce evidence does not mean absence of evidence - Seeing that parties agreed to rely on undisputed documentary evidence (H11)

CONSTITUTIONAL LAW - Jurisdiction - Elections - Ss. 178 & 285 (2) of 1999 Constitution - Cannot be construed to destroy court's jurisdiction in pre-election matters - As related provisions of a law are not interpreted in isolation (H12)

COURTS - Justice - Technicalities - Let justice be done even if the heavens fall - Court can do what has never be done in any case - As adjudicatory power of the court - Will no longer be hindered by adherence to technicalities - (H13)

CONSTITUTIONAL LAW - Elections - Vide s. 221 of 1999 Constitution - Only political parties - Shall canvas for votes for any candidate - Thus, it is a party that wins or loses - For there is no individual candidacy (H14)

ELECTIONS - Party primaries - Substitution of candidate - Where cogent and verifiable reason was not given - As provided by law - The change was never effected (H15)

ELECTIONS - Nomination of candidates - Improper substitution by a political party - Demands that Court determines the valid candidate - Who merely steps into the shoes of the invalid candidate - To order a new election is improper (H16)

COURTS - Powers - Consequential reliefs - Though not claimed - Can be granted by the court - Towards stopping subversion of justice - So that though not claimed appellant is deemed - To be the winner of the election (H17)

FACTS

This case is in respect of the proper Rivers State Governorship candidate of the PDP (Peoples Democratic Party) for the 2007 gubernatorial election. Plaintiff/appellant (Amaechi) contested the party primaries against seven other members of the PDP and secured 6,527 out of 6,575 votes to emerge winner. The PDP submitted Amaechi's name to INEC as its Governorship Candidate. No court of law subsequently made an order disqualifying Amaechi from contesting the election. The PDP however, substituted 2nd appellant's name (Omehia, who did not contest the party primaries) without giving cogent & verifiable reason for the substitution as required by the Electoral Act 2006. Amaechi filed an action before the Federal High Court Abuja against the defendants/respondents claiming inter alia, a

declaration that his substitution is unconstitutional, illegal and unlawful for not being in compliance with the provisions of the electoral Act. Appellant prayed for an order of perpetual injunction restraining the respondents from changing or substituting his name as the Rivers State PDP Governorship Candidate for the April, 2007, election.

The trial court held inter alia, that the reason "error" given by 3rd respondent (PDP) for the substitution satisfied the requirements of the Electoral Act 2006. Appellant appealed to the Court of Appeal while the respondents cross appealed. Some occurrences took place during the time the appeal was pending. At a stage the lower court stated that it will wait for the Supreme Court's decision in the Ugwu v. Araraume case, seeing that the facts are similar with the present case. Yet in its Judgment the Court of Appeal distinguished the two cases and found in favour of the respondents. Still dissatisfied, appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"(1) Whether the Court of appeal was not in error in allowing fresh evidence on appeal when no exceptional circumstance was shown to warrant such admission?"

(2) Whether having regard to the undertaking before the court, the court below ought not to have followed the decision of the Supreme Court in Ugwu v. Araraume (supra)?

(3) Whether there exists cogent and verifiable reason to warrant the substitution of Plaintiff's name with that of any other person in breach of Section 34 of the Electoral Act, 2006 and if not whether the purported substitution of Plaintiff's name is not null and void?

(4) Whether INEC (1st respondent) can rely on extraneous fact or any fact not presented by a political party seeking substitution to verify reason given seeking substitution.

(5) Whether there was in existence an Indictment of the plaintiff for same to be used as a basis to verify the reason of error given by the 3rd respondent for seeking substitution of Plaintiff's name.

(6) Whether having regard to the concept of lis pendens and the fact that at the material time of the election, plaintiff being the only lawful candidate of the Peoples Democratic Party, he ought not to be declared the winner of 14th April, 2007 general election in

Rivers State."

HELD (Unanimously allowing the appeal by lead reasons for judgment per **OGUNTADE JSC**)

ELECTIONS - Candidates - Substitution

1. I observed earlier that Amaechi's case was that Omehia did not contest as a candidate in the PDP primaries. The question that arises is - what 'error' made it possible for a non-candidate at PDP primaries to be named the PDP candidate in the place of eight candidates who contested and of whom Amaechi came first? It seems clear that the reason given by PDP for the substitution of Omehia for Amaechi was patently untrue and certainly unverifiable. B
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Under Section 85 of the Electoral Act, 2006, it is mandatory that political parties inform INEC of the date and time of holding a convention or congress summoned for the purpose of nominating candidates for any of the elective offices under the Electoral Act, 2006.

If parties were not to be bound by the results of their party primaries in the nomination of candidates at any level, why would it be necessary for Independent National Electoral Commission's (INEC) representatives to be present at and monitor the proceedings of such congress? It seems that the obligation on the parties to inform INEC of such congresses was to ensure that INEC would know and keep a record of candidates who won at the primaries. (pp. 280 E/283 A) E
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Political parties - Liberty to put up any candidate they deem fit

2. The respondents' counsel in their briefs have strenuously argued that political parties have the right to put up as candidates for elective offices any persons they deem fit. They relied with a measure of confidence on the decisions of this court in *Dalhatu v. Turaki* [2003] 7 SC. 1, [2003] 15 NWLR (Pt. 843) 300 and *P.C. Onuoha v. R.B.K. Okafor* [1983] SC NLR 244 and some others. Counsel would appear however to have overlooked the fact that there were no provisions of the Electoral Act similar to section 34(2) of the Electoral Act 2006 in force at the time these cases they relied upon were decided. Put simply, section 34(2) has altered the law and made those cases G
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inapplicable in a case as this. It must be borne in mind that the Political Parties were a creation of section 221 of the 1999 Constitution. The same 1999 Constitution in section 222 imposes the duty on parties to file copies of their Constitution with Independent National Electoral Commission (INEC). Nothing in a party's Constitution can
 B override or be superior to the Constitution of Nigeria and the Laws validly enacted by the authority of the Nigerian Constitution.
 (p. 282 E)

ELECTIONS - Candidates - Substitution of

C 3. At pages 155 to 156 of the judgment of this Court in Ugwu & Anor. v. Araraume (supra) I concluded as follows:

*"It is manifest that the requirement under Section 34(2) of the 2006 Act that 'cogent and verifiable reason' be given in order to
 D effect a change of candidates was a deliberate and poignant attempt to reverse the 2002 Act which led to a situation where disputes arose even after elections had been concluded as to which particular candidates had been put up by parties to stand elections.*

*The meaning of the word 'cogent' as given in The Shorter Oxford
 E English Dictionary is stated to be "constraining, powerful, forcible, having power to compel assent, convincing." The same dictionary defines "verifiable" as "that can be verified or proved to be true, authentic, accurate or real; capable of verification."*

*In the light of the above, it seems to me that the expression
 F 'cogent and verifiable reason' can only mean a reason self-demonstrating of its truth and which can be checked and found to be true. The truth in the reason given must be self-evident and without any suggestion of untruth. The reason given must be demonstrably true
 G on the face of it so as not to admit of any shred of uncertainty."*

I am satisfied that the reason given by PDP as 'error' for substituting Omehia for Amaechi did not meet the requirement of section 34 of the Electoral Act. (p. 283 D)

H Elections - Fresh evidence on appeal

4. On 10-4-2007, Independent National Electoral Commission (INEC) brought an application before the court below for leave to call fresh evidence on appeal. The evidence sought to be called on

appeal was the ruling which Kuewumi, J., gave on 30-3-2007 in a suit in which Amaechi had been challenging his "purported indictment". Kuewumi J did not decide the case on the merits but rather on the narrow ground that the filing of the suit constituted an abuse of the court process. The suit was dismissed but nothing was decided therein as to whether or not Amaechi was indicted. It would seem from the final judgment of the court below that it was the said judgment of Kuewumi, J., that was relied upon to arrive at the conclusion that Amaechi was indicted. Was the court below correct to have received the said judgment of Kuewumi J in evidence? Was the court below correct to have taken the said judgment as proof of indictment of Amaechi? Could the said judgment, which was delivered on 30-3-2007, be the basis of the substitution of Omehia for Amaechi which was done on 02-02-2007? The answers to all the three questions must be in the negative.

The power of the court below to receive further evidence on appeal is governed by Order 1 rule 19(2) of the Court of Appeal Rules 2002.

There are judicial authorities governing the manner in which the power to receive further evidence on appeal should be exercised. In *Obasi & Ors. v. Onwuka & Ors.* [1987] 2 NSCC 981, this court per Oputa JSC., considered the circumstances under which fresh evidence may be received on appeal. Appellate courts are very reluctant to admit "fresh evidence, new evidence or additional evidence" on appeal except in circumstances where the matter arose ex improviso which no human ingenuity could foresee and it is in the interest of justice that evidence of that fact be led:- *R. v. Dora Harris* (1927) 28 Cox 432. But by and large, at least in criminal cases, (and the principle should also be the same in civil cases) the courts lean against hearing fresh evidence on appeal.

In civil cases the Court will permit fresh evidence in furtherance of justice under the following circumstances:

(i) Where the evidence sought to be adduced is such as could not have been obtained with reasonable care and diligence for use at the trial.

(ii) Where the fresh evidence is such that if admitted would have an important, but not necessarily crucial, effect on the whole

case.

(iii) Where the evidence sought to be tendered on appeal is such as is apparently credible in the sense that it is capable of being believed. It need not necessarily be incontrovertible.

B In line with the judicial authorities referred to above, evidence to be admitted on appeal under Order 1 rule 19(2) above should only be one which is apparently credible in the sense that it is capable of being believed. It is in the light of this that I must say that the reliefs sought by Amaechi in a previous suit could not be regarded as credible evidence as to whether or not he had been previously indicted or whether the Federal Government had accepted a report of such indictment. (pp. 284 C/287 A/D/H 289 E)

Governor's office - Eligibility of candidates

D 5. Section 182(1)(i) above is in the Constitution in order to ensure that only persons of impeccable character and integrity are eligible for the office of a Governor of a State. It is to ensure transparency and high standard of probity in governance. It is not to be used as an instrument by politicians to hinder the emergence of their opponents or adversaries as Governors. Regrettably, the said provision has been used to witch hunt and victimize. It is a provision which in its application must be read and construed along with other provisions of the 1999 Constitution in section 36(1), (2), (3), (4) and (5) which provide:

F *"36.(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality. (p. 291 D)*

Governor's office - Eligibility - Crime

H 6. It is not a simple matter to find a citizen of Nigeria guilty of a criminal offence without first ensuring that he is given a fair trial before a Court of Law. A Judicial Commission of inquiry or an administrative panel is not the same thing as a court of law or its equivalent. Because a court of law operates within a judicial hierarchy any per-

son wrongly convicted is enabled to contest his conviction to the Supreme Court of Nigeria. This is a right granted by the Constitution of Nigeria. It has not been curtailed or abridged by section 182(1) (i) above. It seems to me that section 182(1) (i) only enables a Judicial Commission of Inquiry or administrative tribunal to determine the culpability of a citizen where it is alleged that such citizen has been in breach of the standards of behaviour expected in public life. Where such Inquiry or tribunal finds a citizen liable or culpable of a conduct bordering on criminality, and the Federal or State Government accepts such report through a published white paper, it is still not good enough to deny a citizen eligibility to the office of Governor unless and until he is afterwards prosecuted in a court of law and found guilty. This approach in my view is buttressed by section 182(2) of the 1999 Constitution. (p. 292 D)

Indictment by a judicial commission

7. It is simply impermissible under a civilized system of law to find a person guilty of a criminal offence without first affording him the opportunity of a trial before a court of law in the country. See also article 7(l) (a) of the African Charter on Human Rights cap. 10, Laws of the Federation. The court below would appear not to have paid heed or attention to the reasoning of this court in *Action Congress & Anor. v. Independent National Electoral Commission (INEC)* (supra) in coming to the conclusion that Amaechi was indicted. Indeed, Amaechi needed not have asked his supposed indictment to be set aside by Kuewumi, since the same was not in any case cognizable under the law. No court of law ought to pay any iota of regard to such alleged indictment. (p. 293 C)

Crime - Investigation and prosecution of

8. The EFCC is a statutory body created under the Laws of Nigeria. Its duties include the investigation and prosecution of a class of criminal offences. In essence, once its investigation has shown prima facie that a person has committed a criminal offence, the duty of EFCC is to have such offender prosecuted in a court of law. I know of no provision of the law which enables EFCC upon the conclusion of investigation in a criminal case to send the report or case file to either

the Federal or State Government. I am surprised therefore to see that INEC pleaded that Amaechi was indicted by EFCC and that the report on the indictment was accepted by the Federal Government. That procedure is not backed by any law in force. Indeed, it is a subversion of the law and an unconcealed attempt to politicize the investigation and prosecution of criminal offences. (p. 293 F)

Governor's immunity - S. 308 of 1999 Constitution

9. Section 308 above is not meant to deny a citizen of this country his right of access to the court. It is a provision put in place to enable a Governor, while in office, to conduct the affairs of governance free from hindrance, embarrassment and the difficulty which may arise if he is being constantly pursued and harassed with court processes of a civil or criminal nature while in office. It is a provision designed to protect the dignity of the office. However, the proviso under section 308 ensures that the period when a governor enjoys immunity shall not be taken into account in computing the time limit for initiating an action under the Statute of limitation. Section 308 cannot be relied upon where the nature of the suit is such that the Res in dispute will be destroyed permanently with the effluxion of time. To hold that section 308 can be invoked in a matter relating to the eligibility for a political office where the tenure of such office has been set out in the Constitution will translate into denying to a plaintiff his right of access to the court. It is only in a case where a deferment of plaintiff's right of action is not likely to destroy the Res in the suit that section 308 can be invoked. In this case, to ask Amaechi to wait till the end of Omehia's tenure of office as Governor before pursuing his suit is to destroy forever his right of action. (p. 296 D)

ACTIONS - Justiciability - Elections

10. This is a pre-election matter premised on the breach of Amaechi's right derived from under the Constitution of Nigeria and Section 34 of the Electoral Act, 2006. The claim of Amaechi is simply that his substitution by PDP was not in accordance with section 34 of the Electoral Act, 2006. The court has a duty to enforce the provisions of the laws validly enacted by National Assembly pursuant to powers derived from the Constitution. The Electoral Act, 2006 is one of such

laws. The major flaws in the case of the respondents throughout this case is the belief held by them that the right of political parties to decide who should contest an election as party candidates is superior to the provisions of the Constitution of Nigeria and the Laws. It is my view that a political party is able to control the affairs of the party only to the extent that the exercise of such control does not run against the provisions of the Constitution and Laws of Nigeria. (p. 297 C) B

Declarations - Are not made on admission or in default of defence C

11. It is trite law that the court does not make declarations of right either on admission or in default of defence without hearing evidence. That is however not the same thing as saying that the proceedings in the two courts below up to this court are void for the reason that evidence viva voce was not taken. The submission of Senior Counsel for Omehia is too sweeping and has no basis in law. Quite apart from this, I think that the learned senior counsel did not bear in mind that the evidence before the trial High Court was not in the form of admissions by the respondents but rather in the form of evidence which parties agreed to be undisputed. E

From the extract of the proceeding reproduced above, it is apparent that all the parties including INEC, Omehia and PDP agreed that Exhibits A-F be put in evidence by consent. None of them afterwards disputed the contents of the said documents. The judgment of the trial High Court was based on the said exhibits A - F not on the admissions made by any of the parties. The parties had chosen to follow a procedure which was not the usual practice but which nevertheless satisfied the requirements of fair hearing. I do not therefore think that the submission of senior counsel for Omehia on the point is well founded. (p. 298 B/ 299 B) F

Court's jurisdiction in pre-election matters

12. Section 178 above is a provision of the 1999 Constitution intended to ensure a smooth transition from one administration to another. It is not a provision to destroy the right of access to the court granted to a citizen under section 36 of the same Constitution. In the same way section 285(2) relied upon by senior counsel cannot be H

construed to destroy the jurisdiction which the ordinary courts in Nigeria have in pre-election matters. Were the court to construe section 285(2) as having the effect of ousting the jurisdiction of the ordinary court in pre-election matters, all that a defendant would need to do to frustrate a plaintiff is to stall for time and obtain adjournment to ensure that a plaintiff's case is 'killed' once an election is held. It is settled law, that the court in interpreting the provisions of a statute or Constitution, must read together related provisions of the Constitution in order to discover the meaning of the provisions. The court ought not to interpret related provisions of a statute or Constitution in isolation and then destroy in the process the true meaning and effect of particular provisions.

As I shall shortly show, it is my view that the approach of the respondents to this case was to 'kill' Amaechi's case in the misconceived notion that once elections were held the court would lose its jurisdiction. It is my firm view that the jurisdiction of the ordinary courts to adjudicate in pre-election matters remains intact and unimpaired by sections 178(2) and 285(2) of the 1999 Constitution. (p. 300 F)

Let justice be done even if the heavens fall

13. A court must shy away from submitting itself to the constraining bind of technicalities. I must do justice even if the heavens fall. The truth of course is that when justice has been done, the heavens stay in place. It is futile to merely declare that it was Amaechi and not Omehia that was the candidate of the PDP. What benefit will such a declaration confer on Amaechi? Now in *Packer v. Packer* 1954 P. 15 at 22, Denning MR., in emphasizing that there ought not to be hindrances or constraints in the way of dispensing justice had this to say:

"What is the argument on the other side? Only this, that no case has been found in which it had been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before we shall never get anywhere. The law will stand still whilst the rest of the world goes on and that will be bad for both."

The sum total of the recent decisions of this court is that the

court must move away from the era when adjudicatory power of the court was hindered by a constraining adherence to technicalities. This often results in the loser in a civil case taking home all the laurels while the supposed winner goes home in a worse situation than he approached the court. (p. 301 F)

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Elections - Only political parties - Shall canvass for votes

14. Now section 221 of the 1999 Constitution provides:

"No association other than a political party shall canvass for votes for any candidate at any election or contribute to the funds of any party or to the election expenses of any candidate at an election." C

The above provision effectually removes the possibility of independent candidacy in our elections; and places emphasis and responsibility in elections on political parties. Without a political party a candidate cannot contest. The primary method of contest for elective offices is therefore between parties. If as provided in Section 221 above, it is only a party that canvasses for votes, it follows that it is a party that wins an election. A good or bad candidate may enhance or diminish the prospect of his party in winning but at the end of the day, it is the party that wins or loses an election. I think that the failure of respondents' counsel to appreciate the overriding importance of the political party rather than the candidate has made them lose sight of the fact that whereas candidates may change in an election but the parties do not. In mundane or colloquial terms we say that a candidate has won an election in a particular constituency but in reality and in consonance with section 221 of the Constitution, it is his party that has won the election. (p. 303 H) D E F

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ELECTIONS - Party primaries

15. I mentioned earlier that PDP did not provide cogent and verifiable reason for the attempt to substitute Amaechi with Omehia. Not having done so, Amaechi who had acquired a vested right by his victory at the primaries and the submission of his name to INEC was never removed as PDP's candidate. If the law prescribes a method by which an act could be validly done, and such method is not followed, it means that act could not be accomplished. What PDP did was merely H

a purported attempt to effect a change of candidates. But as it did not comply with the only method laid down by law to effect the change, the consequence in law is that the said change was never effected. In the eyes of the law, Amaechi's name earlier sent to INEC was never removed or withdrawn. (p. 304 E)

ELECTIONS - Nomination of candidates

16. The argument that a new election ought to be ordered, overlooks the fact that this was not an election petition appeal before this court but rather an appeal on a simple dispute between two members of the same party. If this court falls into the trap of ordering a new election, a dangerous precedent would have been created that whenever a candidate is improperly substituted by a political party, the court must order a fresh election even if the candidate put up by the party does not win the election. The court must shut its mind to the fact that a party wins or loses the election. The duty of the court is to answer the question which of two contending candidates was the validly nominated candidate for the election. It is a purely an irrelevant matter whether the candidate in the election who was improperly allowed to contest wins or loses. The candidate that wins the case on the judgment of the court simply steps into the shoes of his invalidly nominated opponent whether as loser or winner. (p. 305 D)

COURTS - Powers - Consequential reliefs

17. This court and indeed all courts in Nigeria have a duty which flows from a power granted by the constitution of Nigeria to ensure that citizens of Nigeria, high and low get the justice which their case deserves. The powers of the court are derived from the constitution not at the sufferance or generosity of any other arm of the Government of Nigeria. The judiciary like all citizens of this Country cannot be a passive on-looker when any person attempts to subvert the administration of justice and will not hesitate to use the powers available to it to do justice in the cases before it.

Section 6(6) (a) of the 1999 Constitution provides:

"(6) The judicial powers vested in accordance with the foregoing provisions of this section -

(a) shall extend, notwithstanding anything contrary in this Constitution to all inherent powers and sanctions of a court of law."

And Section 22 of the Supreme Court Act provides:

"22. The Supreme Court may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Supreme Court thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Supreme Court as a court of first instance and may rehear the case in whole or in part or may remit it to the court below for the purpose of such rehearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court."

In view of the above provisions, there can be no doubt that there is a plenitude of power available to this Court to do what the justice of the case deserves. It enables a court to grant consequential reliefs in the interest of justice even where such have not been specifically claimed. Having held as I did that the name of Amaechi was not substituted as provided by law, the consequence is that he was the candidate of the PDP for whom the party campaigned in the April 2007 elections not Omehia and since PDP was declared to have won the said elections, Amaechi must be deemed the candidate that won the election for the PDP. In the eyes of the law, Omehia was never a candidate in the election much less the winner. (p. 310 D)

NOTABLE POINTS OF INTEREST

OGUNTADE JSC

1. Respondents failed to respect the rule of Law

Before I close this judgment, it is important that I discuss briefly the approach of the respondents to this case. The political parties in Nigeria are the creation of the Constitution. They therefore have an important stake in flying high and loftily the banner of the rule of law.

In this case the PDP did not live up to that standard. It did everything possible to subvert the rule of law, frustrate Amaechi and hold the court before the general public as supine and irrelevant. Sadly, INEC and Omehia also did the same. I am not complaining about the fact that PDP had followed a wrong approach to substitute one candidate for another. That may well be put down to a honest mistake as to the approach to be followed in doing so. (p. 307 H)

KATSINA-ALU JSC

2. Stare decisis - Court of Appeal is bound by Ugwu Case

Unfortunately, when this court gave its decision in Ugwu v. Araraume (supra), the Court of Appeal failed to proceed and enter judgment for the Appellant. Sadly, that court began to dance to pedestrian tunes totally irrelevant to the determination of the Appellant's case. I will explain.

The case of the Appellant rested on the decision of this court that to offer the reason framed as "error" for a change of candidate is not in compliance with section 34 of the Electoral Act, 2006. This is so because the same reason given and relied upon by the 3rd respondent in substituting the Appellant with the 2nd respondent is the word "error" without more. Under the doctrine of stare decisis the Court of Appeal was bound by the decision of this court. It was bound to apply the decision of this court moreso when that court adjourned the hearing of the appeal to abide by the decision of this court. The Court of Appeal had no option but to enter judgment in favour of the Appellant on 11th April, 2007 the date to which the appeal was adjourned. (p. 316 F)

3. A party cannot enjoy benefit of his illegality

The claim of the respondents that section 308 inures to the benefit of the 2nd respondent has no merit whatsoever. This is so because the wrong upon which the Appellant based his claim had been in existence before the election. His case was clearly a pre-election matter. It is also pertinent to observe at this stage that at the time the 2nd respondent contested the election, his substitution for the Appellant had been voided by the Federal High Court. That decision was valid and subsisting until it was set aside on appeal. At the time the election

was held, that decision was not set aside and therefore subsisting. It goes without any argument that the 2nd respondent's participation in the election was clearly an illegal act. In my judgment the 2nd respondent cannot be heard to contend that he wants to enjoy the benefit of his illegality.

The Appellant, it must be clearly seen, was not substituted in accordance with section 34 (2) of the Electoral Act, 2006. He therefore remained the 3rd respondent's nominated candidate for the Rivers State Governorship election held on 14 April, 2007. In the eyes of the law, the Appellant's name earlier sent to INEC was never withdrawn. (p. 319 E)

4. Supreme Court can grant reliefs that justice of a case dictates

This case is not an election matter. It is clearly a pre-election matter. The court was called upon to decide who of the two candidates was PDP's nominated candidate for the April election. As I have already held it is the Appellant that was the PDP's candidate for the Governorship election. As for the order that I ought to make, I must say that this court has wide jurisdiction to make consequential orders and to grant reliefs which the circumstances and justice of a case dictate. On the principle of *Ubi jus ibi remedium* if the court is satisfied that a person has suffered a legal injury, it will surely provide a remedy irrespective of the fact that no remedy is provided either at common law or by statute.

In this case, it is an incontestable fact that the 3rd respondent did not comply with section 34(2) of the Electoral Act, 2006. The law is an equal dispenser of justice and leaves no one without a remedy for his right. (p. 320 E)

MUSDAPHER JSC

5. Democracy is not one dimensional

Democracy's world is rich and multifaceted. Democracy should not be viewed from a one dimensional vantage point. Democracy is multidimensional. It is based both on the centrality of laws and democratic values, and, at their center, human rights. Indeed democracy is based on every individual's enjoyment of rights of which even the majority cannot deny him simply because the power of the majority

is in its hands. Roland Dworkin in A Bill of Rights For Britain 1990, Pages 35 - 36 stated.

"..... true democracy is not just statistical democracy, in which anything, a majority or plurality wants is legitimate for that reason, but communal democracy, in which majority decision is legitimate only when it is a majority decision within a community of equals. That means not only that every one must be allowed to participate in politics as an equal through the vote and through freedom of speech and protest, but that political decisions must treat every one with equal concern and respect, that each individual person must be guaranteed fundamental civil and political rights no combination of other citizens can take away, no matter how numerous they are or how much they despise his or her race or morals or way of life." (p. 325 H)

D
6. Election proceedings are divorced from immunity issue (s. 308)
I agree that the suit in this action is an election related matter and even though it is not an election petition matter, yet it is a matter directly dealing with the process of becoming a governor. It is clearly a pre-election matter which arose before the election and clearly part of the processes of electing a governor. It is very clear to me that section 308 of the Constitution does not protect a governor from legal proceedings in a matter of his election per se or in a matter connected with the election even when he as a contestant has been declared duly elected or returned as governor. Election petitions and election related proceedings are special proceedings divorced and separated from civil or criminal proceedings within the intendment and context of section 308 of the Constitution. (p. 329 C)

G
MOHAMMED JSC

7. Facts which Court may take judicial notice of
The law is indeed trite that no fact of which the Court must take judicial notice need be proved. Section 73 of the Evidence Act. Facts which the Court must take judicial notice of are clearly set out under Section 74(1) of the Evidence Act, and going through the list, I am unable to find in any of the items (a) - (m), where the word 'indictment' could be accommodated. This is because the word itself does

not constitute the facts of which the Court must take judicial notice. It is the facts which constitute indictment that are capable of being taken judicial notice by the Court. By definition, the word 'indictment' simply means a formal accusation; the written accusation against someone who is to be tried by a Court of law. (In this regard therefore, it is the formal accusation or charge for any offence against the Appellant for which the Appellant was to be tried in a Court of competent jurisdiction that could have constituted the facts showing the indictment of the Appellant that could have been taken judicial notice of by the Court. My stand on this requirement is amply supported by the provisions of Section 74(2) and (3) of the evidence Act which explains how the powers of Court under the Section are exercised. (p. 349 E)

8. Party's Substitution of Candidate - Where to find the cogent reason D

The obligation of giving or providing cogent and verifiable reasons in its application to substitute or replace any candidate for any election under the Electoral Act, 2006, lies squarely on the shoulders of a political party wishing to effect the change. There is a copy of the Report of the E.F.C.C. indicting the Appellant whose no obligation whatsoever on INEC or the Court to which any complaint on the compliance or otherwise with Section 34 of the Electoral Act 2006, may be brought, to look outside the application for the relevant facts, as reasons for wanting to effect the change or substitution of candidate. (p. 351 A) E F

9. Implication of trial court's order against 1st respondent (INEC)

I again quote that part of the judgment which reads: G

"On Independent National Electoral Commission acting on Exhibit D while the case is subjudice, I find that, that is a reprimandable act and the proper thing to have done is await the outcome of the suit and on the authority of the case of Ojukwu v. Government of Lagos State, any action done pursuant to Exhibit D while this case is subjudice is hereby set aside." H

The positive order contained in this part of the judgment of the trial Court, is indeed a decision binding on all the parties to the

case particularly INEC, the 1st Respondent, which was the 1st Defendant to which the order was directed. As long as this order remained in force, the law required the 1st Respondent to obey it pending its being set aside by the trial Court itself on appropriate application or on appeal by an appellate Court. The order is not an obiter as assumed or described by the learned Senior Counsel for the 2nd Respondent. The fact that both the 2nd and 3rd Respondents had to cross-appeal against the order to the Court of Appeal to have it set aside means that it was indeed a ratio decidendi of the Court because an obiter dictum does not decide the life issues in the matter to give any right of appeal. The order of the trial Court directed at INEC, the 1st Respondent handed down on 15th March, 2007, nearly one month before the election of 14th April, 2007, remained in full force until 20th July, 2007, when it was set aside by the Court of Appeal in its judgment. (p. 352 B)

ONNOGHEN JSC

10. Alleged document of indictment is not before the court

In the instant case however, I have gone through the judgment in FHC/ABJ/CS/74/2007 - the additional evidence - and have not seen the alleged indictment of the appellant by the EFCC neither does it contain the Federal Government of Nigeria's official gazette accepting the alleged indictment. In fact, the judgment is not relevant to the facts pleaded as it also does not make any specific findings of facts relevant to the facts pleaded in this case. What the judgment did was simply to dismiss the action of the appellant on the ground that it constituted an abuse of court process. The purported indictment was never tendered in that proceedings neither was the White Paper or any other form of acceptance by the Federal Government of Nigeria. In short, the document has no evidential value having regard to the state of the pleadings at all and was therefore, in my view, wrongly admitted as fresh evidence by the lower court. The wrongful admission of the document in the instant case resulted in grave consequences as it constituted the basis on which judgment was entered by the lower court in favour of the respondents. That is very unfortunate. The non existence of any indictment by EFCC against the appellant and the acceptance of same by the Federal Government was

confirmed by learned Senior Counsel for the 2nd respondent when I asked him at the hearing of the appeal to refer the court to the pages of the record where the relevant documents could be found and he could not. (p. 364 D)

11. Courts are bound by stare decisis principles B

I must hasten to point out that application of the principles of stare decisis or judicial precedent does not involve an exercise of judicial discretion at all. It is what must be done; mandatory. The doctrine is based first of all on the relevant likeness of or between the cases - the previous case and the one before the court. If there is no likeness between the two, it is an idle exercise to consider whether the previous one should be followed or departed from. It is settled law that a previous decision is not to be departed from or even followed, where the facts or the law applicable in the previous case are distinguishable from those in the latter case. (p. 366 E) C D

12. Literal interpretation of s. 34 of Electoral Act 2006 is not absurd E

Both parties are agreed that the provision of section 34 supra is very clear, straightforward and unambiguous and demands nothing other than the application of the literal and ordinary canons of statutory interpretation and I agree with them. It is settled law that in the construction of a statute, the primary concern of the judge is the attainment or ascertainment of the intention of the legislature by examination of the language used therein. Where the language used in the legislation or Statute or Constitution is clear, explicit and unambiguous, as found in the instant case, the judge must give effect to it as the words used speak the intention of the legislature. F G

That apart, the said provision has been interpreted by this Court in the case of *Ugwu vs Ararume* supra. I hold the view that a literal interpretation of the provision of section 34 of the Electoral Act, 2006 will not lead to absurdity or some repugnancy or inconsistency with the rest of the legislation. (p. 371 B) H

13. Domestic affairs of political parties are not interfered with

Much time and energy have been expended by learned Senior Coun-

sel for the respondents in arguing the obvious that the right to nominate, change or substitute candidates for elections are the domestic affairs of the political parties admitting of no interference from the judiciary and that that remains the object of section 34 of the Electoral Act, 2006. I use the word "obvious" because that has been and
B still remains the law though by introducing the words "cogent and verifiable reasons" for substitution the legislature has clearly created an exception to the general rule or a condition precedent. I must repeat that section 34 of the Electoral Act, 2006 has not taken away
C the power or right of political parties to nominate or even appoint candidates, depending on the provisions of their Constitution, to be sponsored by the political party to contest any election under the Electoral Act, 2006 or the right of the political parties to change, substitute or replace such nominated candidate(s). What section 34(1)
D and (2) of the Act is saying is that for such a substitution or change or replacement to be legally effective or recognized by the Act, the change or substitution or replacement must be done within 60 days to the election in question upon application in writing by the political party desiring the change/substitution which written application must contain "cogent and verifiable reasons". I do not think that insistence on
E compliance with the statutory requirement of the giving of "cogent and verifiable reasons" amounts, by any stretch of imagination, to interference by the judiciary with the domestic affairs of the political parties or their power to nominate, sponsor or change or substitute
F any candidate for any election. To argue that it does to me, smacks of nothing but arm twisting or outright blackmail, apart from being a complete misconception of the issues involved in the relevant section calling for interpretation/application. (p. 372 C)

G
14. Error is not a cogent and verifiable reason

Is the reason of "error" in the instant case cogent and verifiable having regard to the facts of the case? I do not think so, particularly as the 2nd respondent was never a participant at the 3rd respondent's primaries conducted to nominate a candidate for the Rivers State Governorship election which was actually won, by an overwhelming majority of votes, by the appellant, whose name was thereby forwarded to and accepted by the 1st respondent as the 3rd respondent's
H

candidate. So, as between the appellant and 2nd respondent, the name of the appellant cannot, with any sense of responsibility be said to have been forwarded by the 3rd respondent to the 1st respondent as its candidate for that election in error so as to constitute cogent and verifiable reason. The error must therefore be from some other omission or commission by the 3rd respondent whose duty it is to assign the cogent and verifiable reason. (p. 373 G) B

15. Evidence of indictment per se is not a cogent and verifiable reason C

Granted, for the purpose of argument only, that there is an evidence of such an indictment, can that without more be enough to satisfy the requirement of cogent and verifiable reason for substitution or change of a nominated candidate for election? I do not think so. In the first place, what is an indictment? An indictment is defined by Blacks Law Dictionary, 8th Edition page 788 as follows:- D

"1. The formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person.

2. The act or process of preparing or bringing forward such a formal written accusation." E

From the above, it is very clear that an indictment is a formal charge or accusation against a person before a court of law made in writing. It does not extend to the trial of the person accused nor his being found liable on the said charge or indictment. What is being proposed as being the intention of the legislature under section 34(2) of the Electoral Act, 2006 is that once there is a charge against a person whether framed up or not he can be substituted by his political party without more. Is that what the law says, particularly when one realizes that the word indictment connotes the commission of crime. Should one be punished by substitution before being tried and found liable by a court of law upon the said indictment/charge? What of if the charge/indictment is a frame up for political expediency? F
G
H

Before leaving the issue of indictment, it is important to note that the issue of appellant's indictment is, from the facts available on record clearly an after thought because it appears to have emerged

long after exhibit D was written giving the reason of "error" for the substitution and much after the appellant had sued. (pp. 374G/376C)

MUHAMMAD JSC

16. Special grounds to warrant additional evidence on appeal

- B It is now trite that for an appeal court to admit additional evidence of facts on appeal, there must exist special grounds. In *Asaboro v Aruwaji* (1974) 1 All NLR (Pt.1) 140, such special grounds were stated as follows;
 - C i. The evidence sought to be adduced must be such as could not have been, with reasonable diligence, obtained for use at the trial.
 - ii. The evidence shall be such as if admitted, it would have an important not necessarily crucial, effect on the whole case, and
 - D iii. The evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible,
 - iv. The additional evidence may be admitted if the evidence sought to be adduced would have influenced the judgment at the
 - E lower court in favour of the applicant had it been available at the trial court.
 - v. The evidence should be weighty and material, where evidence sought to be admitted is irrelevant and immaterial, it will be
 - F rejected. (p. 398 D)

ADEREMI JSC

17. When power to disqualify a candidate lies with Court and not INEC

- G I should here also reiterate the limit of the powers of INEC as it relates to candidates for election while some duties are conferred on INEC per Section 32 (supra) it is obvious from the clear and unambiguous provisions of the aforesaid section of the Electoral Act 2006, that the Commission lacks the power to disqualify any candidate on
- H its own. The power of disqualification of any candidate from contesting an election after his name has been forwarded to the Commission belongs exclusively to the Federal High Court or the State High Court. This court (Supreme Court) has reiterated this principle in a

number of its decided cases. (p. 422 C)

18. Cogent & verifiable defined

The catch-words in this sub-section are "Cogent and "Verifiable" reasons. In Burton's Legal Thesaurus 3rd Edition by William C. Burton, the word "cogent" is defined thus: B

"appealing conclusively, appealing forcibly, authoritative, incontestable, unanswerable, undeniable, undoubtable, unquestionable, weighty, well founded and well-grounded."

In The New Webster's Dictionary International Edition, the word "cogent" is accorded this definition; C

"compelling, convincing"

The word "verify" which is the verb from the adjective "verifiable" is defined in Black's Law Dictionary 6th Edition thus:

"To confirm or substantiate by oath or affidavit; to prove to be true; to confirm or establish the truth or truthfulness of; to check or test the accuracy or exactness of; to confirm or establish the authenticity of; to affirm; to support." D

Again, in The New Webster's Dictionary Int. Edition, the word "verify" is defined thus: - E

"to confirm; to test the truth or accuracy of; to substantiate by proofs."

The word "and" standing between the two words "Cogent" and "Verifiable" in Section 34 (2) supra, is conjunctive and its ordinary meaning is "in addition". So the reasons to be adduced before the substitution of candidates can be allowed in law must be cogent in addition to being verifiable. (p. 423 C) F

19. Lis pendens - Definition - Applicability G

The doctrine of Lis Pendens finds expression in the assertion that it prevents any transfer of any right or the taking of any steps capable of foisting a state of helplessness and/or hopelessness on the parties or the court during the pendency in court of an action and even after. By that doctrine, the law does not allow to litigant parties or give to them during the currency of the litigation involving the rights in it so as to prejudice any of the litigating parties. The doctrine negates and disallows any transfer of rights or interest in any subject-matter that is being litigated upon during the pendency of litigation in H

respect of the said subject-matter. The well-known Maxim is "Pendente Lite Nihil Innovetur" meaning: During a Litigation Nothing New Should Be Introduced. Going by the facts of this case as set out above, it is my humble view that the doctrine applies. The declaration of the 2nd respondent as the Governor of Rivers State founded upon an illegal and/or unlawful election is null and void. (p. 432 D)

20. Reliance on Governor's immunity does not avail in this case

Let me say, In haste, that the issue under consideration in this matter is not a post election matter. Rather, it is one challenging the process by which the alleged beneficiary of the provisions of the aforementioned section came to office i.e. how the 2nd respondent came to be sworn in as the Governor. Put in a simple but very clear manner, it is the right of the 2nd respondent to step into the office of the Governor of Rivers State that is in issue. It will be against the concept of true justice to hold or to permit such a candidate in the person of the 2nd respondent to take a cover under the provisions of Section 308 and thereby ward off the right of an aggrieved and genuine person to examine, in the open, the process by which he became the Governor. That will be injustice at a very high level. It will be tantamount to shielding a person away from seeking a redress from the seat of justice. The complaint here is not a post election grievance; it is one in which the appellant is saying that the 2nd respondent ought not, in law, to have been allowed to participate in the gubernatorial race. In other-words, he is questioning the right of the 2nd respondent to stand for the gubernatorial election in Rivers State. The provisions of Section 308 of the Constitution are not there to be used as an engine of fraud. (p. 434 A)

21. When parties can waive procedural rights

It is clear from the record of proceedings that the parties voluntarily settled issues for determination at the trial court. Again, by consent, all the parties tendered documents which they would rely upon. Let it be said that evidence can take the form of documents or oral testimonies. There is nothing on the record to show that any of the parties objected to this mode of trial. Indeed, they all conducted the case to the logical conclusion before the trial court. That a court, particu-

larly, a court of last resort has a fundamental duty to safeguard fundamental rights of citizens admits of no doubt. A right that inures to the benefit of the entire public can never be waived. Nobody, not even the State can waive the rights entrenched in statutory or constitutional provisions which have been made in favour of the whole country. It is clearly not Pro Publico but Contra Publico to introduce the doctrine of waiver to such rights. But where, as in the instant case, a person in dealing with another is confronted with two alternatives and mutually exclusive procedures, in dealing with the case, between which he can make his election and he has voluntarily made his election in favour of one of the procedures to the exclusion of the other and he has, by that conduct, led the other to believe that he was voluntarily adopting that particular line of approach, he cannot, in law and equity, afterwards resort to the cause which he has voluntarily declared his intention of rejecting. This, in a nutshell, is the simple explanation of principle of waiver. The right here as to how to start his case is conferred solely for the benefit of any of the parties to litigation. Each party or litigant is sui juris; none of them is under any legal disability to forgo or waive any of the two procedures open to them in the instant case. Having made an election, a party cannot later set to revert to the other. That principle is to the effect that where an action was commenced by any irregular procedure and a defendant took steps to participate in the proceedings, as in the instant case, he cannot later be heard to complain of the irregularity as a person will not be allowed to complain against an irregularity which he himself has accepted, waived or acquiesced. (p. 435 B)

22. Equity looks on that as done which ought to be done

I still repeat that the primary duty of the court is to do justice to all manner of men who are in all matters before it. It then seems to me clear, that when the court sets out to do justice so as to cover new conditions or situations placed before it, there is always that temptation, a compelling one, to have recourse to equitable principles. A court, in the exercise of its equitable jurisdiction must be seen as a court of conscience. And judges who dispense justice, in this court of law and equity must always be ready to address new problems and even create new doctrines where the justice of the matter so requires.

Having said that the substitution was null and void; the appellant's position as the candidate of the PDP remains unshaken. This is so because equity looks on that as done which ought to be done or which is agreed to be done; the Maxim is *Aequitas Factum Habet Quod Fieri Oportuit*. I must not fail to say that this Latin Maxim only applies to those who have a right to pray that the thing should be done - the appellant, given the facts of this case, is certainly within that bracket. It is said that the true meaning of the Maxim is that equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been done exactly as they ought to have been. See Fonblanque's *Treatise Of Equity* (5th Edition) page 419. (p. 438 B)

23. Need to avoid political rascality and disrespect for rule of law
 The decision to substitute Celestine Omehia for Rotimi Chibuike Amaechi by the 3rd respondent (P.D.P.) during the period of pending gubernatorial election represents a display of very grave display of political rascality and an irresponsible and wanton disrespect for rule of law. No responsible person or group of persons who parade themselves as having respect for rule of law and due process, can be credited with such a dastardly act. The 1st respondent, by acceding to the request of the 3rd respondent for the substitution, has painted a picture of itself as a spineless body whose pre-occupation is dissemination of injustice. It (1st respondent) has forgotten or it has thrown into the winds the position carved for it by the Constitution of the land - An Unbiased Umpire.

Finally, on this point, I wish to say that in all countries of the world which operate under the rule of law, politics are always adapted to the laws of the land and not the laws to politics. Let our political operators allow this time-honoured principle to sink well into their heads and hearts. The vicious acts of the *dramatis personae* in this case that have led to this unfortunate and time-wasting court case must not be allowed to repeat themselves. No decent and polished characters can be credited with such vicious acts. (p. 441 A)

REPRESENTATION

L. O. Fagbemi, SAN., Awa U. Kalu, SAN., Ricky Tarfa, SAN., O. O.

Oke, SAN., with them S.R. Dappa-Addo, S.O. Sanni, O. I. Olorundare, F.A. Esu, Soji Olowolafe, Joshua E. Aloba, Sola Egbeyinka, H.O. Afolabi, F. J. Edema, K.O. Fagbemi, A. O. Popoola, W. Adedigba, O. O. Ogunmola, R. A. Bakare, M. P. Kalu, C. W. Jerome, N.C. Awa (Mrs.), C. V. Chia, O. O. Ibiam (Mrs) For the Appellant
 Chief Amaechi Nwaiwu, SAN., with him C.U. Ekomaru, D. M. Mando, B
 Odili Achilike, I. C. Acholonu (Mrs) L.Ilo For the 1st Respondent
 J. B. Daudu, SAN., Joe Agi, SAN., with them Cyril Ogbekene, K.E.A. Akorjori, I. L. Ogor For the 2nd Respondent.
 Chief J. K. Gadzama, SAN., with him, A.T. Kehinde, R. O. Yusuf, C
 G.U. Nwaneri, H. Odangla (Miss) and S. F. Oyefeso For the 3rd Re-
 spondent.

CASES REFERRED TO

A. D. Fayose (2004) 8 NWLR (pt. 876)639 D
 Ugwu v. Araraume (2007) 6 S.C. (pt.1) 88
 Dalhatu v. Turaki (2003) 7 SC. 1
 P.C. Onuoha v. R.B.K. Okafor (1983) SC NLR 244
 R. v. Alexander Campbell Mason (1923) 17 Cr. App. R. 160
 R. v. Walter Graham Rowland (1947)32 Cr. App. R.29 E
 Obasi & ors. v. Onwuka & ors. (1987) 2 NSCC 981
 A. G v. Butterworth (1962) 3 All ER 326 at 329
 Adefulu v. Okulaja (1996) 9 NWLR (pt. 475) 668
 A. G Bendel State v. A. G Federation (1985) 10 S. C. 1 F
 Adah v. N.Y.S.C. (2000) 1 NWLR (pt. 693) 65
 Obi v. Mbakwe (1984) 1 SCNLR 192
 Williams v. Showden (1880) AN 124
 Yusuf v. Obasanjo (2003) 9 - 10 S.C 53

G

STATUTES & RULES REFERRED TO

Electoral Act, 2006 ss. 32 (5), 34, 140, 85, 147, 144, 145, 1st Sched-
 ule para 27
 Supreme Court Rules 0. 8 rr. 16, 12 (2) & (5)
 Constitution of Nigeria 1999 ss. 308, 285, 246, 233, 182, 36, 178, H
 221, 6 (6) (a), 137, 198
 Court of Appeal Rules 0.1 r. 19 (2)
 African Charter on Human Rights Cap. 10 LFN Art. 7(1)(a)

Supreme Court Act s. 22
Electoral Act 1982
Evidence Act ss. 74, 73

BOOKS REFERRED TO

- B Black's Law Dictionary 8th Ed. p. 788, 6th Ed.
Burton's Legal Thesaurus by William C. Burton 3rd Ed.
Webster's Dictionary Int. Ed.
Fonblanque's Treatise of Equity 5th Ed. p. 419

C

LEAD JUDGEMENT BY OGUNTADE JSC

On 25-10-2007, this Court heard this appeal and the two cross-appeals. I allowed the appeal and dismissed the cross-appeals. I indicated then that I would give the reasons for my judgment today 18-D 03 -2008. I now do so.

On 26-01-2007, the appellant Rt. Hon. Chibuike Amaechi, as the plaintiff, commenced his suit at the Federal High Court, Abuja against the Independent National Electoral Commission (INEC) (now 1st Respondent) as the defendant. Later the appellant sought and was granted leave to join, as second and third defendants respectively, Celestine Omehia (now 2nd Respondent) and Peoples Democratic Party (now 3rd Respondent). I intended hereafter to refer to the plaintiff/appellant as Amaechi and the 1st, 2nd and 3rd defendants/respondents as INEC., Omehia and PDP respectively.

In his further amended statement of claim, Amaechi claimed against the respondents the following reliefs:

"i. A declaration that the option of changing or substituting a candidate whose name is already submitted to INEC by a political party is only available to a political party and/or the Independent national Electoral Commission (INEC) under the Electoral Act, 2006 only if the candidate is disqualified by a Court Order.

ii. A declaration that under Section 32(5) of the Electoral Act, 2006 it is only a Court of law, by an order that can disqualify a duly nominated candidate of a political party whose name and particulars have been published in accordance with Section 32(3) of the electoral Act, 2006.

iii. A declaration that under the electoral Act, 2006, Indepen-

dent national Electoral Commission (INEC) has no power to screen, verify or disqualify a candidate once the candidate's political party has done its own screening and submitted the name of the Plaintiff or any candidate to the Independent National Electoral Commission (INEC).

iv. A declaration that the only way Independent National Electoral Commission (INEC) can disqualify, change or substitute a duly nominate candidate of a political party is by Court Order. B

v. A declaration that under section 32(5) of the Electoral Act, 2006 it is only a Court of law, after a law suit, that a candidate can be disqualify (sic) and it is only after a candidate is disqualify (sic) by a Court order, that the Independent National Electoral Commission (INEC) can change or substitute a duly nominate candidate. C

vi. A declaration that there are no cogent and verifiable reasons for the Defendant to change the name of the Plaintiff with that of the 2nd defendant candidate of the People's Democratic Party (PDP) for the April, 13, 2007 Governorship Election in river State. D

vii. A declaration that it is unconstitutional, illegal and unlawful for the 1st and 3rd Defendants to change the name of the Plaintiff with that of the 2nd Defendant as the Governorship candidate of Peoples Democratic Party (PDP) for River State in the forthcoming Governorship Election in rivers State, after the Plaintiff has been duly nominated and sponsored by the People's Democratic Party as its candidate and after the 1st Defendant has accepted the nomination and sponsorship of the Plaintiff and published the name and particulars of the plaintiff in accordance with section 32(3) of the Electoral Act, 2006 the 3rd defendant having failed to give any cogent and verifiable reasons and there being no High Court Order disqualifying the Plaintiff E
F
G

viii. An order of perpetual injunction restraining the defendants jointly and severally by themselves, their agents, privies or assigns from changing or substituting the name of the plaintiff as the River State Peoples Democratic Party governorship candidate for the April, 2007 River State Governorship election unless or until a court order is made disqualifying the Plaintiff and or until cogent and verifiable reasons are given as required under section 34(2) of the Electoral Act, 2006." H

In the said Further Amended Statement of Claim, the facts pleaded by Amaechi in support of his claims would appear to be simple and straightforward. The facts may be summarized thus:

Amaechi, as a member of PDP, in his quest to be the Governorship candidate of the party, in the April, 2007 elections in Rivers State, contested the Party Primaries against seven other members of the PDP. They competed for a total of 6,575 votes. Amaechi had 6,527 votes to emerge the winner. Omehia was not one of the candidates at the PDP Primaries. The PDP submitted Amaechi's name to INEC as its Governorship candidate. No court of law subsequently made an order disqualifying Amaechi from contesting the Governorship elections. PDP however substituted Omehia's name for Amaechi's without giving cogent and verifiable reason for the substitution as required by the Electoral Act, 2006. Amaechi therefore brought his suit claiming as earlier stated above.

INEC filed its Statement of Defence. The cornerstone of the defence is as shown in paragraphs 3, 7 and 11 thereof which read:

"3. In answer to Paragraph 14 of the Statement of Claim the 1st Defendant states that the Plaintiff's Political party (the 3rd Defendant) in exercise of its right of choice of candidate has substituted him with Celestine Omehia and Engr. Tele Ikuru as Governorship and Deputy Governorship candidates respectively. Exhibit A.

7. Further to Paragraph 18, the 1st Defendant states that the indictment of the Plaintiff by the EFCC and the acceptance of the report by the Panel set up by the Federal Government provides cogent and verifiable reasons for the Plaintiff's substitution by his Political party.

11. The 1st Defendant states that Parties have a right to change or substitute their candidates up to 60 days before the elections and that the substitution of the Plaintiff was done within the time frame for substitution, that is, on or before 13th February, 2007."

Omehia's defence was anchored on paragraphs 3(i), 3(iv), 3(v), 4(ii), 4(iii), 5(i) and 5(iii) of its Statement of Defence which read:

"3(i) the Plaintiff is not a candidate of the Peoples Democratic Party (PDP) for the gubernatorial election for Rivers State scheduled

to hold in April 2007.

.....
 3(iv) the name of the Plaintiff was included in the list of candidates of the 3rd Defendant for gubernatorial elections in error and submitted to the 1st Defendant. It was this error which was corrected by the 3rd Defendant by its letter dated 2nd February 2007 which letter and back up documents the Plaintiff has annexed to his Amended Statement of Claim as Annexure E. B

3(v) by the Plaintiff Annexure 'E', the Plaintiffs name erroneously entered on the 3rd Defendants List of Gubernatorial candidates was removed and substituted with the name of the 2nd Defendant. C

.....
 4(ii) the Plaintiff has been successfully and fully substituted with the 2nd Defendant on the 2nd day of February, 2007, before the Plaintiff sought and obtained an order of this Honourable Court on the 13th day of February, joining the 2nd and 3rd Defendants in this case. D

4(iii) the Plaintiff's name was duly substituted with the name of the 2nd Defendant within the time allowed by the Electoral Act 2006. E

5(i) sponsorship of any member of a political party for the purpose of contesting election into a public office is not a guaranteed right of any member sand that the Plaintiff has no statutory or constitutional right to be sponsored by the 3rd Defendant as its gubernatorial candidate. F

.....
 5(iii) that the decision of the 1st Defendant as it relates to accepting as cogent and verifiable the reason given by a political party for substituting its candidate is not open to judicial review or liable to G reversal by the court."

The defence of PDP was hinged mainly on paragraphs 3, 4, 7 and 8 of its Statement of Defence which read:

"3. In answer to paragraph 10 of the Statement of Claim, the 3rd defendant avers that the Plaintiff's name was substituted for the 2nd Defendant vide 3rd defendant's letter of 2nd February, 2007, under the hand of the National Chairman and National Secretary of the 3rd defendant. A copy of the said letter addressed to the 1st H

defendant shall be founded upon at the hearing of the substantive suit.

4. Paragraphs 11, 12, 13 and 14 are hereby denied. With specific reference to paragraph 14 of the Statement of Claim, the 3rd defendant states that plaintiff's name and that of his running mate have been substituted for the 2nd defendant, who is the 3rd defendant's candidate for the Rivers State Governorship election in April, 2007.

7. 3rd defendant admits paragraph 27 of the Amended Statement of Claim to the extent only that the Plaintiff's name has been substituted but deny the assertion that there are no cogent and verifiable reasons for the substitution.

8. Paragraph 30 of the Amended Statement of Claim is hereby denied and in response to the averments contained therein, the 3rd Defendant states that it has the right to change or substitute the name of its candidate submitted to 1st Defendant provided same is done 60 days before the period of election."

Amaechi filed replies to the Statements of Defence filed by INEC, Omehia and PDP. The said replies, in their substance only re-asserted the facts pleaded by Amaechi in his Further Amended Statement of Claim earlier discussed.

The case was heard by Nyako J., of the Federal High Court on this state of pleadings. Before I proceed further, it is helpful to identify the issues arising for determination before the trial Judge. At the conclusion of pleadings, there was no dispute whatsoever as to the following facts:

(1) That Amaechi contested and won the PDP's Primaries for the Governorship Elections in Rivers State.

(2) That Omehia never took part in such Party Primaries.

(3) That Amaechi's name was first forwarded by PDP to INEC.

(4) That Omehia's name was later substituted for Amaechi's vide a letter sent to INEC by PDP on 2/02/2007.

(5) That the reason given by PDP for the substitution was 'error'.

The solitary issue of fact to be decided on the evidence was:

"Whether or not Amaechi was indicted by EFCC as pleaded

by INEC in paragraph 7 of its Statement of Defence reproduced above."

And finally, there was the issue of law as to whether the reason 'error' given by PDP for the substitution of Omehia for Amaechi satisfied the requirement of law under section 34(2) of the Electoral Act, 2006. B

In her judgment on 15-3-07, Nyako, J., came to two main conclusions namely:

1. That the reason given by PDP for substituting Omehia for Amaechi satisfied the requirements of the Electoral Act, 2006. C

2. That the letter written by PDP to INEC on 2/02/2007, at a time Amaechi's suit was subjudice was improper. The letter was set aside.

Dissatisfied, Amaechi brought an appeal against the judgment of Nyako, J., before the Court of Appeal, Abuja (hereinafter referred to as 'the court below'). Each of PDP and Omehia filed cross-appeals on 22/3/2007 and 28/3/2007 respectively. D

Some occurrences which I consider important took place during the pendency of the appeal and cross-appeals mentioned above before the court below. These occurrences, have important bearing on this case. I set them out hereunder. I should discuss them later for their effect: E

PDP also conducted its Primaries for its Governorship candidate of Imo State. One Senator Araraume won the Primaries. He was later substituted with one Engineer Ugwu who contested the Primaries but had been placed 16th. The reason given by PDP for the substitution was 'error' as in the current case. Araraume brought a suit challenging his substitution. The High Court dismissed his case. He brought an appeal before the court below. The Araraume's appeal and the Amaechi's appeal happened to be before the court below at the same time. The court below, in its judgment in the Araraume case on 5-4-2007 held that the reason 'error' did not satisfy the requirements of Section 34 of the Electoral Act, 2006. The respondents before the court below in the Araraume case brought an appeal before this court. It is noteworthy that the parties and the court below were ad idem on the view that the decision by this Court in the Araraume case would be accepted by them in the Amaechi case. At F
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page 373 of the record, Adekeye JCA., (presiding) stated in her record thus:

"Court: It is the decision of this court and going by the doctrine of stare decisis -judicial precedent that wet waist (sic) for the judgment of the Supreme Court on Section 34 of the Electoral Act - since that decision shall be law and applicability shall be binding on the parties 'particularly political parties (and) INEC. This Court shall also base other decision on any appeal involving section 34 on the decision of the Supreme Court. This appeal shall be adjourned to the 11th of April 2007."

Now, on 5/4/07, this Court affirmed the judgment of the Court of Appeal in the Araraume case. We came to the conclusion that the reason 'error' did not satisfy' the requirements of Section 34(2) of the Electoral Act; and that Araraume remained the candidate of the PDP for the April 14th, Imo State Governorship Elections. In reaction to the judgment, the PDP on 10-4-07, expelled both Araraume and Amaechi from the party. When later, Amaechi's appeal came before the court below for hearing on 11/04/2007, PDP and INEC asked that the appeal be struck out on the ground that the court below no longer had the jurisdiction to hear the appeal, as a result of the expulsion of Amaechi from the PDP The court below granted the prayers of INEC and PDP It struck out the appeal filed by Amaechi.

Amaechi was dissatisfied with the ruling of the court below which struck out his appeal. The full panel of this Court on 11/5/07 heard the appeal. In a short but expressive judgment, this court, per Kat-sina-Alu, JSC., who presided said:

"Having heard all the arguments of learned counsel on all sides, I hold that the court of Appeal was in error in declining jurisdiction to hear the appeal and cross-appeal on the merit. It is now ordered that the matter be remitted to the Court of Appeal, Abuja to hear the two appeals expeditiously."

(Italics mine)

On 21-05-2007, Omehia brought an application before the court below couched in these words:

"1. An order of this Honourable Court staying further proceedings in this appeal (just remitted for hearing by order of the Supreme Court dated the 11th of May 2007) pending the delivery of

the full judgment which will provide the basis of the determination of the appeal by way of reasons for the judgment (as was announced by Hon. Mr. Justice A. I. Katsina-Alu (presiding) in open court).

Alternatively

2. An order of this Honourable Court staying further proceedings in this appeal, particularly the hearing of the appeal until the Supreme Court is approached by any of the parties to apply the provisions of Order 8 Rule 16 to correct the clerical error in her judgment to the effect that the pronouncement of Katsina-Alu, JSC., made in open court that reasons for the judgment will be provided at a later date, which pronouncement was not reflected in the certified copy of the proceedings of 11th of May 2007 be reflected in the said judgment."

The court below heard Omehia's application which, at the hearing was supported by both INEC and PDP On 21-05-2007 when the said application was filed, the Governorship elections for River State had been concluded and Omehia declared the Governor elect. However, his swearing-in as Governor was not to come until 29-05-2007. The court below on 25-05-2007 in its ruling per R. D. Mohammed JCA (presiding) concluded in these words:

"1. The proceedings in this appeal, particularly the hearing of the appeal is hereby stayed until the Supreme Court is approached by the respondent/applicant to apply the provisions of Order 8 rule 16 to correct clerical error (if any) in her judgment to the effect that the pronouncement made in open court that reasons for the judgment will be provided at a later date which pronouncement was not reflected in the certified copy of proceedings of 11th of May 2007 be reflected in the said judgment.

2. The respondent/applicant is ordered to file his application at the Supreme Court within seven days from today."

It should not escape attention here that the 7 days allowed to Omehia on 25-5-2007, by the Court below would in effect ensure that he would have been sworn in as Governor of Rivers State on 29-05-2007 before the said application was brought.

Once again Amaechi was driven into bringing yet another appeal before this Court against the order of the court below which on 25-05-2007 stayed proceedings in his appeal. This Court needed to

make a repeat order on 10-07-2007 that the appeal be heard expeditiously by the court below. The court below finally heard the appeal on 16-07-2005. This was after Omehia had been sworn in as Rivers State Governor on 29-05-2007.

B It is desirable for clarity that I set out sequentially the events which stalled the hearing of the appeal filed by Amaechi before the 14th April Governorship elections in Rivers State and ultimately before Omehia was sworn in as Governor on 29-05-2007.

C 1. The court below had on 4-04-2007, stated that in the consideration of Amaechi's appeal it would be bound by the judgment of this Court in the Araraume appeal.

D 2. This court on 5-04-2007, affirmed the judgment of the Court of Appeal to the effect that the reason 'error' did not satisfy the requirements of Section 34(2) of the Electoral Act, 2006 for the substitution of one candidate with another.

3. On 5-04-2007, when this Court gave its judgment in the Araraume case, the elections are still nine days away.

E 4. The PDP on 10-04-2007, published a notice expelling both Araraume and Amaechi from the party in reaction to the judgment given by this Court on 5-04-2007.

5. Omehia and PDP on 11-04-2007, three days to the election brought an application that Amaechi's appeal be struck out following his expulsion from the party.

F 6. On 16-04-2007, two days after the Governorship election, the court below struck put Amaechi's appeal.

7. On 11-5-2007, this Court in its judgment on Amaechi's appeal against the order of the Court below which struck out his appeal ordered that the said appeal be heard expeditiously.

G 8. On 21-05-2007, Omehia brought an application that the hearing of Amaechi's appeal be stayed until this Court made further clarification of its judgment given on 11-05-2007.

H 9. On 25-05-07, four days to the swearing-in of Omehia as Governor of Rivers State, the court below made an order staying proceedings in the appeal of Amaechi before it and granted Omehia seven days to bring before this Court an application for the clarification of the judgment given by this Court on 11-05-2007.

10. On 10-07-2007, this Court re-affirmed the order it had

previously made on 11-05-2007, that the appeal by Amaechi and the cross-appeals by PDP and Omehia be heard on the merit.

11. On 16-07-2007, the court below finally heard Amaechi's appeal.

The judgment of the court below against which Amaechi brought this appeal was given on 20-07-2007. In the said judgment, the court below reached the following conclusions:

1. That the facts in the Amaechi's case were distinguishable from those in the Araraume case arising from the fact of Amaechi's indictment as pleaded by INEC in paragraph 7 of its Statement of Defence.

2. That Amaechi's name was properly substituted with that of Omehia.

3. That the cross-appeal was partially meritorious.

Dissatisfied with the judgment of the court below, Amaechi has brought a final appeal before this court. Omehia and PDP also filed cross-appeals.

The issues formulated for determination in Amaechi's appeal are these:

"(1) Whether the Court of appeal was not in error in allowing fresh evidence on appeal when no exceptional circumstance was shown to warrant such admission?"

(2) Whether having regard to the undertaking before the court, the court below ought not to have followed the decision of the Supreme Court in Ugwu v. Araraume (supra)?"

(3) Whether there exists cogent and verifiable reason to warrant the substitution of Plaintiff's name with that of any other person in breach of Section 34 of the Electoral Act, 2006 and if not whether the purported substitution of Plaintiff's name is not null and void?"

(4) Whether INEC (1st respondent) can rely on extraneous fact or any fact not presented by a political party seeking substitution to verify reason given seeking substitution.

(5) Whether there was in existence an Indictment of the plaintiff for same to be used as a basis to verify the reason of error given by the 3rd respondent for seeking substitution of Plaintiff's name.

(6) Whether having regard to the concept of lis pendens and the fact that at the material time of the election, plaintiff being the

only lawful candidate of the Peoples Democratic Party, he ought not to be declared the winner of 14th April, 2007 general election in Rivers State."

The 1st respondent's issues are aptly captured by appellant's issues reproduced above. The 2nd respondent's issues for determination
B raise matters which were not covered by appellant's issues. These are numbered 19, 20 and 22 on pages 13 and 14 of 2nd respondent's brief. The said issues read:

"19. *Granted that this Honourable Court has affirmed the justiciability of Section 34 of the Electoral Act in Ugwu v. Araraume (supra), which the court below has followed in this instant appeal, assuming but not conceding that there has been a breach of section 34 of the Electoral Act) are there limits to the remedies (if any) available to the plaintiff/appellant? (Issue No. 3).*

D "20. *Whether the entire appeal is not academic or overtaken by events as a result of a combination of events, to wit, the unchallenged dismissal of the appellant from the fold of the PDP, the fact that the elections in issue have been held in which several other political parties participated, the declaration of the 2nd respondent as*
E *winner of the said Governorship election and his being sworn in, the existence of appellant's election petition and other petitions in the Rivers State Governorship Election Tribunal? (Issue No. 4).*

F "22. *Whether the appellant's exercise of his access to court in the challenge of alleged breaches of perceived rights in any way derogates from the constitutional power given to 1st respondent to conduct elections under the 1999 Constitution and the Electoral Act and if so whether the Supreme Court can at this point in time venture into a declaration of who is the winner of the Governorship election*
G *in rivers State? (Issue No. 6)."*

The 3rd respondent's issues are covered by appellant's issues. It is not therefore necessary to reproduce them.

I observed earlier, that Omehia filed a cross-appeal. The issues formulated from the grounds of cross-appeal are these:

H "Whether the Court of Appeal was correct when it held that the appeal in issue did not abate upon the 2nd respondent being sworn in as the Governor of Rivers State whereupon he acquires constitutional immunity pursuant to Section 308 of the 1999 Consti-

tution.

Whether the Court of Appeal was correct in law when after finding that the entire gamut of appellant's dispute arose from nomination and sponsorship (matter within the domestic sphere of the 3rd respondent) it did not rule the entire dispute non-justiciable.

Whether the proceedings were void ab initio on the basis that evidence viva voce was not taken in a suit commenced by writs of summons/Statement of claim in respect of reliefs that were all declaratory in nature?"

The PDP formulated one issue from its cross-appeal. That issue reads: C

"Whether the court below was right in law to hold that the appeal before it was an election related matter and having so held went further to hold that the second respondent was not entitled to enjoy the benefits of the immunity conferred on him by virtue of Section 308 of the Constitution of the Federal Republic of Nigeria, D 1999 having taken the oath of office and the oath of allegiance as the Governor of Rivers State and placing reliance on the cases of A.D. Fayose (2004) 8 NWLR (Pt. 876) 639 and Obi v. Mbakwe (1984) 1 SCNLR 192, to arrive at this conclusion"

INEC and Omehia have raised some preliminary objections to E the appeal.

The grounds of the preliminary objection raised by INEC are these:

"1. The 1st Respondent submits that the Appellant in his brief failed to specifically relate the issues to the grounds of appeal and consequently this Court is urged to discountenance the issues argued in the Appellant's Brief. F

2. The (sic) 1st Respondent objects to and this Court is further urged to discountenance all arguments in the Appellant's brief on G vested right or interest at pages 32 Para. 5.26 and page 33 of the brief which are not covered by any ground of Appeal and ought to be discountenanced.

3. The 1st Respondent further objects to Ground 2 of the H Grounds of Appeal as being incompetent, by virtue of the provisions of Part IX Section 140(1), 2(a) - (b) of the Electoral Act 2006. The Supreme Court is without power and has not jurisdiction to declare the Appellant as winner of the Rivers State governorship election

held on 14/4/2007. In the same vein, the Court of Appeal sitting as a regular court is without power and had no jurisdiction to declare the Appellant winner of the said election. Also, the above submission is re-enforced by the provisions of Section 285(2) of the Constitution of the Federal Republic of Nigeria 1999 which provides thus:

B 4. The 1st Respondent further objects to Ground 2 of the Grounds of Appeal in that the Appellant did not claim such relief in his Amended Statement of Claim set out at pages 65 to 70 of the Record but more particularly at pages 68 to 70 of the Record.

C 5. The 1st Respondent further objects to Ground 2 of the Grounds of Appeal, as not arising from the Judgment of the Court of Appeal delivered on 20/7/2007, subject matter of this Appeal and no special circumstances having been shown to warrant such exercise which in any event, neither the Court below nor of this court possesses the requisite jurisdiction to adjudicate upon same."

Omehia's preliminary objections read thus:

"(a) The dispute raised by this appeal concerns who becomes the Governor of Rivers State as sponsored by the 3rd Respondent (Peoples Democratic Party) a situation in respect of which elections E have been held on the 14th of April 2007 and the 2nd respondent issued with a certificate of return having won the said election, consequently this Honourable Court and all other courts (except those expressly vested with jurisdiction by the Constitution and the Electoral Act) lack jurisdiction to invalidate the return or do anything capable of questioning the said election and return pursuant to section F 140-(1) of the Electoral Act 2006.

(b) This Honourable Court lacks jurisdiction to entertain appeal from the subject matter of the original proceedings based on the combined effect of section 285-(2), 246-(1) (ii) and 233 of the 1999 G Constitution, being a post election matter in respect of a Governorship seat the issue now turns on whether the 2nd respondent was validly elected into the said office or not.

H (c) The issue(s) contained in the 15 grounds of appeal relate to academic and hypothetical matters rendered so by the expulsion of the appellant from the fold of the PDP, the conduct of elections and declaration of results consequently the matters upon which this Honourable Court is called upon to adjudicate are not live issues.

(d) The relief sought by the appellant in the notice of appeal are fatally flawed in that they are reliefs which suggest that the Supreme Court can hear an appeal in respect of a matter in which jurisdiction is solely vested in the election tribunal."

It seems to me that I need respond at this stage to only the 1st ground of objection raised by Independent National Electoral Commission (INEC). In essence, Independent National Electoral Commission (INEC) is dissatisfied with the issue raised by Amaechi concerning the consideration of the nature of the reliefs which this Court ought to grant should the appeal succeed. All the four other grounds of preliminary objection by Independent National Electoral Commission (INEC) would appear to be a fall-out of whether or not this Court should declare Amaechi the Governor of Rivers State. Omehia's objection would also appear to dwell on the same point. I think it is appropriate that I first determine the fate of the appeal before discussing the appropriate relief to grant in the event the appeal succeeds.

The central issue to be decided in this appeal is whether or not the two courts below were correct in their conclusion that the reason given by the Peoples Democratic Party (PDP) for substituting Amaechi with Omehia satisfied the requirements of section 34 of the Electoral Act, 2006. The said section provides:

"34(1) A political party intending to change any of its candidates for any election shall inform the Commission of such change in writing not later than 60 days to the election.

(2) Any application made pursuant to subsection (1) of this section shall give cogent and verifiable reasons.

(3) Except in the case of death there shall be no substitution or replacement of any candidate whatsoever after the date referred to in subsection (1) of this section."

Now, it is not in dispute that in the PDP primaries for the Governorship elections in Rivers State, Amaechi had 6,527 votes to emerge the winner. The individual who came second in the primaries was Senator Martyns Yellow J.S. who scored 28 votes. The 3rd candidate Samuel Horseful had 10 votes. The 4th and 5th candidates at the primaries had 6 and 4 votes respectively. Each of the three other candidates scored zero. It is no exaggeration to say that Amaechi

won the primaries overwhelmingly.

On 14-12-2006, PDP in an apparent deference to the results of its party primaries sent the name of Amaechi to Independent National Electoral Commission INEC as its candidate for the governorship elections in Rivers State. However, on 02 -02-2007, PDP sent another letter to Independent National Electoral Commission (INEC). The letter was tendered at the trial court as exhibit

"February 2, 2007

Prof. Maurice Iwu,

Chairman,

INEC,

Abuja.

Re: Forwarding of PDP Governorship

Candidate and Deputy - Rivers State

This is to confirm that Celestine Ngozichim Omehia and Engineer Tele Ikuru are PDP Governorship and Deputy Governorship Candidates for Rivers State.

Barrister Celestine Ngozichim Omehia substitutes Hon. Rotimi Amaechi whose name was submitted in error.

This is for your necessary action.

Sgd. Sen. Dr. Amadu Ali GCON

National Chairman

Ojo Maduekue CFR

National Secretary."

Observed earlier that Amaechi's case was that Omehia did not contest as a candidate in the PDP primaries. The question that arises is - what 'error' made possible for a non-candidate at PDP primaries to be named the PDP candidate in the place of eight candidates who contested and of whom Amaechi came first? It seems clear that the reason given by PDP for the substitution of Omehia for Amaechi was patently untrue and certainly unverifiable.

Now in Ugwu & Anor. v Araraume & Anor. (2007) 6 S.C. (Pt 1) 88, the issue that was considered by this court was whether or not the reason 'error' satisfied the requirement of section 34 of the Electoral Act in a situation where Engineer Ugwu who came 16th in the PDP primaries for the Governorship of Imo State was substituted for Senator Ifeanyi Araraume who came first. This court per Niki Tobi, JSC at pages 132 - 134 observed:

"Taking Section 34(2) in the context of primaries in particular, I have no doubt in my mind that the subsection is not only important but has an imperative content; considering the general object intended to be secured by the 2006 Act. It is certainly not the intention of the Act to gamble with an important aspect of the electoral process, such as primaries in the hands of a political party to dictate the pace in anyway it likes, without any corresponding exercise of due process on the part of an aggrieved person.

If a section of a statute contains the mandatory "shall" and it is so construed by the court, then the consequence of not complying with the provision follows automatically. I do not think I sound clear. Perhaps I will be clearer by taking Section 34(2). The subsection provides that there must be cogent and verifiable reasons for the substitution on the part of the 3rd respondent. This places a burden on the 3rd respondent, not only to provide reasons but such reasons must be cogent and verifiable. If no reasons are given, as in this case, not to talk of the cogency and verifiability of the reasons, then the sanction that follows or better that flows automatically is that the subsection was not complied with and therefore interpreted against the 3rd respondent in the way I have done in this judgment. It is as simple as that. It does not need all the jurisdiction of construction of statute. I know of no canon of statutory interpretation which foists on a draftsman a drafting duty to provide for sanction in every section of a statute."

And at pages 149 - 150 of the same report, I observed:

"There are other cases including Dalhatu v. Turaki [2003] 7 S.C. 1; (2003) 15 NWLR (Pt. 843) 300 inclining to the same view. My humble view on the decision in Onuoha v. Okafor (supra) is that the same has ceased to be a useful guiding light in view of the present state of our political life. I have no doubt that the reasoning in the case might have been useful at the time the decision was made. It seems to me, however, that in view of the contemporary occurrences in the political scene, the decision needs to be reviewed or somewhat modified. If the political parties, in their own wisdom had written it into their Constitutions that their candidates for election would emerge from their party primaries, it becomes unacceptable that the court should run away from the duty to enforce compliance with the pro-

visions of the parties' Constitution. The court did not draft the Constitutions for these political parties, indeed, the court, in its ordinary duties, must enforce compliance with the agreements reached by parties in their contracts. Even if the decision in *Onuoha v. Okafor* (supra) might have been acceptable at the time it was made, the contemporary bitterness and acrimony now evident in this country's electoral process dictate that the decision be no longer followed. An observer of the Nigerian political scene today easily discovers that the failure of the parties to ensure intra-party democracy and live by the provisions of their Constitutions as to the emergence of candidates for elections is one of the major causes of the serious problems hindering the enthronement of a representative government in the country. If a political party was not to be bound by the provisions of its Constitution concerning party primaries, why would there be the need to send members of the parties aspiring to be candidates for an electoral offices on a wild goose chase upon which they dissipate their resources and waste time. Would it not have made better sense in that event for the political parties to just set out the criteria for the emergence of their candidates for electoral offices and then reserve to themselves (i.e. the parties) the ultimate power, to decide who should contest and who should not."

The respondents' counsel in their briefs have strenuously argued that political parties have the right to put up as candidates for elective offices any persons they deem fit. They relied with a measure of confidence on the decisions of this court in *Dalhatu v. Turaki* [2003] 7 SC. 1, [2003] 15 NWLR (Pt. 843) 300 and *P.C. Onuoha v. R.B.K. Okafor* [1983] SC NLR 244 and some others. Counsel would appear however to have overlooked the fact that there were no provisions of the Electoral Act similar to section 34(2) of the Electoral Act 2006 in force at the time these cases they relied upon were decided. Put simply, section 34(2) has altered the law and made those cases inapplicable in a case as this. It must be borne in mind that the Political Parties were a creation of section 221 of the 1999 Constitution. The same 1999 in section 222 imposes the duty on parties to file copies of their Constitution with Independent National Electoral Commission (INEC). Nothing

in a party's Constitution can override or be superior to the Constitution of Nigeria and the Laws validly enacted by the authority of the Nigerian Constitution.

Under Section 85 of the Electoral Act, 2006, it is mandatory that political parties inform INEC of the date and time of holding a convention or congress summoned for the purpose of nominating candidates for any of the elective offices under the Electoral Act, 2006.

If parties were not to be bound by the results of their party primaries in the nomination of candidates at any level, why would it be necessary for Independent National Electoral Commission's (INEC) representatives to be present at and monitor the proceedings of such congress? It seems that the obligation on the parties to inform INEC of such congresses was to ensure that INEC would know and keep a record of candidates who won at the primaries.

At pages 155 to 156 of the judgment of this Court in Ugwu & Anor. v. Araraume (supra) I concluded as follows:

"It is manifest that the requirement under Section 34(2) of the 2006 Act that 'cogent and verifiable reason' be given in order to effect a change of candidates was a deliberate and poignant attempt to reverse the 2002 Act which led to a situation where disputes arose even after elections had been concluded as to which particular candidates had been put up by parties to stand elections.

The meaning of the word 'cogent' as given in The Shorter Oxford English Dictionary is stated to be "constraining, powerful, forcible, having power to compel assent, convincing." The same dictionary defines "verifiable" as "that can be verified or proved to be true, authentic, accurate or real; capable of verification."

In the light of the above, it seems to me that the expression 'cogent and verifiable reason' can only mean a reason self-demonstrating of its truth and which can be checked and found to be true. The truth in the reason given must be self-evident and without any suggestion of untruth. The reason given must be demonstrably true on the face of it so as not to admit

of any shred of uncertainty."

I am satisfied that the reason given by PDP as 'error' for substituting Omehia for Amaechi did not meet the requirement of section 34 of the Electoral Act.

B The matter however does not end there. The court below which had decided in the Araraume case that the reason 'error' did not meet the requirement of section 34 later decided in the present case that the fact that Amaechi had been indicted was good enough a reason for not following the decision of this court and its own in the C Araraume case. The court below also held that INEC, based on Amaechi's alleged indictment was right to allow the substitution sought by PDP

On 10-4-2007, Independent National Electoral Commission (INEC) brought an application before the court below for D leave to call fresh evidence on appeal. The evidence sought to be called on appeal was the ruling which Kuewumi, J., gave on 30-3-2007 in a suit in which Amaechi had been challenging his "purported indictment". Kuewumi J did not decide the case on the merits but rather on the narrow ground that the E filing of the suit constituted an abuse of the court process. The suit was dismissed but nothing was decided therein as to whether or not Amaechi was indicted. It would seem from the final judgment of the court below that it was the said judgment of Kuewumi, J., that was relied upon to arrive at the conclusion that Amaechi was indicted. Was the court below correct to have received the said judgment of Kuewumi J in evidence? Was the court below correct to have taken the said F judgment as proof of indictment of Amaechi? Could the said judgment, which was delivered on 30-3-2007, be the basis of G the substitution of Omehia for Amaechi which was done on 02-02-2007? The answers to all the three questions must be in the negative.

H At pages 658 to 659 of its judgment the court below reasoned thus:

"Before this court now is the judgment of the lower court Coram Kuewumi, J., delivered in suit NO. FHC/ABJ/CS/74/07, delivered on the 3rd of March, 2007. Judgment was delivered after the

judgment of the lower court in this suit.

The picture is clear now on printed record from the judgment

(1) that the appellant sued the Attorney General of the Federation

(2) Economic and Financial Crimes Commission

(3) INEC

(4) Peoples Democratic Party

(5) Celestine Omehia

Reasons inter alia are:-

(I) causing to be published a report that the appellant is not qualified to hold office of governor

(II) For the 1st and 2nd defendants unilaterally setting up an adhoc inquisitorial panel to inquire into official acts of public officers of the Rivers State Government

(III) Declaration that all the actions taken by the 1st - 4th defendants in reliance on the list published by the 2nd defendant and titled "Investigated and Indicted" in which plaintiff now appellant was falsely presented as a person who has been found guilty of financial impropriety, including the setting up of a panel of inquiry, the purported submission, and adoption of the Panel's report by the Federal Government and the purported substitution of the plaintiff as governorship candidate of the result thereof are unconstitutional, illegal, null and void and of no effect whatsoever.

Veracity of the contents of the published list captioned Investigated and Indicted is a matter for the court. The fact remains that at the time of screening of the candidates nominated after screening, the list is available to bodies interested in the electoral process. The published list being a public document is a document at large. The 3rd Respondent which forwarded the letter Exhibit D alleging error for substituting the Appellant and INEC the 1st Respondent which has a duty and role to verify the alleged error in the prevailing circumstance.

Is INEC supposed to turn a blind eye on the published list after the party has requested for the substitution of the appellant with the list at its disposal and vital information that the appellant kept a date with EFCC -Federal Government Panel.

Section 34(1) and (2) cannot be interpreted to be a clog in the

wheel to the enforcement of Section 182(1) (i) of the 1999 Constitution which reads that"

There is no doubt that on the pleadings upon which this suit was tried, a distinct issue was raised as to whether or not Amaechi was indicted. INEC in paragraphs 6 and 7 of its Statement of defence
B had pleaded thus:

"6. In answer to paragraph 18 of the Statement of Claim. The 1st defendant states that the plaintiff was only Substituted by his political party in line with the Provisions of the Electoral Act, 2006.

7. Further to paragraph 18, the 1st defendant dates that the indictment of the plaintiff by EFCC and the acceptance of the report by the panel set up by the Federal Government provides cogent and verifiable reasons for the plaintiff's substitution by his political party."
C

Amaechi had pleaded in paragraph 18 of his Amended Statement of Claim thus:
D

"18. The plaintiff is very sure that he has not committed any offence to warrant disqualification."

In his reply to Independent National Electoral Commission's statement of defence, Amaechi in paragraphs 1 and 6 pleaded thus:

"1. Plaintiff states that he was not indicted by the Economic and Financial Crimes Commission otherwise known as "EFCC" or any panel set up by the Federal Government and the Federal Government of Nigeria never accepted any report in this regard.
E

2. The panel set up by the Federal Government only submitted its report on Monday 19th day of February, 2007 although the news of and its actual constitution came on Wednesday 13th day of February 2007."
F

Guided by the pleadings of Independent National Electoral Commission and Amaechi, it is apparent that the issues to be resolved at the trial were:
G

"(1) Whether or not Amaechi was indicted by EFCC and whether the Federal Government set up a panel on such indictment and whether any report of such panel was accepted by the Federal Government of Nigeria.
H

(2) Whether in any case, the news concerning a report given to the Federal Government on 19-02-2007 or 13-02-2007 could be the basis of Amaechi's substitution on 02-02-2007."

Any fresh evidence to be received by the court below on appeal could only be such evidence as would assist the court to resolve the issues which I have identified above. **The power of the court below to receive further evidence on appeal is governed by Order 1 rule 19(2) of the Court of Appeal Rules 2002** which provides: B

"(2) The court shall have power to receive further evidence on questions of fact either by oral examination in court, by affidavit or by deposition taken before an examiner or Commissioner as the court may direct, but in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds." C

There are judicial authorities governing the manner in which the power to receive further evidence on appeal should be exercised. In Obasi & Ors. v. Onwuka & Ors. [1987] 2 NSCC 981, this court per Oputa JSC., considered the circumstances under which fresh evidence may be received on appeal. At pages 984-985 this court said: D

"The guiding principle here is that to avoid surprise to the opposite party the Plaintiff should plead all the facts and all the documents he intends to rely on at the trial of the case. During that trial he should establish by evidence oral or documentary, those facts on which his case rests and depends. The trial Court usually comes to a decision on the totality of the evidence led on both sides. The purpose of an appeal is to find out whether on that evidence and the applicable law the trial Court came to right decision. It will normally be wrong to "judge" the trial judge on the basis of evidence which was not before him and which he could not have therefore considered. This looks like the brutal absurdity of commanding a man today, to do something yesterday. To talk therefore of assessing the Tightness or wrongness of the trial Court's verdict today by evidence that will be given tomorrow is to talk in blank prose. This is one reason why appellate courts are very reluctant to admit "fresh evidence, new evidence or additional evidence" on appeal except in circumstances where the matter arose ex improviso E

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which no human ingenuity could foresee and it is in the interest of justice that evidence of that fact be led:- R. v. Dora Harris (1927) 28 Cox 432. But by and large, at least in criminal cases, (and the principle should also be the same in civil cases) the courts lean against hearing fresh evidence on appeal, see

B R. v. Alexander Campbell Mason (1923) 17 CR. App. R. 160: See also R. v. Walter Graham Rowland (1947) 32 C.R. App. R.29.

In civil cases the Court will permit fresh evidence in furtherance of justice under the following circumstances:

C (i) **Where the evidence sought to be adduced is such as could not have been obtained with reasonable care and diligence for use at the trial.**

(ii) **Where the fresh evidence is such that if admitted would have an important, but not necessarily crucial, effect D on the whole case.**

(iii) **Where the evidence sought to be tendered on appeal is such as is apparently credible in the sense that it is capable of being believed. It need not necessarily be incontrovertible.**

E In *Attorney-General of the Federation v. Malam Modu Alkali* (1972) 12 S.C. this Court (per Elias, CJN) refused an application for leave for the appellant/applicant to adduce further or additional evidence on appeal because it was contrary to Order 7 Rule 24 of the *Federal Supreme Court Rules 1961*. The reason given therefore the **F** non-production of the Hire Purchase Agreement sought to be tendered on appeal was the appellants' witnesses' inadvertence or gross-negligence. The conditions for admitting fresh evidence on appeal are so stringent that there are very very few cases if any in our Courts **G** where such evidence was admitted (but see the Following English cases *Ladd v. Marshall* (1954) 1 W.L.R. 1489 at p. 1491: *Skone v. Skone* (1971) 1 W.L.R. 812: (1971) 2 All E.R. 582 where the proposed further evidence satisfied the conditions precedent)."

H See also *Asaboro v. Aruwaji* [1974] 4 S.C 119 at pages 123 - 125 where this court said:

"But that is not the only hurdle in the way of the applicant in this case. For instance, there is the fact that the application does not seem to satisfy at least, one of the recognized principles of law which

govern the exercise of its power by the Court of Appeal in granting special leave for new or further evidence to be adduced on appeal. The three cardinal principles are as follows:-

First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.

Secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.

Thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

I take the view that, it has not been shown that the documentary evidence which the applicant is now seeking to put in at this stage, could not have been obtained with reasonable diligence for use at the trial. Indeed, the facts contained in that document were specifically pleaded in the amended statement of defence. The onus was therefore, on the applicant in the court below to prove the averments in her pleadings. The defence, as I have said, knew long before the trial that those facts should be assembled."

In line with the judicial authorities referred to above, evidence to be admitted on appeal under Order 1 rule 19(2) above should only be one which is apparently credible in the sense that it is capable of being believed. It is in the light of this that I must say that the reliefs sought by Amaechi in a previous suit could not be regarded as credible evidence as to whether or not he had been previously indicted or whether the Federal Government had accepted a report of such indictment.

In *Action Congress & Anor. v. Independent National Electoral Commission* [2007] 6 S.C. (Part II) 212 at pages 229 to 231, this court per Katstina-Alu JSC, observed:

"It was also contended for the defendant that the ground of disqualification in Section 137(1)(i) is self-executing. I am not impressed by this contention. I think a dispassionate reading of the provision will reveal that it is not self-executing. To invoke against any candidate the disqualification therein provided would require an inquiry as to whether the tribunal or administrative panel that made

the indictment is of the nature or kind contemplated by Section 137(i) read together with other relevant provisions of the Constitution in particular Section 36(i), which provides that "in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its Independence and impartiality" as well as the provision in subsection (5) of Section 36 that "every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty." The disqualification in Section 137(1)(i) clearly involves a deprivation of right and a presumption of guilt for embezzlement or fraud in derogation of the safeguards in Section 36(1) and (5) of the Constitution. The trial and conviction by a court is the only constitutionally permitted way to prove guilt and therefore the only ground for the imposition of criminal punishment or penalty for the criminal offences of embezzlement or fraud. Clearly, the imposition of the penalty of disqualification for embezzlement or fraud solely on the basis of an indictment for these offences by an administrative panel of inquiry implies a presumption of guilt, contrary to Section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999. I say again that convictions for offences and imposition of penalties and punishments are matters appertaining exclusively to judicial power. See *Sofekun v. Akinyemi* [1980] 5-7 S.C. (Reprint) 1; [1981] 1 NCLR 135; *Garba v. University of Maiduguri* [1986] 1 NWLR (Pt. 18) 550.

An indictment is no more than an accusation: In *Sofekun v. Akinyemi* (supra) this court per *Fatayi-Williams*, CJN said at page 146 as follows:

"It seems to me that once a person is accused of a criminal offence, he must be tried in a court of law where the complaints of his accusers can be ventilated in public and where he would be sure of getting a fair hearing No other Tribunal, investigating panel or Committee will do If regulations such as those under attack in this appeal were valid, the judicial power could be wholly absorbed by the Commission (one of the organs of the Executive Branch of the State Government) and taken out of the hands of the magis-

trates and judges If judicial power will certainly be eroded The jurisdiction and authority of the courts of this country cannot be usurped by either the Executive or the Legislative branch of the Federal or State Government under any guise or pretext whatsoever."

The indictment of a candidate aspiring to the office of Governor is governed by Section 182(1)(i) of the 1999 Constitution which provides:

"182(1) No person shall be qualified for election to the office of Governor of a state if-

(i) He has been indicted for embezzlement or fraud by a judicial commission of Inquiry or an Administrative Tribunals of Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, a Tribunal of Inquiry Law or any other Law by the Federal or State Government which indictment has been accepted by the Federal or State Government"

Section 182(1)(i) above is in the Constitution in order to ensure that only persons of impeccable character and integrity are eligible for the office of a Governor of a State. It is to ensure transparency and high standard of probity in governance. It is not to be used as an instrument by politicians to hinder the emergence of their opponents or adversaries as Governors. Regrettably, the said provision has been used to witch hunt and victimize. It is a provision which in its application must be read and construed along with other provisions of the 1999 Constitution in section 36(1), (2), (3), (4) and (5) which provide:

"36.(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

(2) Without prejudice to the foregoing provisions of this section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law-

(a) provides for an opportunity for the person whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person; and

B (b) contains no provision making the determination of the administering authority final and conclusive.

(3) The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public.

C (4) Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal.....

D (5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty:

Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts."

It is not a simple matter to find a citizen of Nigeria guilty of a criminal offence without first ensuring that he is given a fair trial before a Court of Law. A Judicial Commission of inquiry or an administrative panel is not the same thing as a court of law or its equivalent. Because a court of law operates within a judicial hierarchy any person wrongly convicted is enabled to contest his conviction to the Supreme Court of Nigeria. This is a right granted by the Constitution of Nigeria. It has not been curtailed or abridged by section 182(1) (i) above. It seems to me that section 182(1) (i) only enables a Judicial Commission of Inquiry or administrative tribunal to determine the culpability of a citizen where it is alleged that such citizen has been in breach of the standards of behaviour expected in public life. Where such Inquiry or tribunal finds a citizen liable or culpable of a conduct bordering on criminality, and the Federal or State Government accepts such report through a published white paper, it is still not good enough to deny a citizen eligibility to the office of Governor unless and until he is afterwards prosecuted in a court of law and found

guilty. This approach in my view is buttressed by section 182(2) of the 1999 Constitution which provides:

"182(2) Where in respect of any person who has been-

(a) adjudged to be a lunatic;

(b) declared to be of unsound mind;

(c) sentenced to death or imprisonment or

(d) adjudged or declared bankrupt,

an appeal against the decision is pending in any court of law in accordance with any law in force in Nigeria, subsection (1) of this section shall not apply during a period beginning from the date when such appeal is lodged and ending on the date when the appeal is finally determined or, as the case may be, the appeal lapses or is abandoned, whichever is earlier."

It is simply impermissible under a civilized system of law to find a person guilty of a criminal offence without first affording him the opportunity of a trial before a court of law in the country. See also article 7(1) (a) of the African charter on Human Rights cap. 10, Laws of the Federation. The court below would appear not to have paid heed or attention to the reasoning of this court in Action Congress & Anor. v. Independent National Electoral Commission (INEC) (supra) in coming to the conclusion that Amaechi was indicted. Indeed, Amaechi needed not have asked his supposed indictment to be set aside by Kuewumi, since the same was not in any case cognizable under the law. No court of law ought to pay any iota of regard to such alleged indictment.

Another matter deserves to be mentioned here. **The EFCC is a statutory body created under the Laws of Nigeria. Its duties include the investigation and prosecution of a class of criminal offences. In essence, once its investigation has shown prima facie that a person has committed a criminal offence, the duty of EFCC is to have such offender prosecuted in a court of law. I know of no provision of the law which enables EFCC upon the conclusion of investigation in a criminal case to send the report or case file to either the Federal or State Government. I am surprised therefore to see that INEC pleaded that Amaechi was indicted by EFCC and that the report on the**

indictment was accepted by the Federal Government. That procedure is not backed by any law in force. Indeed, it is a subversion of the law and an unconcealed attempt to politicize the investigation and prosecution of criminal offences.

And finally on the point, the case made by Amaechi was that B PDP had not given a cogent and verifiable reason by its letter on 02-02-2007 as required under section 34(2) of the Electoral Act for his substitution. How could the ruling by Kuewumi J on 30-03-2007 or any other date subsequent to 02-02-2007 be the reason relied upon C by the PDP for an act done on 2-2-2007? In the course of his address before this Court on 25-10-2007, Mr. L. Fagbemi, SAN., of Counsel for Amaechi likened the behaviour of INEC as being more catholic than the Pope. I think it is an apt description which fully captured the approach of INEC in this matter.

D I am satisfied that the court below wrongly and improperly admitted in evidence the ruling of Kuewumi J., in Suit No. FHC/ABJ/CS/74/2007 as further evidence on appeal. The said ruling proves nothing to show that Amaechi was ever indicted. It is difficult for me to understand how the Court of Appeal could slip into such error. If E one may ask - what was the offence for which the court below held that Amaechi was indicted?

The facts of this case are similar to those in Araraume. Indeed the facts in the Araraume's case are more favourable to Engineer Ugwu than those in this case to Omehia. Whereas Omehia did not F contest PDP Primaries at all, Engineer Ugwu in the Araraume case contested and placed 16th. The court below should simply have followed its decision and the decision of this court in the Araraume case. The implication of my finding is that this appeal ought to be allowed. G I hold that the substitution of Omehia for Amaechi was not done in accordance with the law. I accordingly set aside the judgment of the court below which was wrongly premised.

Let me at this stage respond to the issues raised by Omehia and PDP in their cross-appeals. It was contended that by virtue of H section 308 of the 1999 Constitution, Amaechi's Suit against Omehia should abate and be discontinued following the swearing-in of Omehia as Governor of Rivers State. In reacting to the application brought before it concerning Omehia on the question of immunity based on

section 308, the court below said:

"The cases cited by the learned senior counsel for the 2nd Respondent are easily distinguishable from the case in hand. For the case of Attorney-General of the Federation v. Alhaji Atiku Abubakar & 1 Or. affects a criminal proceeding, Global Communications v. Donald Duke affects a civil proceeding in which the governor sued another person and the court held that immunity granted by Section 308 does not include his ability to sue other people. Umannah v. Attah which affects an election matter is not on all fours with this case in hand. I hold that the provision of section 308 is only applicable to ordinary civil proceedings and criminal proceedings and not in election related matters.

In this case the subject-matter queries the foundation of his appointment as governor. If the governor is said to be immune under Section 308 of the 1999 Constitution the resultant effect is that once a person is declared and sworn in as governor-elect that ends the matter and no one can complain or take any legal action even if the person conducted gross election malpractices.

In the case of A.D. v. Fayose 2004 8 NWLR (pt 876) 639 at 653 D-G it was observed that such decision will encourage gross wrongful and illegal activities among the parties contesting for the position and negative the spirit and necessary intendment of the Constitution and hence destroy democracy. On that score I hold that in an election related matter where the status of the 2nd Respondent as governor is being challenged, the immunity conferred on him by the Constitution is equally in question. The 2nd Respondent/ Cross-Appellant does not enjoy any immunity from being sued in this Suit. Obi v. Mbakwe 1984 1 SCNLR 192, Unongo v. Aku 1985 6 NCLR . 262."

I think that the court below correctly decided the point. Section 308 of the 1999 Constitution provides:

"308(1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section

(a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;

(b) a person to whom this section applies shall not be arrested

or imprisoned during that period either in pursuance of the process of any court or otherwise; and

(c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued:

B *Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.*

C *(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.*

D *(3) This section applies to a person holding the office of President or Vice President, Governor or Deputy Governor; and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office."*

Section 308 above is not meant to deny a citizen of this country his right of access to the court. It is a provision put in place to enable a Governor, while in office, to conduct the affairs of governance free from hindrance, embarrassment and the difficulty which may arise if he is being constantly pursued and harassed with court processes of a civil or criminal nature while in office. It is a provision designed to protect the dignity of the office. However, the proviso under section 308 ensures that the period when a governor enjoys immunity shall not be taken into account in computing the time limit for initiating an action under the Statute of limitation. Section 308 cannot be relied upon where the nature of the suit is such that the Res in dispute will be destroyed permanently with the effluxion of time. To hold that section 308 can be invoked in a matter relating to the eligibility for a political office where the tenure of such office has been set out in the Constitution will translate into denying to a plaintiff his right of access to the court. It is only in a case where a deferment of plaintiff's right of action is not likely to destroy this Res in the suit that sec-

tion 308 can be invoked. In this case, to ask Amaechi to wait till the end of Omehia's tenure of office as Governor before pursuing his suit is to destroy forever his right of action.

There is also the issue raised in Omehia's cross-appeal that the court below having held that Amaechi's suit was hinged on nomination and sponsorship of a candidate for election by a political party should have held that Amaechi's suit was not justiciable. The simple answer is that even if Amaechi's suit related to nomination and sponsorship of a candidate for an election, it is still not an election matter. **This is a pre-election matter premised on the breach of Amaechi's right derived from under the Constitution of Nigeria and Section 34 of the Electoral Act, 2006. The claim of Amaechi is simply that his substitution by PDP was not in accordance with section 34 of the Electoral Act, 2006. The court has a duty to enforce the provisions of the laws validly enacted by National Assembly pursuant to powers derived from the Constitution. The Electoral Act, 2006 is one of such laws. The major flaws in the case of the respondents throughout this case is the belief held by them that the right of political parties to decide who should contest an election as party candidates is superior to the provisions of the Constitution of Nigeria and the Laws. It is my view that a political party is able to control the affairs of the party only to the extent that the exercise of such control does not run against the provisions of the Constitution and Laws of Nigeria.**

Omehia's counsel, J.B. Daudu Esq, SAN., has also argued that the proceedings in this case are void ab initio on the basis that evidence viva voce was not taken in a suit commenced by writ of Summons and Statement of Claim. Learned senior counsel has in support of this argument relied on Vincent I, Bello Vs. Magnus Eweka [1981] 1 S.C. 101 at 103 where Obaseki, JSC observed:

"I turn to the counter-claim He had not served any defence to the counter-claim. According to RSC Ord. 19 R 7 (1) 'on the hearing of the application the court shall give such judgment as the plaintiff appears entitled to on his statement of claim.' Likewise with 'a counter-claim'. See RSC Ord. 9 R 8. Although the word 'shall' is used in that rule, it is clear from the authorities that it is not imperative but

directory. The court will not enter a judgment which it would afterwards set aside on proper grounds being shown. See *Graves v. Terry* (1882) 9 QBD 170; *Gibbings v. Strong* (1884) 26 Ch D 66." (Underlining is mine)

There is no doubt that this suit was commenced by Writ of Summons before the Federal High Court, Abuja. Parties also filed pleadings. ***It is trite law that the court does not make declarations of right either on admission or in default of defence without hearing evidence. That is however not the same thing as saying that the proceedings in the two courts below up to this court are void for the reason that evidence viva voce was not taken. The submission of Senior Counsel for Omehia is too sweeping and has no basis in law. Quite apart from this, I think that the learned senior counsel did not bear in mind that the evidence before the trial High Court was not in the form of admissions by the respondents but rather in the form of evidence which parties agreed to be undisputed.*** The record of proceedings before the trial High Court on pages 167 and 168 Vol. 1 bears this out. The said record for 2/3/2007 reads:

"Parties: Absent.

Counsel: L. O. Fagbemi, SAN for the Plaintiff with S. Dapan Addo, H.O. Afolabi, S.O. Adewoye; A. O. Popoola; O. O. Ogunmola (Miss.)

-Kabiru Bala with U. Elekwa for 1st defendant

-E.C. Ukala SAN., for the 2nd Defendant with O.

-Wali, C. Ihua-Maduenyi and K.K. Obayi R.O. Yusuf for 3rd defendant with C. L. Nwankwo.

Mr. Fagbemi SAN: We have filed our issues for determination dated 27/2/07. The first Defendant has filed issues dated 2/3/07, 2nd defendant filed issues dated 28/2/07, 3rd defendant filed on 1/3/07, we have agreed to tender documents by consent.

Exhibit A. - PDP result of primary election 2006/2007

Exhibit B.- PDP letter dated 14/12/06 to chairman of defendant

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Exhibit C. - INEC form CF001 (Affidavit of particulars)

Exhibit D. - Letter of 2/2/07 by PDP to chairman of 1st Defendant

Exhibit E. - Constitution of PDP

Exhibit F. - Electoral guidelines 2006 by PDP

Mr. Bala: No objection

Mr. Ukala SAN: No objection

Mr. Yusuf: No objection

Court: Admitted and marked Exhibit A - F."

(underlining mine)

B

From the extract of the proceeding reproduced above, it is apparent that all the parties including INEC, Omehia and PDP agreed that Exhibits A-F be put in evidence by consent. None of them afterwards disputed the contents of the said documents. The judgment of the trial High Court was based on the said exhibits A - F not on the admissions made by any of the parties. The parties had chosen to follow a procedure which was not the usual practice but which nevertheless satisfied the requirements of fair hearing. I do not therefore think that the submission of senior counsel for Omehia on the point is well founded.

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It was also contended that arising from the fact that an election has been conducted in Rivers State, all courts have lost their jurisdiction to hear this case. At page 42 of his brief J. B. Daudu Esq. SAN., for Omehia submitted thus:

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"On the objection that the appeal is dead or no longer a live issue, it is humbly submitted that once an election has been conducted in respect of an office to which the 'Act' relates and a return declared, all courts except those specified as competent to take election matters lose their jurisdiction in matters relating to such an office. Conversely, no person shall question 'in any manner' the election of any person except by way of election petition. See section 140 (1) of the Electoral Act 2006. This provision is in consonance with section 285(2) of the 1999 Constitution which provides thus:

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

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islative house."

My first reaction to this submission is that Amaechi's case is not an election petition as to whether Omehia has been validly elected to the office of Governor. Section 140(1) of the Electoral Act to which senior counsel referred reads:

B *"(1) No election and return at an election under this Act shall be question (sic) in any manner other than by a petition complaining of an undue election or undue return (in this Act referred to as an "election petition") presented to the tribunal or court in accordance*
C *with the provisions of the Constitution or of this Act and in which the person elected or returned is joined as a Party."*

At the commencement of this judgment, I reproduced seriatim the substance of the reliefs which Amaechi had sought from the trial High Court. Amaechi's suit was filed on 26/01/07. The Governor-ship elections for Rivers State were not held until 14/04/07. Amaechi's suit did not and could not have questioned anything about the election yet to be held. Amaechi, as a citizen had simply exercised his right of access to the court as guaranteed him under section 36 of the 1999 Constitution. Now section 178(1) and (2) of the said constitution provides:

"(1) An election to the office of Governor of a State shall be held on a date to be appointed by the Independent National Electoral Commission.
F *(2) An election to the office of Governor of a state shall be held on a date not earlier than sixty days and not later than thirty days before the expiration of the term of office of the last holder of that office."*

Section 178 above is a provision of the 1999 Constitution intended to ensure a smooth transition from one administration to another. It is not a provision to destroy the right of access to the court granted to a citizen under section 36 of the same Constitution. In the same way section 285(2) relied upon by senior counsel cannot be construed to destroy the jurisdiction which the ordinary courts in Nigeria have in pre-election matters. Were the court to construe section 285(2) as having the effect of ousting the jurisdiction of the ordinary court in pre-election matters, all that a defendant would need

to do to frustrate a plaintiff is to stall for time and obtain adjournment to ensure that a plaintiff's case is 'killed' once an election is held. It is settled law, that the court in interpreting the provisions of a statute or Constitution, must read together related provisions of the Constitution in order to discover the meaning of the provisions. The court ought not to interpret related provisions of a statute or Constitution in isolation and then destroy in the process the true meaning and effect of particular provisions: See *Obayuwana v. Governor* (1982) 12 S.C. 47 at 211 and *Awolowo v. Shagari* (1979) 6 - 9 S.C 51 at 97.

As I shall shortly show, it is my view that the approach of the respondents to this case was to 'kill' Amaechi's case in the misconceived notion that once elections were held the court would lose its jurisdiction. It is my firm view that the jurisdiction of the ordinary courts to adjudicate in pre-election matters remains intact and unimpaired by sections 178(2) and 285(2) of the 1999 Constitution.

I now consider the relief to be granted to Amaechi in this case even if elections to the office of Governor of Rivers State had been held. As I stated earlier there is no doubt that the intention of Amaechi, to be garnered from the nature of the reliefs he sought from the court of trial, was that he be pronounced the Governorship candidate of the PDP for the April, 2007 election in Rivers State. He could not have asked to be declared Governor. But the elections to the office were held before the case was decided by the court below. Am I now to say that although Amaechi has won his case, he should go home empty-handed because elections had been conducted into the office.? That is not the way of the court. **A court must shy away from submitting itself to the constraining bind of technicalities. I must do justice even if the heavens fall. The truth of course is that when justice has been done, the heavens stay in place. It is futile to merely declare that it was Amaechi and not Omehia that was the candidate of the PDP What benefit will such a declaration confer on Amaechi? Now in *Packer v. Packer* 1954 P. 15 at 22, Denning MR., in emphasizing that there ought not to be hindrances or constraints in the way of dispensing justice had this to say:**

"What is the argument on the other side? Only this, that no case has been found in which it had been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before we shall never get anywhere. The law will stand still whilst the rest of the world goes on and that will be bad for both."

The Supreme Court in Nigeria has followed the same approach. In *Engineering Enterprise Contractor Company of Nigeria v. Attorney-General of Kaduna State* (1987) 1 NSCC 601 at 613 Eso, JSC., observed:

"One stream that permeates all these decision and I held the view that this is a good sign for the administration of justice in this country, is the clear, unadulterated water filled with great concern for the justice of the case. The signs are now clear that the time has arrived that the concern for justice must be the overriding force and actions of the court. I am not saying that ex debito Justitiae by itself is a cause of action. It is to be the basis for the operation of the court, whether in the interpretative jurisdiction or basic attitude towards the examination of a case."

The sum total of the recent decisions of this court is that the court must move away from the era when adjudicatory power of the court was hindered by a constraining adherence to technicalities. This often results in the loser in a civil case taking home all the laurels while the supposed winner goes home in a worse situation than he approached the court.

Now in this court, Omehia never argued that he took part in PDP primaries. He therefore did not manifest a desire for the office of Governor of Rivers State. Amaechi vied in the primaries for the office. He won overwhelmingly. Amaechi's name was sent to INEC as PDP's candidate. This approach by PDP reflected the result of the election. I earlier reproduced section 34. The provisions of sections 34 and 85 of the Electoral Act, 2006 ought to be read together. I reproduce them hereunder:

"34(1) A political party intending to change any of its candidates for any election shall inform the commission of such change in writing not later than 60 days to the election.

(2) Any application made pursuant to subsection (1) of this

section shall give cogent and verifiable reasons."

"85(1) Every registered political party shall give the Commission at least 21 days notice of any convention, congress, conference or meeting convened for the purpose of electing members of its executive committees, other governing bodies or nominating candidates for any of the elective offices specified under this Act."

(2) The Commission may with or without prior notice to the political party monitor and attend any convention, congress, conference or meeting which is convened by a political party for the purpose of:

(a) electing members of its executive committees or other governing bodies;

(b) nominating candidates for an election at any level;

(c) approving a merger with any other registered political party

(3) Notice of any congress, conference or meeting for the purpose of nominating candidates for Area Council elections shall be given to the Commission at least 21 days before such congress, conference or meeting."

There is no doubt that PDP having previously sent Amaechi's name to INEC by letter on 26/12/2006 could only validly remove the name or withdraw it if it complied with section 34(2) above. The cogency or the verifiability of the reason for the withdrawal of a candidate's name has to be considered against the background that INEC officials, pursuant to section 85 of the Electoral Act above, would have been present at a meeting or congress of a party called for the nomination of a candidate for an elective office. INEC would thus know the results of such party primaries. When a political party later asks to substitute a candidate, it does so against the background of the result of the primary election. If there is a problem with a candidate who comes first, then the party will opt for the 2nd and later 3rd etc in that order. There is simply no room for a candidate who never contested a primary election in such setting to emerge a party candidate. This seems to me a praiseworthy attempt to enthrone intra-party democracy in order to ensure that our democracy is truly reflective of the people's choice.

Now section 221 of the 1999 Constitution provides:

"No association other than a political party shall can-

vass for votes for any candidate at any election or contribute to the funds of any party or to the election expenses of any candidate at an election."

The above provision effectually removes the possibility of independent candidacy in our elections; and places emphasis and responsibility in elections on political parties. Without a political party a candidate cannot contest. The primary method of contest for elective offices is therefore between parties. If as provided in Section 221 above, it is only a party that canvasses for votes, it follows that it is a party that wins an election. A good or bad candidate may enhance or diminish the prospect of his party in winning but at the end of the day, it is the party that wins or loses an election. I think that the failure of respondents' counsel to appreciate the overriding importance of the political party rather than the candidate that has made them lose sight of the fact that whereas candidates may change in an election but the parties do not. In mundane or colloquial terms we say that a candidate has won an election in a particular constituency but in reality and in consonance with section 221 of the constitution, it is his party that has won the election.

I mentioned earlier that PDP did not provide cogent and verifiable reason for the attempt to substitute Amaechi with Omehia. Not having done so, Amaechi who had acquired a vested right by his victory at the primaries and the submission of his name to INEC was never removed as PDP's candidate. If the law prescribes a method by which an act could be validly done, and such method is not followed, it means that act could not be accomplished. What PDP did was merely a purported attempt to effect a change of candidates. But as it did not comply with the only method laid down by law to effect the change, the consequence in law is that the said change was never effected. In the eyes of the law, Amaechi's name earlier sent to INEC was never removed or withdrawn.

In his argument in the brief filed for PDP, J.K. Gadzama, SAN., senior counsel argued that Amaechi who had not contested the election could not be declared the winner. He stated that such a declara-

tion would amount to a negation of democratic practice. With respect to counsel, I think he missed the central issue which is that it was in fact Amaechi and not Omehia who contested the election. Omehia remained no more than a pretender to the office. The one unchanging feature is that PDP was the sponsoring party.

As for the argument that it is a negation of democracy to declare Amaechi the winner, it must be borne in mind that this suit was brought to court as an intra-party dispute. At the time it was brought, the question concerning which party or candidate would win the Governorship election in Rivers State was irrelevant and not an issue. It simply had to do with the question which candidate would run for PDP. I ought not allow my approach to this case to be influenced by a consideration of the fact that PDP eventually won the election. Even if Omehia had lost the election, this court would still be entitled to declare that it was Amaechi and not Omehia who was PDP's candidate for the election. ***The argument that a new election ought to be ordered, overlooks the fact that this was not an election petition appeal before this court but rather an appeal on a simple dispute between two members of the same party. If this court falls into the trap of ordering a new election, a dangerous precedent would have been created that whenever a candidate is improperly substituted by a political party, the court must order a fresh election even if the candidate put up by the party does not win the election. The court must shut its mind to the fact that a party wins or loses the election. The duty of the court is to answer the question which of two contending candidates was the validly nominated candidate for the election. It is a purely an irrelevant matter whether the candidate in the election who was improperly allowed to contest wins or loses. The candidate that wins the case on the judgment of the court simply steps into the shoes of his invalidly nominated opponent whether as loser or winner.***

In any case section 147 of the Electoral Act, 2006 provides:

"147(1) Subject to subsection (2) of this Section, if the Tribunal or the Court as the case may be, determines that a candidate who was returned as elected was not validly elected on any ground, the Tribunal or the Court shall nullify the election.

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

(3) *Subject to the provision of subsection (2) of Section 149 of this Act, on the motion of a respondent in an election petition, the Election Tribunal or the Court, as the case may be, may strike out an election petition on the ground that it is not in accordance with the provisions of this Part of this Act, or the provision of First Schedule of this Act."*

And Paragraph 27 of the First Schedule to the Electoral Act 2006 also Provides:

"27(1) At the conclusion of the hearing, the Tribunal shall determine whether a person whose election or return is complained of or any other person, and that person, was validly returned or elected, or whether the election was void, and shall certify the determination to the Resident Electoral Commissioner or the Commission.

(2) If the Tribunal or Court has determined that the election is invalid, then, subject to Section 147 of this Act, where there is an appeal and the appeal fails, a new election shall be held by the Commission.

(3) Where a new election is to be held under the provisions of this paragraph, the Commission shall appoint a date for the election which shall not be later than 3 months from the date of the determination."

The combined effect of section 147 and paragraph 27 above is that this court has no jurisdiction to nullify an election and order a fresh one. All that I can do it to declare whether or not Amaechi was the candidate validly nominated and to grant him the reliefs which on the evidence he is entitled to. The jurisdiction to declare the election invalid is vested in an election tribunal.

It has been argued that this court has no jurisdiction to entertain this appeal. I think that such argument is an attempt to 'kill' Amaechi's case. Sections 144 and 145 of the Electoral Act 2006 pro-

vide:

"144(1) An election petition may be presented by one or more of the following persons:

(a) a candidate in an election;

(b) a political party which participated in the election

(2) The person whose election is complained of, is in this Act, referred to as the Respondent, but if the petitioner 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 provided that where such officer or person is shown to have acted as an agent of the Commission, his non-joinder as aforesaid will not on its own operate to void the petition if the Commission is made a party."

"145(1) An election may be questioned on any of the following grounds,

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

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

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

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

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

It is apparent that based on the above sections, Amaechi would have been unable to have a platform upon which to make a case at the election tribunal. The nearest he could come to securing a platform before an election tribunal would have been under section 145(d) above. But his case would still have come to grief because that provision does not cover intra party dispute as in the instant case.

Before I close this judgment, it is important that I discuss briefly the approach of the respondents to this case. The political parties in

Nigeria are the creation of the Constitution. They therefore have an important stake in flying high and loftily the banner of the rule of law. In this case the PDP did not live up to that standard. It did everything possible to subvert the rule of law, frustrate Amaechi and hold the court before the general public as supine and irrelevant. Sadly INEC and Omehia also did the same. I am not complaining about the fact that PDP had followed a wrong approach to substitute one candidate for another. That may well be put down to a honest mistake as to the approach to be followed in doing so.

When however, the court below and this court gave the judgment in the Araraume case, whatever uncertainties there might have been, in relation to the interpretation of section 34 of the Electoral Act were removed. This is the more so when parties to the case had given an indication to the court below to abide with the judgment of this Court in the Araraume case. The said judgment was given on 5/04/2007 when the elections were still 9 days away. But PDP on 10/04/2007 put out a publication exhibit 'F', expelling Araraume and Amaechi from PDP. At the time of the expulsion, Araraume had shortly been declared by this court to be the validly nominated candidate of the PDP. Amaechi's appeal was still pending before the court below. In a part of the publication PDP said:

"The National Working Committee also considered the cases and reports brought against Senator Ifeanyi Araraume (Imo State) and Hon. Rotimi Amaechi (Rivers) from the State Chapters and proceeded to expel both of them from the PDP for gross indiscipline and wanton violation of the PDP Constitution. Consequently, the PDP has no gubernatorial candidate in Imo State for the elections of 14th April 2007."

(underlining mine)

In relation to Araraume, the message sent to the general public translated into saying that the PDP was not bound to obey the judgment of the court. The PDP by publicly announcing that it had no candidate for Imo State Governorship election, clearly destroyed the efficacy of the judgment in favour of Araraume given by this Court in order to destroy his chances at the election. In relation to the Amaechi's case., the message to the public was that whatever judgment the court gave was irrelevant. Worse still, the PDP went

before the court below to ask that the appeal in Amaechi's case be struck out on the ground that with his expulsion, the court had lost the jurisdiction to hear the case. Let me say for the avoidance of doubt that the expulsion of Amaechi from the PDP at the time when his appeal was pending before the court below was unlawful and amounts to a calculated attempt to undermine judicial authority. B

Now in A.G. Vs. Butterworth (1962) 3 ALL ER 326 at 329 lord Denning MR., observed:

"I have no hesitation in declaring that the victimization of a witness is contempt whether done whilst the proceedings are still pending or after they have finished, such a contempt can be punished by a court itself before which he has given evidence, and so that those who think of doing such things may know where they stand, I would add that, if the witness has been daminified by it, he may have redress in a civil court for damages." C D

In Re Ludlow Charities Lochmere Charllori's case (1837) 40 ER 661 at 670 Lord Coltenham, (Lord Chancellor) observed:

"All these authorities tend to the same point; they show that it is immaterial what measures are adopted, if the object is to taint the source of justice and to obtain a result of legal proceedings different from what would follow in the ordinary course; it is contempt of the highest order although such a foolish attempt as this cannot be supposed to have any effect, it is obvious that if such cases" E

The reliance on the plainly contemptuous conduct of PDP in expelling Amaechi as a basis to deny the court below the jurisdiction to hear his appeal is particularly alarming. In Re Septimis Parsonage & Co 1901 Chancery Division 424 at 430 Wright J alluding to such occurrence said: F

"Where there is a real interference with the jurisdiction of the court, which is a better phrase than contempt of Court, the court has no option but to act, however unwilling it is to deal with matters affecting the liberty of the subject" G

Remarkably and perhaps unexpectedly, the court below did not react as it should in punishing this behaviour of the PDP More shockingly the court below struck out Amaechi's appeal on the ground that he had been expelled from PDP during the pendency of his appeal. And when this court, following an appeal by Amaechi against H

the order striking out his appeal, ordered that the appeal be heard expeditiously, the court below at the behest of Omehia's counsel, supported by INEC's and PDP's counsel, concluded that the judgment of this court which ordered that the appeal be heard expeditiously needed further clarification before it could be obeyed.

B These occurrences needlessly brought the administration of justice to disrepute and I am greatly alarmed by these developments. The result of this calculated and improper behaviour was that the respondents ensured that the elections for the Governorship office in
C Rivers State were held and Omehia sworn in as Governor before Amaechi's appeal was heard. Before us in this appeal, the respondents who had improperly prevented the expeditious hearing of the appeal, argued that this court has no jurisdiction on the ground that elections had been held and further that because Omehia has been
D sworn in as Governor of Rivers State, he now enjoys immunity from civil suits. In other words they relied on their own wrong doing to oust the jurisdiction of this court.

This court and indeed all courts in Nigeria have a duty which flows from a power granted by the constitution of Nigeria to ensure that citizens of Nigeria, high and low get the justice which their case deserves. The powers of the court are derived from the constitution not at the sufferance or generosity of any other arm of the Government of Nigeria. The judiciary like all citizens of this Country cannot be a passive on-looker when any person attempts to subvert the administration of justice and will not hesitate to use the powers available to it to do justice in the cases before it.

Section 6(6) (a) of the 1999 Constitution provides:
G ***"(6) The judicial powers vested in accordance with the foregoing provisions of this section -***
(a) shall extend, notwithstanding anything contrary in this Constitution to all inherent powers and sanctions of a court of law."

H ***And Section 22 of the Supreme Court Act provides:***
"22. The Supreme Court may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in

the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Supreme Court thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Supreme Court as a court of first instance and may rehear the case in whole or in part or may remit it to the court below for the purpose of such rehearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court."

In view of the above provisions, there can be no doubt that there is a plenitude of power available to this Court to do which the justice of the case deserves. It enables a court to grant consequential reliefs in the interest of justice even where such have not been specifically claimed. Having held as I did that the name of Amaechi was not substituted as provided by law, the consequence is that he was the candidate of the PDP for whom the party campaigned in the April 2007 elections not Omehia and since PDP was declared to have won the said elections, Amaechi must be deemed the candidate that won the election for the PDP. In the eyes of the law, Omehia was never a candidate in the election much less the winner. It is for this reason that I on 25/10/2007 allowed Amaechi's appeal and dismissed the cross-appeals. I accordingly declared Amaechi the person entitled to be the Governor of Rivers State. I did not nullify the election of 14/04/2007 as I never had cause to do so for the reasons earlier given in this judgment.

I make no order as to costs.

KATSINA-ALU JSC

On the 20th October, 2007 I gave judgment in this appeal and indicated that I would give my reasons today, and I now proceed to

do so.

The Appellant herein Rt. Hon. Chibuike Rotimi Amaechi was Plaintiff in the trial court. The Appellant emerged as the candidate of the Peoples Democratic Party (hereinafter referred to simply as "PDP") for Rivers State, at the Governorship Primaries conducted by the PDP. The result of the Primaries shows that the Appellant polled 6,527 votes out of a total of 6,575 votes. The second Respondent Celestine Omehia did not contest at the primaries.

Pursuant to the primaries, the PDP forwarded the Appellant's name to the Independent National Electoral Commission (hereinafter referred to as INEC) as the Governorship candidate for the State on 14 December 2006. INEC subsequently published the Appellant's name as PDP candidate for the State. Soon after, rumour became rife that the Appellant's name was about to be substituted. The Appellant went to court to stop PDP from substituting his name or disqualifying him except in accordance with the provision of the Electoral Act.

Subsequently, on the 2nd of February, 2007 the PDP sent the name of the 2nd Respondent Celestine Omehia to the INEC as its Gubernatorial Candidate in substitution for the Appellant. INEC effected the substitution. The reason for this substitution was that the name of the Appellant was submitted in error. The substitution was done during the pendency of the Appellant's suit.

In his amended Statement of Claim, the Appellant claimed the following declarations and an order of perpetual injunction:

i. A declaration that the option of changing or substituting a candidate whose name is already submitted to INEC by a political party is only available to a political party and/or the Independent National Electoral Commission (INEC) under the Electoral Act, 2006 only if the candidate is disqualified by a Court Order.

ii. A declaration that under Section 32(5) of the Electoral Act, 2006 it is only a Court of law, by an order that can disqualify a duly nominated candidate of a political party whose name and particulars have been published in accordance with Section 32(3) of the Electoral Act, 2006.

iii. A declaration that under the Electoral Act, 2006, Independent National Electoral Commission (INEC) has no power to screen,

verify or disqualify a candidate once the candidate's political party has done its own screening and submitted the name of the Plaintiff or any candidate to the Independent National Electoral Commission (INEC).

iv. A declaration that the only way Independent National Electoral Commission (INEC) can disqualify, change or substitute a duly nominated candidate of a political party is by Court Order. B

v. A declaration that under section 32(5) of the Electoral Act, 2006 it is only a Court of law, after a law suit, that a candidate can be disqualified and it is only after a candidate is disqualified by a Court order, that the Independent National Electoral Commission (INEC) can change or substitute a duly nominated candidate. C

vi. A declaration that there are no cogent and verifiable reasons for the Defendant to change the name of the Plaintiff with that of the 2nd defendant candidate of the People's Democratic Party (PDP) for the April, 13, 2007 Governorship Election in Rivers State. D

vii. A declaration that it is unconstitutional, illegal and unlawful for the 1st and 3rd Defendants to change the name of the Plaintiff with that of the 2nd Defendant as the Governorship candidate of the Peoples Democratic party (PDP) for Rivers State in the forthcoming Governorship Election in Rivers State, after the Plaintiff has been duly nominated and sponsored by the People's Democratic Party as its candidate and after the 1st Defendant has accepted the nomination and sponsorship of the Plaintiff and published the name and particulars of the Plaintiff in accordance with section 32(3) of the Electoral Act, 2006 the 3rd defendant having failed to give any cogent and verifiable reasons and there being no High Court Order disqualifying the Plaintiff. E F

viii. An order of perpetual injunction restraining the defendants jointly and severally by themselves, their agents, privies or assigns from changing or substituting the name of the plaintiff as the River State Peoples Democratic Party Governorship candidate for the April, 2007 Rivers State Governorship Election unless or until a court order is made disqualifying the plaintiff and or until cogent and verifiable reasons are given as required under section 34(2) of the Electoral Act, 2006. G H

The trial court found as a fact that 3rd respondent could by

cogent and verifiable reasons substitute the 2nd Respondent for the Appellant and the substitution was made within the 60 days stipulated in section 34(1) of the Electoral Act, 2006. Although the trial court found as a fact that the substitution was done within time and was in fact accepted by the INEC, it however set aside the substitution on the ground that it was done during the pendency of the suit.

The Appellant appealed to the Court of Appeal against the decision while the Respondents cross-appealed. When the appeal and cross-appeal came on the 4th of April, 2007 for hearing, the Court of Appeal on the prompting of counsel observed as follows at p. 373 of the Records:

"Court: It is the decision of this court and going by the doctrine of stare decisis- judicial precedent that not wait for the judgment of the Supreme Court on Section 34 of the Electoral Act - Since that decision shall be law and applicability shall be binding on the parties particularly political parties INEC. This court shall also base other decision on any appeal involving section 34 on the decision of the Supreme Court. This appeal shall be adjourned to the 11th of April 2007."

The decision of the Supreme Court in Ugwu v. Araraume was delivered on 5th April, 2007 affirming the decision of the Court of Appeal which had held that in view of section 34(1) and (2) of the Electoral Act, 2006 any party wishing to substitute a candidate must give cogent and verifiable reasons and that merely stating that a candidate's name was "submitted in error" as was done in Araraume's case would not meet the requirement of the law. Immediately this decision was given, the PDP expelled the Appellant from the party for daring to take it to court.

It would be recalled that the Court of Appeal indicated that it would await the decision of this court in Ugwu v. Araraume. Instead of allowing the appeal of the Appellant to be determined on the outcome of the decision of this court in Ugwu v. Araraume, the 2nd Respondent Celestine Omehia brought a motion for an order dismissing the appeal or otherwise striking out the appeal of the appellant on the ground that the appeal had been overtaken by the event of expulsion of the Appellant from the PDP. The motion was taken on 11th April 2007 and Ruling was reserved for 12th April, 2007.

On the same date 11th April 2007, the Federal Government declared 12th and 13th public holidays. It then became practically impossible to have a ruling until 16th day of April, 2007.

In the meantime election to the office of Governor had taken place on 14/4/07. On 16th day of April, 2007 even before the reserved ruling was read, the PDP made an oral application urging the Court of Appeal to strike out the appeal on the ground that election having taken place, the appeal of the Appellant had become academic. In its ruling the Court of Appeal held thus:

"..... in view of the reliefs being sought by the Appellant, this court has no jurisdiction to adjudicate upon the appeal. All the issues in the substantive appeal and the cross-appeals cease to be live and any consideration of them will not just amount to mere expression of opinion, a moot debate and academics which activities courts are precluded from engaging in, it will indeed be an exercise in futility, a further waste of precious judicial time, energy and resources."

The Appellant appealed against the decision in SC.74/07 to this court upon a number of grounds.

This matter has come up for hearing in this court for the third time. It first came up as SC.74/07 wherein this court allowed the appeal of the Appellant Rt. Hon. Rotimi Chibuike Amaechi and ordered an expeditious hearing of the appeal and the cross-appeal before the Court of Appeal.

Rather than hear the appeal as directed by this Court, the Court of Appeal stayed further proceedings before it. The Appellant appealed to this Court in SC. 126/07. This Court re-stated its order that the appeal before the Court of Appeal be heard expeditiously. The appeal was heard and judgment delivered on 20 July 2007. The present appeal and cross-appeals are against that decision.

The main issue in this appeal falls within a narrow compass. The issue is whether the instant case is similar to the case of Ugwu v. Araraume (2007)12 NWLR (Pt. 1048) 367 decided by this Court and if so whether the same principle applies. Put differently: is the Court of Appeal bound by the decision of this Court in the case of Ugwu v. Araraume (supra)?

The simple issue decided in that case is that a political party wishing to substitute a candidate must within 60 days give cogent

and verifiable reasons to INEC for the substitution sought. In Ugwu v. Araraume (supra), this court decided that to offer the reason framed as "error" for a change of candidate is not in compliance with section 34(2) of the Electoral Act, 2006 which provides that:

B *"1. A political party intending to change any of its candidates for any election shall inform the Commission of such change in writing not later than 60 days to the election.*

2. Any application made pursuant to subsection (1) of this section shall give cogent and verifiable reasons .."

C In the present case, the reason relied upon by the 3rd respondent in substituting the Appellant with the 2nd respondent is the word "error" without more.

It is pertinent to relate here what transpired at the Court of Appeal when this appeal came up for hearing by that court. On that day i.e. 4th April, 2007, the Court of Appeal in adjourning the matter stated thus:

E *"It is the decision of the court and going by the doctrine of stare decisis-judicial precedent that not (sic) wait for the judgment of the Supreme Court on section 34 of the Electoral Act. Since that decision shall be law and applicability shall be binding on the parties INEC. This court shall also base their (sic) decision on any appeal involving section 34 on the decision of the Supreme Court. This appeal shall be adjourned to the 11th April, 2007."*

F Essentially, the Court of Appeal was saying that this case and Araraume case are similar and the same principle applies. I agree entirely.

G Unfortunately, when this court gave its decision in Ugwu v. Araraume (supra), the Court of Appeal failed to proceed and enter judgment for the Appellant. Sadly, that court began to dance to pedestrian tunes totally irrelevant to the determination of the Appellant's case. I will explain.

H The case of the Appellant rested on the decision of this court that to offer the reason framed as "error" for a change of candidate is not in compliance with section 34 of the Electoral Act, 2006. This is so because the same reason given and relied upon by the 3rd respondent in substituting the Appellant with the 2nd respondent is the word "error" without more. Under the doctrine of stare decisis the

Court of Appeal was bound by the decision of this court. It was bound to apply the decision of this court moreso when that court adjourned the hearing of the appeal to abide the decision of this court. The Court of Appeal had no option but to enter judgment in favour of the Appellant on 11th April, 2007 the date to which the appeal was adjourned. B

The Court of Appeal regrettably busied itself with irrelevant issues, such as the EFCC indictment of the Appellant and section 308 of the 1999 Constitution. On these issues, I make the following observations: C

INDICTMENT BY EFCC

The 3rd respondent's letter to the 1st respondent applying to substitute the Appellant with the 2nd respondent was dated 2 February 2007. The Administrative Panel of Inquiry did not start sitting until 9 February 2007. The question is: How could INEC have acted D on the supposed panel report when the panel had not even started sitting as at the time of the Appellant's substitution?

The EFCC's alleged list of indicted persons, the Appellant included, was published on 22 February 2007, twenty clear days after the Appellant had been substituted. Again the question is: How could INEC have acted on a list that was not published as at the time of the Appellant's substitution? It is to be observed that both the alleged EFCC report and the Government White Paper were not before the Court of Appeal. So, what informed the Court of Appeal's decision F that the Appellant was indicted. It is a matter of great concern. I say no more except to hold that there was no indictment known to law against the Appellant. He was not charged before any court. See the decision of this court in SC.69/2007. AC & Alhaji Atiku Abubakar v. Independent National Electoral Commission (INEC) delivered on 29 G June, 2007. In that case this court had this to say:

"It has been argued for the Defendant that its power to disqualify any candidate in the 2007 general elections is derived from section 137(1) of the constitution which I have already reproduced. The plaintiffs contend otherwise. I have read that provision over and over again and I must say that there is no mention of the defendant in the provision except (j) where the candidate has presented a forged certificate to the Independent National Electoral Commission. The H

defendant, I hold, in the circumstances, cannot claim that the power to disqualify any candidate, the 2nd plaintiff inclusive, is conferred on it by section 137(1). I am also unable to find anything in the provision in the constitution that confers the power to disqualify candidates on the defendant either expressly or by necessary implication.

It was also contended for the defendant that the ground of disqualification in section 137(l)(i) is self-executing. I am not impressed by this contention. I think a dispassionate reading of the provision, will reveal that it is not self-executing. To invoke against any candidate the disqualification therein provided would require an inquiry as to whether the tribunal or administrative panel that made the indictment is of the nature or kind contemplated by section 137(i), read together with other relevant provisions of the Constitution in particular section 36(i), which provides that "in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality" as well as the provision in sub-section (5) of section 36 that "every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty." The disqualification in section 137(l)(i) clearly involves a deprivation of right and a presumption of guilt for embezzlement or fraud in derogation of the safeguards in section 36(1) and (5) of the Constitution. The trial and conviction by a court is the only constitutionally permitted way to prove guilt and therefore the only ground for the imposition of criminal punishment or penalty for the criminal offences of embezzlement or fraud solely on the basis of an indictment for these offences by an administrative panel of inquiry implies a presumption of guilt, contrary to section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999. I say again that conviction for offences and imposition of penalties and punishments are matters appertaining exclusively to judicial power: see *Sokefun v. Akinyemi* (1981) 1 NCLR 755; *Garba v. University of Maiduguri* (1986) 1 NWLR (Pt. 18) 550.

An indictment is no more than an accusation. In *Sokefun v.*

Akinyemi (supra) this court per Fatayi Williams CJN said at page 146 as follows:

"It seems to me that once a person is accused of a criminal offence, he must be tried in a court of law where the complaints of his accusers can be ventilated in public and where he would be sure of getting a fair hearing No other Tribunal, investigating Panel or Committee If regulations such as those under attack in this appeal were valid, the judicial power could be wholly absorbed by the Commission (one of the organs of the Executive branch of the State Government) and taken out of the hands of the magistrates and judges If judicial power will certainly be eroded The jurisdiction and authority of the courts of this country cannot be usurped by either the Executive or the Legislative branch of the Federal or State Government under any guise or pretext whatsoever."

There is clearly no evidence that the Appellant had been found guilty of any criminal offence by a court of law justifying his exclusion from the election. I am troubled by the fact that the Court of Appeal behaved as if it was not bound by the decisions of this court. It proceeded non-chalantly and came to the conclusion that the Appellant was indicted by the EFCC.

SECTION 308

The claim of the respondents that section 308 inures to the benefit of the 2nd respondent has no merit whatsoever. This is so because the wrong upon which the Appellant based his claim had been in existence before the election. His case was clearly a pre-election matter. It is also pertinent to observe at this stage that at the time the 2nd respondent contested the election, his substitution for the Appellant had been voided by the Federal High Court. That decision was valid and subsisting until it was set aside on appeal. At the time the election was held, that decision was not set aside and therefore subsisting. It goes without any argument that the 2nd respondent's participation in the election was clearly an illegal act. In my judgment the 2nd respondent cannot be heard to contend that he wants to enjoy the benefit of his illegality.

The Appellant, it must be clearly seen, was not substituted in accordance with section 34 (2) of the Electoral Act, 2006. He therefore remained the 3rd respondent's nominated candidate for the Rivers

State Governorship election held on 14 April, 2007. In the eyes of the law, the Appellant's name earlier sent to INEC was never withdrawn. Having come to this conclusion, what remains is the type of order to be made. It must be borne in mind that this case is a pre-election matter involving an intra-party dispute.

B A petition as to who is validly elected as Governor can only arise after an election, and in this case, as I have already pointed out, the Appellant's case arose before the election of 14 April 2007 involving an intra-party dispute and consequently the Appellant could
C not go before an election tribunal to seek an order of re-election. That apart, I think it would be absurd to cancel an entire election conducted between several parties for the sole reason that there was crisis within the winning party.

Additionally this court (i.e. Supreme Court) has no jurisdiction
D to either cancel an election or order fresh elections since it is not an Election Petition Tribunal as established under sections 285 and 246 of the 1999 Constitution of the Federal Republic of Nigeria. It is clear from the provisions of these sections of the 1999 Constitution that it is only an Election Petition Tribunal as well as the Court of Appeal
E that have jurisdiction to hear and determine election petitions. It is within their exclusive authority and power to order for cancellation, annulment, or fresh elections as the case may be.

This case is not an election matter. It is clearly a pre-election
F matter. The court was called upon to decide who of the two candidates was PDP's nominated candidate for the April election. As I have already held it is the Appellant that was the PDP's candidate for the Governorship election. As for the order that I ought to make, I must say that this court has wide jurisdiction to make consequential orders
G and to grant reliefs which the circumstances and justice of a case dictate. On the principle of *Ubi jus ibi remedium* if the court is satisfied that a person has suffered a legal injury, it will surely provide a remedy irrespective of the fact that no remedy is provided either at common law or by statute. In *Oyekanmi v. NEPA* (2000) 15 NWLR
H (Pt.690)414 this Court per Onu JSC said at p.444:

"On the principle of Ubi jus Ibi Remedium; in Bello and 13 Others v. A.G. Oyo State (1986)5 NWLR (Pt 45) 828 at 890 this court per Oputa, JSC held that if from the facts available before the

court it is satisfied:

(i) that the defendant is under a duty to the plaintiff;
 (ii) that there was a breach of that duty;
 (iii) that the defendant suffered legal injury;
 (iv) that the injury was not too remote, it will surely provide a
 remedy i.e. create one irrespective of the fact that no remedy is provided
 either at common law or by statute."

In this case, it is an incontestable fact that the 3rd respondent did not comply with section 34(2) of the Electoral Act, 2006. The law is an equal dispenser of justice and leaves no one without a remedy for his right.

It was for the above reasons and for the comprehensive reasons given by my learned brother Oguntade JSC., that I allowed the appeal of Rt. Hon. Rotimi Chibuike Amaechi and dismissed the cross-appsals and ordered that he be sworn in forthwith as the Governor of Rivers State on 25 October, 2007.

MUSDAPHER JSC

On the 25th day of October, 2007, this appeal and the two cross-appsals were heard and determined by this court I allowed the appeal and dismissed the two cross - appsals on that date, I indicated then that I would give the reasons for my judgment today, the 18/1/2008. I proceed to do so now I have seen before now, the Reasons for Judgment just delivered by my learned brother, Oguntade JSC. I entirely agree with him and only want to express my opinion on some of the issues if only for the sake of emphasis.

In the aforesaid Reasons for Judgment, his Lordship has exhaustively and meticulously recounted the relevant facts and I do not need to repeat them here except where I find it necessary in order to make my opinions clearer.

The court below in its judgment delivered the 20/7/2007, the subject matter of this appeal and cross appsals reached the following conclusions;

1. That the facts in the instant case were distinguishable from those in Ugwu VS. Araraume 120071 6 SC (Part) 88 in this Amaechi's indictment was pleaded by INEC in paragraph 7 of its Statement of

Defence.

2. That Amaechi's name was properly substituted with that of Omehia

3. That the Cross-Appeal was partially meritorious.

B Dissatisfied -with the judgment of the court below, the appellant herein brought this appeal while the 2nd and 3rd Respondents also filed cross-appeal.

Now, the issues formulated for the determination of the main appeal read this:-

C "1. Whether the Court of Appeal was not in error in allowing fresh evidence on appeal when no exceptional circumstance was shown to warrant such admission.

D 2. Whether having regard to the undertaking before the court, the court below ought not have followed the decision of the Supreme Court in *Ugwu vs. Araraume* (supra)?

E 3. Whether there exists cogent and verifiable reasons to warrant the substitution of the appellant's name with that of any other person in breach of Section 34 of the Electoral Act, 2006 and if not whether the purported substitution of the appellant's name is not null and void.

4. Whether INEC (1st Respondent) can rely on extraneous facts or any facts not presented by a political party seeking substitution to verify reasons given seeking substitution.

F 5. Whether there was in existence on indictment of the Appellant for same to be used as a basis to verify the reasons of error given by the 3rd respondent for seeking the substitution of the Appellant's name.

G 6. Whether having regard to the concept of *lis pendens* and the fact that at the material time of the election, appellant being the only lawful candidate of the PDP, he ought not be declared the winner of 14th April, 2007 gubernatorial elections in Rivers State."

H The first and second respondents more or less submitted the same issues for the determination of the appeal. The 2nd respondent however included issues which are not covered by the appellant's issues. The three extra issues read:-

"(a) Granted that this Honourable Court has affirmed the justiciability of Section 34 of the Electoral Act in *Ugwu vs. Araraume*

(supra), which the court below has followed in this instant appeal, assuming (but not conceding that there has been a breach of section 34 of the Electoral Act) are there limit to remedies (if any) available to the Appellant ?

(b) Whether the entire appeal is not academic or overtaken by events as a result of the combination of events, to wit, the unchallenged dismissal of the appellant from the fold of the PDP, the fact that the elections in issue have been held in which several other political parties participated, the declaration of the 2nd respondent as winner of the said governorship election and his being sworn in, the existence of (he appellant's election petition and other petitions in the Rivers State Governorship Election Tribunal?

(c) Whether the appellant's exercise of his access to court in the challenge of the alleged breaches of perceived rights in any derogates from the constitutional powers given to 1st respondent to conduct elections under the 1999 constitution and Electoral Act and if so whether the Supreme Court can at this point in time venture into a declaration of who is the winner of the governorship election in Rivers State?"

As mentioned above, the 2nd respondent Omehia filed a cross-Appeal. He submitted the following three issues for the determination of the Cross appeal:-

"1. Whether the Court of Appeal was correct when it held that the appeal in issue did not abate upon the 2nd respondent being sworn in as the Governor of Rivers State whereupon he acquires Constitutional immunity pursuant to Section 308 of the 1999 Constitution.

2. Whether the Court of Appeal was correct in law after finding that the entire gamut of appellant's dispute arose from nomination and sponsorship (matter within the domestic sphere of the 3rd respondent, it did not rule the entire dispute non-Justiciable.

3. Whether the proceedings were void Ab Initio on the basis that evidence Viva Voce was not taken in a suit Commenced by writ of summons/statement of claim in respect of reliefs that were all declaratory in nature?"

Now in respect of its cross appeal the third respondent has formulated and submitted the following issue for the determination

of the cross appeal:-

"Whether the court below was right in law to hold that the appeal before it was an election related matter and having so held went further to hold that the 2nd respondent was not entitled to enjoy the benefits of the immunity conferred on him by virtue of section 308 of the constitution of the Federal Republic of Nigeria 1999 having taken the oath of office and the oath of allegiance as the Governor of Rivers State and pleading reliance on the Cases *Ad vs. Fayose* (2004) 8 NWLR (Pt. 876) 639 and *Obih vs. Mbakwe* (2004) 1 SCNLR 192 to arrive at this conclusion"

In my view the crucial and fundamental issue to be decided in these appeals is whether or not the two courts below were correct in their conclusions that the reasons given by the 3rd respondent herein PDP for substituting the appellant with the 2nd respondent satisfied the requirements of section 34 of the Electoral Act, 2006. The said section provides:-

"34(1) A political party intending to change any of its candidates for any election shall inform the Commission of such change in writing not later than 60 days to the election.

(2) Any application made pursuant to subsection (1) of this section shall give cogent and verifiable reasons.

(3) Except in the case of death there shall be no substitution or replacement of any candidate whatsoever after the date referred to in subsection (1) of this section."

Now, there is no dispute whatever and it is common ground that the appellant amongst other candidates vied for the primary gubernatorial elections held and conducted by the 3rd respondent P.D.P. It is not also disputed that he overwhelmingly won the primary election. There is also no dispute whatsoever that on the 14/12/2006, the PDP sent the name of the appellant as its candidate for the scheduled gubernatorial election to the 1st respondent, INEC. It is also not disputed that INEC verified and published the name of the appellant as the candidate of the PDP in the scheduled gubernatorial elections in the Rivers State. However on the 2nd day of February 2007, the 3rd respondent, PDP addressed a letter Exhibit 1) to the 1st respondent INEC the letter was to the effect that:

"Barrister Celestine Ngozichim Omehia substitutes Lion. Rotimi

Amaechi whose name was submitted in error."

It is not also in dispute that the 2nd respondent did not even take part nor submit himself as a candidate for the primary gubernatorial elections held by the 3rd respondent, P.D.P.

The court below in the lead judgment at page 649 of the printed record stated thus:-

"I have carefully considered the submission of the learned senior counsel for the parties. I have no doubt in my mind that the main grouse of the appellant which is the bone of contention in this appeal is the interpretation of section 34(1) and (2) as it is applicable to the substitution of the appellant in this case with the 2nd Respondent/Cross-appellant based on Exhibit D a letter dated 2nd February, 2007 acted upon by the 1st Respondent Cross-appellant

" Now, this court in the Araraume's ease supra considered and decided that the reason of "error" did not satisfy the requirements of section 34 of the Electoral Act, 2006. NIKI TOBI JSC in that ease at page 134 observed:-

"..... The subsection provides that there must be a cogent and verifiable reasons for the substitution on the part of the 3rd respondent. This places a burden on the 3rd respondent not only to provide reasons but such reasons must be cogent and verifiable"

I note that all the justices of this Court unanimously agreed, that on a true construction of section 34 of Electoral Act, 2006 , that no reason was given for the substitution "not to talk of the cogency and verifiability of the reasons". It was also unanimously agreed, that a political party must ensure intra party democracy and abide by the provisions of its constitution on the emergence of its candidate after primary elections. Oguntade JSC put it thus:-

"..... If a political party was not bound by the provisions of its constitution concerning party primaries, why should there be the need to send members of the parties aspiring to be candidates for electoral offices on a wild goose chase upon which they dissipate their resources and waste lime."

Democracy's world is rich and multifaceted. Democracy should not be viewed from a one dimensional vantage point. Democracy is

multidimensional. It is based both on the centrality of laws and democratic values, and, at their center, human rights. Indeed democracy is based on every individual's enjoyment of rights of which even the majority cannot deny him simply because the power of the majority is in its hands. Roland Dworkin in *A Bill of Rights For Britain 1990*, Pages 35 - 36 stated.

"..... true democracy is not just statistical democracy, in which anything, a majority or plurality wants is legitimate for that reason, but communal democracy, in which majority decision is legitimate only when it is a majority decision within a community of equals. That means not only that every one must be allowed to participate in politics as an equal through the vote and through freedom of speech and protest, but that political decisions must treat every one with equal concern and respect, that each individual person must be guaranteed fundamental civil and political rights no combination of other citizens can take away, no matter how numerous they are or how much they despise his or her race or morals or way of life."

I entirely agree, that the decision of the court in *Dalhatu v. Turaki* [2003] 7 SC 1 and *Onuoha v. R.B.K. Okafor* (1983) SCNLR 244 could no longer apply. In the *Onuoha v. Okafor* case, it was decided that upon the construction of the Electoral Act 1982, (1) the right freely to choose a candidate it will sponsor for election to any elective office is reserved to the political party to do as it pleases (2) the exercise of this right of a political party is a democratic affair over which (he court has no jurisdiction and (3) the question of the candidate a political party will sponsor is more in the nature of a political question which the courts are not qualified to deliberate upon and answer. Consequently, the question is not justiciable in a court of law. Indeed in the *Dalhatu v. Turaki* case supra at 347 of the report. Tobi JSC stated:-

"From the decision of this court in *Onuoha*, it is clear that the right to sponsor a candidate by a party is not a legal right but a domestic right of the party which cannot be questioned in a court of law. The political organization has a discretion in the matter; a discretion which is-unbelted in the sense that a court of law has no jurisdiction to question its exercise one way or the other. The moment a court goes into such a domestic affair of a party, it has involved itself

in nominating a particular candidate, a jurisdiction which a court cannot exercise."

As shown above, the decision was based on the provisions of the Electoral Act 1982 which did not contain the provisions as contained under Section 34 of the Electoral Act, 2006. It is very clear that the cases of Dalhatu v Turaki and Onuoha v. Okafor supra are no longer applicable. Under the provisions of Section 34 of the Electoral Act 2006, a political party has no longer the right to substitute a candidate to an elective office without fulfilling certain conditions. The right has been curtailed by time and reason. In the instant case, which is on all fours with the Araraume's case, the 3rd respondent has no right to substitute the appellant with the 2nd respondent since the reason of "error" given did not satisfy and could not satisfy the provisions of section 34 of the Electoral Act 2006.

When this appeal came before the lower court on the 4/4/2007, learned counsel for the respondents' requested that since the case of Ugwu vs. Araraume would come up for hearing on the 5th of April 2007 before the Supreme Court and bearing in mind the identical nature of the facts of the Araraume and this case the lower court ruled at page 373 -374 of the printed record thus:-

"Court: It is the decision of this court and going by the doctrine of stare decisions - judicial precedent - that not to wait for the Judgment of the Supreme Court on Section 34 of the Electoral Act - since that decision shall be law and applicability shall be binding on the parties particularly political parties INEC. This Court shall also base other decision on any appeal involving section 34 on the decision of the Supreme Court. This appeal shall be adjourned to the 11th day of April, 2007."

One would have thought that when the Supreme Court delivered its decision on the Araraume's Case the Court of Appeal would simply apply the decision to the identical facts in the instant case. Having decided to follow the decision in the Araraume's case on the 4/4/2007 as reproduced above, the Court of Appeal had no jurisdiction for it to turn, as it were, summersault and refuse to follow the guiding principles it set itself to follow. See Oyeyemi v. Irowole Local Government (1993) 1 NWLR (pt 270) 462.

The reasons given by the court below in not following the de-

cision of this court in the Araraume case are in any event untenable. The facts are identical indeed the instant case is stronger than that of Araraume, whereas Engineer Ugwu contested the primary gubernatorial elections, Omehia, the 2nd respondent herein was not a candidate at PDP primary elections for the gubernatorial elections in Rivers State.

The PDP as a party under the provisions of Section 34 of the [Electoral Act would have no power or justifiable reason to simply drop the appellant and pick the 2nd respondent as its candidate for the gubernatorial elections in the Rivers State of Nigeria .I accordingly hold that the substitution of the appellant for the 2nd respondent as the candidate of the PDP for the gubernatorial elections held in the Rivers State in 14/4/2007 was not done in accordance with the requirement of section 34 of the Electoral Act, 2006 and was therefore irregular null and void. I accordingly set aside the decision of the Court of Appeal on this issue.

On the issue of the cross - appeals specifically with reference to section 308 of the 1999 Constitution. I agree with the court below when it stated:-

"The cases cited by the Learned Senior Counsel for the 2nd respondent are easily distinguishable from the case in hand. For the case of Attorney-General Of The Federation v. Alhaji Atuku Abubakar & I other, affects a Criminal proceeding, Global Communications v. Donald Duke affects a civil proceeding in which the governor sued another person and the court held that the immunity granted by section 308 does not include his ability to sue other people. Ummanah v. Atta which affects an election matter is not on all fours with this case in hand. I hold that the provision of section 308 is only applicable to ordinary civil proceedings and criminal proceedings and not in election related matters.

In this case the subject matter queries the foundation of his appointment as governor. If the governor is said to be immune under section 308 of the Constitution the resultant effect is that once a person is declared and sworn in as governor - elect that ends the matter and no one can complain or take any legal action even if the person conducted gross election malpractices. In the case of AD v. Fayose 2004 8 NWLR (Pt 876) 639 at 653 D.G. It was observed that

such decision will encourage gross wrongful and illegal activities among the parties contesting for the position and negative the spirit and necessary intendment of the Constitution and hence destroy democracy. On that score I hold that an in election related matter where the status of the 2nd respondent as governor is being challenged, the immunity conferred on him by the Constitution is equally in question. The 2nd respondent cross-appellant does not enjoy any immunity from being sued in the suit. Obi v. Mbakwe 1984 1 SC NLR 192, Unongo v. Aku 1985 6 NCLR 262." B

I agree that the suit in this action is an election related matter C and even though it is not an election petition matter, yet it is a matter directly dealing with the process of becoming a governor. It is clearly a pre-election matter which arose before the election and clearly part of the processes of electing a governor. It is very clear to me that section 308 of the Constitution does not protect a governor from D legal proceedings in a matter of his election per se or in a matter connected with the election even when he as a contestant has been declared duly elected or returned as governor. Election petitions and election related proceedings are special proceedings divorced and separated from civil or criminal proceedings within the intendment E and context of section 308 of the Constitution. See Onitiri v. Benson 1960 5 FSC I, Oyeke v. Akinjide [1965] NMLR 381.

In the case of Obi v. Mbakwe supra at page 205. It was held:-

"It is the declared aim and purpose of the xxxx Constitution F that every state in the Federation shall have a Governor as Chief Executive who is democratically elected. It is also the declared purpose of the Constitution that the validity of the election [or the nomination and the entire electoral process as [mine] to the office shall be clear and transparent to all and if questioned the validity is to be G finally decided by the competent (Tribunal) The Constitution forbids the governance of the Federal Republic of Nigeria or any slate thereof by any person not validly elected,"

The processes leading to the election are not only justiciable at the instance of any party aggrieved in the process but the immunity H under section 308 of the Constitution cannot avail a governor since the immunity is not within the contemplation of such proceedings.

The other issue is that whether section 285(2) of the Constitu-

tion deprives this court and the other two lower courts the jurisdiction to entertain the dispute herein. This is clearly not an election petition within the meaning of section 285 of the Constitution. It is not a case dealing with the conduct of the election but it is a pre-election matter in which the ordinary courts of the land have an undoubted jurisdiction to adjudicate in pre- election matter or matters not connected with the conduct of the election. The suit herein is not affected by sections 198(2) and 285(2) of the Constitution. 1 accordingly dismisses the Cross - appeals as they are unmeritorious.

I now consider briefly the relief granted to the appellant. By his statement of Claim, the sum total of the reliefs sought by the appellant before the trial court was that he be pronounced as the PDP gubernatorial candidate for the election scheduled for April, 2007 and that both the 1st and 3rd respondents herein have no reason under the Electoral Act 2006 to substitute him for the 2nd respondent. It has now been decided by this Court that he was entitled to the relief he sought. Yet the 1st respondent proceeded to conduct the gubernatorial election before a decision was reached.

Now, in the reliefs sought by the appellant in his notice of appeal the appellant applied to this court for the following prayers amongst others:-

"A. An Order declaring that the alleged substitution of the plaintiff/appellant's name with that of the second respondent was unlawful, null and void.

B. An Order declaring that it was the plaintiff/ appellant who was 3rd defendant/respondent's candidate at the 14th of April, 2007 governorship election in Rivers State."

As shown above, the appellant has won his case and in my view he is entitled to the reliefs he sought in his Notice of Appeal. In the interest of justice and fair play, this court cannot shy away from doing substantial justice without any undue regard to technicalities. In my view, there is no doubt that it was the appellant and not the 2nd respondent who was the PDP candidate for the 2007 gubernatorial elections in the Rivers State. In matters of this nature, this court will not allow technicalities to prevent it from doing substantial justice see *Attorney-General of Bendel State v. Attorney General of The Federation & Others.* (1982) 3 NCLR (vol. 3) 1. *Patrick Magit v.*

University of Agriculture Makurdi & Others (2005) 24 NSCQR 143,

Again, having held that the appellant was in law the PDP candidate for the 2007 gubernatorial elections in Rivers State, this court has the duty being the final court of the land, to ensure that the determination of issues on appeal to it is reached on the merits of the question in controversy between the parties which resulted in the litigation. This court has very wide powers to do substantial justice without undue regard to technicalities. From the facts of this case, this court has the power and the duty to invoke section 22 of the Supreme Court Act 1990, even if no such relief was sought by the appellant to grant him such relief that will completely determine all the issues arising for enforcement of the judgment won by the appellant. See also Order 8 of the Supreme Court Rules particularly Rules 12(2) and 12(5) - See the case of CGC (Nig) Ltd v. Ogu (2005) FWLR (pt.261) 202, Adeleke v. Cole (1961) 1 All NLR 55; Ode V. The Diocese of Ibadan (1966) 1 ALL NLR 287, Obiyan v. Military Governor of Midwest (1972) 1 ALL NLR 422 Chief Ajagun.jeun v. Osho (1977) 5 SC 89. The real question in controversy in this appeal, in my view is, whether, the appellant was the lawful candidate for the PDP in the April 2007 gubernatorial elections or not.

The relief granted to the appellant even if not asked could under the circumstances of the facts of this case amount to a consequential relief. It is the law even where a person has not specifically asked for a relief from a court the court has the power to grant such a relief as a consequential relief. A consequential order must be one made giving effect to the judgment which it follows. It is not an order made subsequent to a judgment, which derails from the judgment or contains extraneous matters. It is settled law that court can order an injunction even where it is not specifically claimed but appears incidentally necessary to protect established rights. See Atolagbe v. Sharun (1985) 4 SC (Pt 1) 250, Okupe v. F.B.I.R. (1974) 1 NMLR 422, Liman v. Mohammed (1999) 9 NWLR (Pt 617) 116 in which ease at page 143, Achike JSC, stated on the issue whether the respondent in that case based on the facts was not entitled to any remedy:-

"The conclusion should not erroneously be taken to mean that this court does not frown on the diabolical dishonesty and fraud, as found by the trial court, perpetrated by the appellant on the unsus-

pecting respondent nor is it to be said that the position of the defrauded respondent though hapless is hopeless, I am clearly of the view, that quite on the contrary, the laws of this country are not bereft of remedy to meet such circumstances posed in this case where
 B *the appellant unabashedly engages in the unwholesome acts xxxxxx to the chagrin of innocent contracting party. Thank God the apex court in the land cannot remain emasculated to redress such over-reaching misconduct of the appellant, if the monumental decision of the Supreme Court in Bello Vs. A. G. Of Oyo State (1986) 5 NWLR*
 C *(Pt 45) 828 is anything to go by."*

Similarly under the undoubted facts of this case and the judgment arrived at in this case, this court must rise to the occasion and since the laws are not bereft of remedy to meet such circumstances to grant the relief sought by the appellant in his notice of appeal.

D One may perhaps ask, why do I not order that fresh elections be held with the appellant as the P.D.P candidate? My short answer to the question is that this court has no constitutional competence to order a fresh election. It must be understood, that this court was not
 E seized of this matter as an election petition, though admittedly an election related matter or a pre election matter. Section 285(2) of the Constitution established the Governorship and Legislative Houses Election Tribunals "which shall to the exclusion of any Court or Tribunal have original jurisdiction to hear and determine petition as to
 F whether any person has been validly elected to the office of the Governor or Deputy Governor or as a member of any legislative house. This jurisdiction clearly deals with the conduct of the elections on which a petition may be based as provided for under Electoral Act.

This jurisdiction is exclusive to the Tribunals established and is
 G not within the competence of the ordinary courts established under section 6 of the Constitution. In any event by section 246 (3) of Constitution, the Court of Appeal is the final adjudicator in appeals emanating from such tribunals established under section 285 of the
 H Constitution. So clearly, in my view, the Supreme Court would have no jurisdiction or competence to order a fresh election. To do so would have been unlawful for we could not dabble into the matter which was not before us, moreover the other parties who contested the election are not parties before us and that the conduct of the

election was not an issue before the Supreme Court. The only issue before this court was whether the appellant was the proper and lawful candidate of the P.D.P at the April gubernatorial elections for Rivers State and which this court duly decided. This is simply a dispute between two party members as to who between the two of them was the candidate for the party. It has nothing to do with the conduct of the election which issue is not within the competence and the jurisdiction of the Supreme Court. This court has no jurisdiction to nullify the elections held in April, as a matter of fact, there was no prayer to that effect.

Having held that the appellant was not legally substituted for the 2nd respondent, the appellant remained the candidate of the 3rd respondent in the elections. It is for these reasons and the Reasons For Judgment of my Lord Oguntade, JSC aforesaid, that I on the 25/10/2007, allowed the appellant's appeal and dismissed the cross-appeals. I accordingly declared the appellant the PDP candidate for the gubernatorial elections of Rivers State held in April 2007. I did not nullify the elections as I never had the cause to do so nor did I have the jurisdiction to do so.

MOHAMMED JSC

On Thursday 25th day of October, 2007, this appeal and the cross-appeals were heard by this court and in a unanimous decision delivered the same day, the Appellant's appeal was allowed and the judgment of the court below was set aside while the 2nd and 3rd Respondents Cross-Appeals were dismissed. On that day I pronounced my judgment allowing the Appeal and dismissing the Cross-Appeals and further stated that I shall give my reasons for doing so today. I now proceed to do so.

Before proceeding to give my reasons, I wish to state that I have had the privilege before today of reading the reasons, for judgment just given by my learned brother Oguntade, JSC. I entirely agree with the manner he handled and resolved the preliminary objections to the hearing of the appeal and the Cross-Appeals including all the issues arising in the matter as presented by the learned Senior Counsel for the Appellant and the Respondents respectively.

The dispute between the parties in this matter arose out of the preparations being made for the conduct of the Governorship election in the country then scheduled for 14/4/2007. As part of the preparation for that election, the Peoples Democratic Party (PDP) which is the 3rd Respondent ^ Cross-Appellant in this matter, conducted primary election in accordance with its own constitution and the electoral guidelines for the election in Rivers State with the aim of producing a candidate to contest with other candidates of other political parties the seat of the Governor of Rivers State. Rt. Hon. Chibuike Rotimi Amaechi, the Appellant in this matter, emerged the winner in the primary election scoring over whelming victory over the other contestants. Following this victory, the name of the Appellant was forwarded by the 3rd Respondent to the Independent National Electoral Commission (INEC), the 1st Respondent as its candidate to contest the Governorship election in Rivers State under the platform of the Peoples Democratic Party (PDP). In compliance with the requirement of the Electoral Act, 2006, the 1st Respondent, Independent National Electoral Commission (INEC), duly published the name and particulars of the Appellant along with the names and particulars of other candidates contesting the election in the constituency.

However, long after submitting the name of the Appellant to the 1st Respondent, the 3rd Respondent wrote another letter to the 1st Respondent forwarding the name of the 2nd Respondent Barrister Celestine Ngozichukwu Omehia who did not even participate in the party's primaries, as its candidate for the Governorship election in Rivers State, stating that the name of the Appellant earlier sent, was done in error. Following this development, the Appellant rushed to the Federal High Court, Abuja and took out a writ of summons on 26/1/2007, initially against the 1st Respondent but later by order of court, joined the 2nd and 3rd Respondents to the action as defendants and claimed the following reliefs:-

"(i) A declaration that the option of changing or substituting a candidate whose name is already submitted to INEC by a political party and/or the Independent National Electoral Commission (INEC) under the Electoral Act, 2006, only if the candidate is disqualified by a Court order.

(ii.) A declaration that under Section 32(5) of the Electoral Act, 2006 it is only a court of law, by an order that can disqualify a duly nominated candidate of a political party whose name and particulars have been published in accordance with Section 32(3) of the of the Electoral Act, 2006.

(iii) A declaration that under the Electoral Act, 2006, Independent National Electoral Commission (INEC) has no power to screen, verify or disqualify a candidate once the candidates political party has done its own screening and submitted the name of the Plaintiff or any candidate to the Independent National Electoral Commission (INEC). B

(iv) A Declaration that the only way Independent National Electoral Commission (INEC) can disqualify, change or substitute a duly nominated candidate of a political party is by Court Order.

(v) A declaration that under Section 32(5) of the Electoral Act, 2006, it is only a Court of law after a law suit, that a candidate can be (sic) disqualified and it is only after a candidate is disqualified by a court order, that the Independent National Electoral Commission (INEC) can change or substitute a duly nominated candidate. D

(vi) A declaration that there are no cogent and verifiable reasons for the Defendant to change the name of the plaintiff with that of the 2nd defendant candidate of the Peoples Democratic Party (PDP) for the April (sic) 13, 2007 Governorship Election in Rivers State. E

(vii) A declaration that it is unconstitutional, illegal and unlawful for the 1st and 3rd Defendants to change the name of the Plaintiff with that of the 2nd Defendant as the Governorship candidate of Peoples Democratic Party (PDP) for Rivers State in the forthcoming Governorship Election in Rivers State, after the Plaintiff has been duly nominated and sponsored by the Peoples Democratic Party as its candidate and after the 1st Defendant has accepted the nomination and sponsorship of the Plaintiff and published the name and particulars of the plaintiff in accordance with section 32(3) of the Electoral Act, 2006 the 3rd defendant having failed to give any cogent and verifiable reasons and there being no High Court Order disqualifying the Plaintiff. F

(viii) An order of perpetual injunction restraining the defendants jointly and severally by themselves, their agents, privies or as- H

signs from changing or substituting the name of the Plaintiff as the Rivers State Peoples Democratic Party Governorship candidate for the April, 2007 Rivers State Governorship Election unless and until a court order is made disqualifying the Plaintiff and or until cogent and verifiable reasons are given as required under Section 34(2) of the Electoral Act, 2006."

The trial court after hearing the parties and admitting in evidence various documents as Exhibits A, B, C, D, E and F, delivered its judgment on 15/3/2007. The relevant part of this judgment, as far as the appeal and the cross-appeals in this matter are concerned, reads:-

"The crux of the Plaintiffs case is that as at 2nd February, 2007, when this Exhibit D was written this case was subjudice and that even if the 2nd and 3rd Defendants were not parties in the suit then the 1st Defendant was and (sic) he was bound not to act on the said exhibit D so as to preserve the res of litigation.

Secondly, that the said exhibit D has not given any cogent and verifiable reason for the substitution and that two conditions go together and questioning what the particulars of the error are?

This really is the bone of contention. The Defendants have said that error means mistake and there cannot be any particulars of a mistake otherwise it would not be a mistake.

I have interpreted Section 34(1) and (2) of the Electoral Act above. I do not agree that error cannot have particulars. It must certainly can. But error is an objective which by itself is self explanatory. It connotes mistake.

The said exhibit D gives only a reason which ought to be verifiable. But as held in the in the case of Senator Ifeanyi Ararume Vs INEC & Ors unreported FHC/ABJ/CS/9/07 of 16th February, 2007, if the letter falls short of particulars of error it is the responsibility of Independent National Electoral Commission to ask for better particulars.

I believe that the framers of the law particularly want Independent National Electoral Commission to be able to verify or confirm the reason proffered for the intention to substitute. If however Independent National Electoral Commission is able to verify the reason from reason 'error', then I don't see how the court can question their

verification or acceptance of the substitution.

No matter how it is couched the final say as to whom a political party sponsors for an election is their ultimate decision. When they run foul of the procedure the remedy is not for the court to substitute a candidate for it.

"No, its folly will be in not fielding a candidate at all."

Independent National Electoral Commission has not told us that they were not able to verify the cogent reason of error given to it by the Defendant for wanting to substitute its candidate. That the Plaintiff's name was in same indicted list is not before the court and I shall refrain from touching on that extensive issue.

On independent National Electoral Commission acting on exhibit D while the case is subjudice, I find that it is replemandable act and the proper thing to have done is await the outcome of the suit and on the authority of the case of Ojukwu Vs Government of Lagos State, any action done pursuant to Exhibit D while this case is subjudice is hereby set aside.

The only time the court will interfere with the candidates of political party by virtue of section 34(1) and (2) is when the procedure is not complied with.

Consequent upon all the above and all the reasons and conclusions in the case of Senator I. Ararume (supra) 1 can only find that the submission of the name of the 2nd Defendant in replacement for the plaintiff was done within time. Secondly, any action taken by the 1st Defendant pursuant to exhibit D while this Case is subjudice is set aside.

Thirdly, Independent National Electoral Commission has the responsibility to verify the reason given to it by a political party for wanting to change or substitute its candidate for another and if they require more particulars to verify it is for it to ask for more particulars and not for the court.

On the whole.

Prayer 1, declared to the contrary.

Prayer 2, deals with false information in an affidavit and not with substitution of a candidate not the issue before the court.

Prayer 3, appears abandoned.

Prayer 4, is declared to the contrary.

Prayer 5, deal with Section 32 of the Electoral Act which was not issues before the court. ;

Prayer 6, there is cogent reason given by the Defendant for wanting to substitute its candidate and only the 1st Defendant can determine if it is verifiable or not.

Prayer 7, the 1st and 3rd Defendants have the right to change its candidate within 60 days to election in compliance with the Provisions of Electoral Act.

Prayer 8, the Court cannot grant such an Order if and where the Defendants have complied with the laid down procedure for substitution of candidate by virtue of Section 34(1) and (2) of the Electoral Act."

Let me observe at this stage that one of the positive Orders of the trial Court in its judgment is the setting aside of any action taken by Independent National Electoral Commission (INEC), the 1st Respondent, on the Peoples Democratic Party's (P.D.P) 3rd Respondent's letter of substitution Exhibit D, against which the Respondents had cross-appealed to the Court of appeal, remained in full force until it was set aside by the Court of Appeal in its judgment delivered on 20th My, 2007, more than three months after the Governorship Election conducted on 14th April, 2007. I shall deal with the effect of this situation later in my reasons for the judgment.

It is not surprising therefore that all the parties before the trial Court were not satisfied with the judgment resulting in the Plaintiff appealing against it, while the Defendants also challenged part of the judgment in their respective cross-appeals. However, while the Appeal and the cross-appeals were awaiting hearing and determination, the Appellant was expelled from the P.D.P the 3rd Respondent, which then together with the 2nd Respondent Celestine Omehia, brought an application urging the Court of Appeal to strike out the matter as the Appellant no longer had locus standi to prosecute it. The matter was accordingly struck-out. The parties were again dissatisfied with the decision of the Court of Appeal resulting in an appeal by the Appellant and cross-appeals by the Respondents against the decision to this Court which after hearing the parties, allowed the appeal and remitted the case to the Court of Appeal for expeditious hearing of the appeal and the cross-appeals. This order was not com-

plied with by the Court of Appeal because the matter found its way back to this Court again on the flimsy excuse that the earlier judgment of this Court directing the expeditious hearing of the appeal and the cross-appeals was not clear. However, on a further directive by this Court to the Court of Appeal to hear and determine the matter immediately, the Appellant's appeal and the Respondents cross-appeals were only heard. Meanwhile, it is worth mentioning at this stage that before die matter could be heard by the Court of Appeal. Governorship Elections scheduled for 14th April, 2007 had already been conducted in the country including the Rivers State where Celestine Omehia, the 2nd Respondent was sworn in as Governor of the State on 29th May, 2007. In its judgment delivered on 20th July, 2007, the Court of Appeal in a unanimous decision, dismissed the Appellant's appeal and allowed in part, the Respondents cross-appeals. Dissatisfied with this judgment the Appellant has appealed against it while Celestine Omehia and Peoples Democratic Party (P.D.P) the 2nd and 3rd Respondents, have also filed cross-appeals against it. In addition, the Independent National Electoral Commission (INEC) which is the 1st Respondent in this Court and Celestine Omehia, the 2nd Respondent, have separately filed their Notices of Preliminary Objection. Before the matter came up for hearing on 25 ^ October, 2007, relevant appropriate briefs of arguments comprising Appellants brief, Respondents' briefs, Appellant's Reply brief, Cross-Appellants' briefs and Cross-Respondents' briefs of argument were duly filed and served. In the Appellant's brief of argument, six issues have been identified for the determination of die appeal. They are -

"(1) Whether the Court of Appeal was not in error in allowing fresh evidence on appeal when no exceptional circumstance was shown to warrant such admission.?"

(2) Whether having regard to the undertaking before the Court the Court below ought not to have followed the decision of the Supreme Court in Ugwu v. Araraume (supra)?

(3) Whether there exists cogent and verifiable reason to warrant the substitution of Plaintiff's name with that of any other person in breach of Section 34 of the Electoral Act, 2006 and if not, whether the purported substitution of the Plaintiff's name is not null and void?

(4) Whether INEC, (1st Respondent) can rely on extraneous

fact or any fact not presented by a political party seeking substitution to verify reason given for seeking substitution?

(5) *Whether there was in existence any indictment of the Plaintiff for same to be used as a basis to verify the reason or error given by the 3rd Respondent for seeking substitution of Plaintiff's name?*

B (6) *Whether having regard ; to the concept of lispendens and the fact that at the material time of the election, Plaintiff being the only lawful candidate of the Peoples Democratic Party, he ought not to be declared the winner of 14th April, 2007 general election in Rivers State?"*

C In the brief of argument filed for the 1st Respondent however, the following four issues were formulated.

D "1. *Was the Court of Appeal bounded by itself and bound to apply by the decision in Ugwu v. Araraume (2007) 12 NWLR. (Pt. 1048) 367 in the event of subsequent distinguishable features and circumstances? (Ground 1)*

E 2. *Whether the Court of Appeal was right in refusing to declare the Appellant as the winner of the Rivers State Governorship election of 14th April, 2007 (Ground 2)*

F 3. *Whether the Court of Appeal was right in allowing the application of the 1st Respondent for further evidence on appeal, admitting copy of Ruling in FHC/ABJ/CS/74/207 and was it held to operate as indictment of Appellant (Grounds 3,10,14 and 15).*

G 4. *Was the Court of Appeal right hi holding that this case is distinguishable from the case of Ugwu v. Araraume (supra), in coming to the Conclusion that the Appellant was properly substituted in accordance with the provisions of Section 34(1) and (2) of the Electoral Act 2006. (Grounds 4, 5, 6, 7, 8, 9 11,12 and 13)."*

H The 2nd Respondent's brief of argument on the other hand like the appellant's brief, six issues for the determination of the appeal were identified. They are -

"17. *Whether additional evidence of indictment admitted by the Court of Appeal is proper in the circumstances and relevant to determination of the propriety of the process of substitution challenged herein by the Appellant? (issue No.1)*

18. *Having regard to the peculiar facts and circumstances of this appeal, whether the Court of Appeal was right in her findings*

that the provisions of Section 34 of the Electoral Act have been complied with in this instance and that there was proper substitution of the Appellant as Governorship candidate of the 3rd Respondent with the 2nd Respondent. (Issue No. 2)

19. *Granted that this Honourable Court has affirmed the justiciability of Section 34 of the Electoral Act in Ugwu v. Araraume (supra), which the Court below has followed in this instant appeal, assuming but not conceding that there has been a breach of Section 34 of the Electoral Act are there any limits to the remedies (if any) available to the Plaintiff/Appellant? (Issue No. 3)* B

20. *Whether the entire appeal is not academic or overtaken by events as a result of a combination of events, to wit, the unchallenged dismissal of the Appellant from the fold of the P.D.P, the fact that the elections in issue have been held in which several other political parties participated, the declaration of the 2nd Respondent as winner of the said Governorship election and his being sworn in, the existence of Appellant's election petition and other petitions in the Rivers State Governorship Election Tribunal? (Issue No. 4)* C

21. *What is the real scope and extent of Section 34 of the Electoral Act in the light of the peculiarities of this instant case? (Issue No. 5)* D

22. *Whether the Appellant's exercise of his access to Court in the challenge of alleged breaches of perceived rights in anyway derogates from constitutional power given to 1st Respondent to conduct election under the 1999 constitution and the Electoral Act and if so whether the Supreme Court can at this point in time venture into the declaration of who is the winner of the Governorship election in Rivers State? (Issue No. 6)"* E

Like the 1st Respondent, the 3rd Respondent in its Respondent's brief of argument also saw only four issues arising for determination in this appeal. These issues are -

"(a) *Whether the lower Court was right in granting the 1st Respondent's application to adduce fresh evidence on appeal.*

(b) *Whether or not the lower Court was right hi holding that the substitution of the name of the Appellant for the 2nd Respondent was valid having regard to the indictment of the Appellant.*

(c) *Whether the lower Court was right in holding that the fact*

of indictment of the Appellant is a fact which the Court can take judicial notice of and as such the 1st Respondent cannot turn a blind eye to this fact.

(d) *Whether or not this Honourable Court can grant a prayer of the Appellant for a declaration that he is the duly elected Governor of Rivers State having regard to his claim before the trial Court."*

Although having regard to the conduct of the parties in this appeal right from the trial Court to this Court gave rise to a number of what I may term as 'side issues' in this appeal, I am of the firm view that the real and main issue in this appeal is as identified and put forward in issue number 3 in the Appellant's brief of argument; issue number 4 in the 1st Respondent's brief of argument; issue number 2 in the 2nd Respondent's brief of argument and lastly issue number (b) in the 3rd Respondent's brief of argument. These issues, which I have earlier quoted in full in the issues formulated by the parties in their respective briefs for the determination of this appeal, all generally agreed that what calls for determination in this appeal is whether the Court below was correct in its decision affirming the decision of the trial Court that the reason given by the 3rd Respondent for substituting the Appellant with the 2nd Respondent as its Governorship candidate in the Rivers State, for the election scheduled for 14th April, 2007, was done in accordance with the requirements of Section 34 of the Electoral Act, 2006 as interpreted and laid down by this Court in the case of Ugwu v. Araraume (2007) 12 N.W.L.R. (Pt. 1048) 367

Section 34 of the Electoral Act, 2006 which is in contention in this appeal reads -

"34(1) *A political party intending to change any of its candidates for any election shall inform the Commission of such change in writing not later than 60 days to the election.*

(2) *Any Application made pursuant to subsection (1) of this section shall give cogent and verifiable reasons.*

(3) *Except in the case of death, there shall be no substitution or replacement of any candidate whatsoever after the date referred to in subsection (1) of this section."*

It is not at all in dispute between the parties in this appeal that it was the Appellant who emerged as the flag bearer of the 3rd Re-

spondent in the primaries of the party conducted in the Rivers State to elect the Governorship candidate of the party in the State for the 14th April, 2007 election. Following this success in the primary election, the 3rd Respondent by a letter dated 14th December, 2006 forwarded the name of the Appellant as its Governorship candidate to the 1st Respondent which went ahead to publish his name and particulars as such candidate in the constituency being the River State as required by law. However, by another letter dated 2nd February, 2007, the 3rd Respondent again forwarded the name of the 2nd Respondent to the 1st Respondent as its Governorship candidate for the election to replace the Appellant whose name was said to have been submitted in error. This letter of information to the 1st Respondent for the substitution or replacement of candidate regarded also as an application for the substitution of candidate as prescribed in Section 34 of the Electoral Act, 2006 which was in evidence as Exhibit 'D' reads -

"Peoples Democratic Party (P.D.P)

February 2, 2007

Prof. Maurice Iwu,

Chairman,

INEC,

Abuja.

Re: Forwarding of P.D.P Governorship Candidate and Deputy - Rivers State

This is to confirm that Celestine Ngozichukwu Omehia and Engineer Tele Ikuru are P.D.P Governorship and Deputy Governorship candidates for Rivers State.

Barrister Celestine Ngozichukwu Omehia substitutes Hon. Rotimi Amaechi whose name was submitted in error.

This is for your necessary action.

Sign.

Sign.

Sen.

Dr.

Amadu

Ali,

GCON

OjoMaduekwe, CFR

National

Chairman

National Secretary"

It is significant to observe that the date and substance of this letter Exhibit 'D' are virtually the same as those in the letter or application for substitution of candidate forwarded to the 1st Respondent by the 3rd Respondent in respect of its desire to

substitute it's Governorship candidate in Imo State for the -same election scheduled for 14th April, 2007, that was considered and decided upon by this Court in Ugwu v. Ararume (2007) 12 NWLR. (Pt. 1048) 367. The letter of application for substitution or replacement of candidate forwarded to INEC, the 1st Respondent by the P.D.P, the 3rd Respondent in that case which was in evidence as Exhibit 'L' in that case, reads in full as follows:-

"Peoples Democratic Party (P.D.P)

February 2, 2007

Prof. Maurice Iwu,

Chairman,

INEC,

Abuja

Re: Forwarding of P.D.P. Governorship Candidate ^ and

D Deputy - Imo State

Our letter of 18th February, 2007, refers please.

This is to confirm PDP position that Chief Charles Chukwuemeka Ugwu and Col. Lambert Ogbonna Iheanacho (Rtd) are P.D.P. Governorship and Deputy Governorship candidates for Imo State.

Chief Charles Ugwu substitutes Sen. Ifeanyi Godwin Ararume whose name was submitted in error.

This is for your necessary action.

Sign.

Sign.

Sen. Dr. Amadu All, GCON

Ojo Maduekwe, CFR

National Chairman

National

Secretary"

In considering whether the reason given by the

PDP for substituting the name of Senator Ifeanyi Godwin Araraume

G with that of Chief Charles Chukwuemeka Ugwu as the party's. Gov-

ernorship candidate for Imo State in the election of 14th April, 2007,

as simply that the name of Araraume was submitted in error, had

satisfied the requirement of Section 34(2) of the Electoral Act, 2006,

this Court had this to say in Ugwu v. Araraume (supra) at page 437 -

H 438 where Tobi JSC stated the position of the law -

"The fulcrum or crux of this appeal is the interpretation of Section 34 of the Electoral Act, 2006, specifically Section 34(2). Let me read the whole Section for completeness.

(1) *A political party intending to change any of its candidates for any election shall inform the Commission; of such change in writing not later than 60 days to the election.*

(2) *Any application made pursuant to subsection (1) of this Section shall; give cogent and verifiable reasons.*

(3) *Except in the case of death, there shall be no substitution or replacement of any candidate whatsoever after the date referred to in subsection (1) of this section,'* B

The underlying principle in the interpretation of a statute is that the meaning of the statute or legislation must be collected from the plain and unambiguous expressions or words used therein rather than from any notions which may be entertained as to what is just and expedient. See *Ahmed v. Kassim* (1958) 3 FSC 51; (1958) S.C. N.L.R. 28; *Lawal v. G. B. Olivant* (1972) 3 S.C. 124. The literal construction must be followed unless this would lead to absurdity and inconsistency with the provisions of the statute as a whole. See *Ona Shile v. Idowu* (1961) All N.L.R. 313. This is because it is the duty of the Judge to construe the words of a statute and give those words their appropriate meaning and effect. See *Adejumo v. The Military Governor of Lagos State* (1972) 3 S.C. 45. It is certainly not the duty of a Judge to interpret a statute to avoid its consequences. See *Aya v. Henshaw* (1972) S S.C. 87. The consequences of a statute are those of the legislature, not the Judge. A Judge who regiments himself to the consequences of a statute is moving outside the domain of statutory interpretation. He has by that conduct engaged himself in morality which may be against the tenor of the statute and therefore not within his judicial power. In the construction of a statute, the primary concern of a Judge is the attainment of the intention of the legislature. If the language used by the legislature is clear and explicit, the Judge must give effect to it because in such a situation, the words of the statute speak the intention of the Legislature see *Ojokolobo v. Alamu* (1987) 3 N.W.L.R. (Pt. 61) 377. xxx With the above back ground of the law, I shall take the ; submissions of Counsel and construct Section 34(2) of the Electoral Act, 2006. H

It is my firm view that the word 'shall' in Section 34(2) is clearly *mandatory and peremptory and not directory or permissive. In other words, by the subsection the 3rd Respondent must in its application*

to the 2nd Respondent given cogent and verifiable reasons for the change of candidate. Where the 3rd Respondent fails to give any reasons or gives reasons which are not cogent and verifiable, an aggrieved party has the legal right to seek redress in a competent Court of law by virtue or in virtue of Section 6 of the Constitution. This is what the 1st Respondent did and I cannot fault him for doing so.
xxxx

Were any reasons given by the 3rd Respondent for substituting the name of the 1st Respondent for the 1st Appellant as required by Section 34(2) of the Act?"

The answer to this question was given by Tobi, JSC at page 455 after dismissing the Appellant's appeal in the final Orders of the Court where he declared -

"(1) I declared that there are no cogent and verifiable reasons for the 2nd and: 3rd Respondents to change or entertain the change of the name of the 1st Respondent as candidate of the 3rd Respondent for the April 14, 2007 State Governorship Election in Imo State.

(2) I here grant an order of injunction restraining the 2nd and 3rd Respondents from changing or substituting the name of the 1st Respondent with that of the 1st Appellant or any other person as 3rd Respondent's candidate for the April 14, 2007 Imo State Governorship Election."

Taking into consideration that the applications forwarded to INEC by the PDP for the substitution or replacement of their Governorship candidates in Imo State Exhibit 'L' in the case Ugwu v. Araraume (supra) just cited, and Exhibit 'D' in the present case, were gave 'error' as the only reason the intended substitution of candidate under Section 34 of the Electoral Act, 2006, it is my view that the present case and the case of Ugwu v. Araraume (supra), are the same as far as to whether or not the requirements of the law in Section 34(2) of the Electoral Act, had been complied with by the P.D.P, in its application for the substitution of its candidate. For this reason, on this main issue in the present case as to whether or not cogent and verifiable reasons have been given as required under Section 34(2) of the Electoral Act, 2006 for the substitution of the Appellant with the 2nd Respondent as Governorship candidate of the 3rd 'Respondent in the April 14, 2007 election in Rivers State, I am bound by

our decision in Ugwu v. Araraume (supra) in coming to the conclusion that there was no substitution in compliance with Section 34(2) of the Electoral Act, 2006 in the present case. The Court below was therefore initially on the right course or track in its proceedings of 4th April, 2007 in its ruling for adjournment undertaking to await the decision of this Court in Ugwu v. Araraume (Supra) where the Court said -

"It is the decision of this Court and going by the doctrine of the stare decisis-judicial precedent that not wait for the judgment of the Supreme Court on Section 34 of the Electoral Act -since that decision shall be law and applicability shall be binding on the ; parties particularly political parties INEC. This Court shall also base other decision on any appeal involving Section 34 on decision of the Supreme Court. This appeal shall be adjourned to the 11th of April, 2007."

Regrettably and sadly too, the Court below which ultimately heard the appeal and the cross-appeals in this matter on 16th July, 2007 and in its judgment delivered on 20th July, 2007 made a complete U-turn to refuse to be bound by the decision Of this Court in Ugwu v. Araraume (supra) under the guise that the two cases are not the same. This is what the Court said -

"This case is distinguishable from Araraume's case. That Section 34(2) must be interpreted in a way to sustain the candidature after the political party sponsoring the candidate has informed INEC of the change of that candidate as its candidate. If the candidature of a withdrawn candidate is sustained because no cogent and verifiable reason had been given, the Court would be sustaining the candidature of a person who is no longer being sponsored by a political party as the Court has no power to impose a candidate on a political party."

This decision of the Court below on the interpretation and application of Section 34(2) of the Electoral Act, 2006 on the application by a political party intending to change any of its candidates whose names have already been submitted to INEC to contest any election, is a complete reversal of what this Court decided in Ugwu v. Araraume (supra) which the Court below has no power to refuse to apply to the present case. The provisions of Section 34(2) of the Electoral Act, 2006, are quite plain and unambiguous and as such it

was the duty of the Court below, to give the words 'cogent and verifiable reasons' their appropriate meaning and effect rather than giving them its own interpretation simply to avoid their consequences which is not the duty of the Court. See *Aya v. Henshaw* (1972) 5 S.C. 8730

Although in line with the position taken by the Court below in its judgment, learned senior counsel for the Respondents have strongly argued that the element of indictment of the Appellant which was present in the instant case right from the trial Court to the Court of Appeal and finally in this Court, can be said to have distinguished this case from *Ugwu v. Araraume* (supra), this argument is not supported at all by any evidence in spite of the claim by the Court below of having taken judicial notice of the said indictment under Section 74 of the Evidence Act. What was before the trial Court was not an issue of indictment which was staring the trial Court in the face as remarked by the Court below but that the matter was raised by the 1st Defendant now 1st Respondent in paragraph 7 of the statement of defence which states -

"7 Further to paragraph 18, the 1st Defendant states that the indictment of the Plaintiff by the EFCC and the acceptance of the Report of the Panel set up by the Federal Government provide cogent and verifiable reasons for the Plaintiff's substitution by his Political Party."

In response to this paragraph, the Plaintiff now Appellant in his reply to paragraph 17 of the Statement of defence retorted thus -

"The Plaintiff states that he was not indicted by the Economic and Financial Crimes Commission otherwise known as 'EFCC' in any panel set up by the Federal Government and the Federal Government of Nigeria never accepted any report in this regard."

However, from the record of this appeal no oral evidence was adduced by me parties rather, all the parties agreed to rely on the evidence contained in the relevant documents tendered and admitted by the trial Court as Exhibits A, B, C, D, E and F. Close scrutiny of these documents, does not reveal anything on the alleged indictment of the Appellant by the E.F.C.C. The Report of the Panel Set-up by the Federal Government, the Government's White Paper accepting the Report containing the list of the said indicted persons including

the Appellant showing the offence or offences he was indicted with, were clearly not before the trial Court. In the absence of this rather important and relevant evidence in support of the alleged indictment of the Appellant, the trial Court was quite in order when it decided to avoid or totally ignore the issue in its judgment when it said -

"Independent National Electoral Commission has not told us that they were not able to verify the cogent reason for error given to it by the Defendant for wanting; to substitute its candidate. That the Plaintiff's name was in same indicted list is not before the Court and I shall refrain from touching on that extensive issue."

It is indeed elementary principle of law that judgment or decision of a trial Court must be supported by evidence. See cases of Metal Construction (W.A.) Ltd; V.D.A. Migliore (1990) 1 N.W.L.R. (Pt. 126) and Obulor v. Oboro (2001) 8 N.W.L.R. (Pt. 714) 25 at 32. The stand of the trial Court on the question of indictment of the Appellant was therefore in accordance with the law.

The question now is, was the Court of Appeal right in hanging on the existence of indictment of the Appellant in its judgment in spite of clear absence of evidence in its support by resorting to taking judicial notice of the relevant facts to support it when the source or origin of such facts were not referred to or even known to the Court itself? The law is indeed trite that no fact of which the Court must take judicial notice need be proved. Section 73 of the Evidence Act. Facts which the Court must take judicial notice of are clearly set out under Section 74(1) of the Evidence Act, and going through the list, I am unable to find in any of the items (a) - (m), where the word 'indictment' could be accommodated. This is because the word itself does not constitute the facts of which the Court must take judicial notice. It is the facts which constitute indictment that are capable of being taken judicial notice by the Court. By definition, the word 'indictment' simply means a formal accusation; the written accusation against someone who is to be tried by a Court of law. (In this regard therefore, it is the formal accusation or charge for any offence against the Appellant for which the Appellant was to be tried in a Court of competent jurisdiction that could have constituted the facts showing the indictment of the Appellant that could have been taken judicial notice of by the Court. My stand on this requirement is amply supported by

the provisions of Section 74(2) and (3) of the evidence Act which explains how the powers of Court under the Section are exercised. The subsections are -

"74(1)

B (2) *In all cases in subsection (1) of this Section and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.*

C (2) *If the Court is called upon by any person to take judicial notice of any fact, it may refused to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so."*

D These requirements of Section 74 of the Evidence Act CAP 12 of the Laws of the Federation of Nigeria, 1990 are in line with the definition of the term judicial notice in the case of Commonwealth Shipping Representative v. P. O. Branch Services (1923) AC 191 at 212 where the Court said -

E *"Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer."*

F Therefore having regard to the state of the law on the requirements of taking judicial notice of facts under Section 74 of the Evidence Act, in the absence of a formal accusation or charge for any offence which the Appellant was awaiting to face a trial in Court, is alleged to be contained in the list of the said indicted persons or the Report of the Panel set-up by the Federal Government and its acceptance of the said Report in a White Paper which are completely absent in the proceedings and judgment of the Federal High Court G Abuja admitted as additional evidence

on appeal by the court below, there is no basis whatsoever for the Court below to have taken judicial notice of the alleged indictment of the Appellant as providing the cogent and verifiable reasons for the substitution of the Appellant's name with that of the 2nd Respondent H as Governorship candidate for tire April 4, 2007 election in Rivers State.

In any case, having regard to the clear and unambiguous wording of the provisions of subsection (2) of Section 34 of the Electoral

Act which says -

"(2) Any application made pursuant to subsection (1) of this Section shall give cogent and verifiable reasons."

The obligation of giving or providing cogent and verifiable reasons in its application to substitute or replace any candidate for any election under the Electoral Act, 2006, lies squarely on the shoulders of a political party wishing to effect the change. There is a copy of the Report of the EFCC indicting the Appellant whose no obligation whatsoever on INEC or the Court to which any complaint on the compliance or otherwise with Section 34 of the Electoral Act 2006, may be brought, to look outside the application for the relevant facts, as reasons for wanting to effect the change or substitution of candidate.

In the instant case, although the application of the 3rd Respondent for the substitution of its candidate, Exhibit 'D', was written and submitted to INEC, the 1st Respondent on 2nd February, 2007, the alleged accusation or indictment of the Appellant did not come to light until 17th February, 2007. It is not surprising therefore that 'indictment' as one of the reasons for wanting to effect the substitution of its candidate for the April, 14th 2007 Election in Rivers State, could not have found its way into Exhibit 'D' which contains only 'error' as reason for the substitution. For the same reason, the proceedings and judgment of the Federal High Court Abuja in the case instituted by the Appellant which was struck out by that Court for being an abuse of the process of the Court on 30th March, 2007, admitted as fresh evidence by the Court below, could not have been regarded as cogent and verifiable reason for the intended substitution of candidate contained in the 3rd Respondent's letter Exhibit 'D' dated 2nd February, 2007. In other words the cogent and verifiable reasons contemplated under Section 34(2) of the Electoral Act 2006, are cogent and verifiable reasons given by the political party applicant wishing to effect any change of candidate in its application to INEC, specified in that Section of the Act. Therefore any reason or reasons plucked out or extracted from any source outside; the letter or application for the substitution of candidate by the Respondents or the Court below after 2nd February, 2007, is certainly not a reason within the contemplation or requirement of Section 34(2) of the Electoral Act, 2006.

Returning to the part of the judgment of the trial Court setting aside any action taken by INEC on the letter of the P.D.P. Exhibit 'D' asking for the substitution of its candidate while this case was subjudice, which learned Senior Counsel for the 2nd Respondent described as a mere Obiter Dictum, even at the expense of repetition, I again
 B quote that part of the judgment which reads:

*"On Independent National Electoral Commission acting on Exhibit D while the case is subjudice, I find that, that is a reprimandable act and the proper thing to have done is await the outcome of the
 C suit and on the authority of the case of Ojukwu v. Government of Lagos State, any action done pursuant to Exhibit D while this case is subjudice is hereby set aside."*

The positive order contained in this part of the judgment of the trial Court, is indeed a decision binding on all the parties to the
 D case particularly INEC, the 1st Respondent, which was the 1st Defendant to which the order was directed. As long as this order remained in force, the law required the 1st Respondent to obey it pending its being set aside by the trial Court itself on appropriate application or
 E on appeal by an appellate Court. The order is not an obiter as assumed or described by the learned Senior Counsel for the 2nd Respondent. The fact that both the 2nd and 3rd Respondents had to cross-appeal against the order to the Court of Appeal to have it set
 F aside means that it was indeed a ratio decidendi of the Court because an obiter dictum does not decide the life issues in the matter to give
 G any right of appeal. See *Orugbo v. Una* (2002) 16 N.W.L.R. (Pt. 792) 175 at 208. The order of the trial Court directed at INEC, the 1st Respondent handed down on 15th March, 2007, nearly one month before the election of 14th April, 2007, remained in full force
 H until 20th July, 2007, when it was set aside by the Court of Appeal in its judgment. The effect of this situation created by the delay in the hearing of the matter as the result of various obstacles placed on the path of the Court below and this Court to expeditiously hear and dispose of the matter before the election of 14th April, 2007, is that
 H the name of the Appellant earlier submitted to the 1st Respondent to contest the election as candidate of P.D.P, the 3rd Respondent, remained as such candidate up to 14th April, 2007, when the election was conducted.

In the result, following the judgment of the trial Court setting aside any action taken on the letter of application for substitution of candidate Exhibit D, coupled with the fact the same letter Exhibit 'D' does not give any cogent and verifiable reasons for the substitution of the Appellant as candidate of the 3rd Respondent in compliance with Section 34(2) of the Electoral Act, 2006 as decided by this Court in Ugwu v. Araraume (supra), this appeal must succeed and it is hereby allowed by me on the reasons given. The judgment of the Court below given on 20th July, 2007 is accordingly hereby set aside. In place of that judgment set aside, I hereby affirm the Orders in form of reliefs granted to the Appellant by this Court on 25th October, 2007.

I now come to the Preliminary Objections raised by the 1st and 2nd Respondents on the jurisdiction of this Court to hear and determine the appeal and grant the reliefs sought by the Appellant. The objections are mainly rooted on the false assumption of all the Respondents that the Appellant's case though having commenced at the trial Court before election, not having been disposed of at the appellate Courts before election and swearing in of the 2nd Respondent as Governor of Rivers State, has now become academic as the result of its having been transformed into a post election matter, within the jurisdiction of the Election Tribunals thereby depriving this Court of its jurisdiction to grant any relief to the Appellant. This argument is completely baseless because the Respondents failed to realize that this appeal has its root from the decision of the Federal High Court given on 15th March, 2007 which was affirmed on appeal and cross-appeals by the parties at the Court of Appeal on 20th May, 2007. If appeal does not lie from that decision of the Court of Appeal to this Court as prescribed by Section 233(1) of the 1999 constitution which states -

"233(1) The Supreme Court shall have jurisdiction, to the exclusion of any other Court of law in Nigeria, to hear and determine appeals from the Court of Appeal."

Then the Respondents no longer regard the 1999 constitution as an existing statute. I must observe that the action of the Respondents in frustrating the expeditious hearing and determination of the Appellant's appeal and his expulsion from the PDP aimed at interfer-

ing with the jurisdiction of the Court of Appeal and of this Court is most unfortunate. It may not be out of place if on this rather ignoble role played by the Respondents, I quote and adopt the observation of Fatayi Williams CJN of the blessed memory in the case of *Sokefun v. Akinyemi* (1981) 1 NCLR 135 at 146 where he said -

B *"The jurisdiction and authority of the Courts of this Country cannot be usurped by either the, Executive or the Legislative branch of the Federal or State Government under any guise or pretext whatsoever."*

C That is why in this matter this Court refused to allow the Respondents comprising INEC and the PDP who are themselves the creation of the constitution and the 2nd Respondent, a member of the PDP, to usurp the jurisdiction and powers of this Court under any guise or pretext whatsoever to pervert the course of justice in this matter. To
D succumb to the arguments of the learned Senior Counsel to the Respondents on the lame issue of jurisdiction, would certainly amount or result in allowing parties to take the reins of adjudication from the Courts.

E The case having commenced by a writ of summons and heard on statement of claim and statements of defence filed by the parties, can never be transformed into an election matter which under the same Constitution is commenced by Petition before an Election Tribunal. I am therefore of the view that no amount of gimmicks or
F self induced transformation of the case by the Respondents would have the effect of changing the nature or character of this case to push it out of the jurisdiction of this Court. Since thus Court has jurisdiction to hear the appeal and the cross-appeals, there is no provision of the Constitution or any law for that matter that may
G prevent or place any obstacle in the path of this Court in doing justice in the matter by granting any appropriate reliefs to the successful party.

H With regard to the cross-appeal grounded on the provision of Section 308 of the 1999 constitution, I entirely agree with the decision of the Court below. This matter having started since 26th January, 2007 at the Federal High Court long before election of 14th April, 2007, the assumption of office by the 2nd Respondent as the Governor of Rivers State would not have the effect of 'destroying the

acquired rights by the Appellant who was already in Court in search of justice.

As for the argument of the 2nd Respondent that this case is void ab initio for being derived from the judgment of the trial Court not based on evidence heard from the parties, there is no truth whatsoever on this stand of the 2nd Respondent. The trial Court heard the parties through the documentary evidence admitted with the consent of all the parties as Exhibits A - F. The judgment of the trial Court is therefore supported by evidence and is quite valid in law in spite of the fact that none of the parties gave or called oral evidence. B

Learned senior counsels to Respondents have argued variously that this Court has no power to grant the reliefs sought by the Appellant. From the substance and pronouncements of the learned trial judge and the Appellant's appeal and the Respondents' cross-appeals to the Court of Appeal against that judgment, on the facts and the law, the 2nd Respondent whose substitution as a new candidate of the 3rd Respondents was effectively set aside by the trial Court, did not therefore contest the election of 14th April, 2007. Further more, the assumed substitution erroneously or flagrantly recognized by the 1st and 3rd Respondents was not in compliance with Section 34(2) of the Electoral Act, 2006 and the decision of this Court in Ugwu v. Araraume (*supra*). The Appellant therefore in the eyes of the law remained effectively the authentic candidate of the 3rd Respondent for the Governorship election of 14th April, 2007 in Rivers State and for that reason ought to have been sworn in as the Governor of the State. C
D
E
F

It is for these reasons that on 25th October, 2007 when this appeal and the cross-appeals were heard, I allowed the appeal and dismissed the cross-appeals. These are my reasons for doing so and for granting the Appellant the appropriate reliefs on that day. G

I am not making any order on costs.

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal, holden at Abuja in appeal number CA/A/70/07 delivered on the 20th day of July, 2007 in which it dismissed the appeal of the appellant H

against the judgment of the Federal High Court delivered on 15/3/07, in suit No. FHC/ABJ/CS/29/2007 and allowed the cross appeals of the respondents.

On Thursday, the 25th day of October, 2007 when this appeal was heard, I delivered my judgment in the open court after the submissions of learned Senior Counsel for the parties, allowing the appeal of the appellant and dismissing the cross appeals and did promise to give details of my reasons for the judgment today, the 18th day of January, 2008. The instant exercise is in fulfillment of that promise.

The appellant, a member of the Peoples Democratic Party (PDP) was one of the 8 candidates who contested the primaries for nomination as Peoples Democratic Party (PDP) candidate for the Rivers State Governorship election scheduled for the 14th day of April, 2007. It is not disputed that from the records, he scored the highest votes cast at the primary election and was not only declared the winner of same but his names and relevant particulars were duly sent by the party, the ' 3rd respondent in this appeal, to the 1st respondent as the 3rd respondent's duly nominated candidate for the scheduled general election. The parties are agreed that the 2nd respondent was never a candidate in the primary election conducted to nominate the candidate for the Rivers State Governorship election neither did he win the same. Upon the receipt of the nomination of the appellant, the 1st respondent caused -the name of the appellant to be published in the Constituency as required by the Electoral Act, 2006.

However, on the 2nd day of February, 2007, the 3rd respondent acting under its powers of substitution or change of candidate for the election, purported to exercise same by submitting the name of the 2nd respondent to the 1st respondent as a substitute for the appellant for the said election on the ground that the name of the appellant was earlier submitted "in error".

Meanwhile, and in anticipation of the threat to substitute him with the 2nd respondent, the appellant caused a writ of summons to be issued against the 1st respondent on the 20th day of January, 2007 and by an amended statement of claim to be found at pages 65 to 70 of the record, the appellant claimed the following reliefs:-

"i. A declaration that the option of changing or substituting a

candidate whose name is already submitted to INEC by a political party is only available to a political party and/or the Independent National Electoral Commission (INEC) under the Electoral Act, 2006 only if the candidate is disqualified by a Court Order.

ii. *A declaration that under Section 32(5) of the Electoral Act, 2006 it is only a Court of law, by an order that can disqualify a duly nominated candidate of a political party whose name and particulars have been published in accordance with Section 32(3) of the Electoral Act, 2006.* B

iii. *A declaration that under the Electoral Act, 2006, Independent National Electoral Commission (INEC) has no power to screen, verify or disqualify a candidate once the candidate's political party has done its own screening and submitted the name of the Plaintiff or any candidate to the Independent National Electoral Commission (INEC).* C D

iv. *A declaration that the only way Independent National Electoral Commission (INEC) can disqualify, change or substitute a duly nominated candidate of a political party is by Court Order.*

v. *A declaration that under section 32(5) of the Electoral Act, 2006 it is only a Court of law, after a law suit, that a candidate can be disqualified and it is only after a candidate is disqualified by a Court order, that the Independent National Electoral Commission (INEC) can change or substitute a duly nominated candidate.* E

vi. *A declaration that there are no cogent and verifiable reasons for the Defendant to change the name of the Plaintiff with that of the 2nd defendant candidate of the People's Democratic Party (PDP) for the April, 13, 2007 Governorship Election in Rivers State.* F

vii. *A declaration that it is unconstitutional, illegal and unlawful for the 1st and 3rd Defendants to change the name of the Plaintiff G with that of the 2nd Defendant as the Governorship candidate of the Peoples Democratic party (PDP) for Rivers State in the forthcoming Governorship Election in Rivers State, after the Plaintiff has been duly nominated and sponsored by the People's Democratic Party as its candidate and after the 1st Defendant has accepted the nomination and sponsorship of the Plaintiff and published the name and particulars of the Plaintiff in accordance with section 32(3) of the Electoral Act, 2006 the 3rd defendant having failed to give any co- H*

gent and verifiable reasons and there being no High Court Order disqualifying the Plaintiff.

viii. An order of perpetual injunction restraining the defendants jointly and severally by themselves, their agents, privies or assigns from changing or substituting the name of the plaintiff as the Rivers State Peoples Democratic Party Governorship candidate for the April, 2007 Rivers State Governorship Election unless or until a court order is made disqualifying the plaintiff and or until cogent and verifiable reasons are given as required under section 34(2) of the Electoral Act, 2006."

The action, as stated earlier in this judgment was commenced by way of a writ of summons in which pleadings were duly filed by, and exchanged between the parties. At the close of pleadings, the parties, by consent settled the issues arising from the pleadings for determination and tendered certain documents as exhibits from the Bar. Except the 'documentary evidence so tendered and admitted, no oral evidence was given as learned senior counsel for the parties addressed the trial court on the issues as earlier settled.

In his judgment, the learned trial judge held that there was cogent reason given by the 3rd respondent for wanting to substitute its candidate and only the 1st respondent can determine if the reason was verifiable or not; that the 3rd respondent has the right to change its candidate within 60 days to the election in compliance with the provisions of the Electoral Act, 2006 and that injunction to restrain the respondents jointly and severally or through their agents from changing or substituting the name of the plaintiff as the Rivers State Peoples Democratic Party Governorship candidate for the April, 2007 Governorship election unless a court order is made disqualifying the plaintiff and or until cogent and verifiable reasons are given cannot be granted as the respondents have complied with the laid down procedure of substituting a candidate under section 34(1) and (2) of the Electoral Act, 2006. However, it is important to note that though the trial court held that the substitution was made within the stipulated time of 60 days to the election, it nevertheless set aside the said substitution on the ground that it was done during the pendency of the litigation between the parties.

The appellant was dissatisfied with the judgment of the trial

court and appealed to the Court of Appeal while the respondents cross appealed which appeal was dismissed by the Court of Appeal and the cross appeals partially succeeded resulting in the further appeal to this Court the issues for determination of which have been identified in the appellant's brief of argument filed on 8/10/07 as follows:- B

"(1) Whether the Court of Appeal was not In error In allowing fresh evidence on appeal, when no exceptional circumstance was shown to warrant such admission?"

(2) Whether having regard to the undertaking before the court, C court below ought not to have followed the decision of the Supreme Court in Ugwu vs Ararume (supra) ?

(3) Whether there exists cogent and verifiable reason to warrant the substitution of plaintiff's name with that of (sic) any other person in breach of section 34 of the Electoral Act, 2006 and if not, D whether the purported substitution of plaintiff's name is not null and void?

(4) Whether INEC (1st Respondent) can rely on extraneous fact or any fact not presented by a political party seeking substitution to verify reason given for seeking substitution? E

(5) Whether there was in existence any indictment of the plaintiff for same to be used as a basis to verify the reason of error given by the 3rd Respondent for seeking substitution of plaintiff's name? and

(6) Whether having regard to the concept of lis pendens and F the fact that at the material time of the election, plaintiff being the only lawful candidate of the People Democratic Party, he ought not to be declared the winner of 14th April, 2007 general election of Rivers State?"

There are two cross appeals in the instant appeal; one by the G 2nd respondent and the other by the 3rd respondent.

The issues for determination in the 2nd respondent's cross appeal as identified in the Cross Appellant's brief filed on 15/10/07 by Messrs J.B. Daudu SAN and E.G. Ukala, SAN are as follows:-

"66. Whether the Court of Appeal was correct when it held H that the appeal in issue did not abate upon the 2nd respondent being sworn in as the Governor of Rivers State whereupon he acquired constitutional immunity pursuant to section 308 of the 1999 Consti-

tution?

67. *Whether the Court of Appeal was correct in law when after finding that the entire gamut of appellants (sic) dispute arose from nomination and sponsorship (matters within the domestic sphere of the 3rd respondent) it did not rule the entire dispute non justiciable?*

B 68. *Whether the proceedings are not void ab initio on the basis that evidence viva voce was not taken in a suit commenced by writ of summons/statement of claim in respect of reliefs that were all declaratory in nature?"*

C On the other hand, a single issue was formulated in the 3rd Respondent's/Cross Appellant's brief of argument filed on 15/10/07 by Chief Joe Kyari Gadzama, SAN, to wit:

"Whether the court below was right in law to hold that the appeal before it was an election related matter and having so held
D went further to hold that the second respondent was not entitled to enjoy the benefits of the immunity conferred on him by virtue of section 308 of the Constitution of the Federal Republic of Nigeria, 1999 having taken the oath of office and the oath of allegiance as the Governor of Rivers State and placing reliance on the cases of *AD vs Fayose* (2004) 8 NWLR pt. 876 p. 639 and *Obi v. Mbakwe* (1984) 1
E SCNLR 192 to arrive at this conclusion."

From the issues formulated for determination of the cross appeals, it is very clear that the pivot or fulcrum of the cross appeals is the claim of constitutional immunity by the 2nd respondent/cross
F appellant as it relates to the peculiar facts of this case. Of course the issue is relevant having regard to the fact that at the relevant point in time, the 2nd respondent had been sworn in as the Governor of Rivers State of Nigeria and section 308 of the Constitution of the
G Federal Republic of Nigeria, 1999 (hereinafter referred to as the 1999 Constitution) confers immunity on occupants of that office. However, the issue will take its proper pride of place in the course of this Judgment. Now to the main appeal.

In arguing issue 1, learned Senior Counsel for the appellant,
H L.O. Fagbemi, Esq, SAN submitted that though Order 1 Rule 19(2) of the Court of Appeal Rules makes provision for admission of additional evidence on appeal, it is not in every situation that such fresh evidence would be allowed. Learned Senior Counsel then gave the

three instances where fresh evidence would be allowed in appeal to include:

(i) that the evidence sought to be adduced must be such as could not have been with reasonable diligence, obtained for use at the trial, or are matters which have occurred after judgment in the trial court; B

(ii) the evidence to be adduced should be such as if admitted it would have an important, not necessary crucial effect on the whole case;

(iii) the evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incon....., relying on the case of *Akanbi v Alao* (1989) 3 NWLR (pt. 108) 118 at 137-138; C

that the ruling of the trial court which was admitted as additional evidence on appeal was not pleaded by the parties thereby rendering same inadmissible; that what was pleaded was indictment by EFCC and acceptance of same by the Federal Government, not the ruling in suit No FHC/ABJ/CS/74/2007 or any judicial pronouncement thereof; that the ruling admitted had no probative value as it proved nothing as the trial court did not find in that suit that appellant was indicted but merely dismissed the suit for being an abuse of process. D E

In the 1st Respondent's brief of argument filed by Chief A.I. Idigbe, SAN on the 15/10/07, appellant's issue No. 1 was treated therein as issue No. 3. In arguing the issue, learned Senior Counsel submitted that the lower court was right in allowing the application of the 1st respondent for further evidence on appeal and in admitting the ruling as the parties had joined issues on the matter of indictment of the appellant; that the ruling in FHC/ABJ/CS/74/2007 was delivered on 30/3/07 after the judgment of the trial court on 15/3/07; that the ruling was not in existence at the time of trial hence it could not have been pleaded though it is the law that documents in support of facts pleaded need not be pleaded as they can be tendered in support of facts pleaded, relying on the case of *Monier Construction Co. Ltd vs. Azubuike* (1990) 3 NWLR (pt. 136) 74; *Odunsi vs Bamgbata* (1995) 1 NWLR (pt. 374) 641 at 667. F G H

On the principles guiding the courts on admissibility of fresh

evidence on appeal, learned Senior Counsel cited and relied on the case of *Akanbi vs Alao*, supra; *Asaboro vs Aruwaji* (1974) 4 S.C (Reprint) 87 at 90-91; *Okoro vs Egbuaoh* (2006) 15 NWLR (pt. 1001) 1; *FBN Plc vs Jibo* (2006) 9 NWLR (pt. 985) 255; *Okenwa vs Mil. Governor, Imo State* (1996) 6 NWLR (pt. 455) 394; *Obasi vs Onwuka* (1987) 3 NWLR (pt. 61) 364; *Agwuna 111 vs Isiadinso* (1996) 5 NWLR (pt. 451) 705 and *Owata vs Anyigor* (1993) 2 NWLR (pt. 276) 380, and submitted that the facts of the case justified the application of the principles in the instant case and urged the court to resolve the issue in favour of the respondents.

Learned Senior Counsel for the 2nd Respondent submitted that the lower court was right in admitting the document as it was a document that came into existence after the trial and it is relevant to the case; that documents need not be specifically pleaded to render them admissible if the relevant facts have been pleaded. Learned Counsel urged the court to resolve the issue against the appellant.

Learned Senior Counsel for the 3rd Respondent treated the issue under his issue A and submitted, like the previous respondents that the lower court was right in admitting the additional evidence and urged the court to resolve the issue against the appellant.

Both parties agree that for the document to be admitted as an additional or fresh evidence on appeal, it must satisfy certain preconditions, to wit:

1. The evidence sought to be adduced must be such as could not have been, with reasonable diligence, obtained for use at the trial;

2. The evidence should be such as if admitted would have an important not necessarily crucial effect on the whole case;

3. The evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible; and

4. It is in the interest of justice in the case not only to one of the parties but that the evidence be admitted. The crucial question however, remains whether the document in issue satisfies these requirements?

The second vital point not in dispute by the parties is the fact that the document in this case was not pleaded by any of the parties.

While the appellant has submitted that parties are bound by their pleading and that evidence on facts not pleaded ground to no issue and that the document is thereby inadmissible, the respondents have contended that what determines admissibility of evidence is relevance and the pleading of relevant facts, not evidence by which the facts can be proved and by extension that since the fact of indictment was pleaded, the evidence by which it is provable i.e the ruling of the court, need not be pleaded to render same admissible in evidence. B

I agree with the submission of learned Senior Counsel for the respondents on the point as it is settled law that every pleading shall contain statement of all material facts on which the party pleading relies, but not the evidence by which they are to be proved. The relevant question then becomes, what is the pleadings of the parties relevant to the facts in issue in this case? D

In paragraph 7 of the Statement of Defence of the 1st respondent it is pleaded as follows:-

"7. Further to 18, the 1st defendant states that the indictment of the plaintiff by the Economic and Financial Crimes Commission (EFCC) and the acceptance of the report of the panel set up by the Federal Government provide cogent and verifiable reasons for the plaintiff's substitution by his political party." E

The reply of the plaintiff (appellant) to the above averment of the 1st respondent is:- F

"Plaintiff states that he was not indicted by the Economic and Financial Crimes Commission (EFCC) otherwise known (sic) as EFCC or any panel set up by the Federal Government and the Federal Government of Nigeria never accepted any report in that regard."

From the above pleadings, it is very clear that issues were joined G by the parties on the fact of the existence of an indictment by EFCC of the appellant and secondly the acceptance of the report by the panel set up by the Federal Government. In other words, there are supposed to exist the fact that appellant was indicted by the EFCC and the acceptance of that indictment by the Federal Government of Nigeria following the report of a panel set up by that government on that issue. H

It is therefore clear that two distinct documents must exist to

prove the facts pleaded in paragraph 7 of the 1st respondent's statement of defence, namely:

(a) the indictment, and,

(b) acceptance of same as evidence in a Federal Government of Nigeria gazette.

The question is whether what was tendered and admitted was relevant to the facts as pleaded.

It is not in doubt that the document alleged to be proof of the indictment and acceptance of same was not in existence at the time the Federal High Court delivered its judgment in this case on 15/3/07 whereas the document/judgment in FHC/ABJ/CS/74/2007 was delivered on 30/3/07. This satisfies the requirement that the document or evidence sought to be tendered must not have existed or available at the time of trial so as to avoid giving the applicant a second bite at the Cherry, which would/could result in injustice to the other party.

In the instant case however, I have gone through the judgment in FHC/ABJ/CS/74/2007 - the additional evidence - and have not seen the alleged indictment of the appellant by the EFCC neither does it contain the Federal Government of Nigeria's official gazette accepting the alleged indictment. In fact, the judgment is not relevant to the facts pleaded as it also does not make any specific findings of facts relevant to the facts pleaded in this case. What the judgment did was simply to dismiss the action of the appellant on the ground that it constituted an abuse of court process. The purported indictment was never tendered in that proceedings neither was the White Paper or any other form of acceptance by the Federal Government of Nigeria. In short, the document has no evidential value having regard to the state of the pleadings at all and was therefore, in my view, wrongly admitted as fresh evidence by the lower court. The wrongful admission of the document in the instant case resulted in grave consequences as it constituted the basis on which judgment was entered by the lower court in favour of the respondents. That is very unfortunate. The non existence of any indictment by EFCC against the appellant and the acceptance of same by the Federal Government was confirmed by learned Senior Counsel for the 2nd respondent when I asked him at the hearing of the appeal to refer the court to the pages of the record where the relevant documents could be found

and he could not. The only way by which the document could have been legally admissible as fresh evidence on appeal is, if it was tendered in proof of the facts pleaded and on which issues have been joined. As it were the instant document ground to no issue as it is irrelevant. I therefore resolve the issue in favour of the appellant.

On issue 2, learned Senior Counsel submitted that the lower court having stated on record that it would be bound by the decision of the Supreme Court in Ararume's case on section 34 of the Electoral Act, 2006 it was bound by it and ought to have applied the decision of this Court on the said case to the facts of this case, relying on *Oyeyemi vs Irewole Local Government* (1993) 1 NWLR (pt. 270) 462 at 477; that the attempt at distinguishing Ararume's case from the facts of the instant case amounts to a distinction without a difference.

On his part, learned Senior Counsel for the 1st respondent submitted that the facts of the instant case are distinguishable from Ararume's case and as such the lower court was right in not applying same in its decision; that the distinguishing features include the admission of additional evidence, election having taken place on 14/4/07 and the return and declaration of 2nd respondent as elected Governor of Rivers State thereby raising the issue of constitutional immunity; that it would be "stretching the doctrine of precedent dangerously too far to insist that a Court of Appeal is not at liberty to distinguish one matter from the other when it sees there are features that makes (sic) such distinction imperative;" that the lower court held that in Ararume's case the error could not be related to the facts and information available and at the disposal of the 1st respondent to verify whereas in the instant case, the evidence to justify the error was already at the disposal of the 1st respondent, that the decision in *Oyeyemi vs Irewole Local Government* supra cited by his learned friend silk is not applicable to the facts of the case and urged the court to resolve the issue against the appellant.

The learned Senior Counsel for the 2nd and 3rd respondents did address the issue in similar vein in the 2nd and 3rd respondent's briefs of argument.

When one takes a close look at the issue under consideration, it is very clear that learned counsel for the appellant is attacking the

fact that the lower court did not adhere to its stated intention to follow the decision of the Supreme Court in Ararume's case in deciding the instant case then on appeal before it. The issue therefore is two fold - (a) the court's undertaking to be bound by whatever the Supreme Court decided in Ararume's case and (b) application of the doctrine of judicial precedent.

It is in relation to (a) supra that learned Senior Counsel submitted that the lower court having so decided it amounted to a statement of guiding principle binding on that court, hence the reliance on Oyeyemi's case supra, where it was held at page 477 thus:

"Moreover, once the court made a statement of its guiding principles, it was bound to follow them for, by such statement of guiding principles, the court had set for itself a yardstick of measurement for its correct exercise of its discretion. Having set those criteria and standards for itself, for it to turn, as it were, somersault and decide on how to exercise its discretion without using them as acid tests for the correctness, or otherwise, of the exercise was to decide arbitrarily"

I must hasten to point out that application of the principles of stare decisis or judicial precedent does not involve an exercise of judicial discretion at all. It is what must be done; mandatory. The doctrine is based first of all on the relevant likeness of or between the cases - the previous case and the one before the court. If there is no likeness between the two, it is an idle exercise to consider whether the previous one should be followed or departed from. It is settled law that a previous decision is not to be departed from or even followed, where the facts or the law applicable in the previous case are distinguishable from those in the latter case.

In the instant case, and applying the law to the facts, it is my considered view that the lower court was not, without more, bound to apply the decision in Ararume's case, which was not in existence at the time the commitment was made to the facts of the instant case without considering any distinguishing features that may be brought to its attention between the two cases. The decision to follow that case does not involve the exercise of any discretion by that court particularly where the facts are similar. In the instant case, the lower court thought the issue of indictment of the appellant by EFCC con-

stitutes a distinguishing feature between Ararume's case and the instant one and I think the court is entitled to so hold leaving it for this Court to determine whether that decision is right or wrong.

Learned Counsel for the appellant argued issues 3, 4 and 5 together.

Referring to and placing reliance on the decision in the case of Adah vs N.Y.S.C. (2001) 1 NWLR (pt. 693) 65 at 79 - 80, learned Senior Counsel submitted that in interpreting the provisions of section 34 of the Electoral Act, 2006, the words used in the statute are to be given their natural or ordinary meaning as they (words) admit of no ambiguity; that on a literal interpretation of the said section 34 of the Electoral Act, 2006, a political party has the right to change any of its candidates at least 60 days to the election; that section 34 of the Electoral Act, 2006 enjoins a political party intending to change or substitute its candidate to first apply to INEC giving cogent and verifiable reasons for the change or substitution; that all the steps are mandatory, relying on Ugwu vs Ararume (2007) 12 NWLR (pt. 1048) 364; that the 3rd respondent gave no reason in the pleadings for wanting to substitute the name of the appellant; that no report or list of EFCC was tendered to prove or establish the supposed indictment of the appellant neither was there any prove of the acceptance of that report by the Federal Government; that from the facts of the case particularly the participation of the appellant in the primary election of the party in which he emerged the winner, the reason of error in the substitution of his name with that of the 2nd respondent, who never participated at the election, cannot be said to be cogent and verifiable; that there was no indictment when the substitution was sought and obtained; that indictment report is not something that can be judicially noticed as decided by the lower court.

Referring to the judgment of the Federal High Court in suit No FHC/ABJ/CS/74/2007 delivered on 30/3/07, Learned Senior Counsel submitted that it made no findings on the alleged indictment of the appellant and as such does not constitute evidence of indictment, and urged the court to resolve the issues in favour of the appellant.

On his part, learned Senior Counsel for the 1st respondent submitted that contrary to the submissions of his learned friend silk, supra, there are distinguishing factors in this case from the case of

Ugwu vs Ararume supra which resulted in the holding that the appellant was properly substituted in accordance with the provisions of section 34(1) and (2) of the Electoral Act, 2006; that the distinguishing factors include the following:-

B (a) that the 2nd respondent did not participate in the primaries while in Ararume's case, the appellant came first in the primaries but was substituted;

C (b) the error necessitating the change was verified from the circumstances of the information at the disposal of the 1st respondent unlike in Ugwu vs Ararume where the error could not be related to the facts and information available to INEC to act and verify;

(c) unlike the Ararume's case, the published list of the appellant's indictment supplied the missing link which made the reason verifiable;

D (d) the appellant was not disqualified by the 1st respondent from contesting based on the list captioned investigated and indicted, but it was the party that substituted his name under section 34(1) and (2) of the Electoral Act, 2006; and,

E (e) that unlike the Araraume's's case, the 2nd respondent has been declared and returned as the Governor of Rivers State at the 14/4/07 election and only a tribunal can upset the declaration and return of the 2nd respondent as Governor of Rivers State.

F Finally, learned Senior Counsel submitted that section 34(2) of the Electoral Act, 2006 gave the 1st respondent the obligation of verifying the reasons given for the substitution and urged the court to resolve the issues against the appellant.

G On the other hand, learned Senior Counsel for the 2nd respondent submitted correctly "that the degree of disparity between the facts herein and the decision of this Honourable Court in Ararume and the legal consequences flowing therefrom are in reality the crux of the matter in this appeal."

H Learned Counsel then submitted that section 34 of the Electoral Act, 2006 is clear and straightforward and amenable only to literal interpretation and that to so interpret the section, sub-section 2 of section 34 should be read subject to section 34(1) thereof, relying on the decision in *Matari vs Dangaladima* (1993) NWLR (pt. 281) 261; that the object of the section is to allow political parties substi-

tute candidates, 60 days to election day, upon information to INEC and that the procedure for transmitting the information which is the object of subsection 2 of section 34 cannot override the main object of the section which remains to provide liberty to political parties to effect a change in candidates in a specified manner; that subsection 2 of section 34 does not create any sanctions or held rights that transcend the fact that party nomination and substitution remains in the domestic domain of political parties, learned Counsel further submitted.

Learned Senior Counsel then submitted that the lower court is right in holding that the substitution of the appellant complied with section 34 of the Electoral Act, 2006 and invited the court to apply the decision in *Ararume's* case to the facts of this case "dispassionately."; that there are differences between *Ararume's* case and the instant case particularly as issues were joined at the trial of this case on the matter of indictment which was what INEC, the 2nd respondent is alleged to have verified as the reason for substituting the appellant's name in error; that by the Constitution of the PDP, 3rd respondent herein, which binds the appellant and other members, the fact that 2nd respondent did not take part in any primaries is of no moment as it provided therein that the party reserves the right to field any candidate it deems fit; that the language of section 34 did not expressly or impliedly disclose any intention to override the age old judicial policy which is not to involve itself in the domestic affairs of political parties in choosing, changing or substituting their candidate, relying on *Uyovwukerhi vs Afohughe* (1976) 5 S.C 85 at 93 and *Maxwell On Interpretation of Statute* 2nd Ed. 116-117.

In conclusion, learned Senior Counsel submitted that section 34 of the Electoral Act, 2006 "ought not to be imperatively interpreted as if appellant has a personal right to the office of Governor, with or without his party's sponsorship. At best, flowing from the principles in:

- (i) *Onuoha v Okafor* (1983) 2 SCNLR 244 at 204;
- (ii) *Dalhatu v Turaki* (2003) 15 NWLR (pt. 843) 310 at 347.
- (iii) *Ogunbiyi v Ogundipe* (1992) 9 NWLR (pt. 263) 4 at 39.

The right to sponsor a candidate by a political party for an election is not a statutory right or a legal right that is vested in a

candidate rather it is the right of the political party guaranteed by 1999 Constitution which is domestic to the political party and ought not be subject of determination by a court of law except for the purpose of computing damages in the event that there is fault or liability found against the party".....

B On his part, learned Senior Counsel for the 3rd respondent submitted that consent or undertaking of counsel to adjourn the matter to abide the decision of the Supreme Court in Ararume and to apply same to the facts of this case, cannot be a basis for the court to decide C a matter in a particular way as parties cannot, by agreement confer jurisdiction on a court where it lacks same, to hear and determine a matter before it; that the lower court was right in not following the decision in Ararume's case for the following reasons:-

D (i) the issue of indictment did not arise in Ararume's case to warrant the application of the doctrine of stare decisis to this case;

(ii) the 2nd respondent contested and won the Rivers State Governorship election and had been sworn into office, and,

(iii) unlike Ararume who contested the election as candidate E the appellant never contested the elections a candidate; that the above facts constitute distinguishing factors between Ararume's case and the instant case and thereby make Ararume's case inapplicable to the facts of the instant case.

F Learned Senior Counsel then proceeded to address the issue of section 34 of the Electoral Act, 2006 and submitted that the lower court is right in holding that the substitution of the name of the appellant was valid particularly as exhibit D was made within 60 days allowed by law to effect the change or substitution; that the indictment of the appellant for financial impropriety while functioning as G the Speaker of the Rivers State House of Assembly constitutes cogent and verifiable reasons for the substitution and that by the operation of section 73 of the Evidence Act, the court can take judicial notice of that fact. Learned Senior Counsel urged the court to resolve the issues against the appellant.

H Now Section 34 of the Electoral Act, 2006 provides as follows:-

"34. (1) A political party intending to change any of its candidates for any election shall inform the commission of such change in

writing not later than 60 days to the election.

(2) Any application made pursuant to subsection (1) of this section shall give cogent and verifiable reasons.

(3) Except in the case of death, there shall be no substitution or replacement of any candidate whatsoever after the date referred to in subsection (1) of this section." B

Both parties are agreed that the provision of section 34 supra is very clear, straightforward and unambiguous and demands nothing other than the application of the literal and ordinary canons of statutory interpretation and I agree with them. It is settled law that in C the construction of a statute, the primary concern of the judge is the attainment or ascertainment of the intention of the legislature by examination of the language used therein. Where the language used in the legislation or Statute or Constitution is clear, explicit and unambiguous, as found in the instant case, the judge must give effect to it D as the words used speak the intention of the legislature.

That apart, the said provision has been interpreted by this Court in the case of Ugwu vs Ararume supra. I hold the view that a literal interpretation of the provision of section 34 of the Electoral Act, 2006 E will not lead to absurdity or some repugnancy or inconsistency with the rest of the legislation.

It is clear that section 34 provides that a political party intending to change any of its candidates for any election conducted under the Electoral Act, 2006 shall inform the Independent National Electoral Commission (INEC) of such change in writing not later than 60 F days to the election upon giving cogent and verifiable reasons and that there shall be no substitution or change or replacement of any candidate whatsoever after the date referred thereto, except in the case of death of a nominated candidate. The section does not say G that the application to the Independent National Electoral Commission must be formal but that it must be in writing. That being the case, I hold the view that a letter conveying the intention of a political party to effect the change or substitution of its nominated candidate within the specified time, such as Exhibit D, in this case, will satisfy H that requirement of application and as such the view vigorously canvassed by the learned Senior Counsel for the appellant that the application referred to in the section must be a formal application is

with respect, erroneous. What is required is that the application must not be oral or verbal but must be in writing, giving cogent and verifiable reasons, for the intended change or substitution.

B The section also clearly imposes a duty on such political party intending the change to comply with that provision. The manner or mode of sending the information/application to the independent National Electoral Commission is by writing. In short section 34 is mandatory, not permissive as contended by learned Senior Counsel for the respondents in this appeal.

C Much time and energy have been expended by learned Senior Counsel for the respondents in arguing the obvious that the right to nominate, change or substitute candidates for elections are the domestic affairs of the political parties admitting of no interference from the judiciary and that that remains the object of section 34 D of the Electoral Act, 2006. I use the word "obvious" because that has been and still remains the law though by introducing the words "cogent and verifiable reasons" for substitution the legislature has clearly created an exception to the general rule or a condition precedent. I E must repeat that section 34 of the Electoral Act, 2006 has not taken away the power or right of political parties to nominate or even appoint candidates, depending on the provisions of their Constitution, to be sponsored by the political party to contest any election under the Electoral Act, 2006 or the right of the political parties to change, F substitute or replace such nominated candidate(s). What section 34(1) and (2) of the Act is saying is that for such a substitution or change or replacement to be legally effective or recognized by the Act, the change or substitution or replacement must be done within 60 days to the election in question upon application in writing by the political party G desiring the change/substitution which written application must contain "cogent and verifiable reasons". I do not think that insistence on compliance with the statutory requirement of the giving of "cogent and verifiable reasons" amounts, by any stretch of imagination, to interference by the judiciary with the domestic affairs of the political H parties or their power to nominate, sponsor or change or substitute any candidate for any election. To argue that it does to me, smacks of nothing but arm twisting or outright blackmail, apart from being a complete misconception of the issues involved in the relevant section

calling for interpretation/application.

The next question to be answered is whether the 3rd respondent, in seeking to change or substitute the appellant complied with the mandatory requirements of section 34 of the Electoral Act, 2006. In short, did the 3rd respondent assign any "cogent and verifiable" reason for the intended change or substitution. The lower courts held that it did but the appellant does not agree hence the further appeal to this Court. B

It is not disputed that the appellant was the duly nominated candidate of the 3rd respondent for the election to the office of the Governor of Rivers State of Nigeria; that within the sixty days allowed by section 34 of the Electoral Act, 2006 the 3rd respondent wrote exhibit D to the 1st respondent intending to substitute the 2nd respondent for the appellant for the above mentioned election; that the reason for the intended change/substitution was stated in exhibit D as "error" j in the submission of the name of the appellant to the 1st respondent in the first place; the 1st respondent in compliance with the request of the 3rd respondent changed or substituted the name of the 2nd respondent for the appellant; that prior to the actual substitution, the appellant being apprehensive of the threat of the substitution instituted the present action in the Federal High Court, Abuja claiming the reliefs earlier reproduced in this judgment, the rest is now history. The question is whether the 3rd respondent, in the circumstances of the instant case did give "cogent and verifiable reasons" for the intended change or substitution of the appellant. C
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As stated earlier in this judgment, the reason given in exhibit D is "error", just as was the case in the case of Ugwu vs Ararume supra. In the case of Ugwu vs Ararume (supra) this. Court did hold that the reason of "error" having regard to the facts of that case did not constitute cogent and verifiable reasons for the change or substitution and therefore declared the change or substitution null and void as the same failed to comply with the provisions of section 34 of the Electoral Act, 2006. Is the reason of "error" in the instant case cogent and verifiable having regard to the facts of the case? I do not think so, particularly as the 2nd respondent was never a participant at the 3rd respondent's primaries conducted to nominate a candidate for the Rivers State Governorship election which was actually won, by an G
H

overwhelming majority of votes, by the appellant, whose name was thereby forwarded to and accepted by the 1st respondent as the 3rd respondent's candidate. So, as between the appellant and 2nd respondent, the name of the appellant cannot, with any sense of responsibility be said to have been forwarded by the 3rd respondent to the 1st respondent as its candidate for that election in error so as to constitute cogent and verifiable reason. The error must therefore be from some other omission or commission by the 3rd respondent whose duty it is to assign the cogent and verifiable reason.

Unfortunately the 3rd respondent has not pleaded nor given evidence of any "error" in the instant case, just as was the case in the case of Ugwu vs Ararume supra. However, the 1st respondent did plead that the "error" arose from the fact that the appellant was indicted by the EFCC for financial impropriety during his tenure of office as the Hon. Speaker of the Rivers State House of Assembly and that the report of the indictment was accepted by the Federal Government. As found earlier, in this judgment no record of the alleged indictment and acceptance of same by the Federal Government exists. It is a settled principle of law that he who alleges must prove and that where a party fails to adduce evidence in support of facts pleaded, the pleadings are thereby deemed abandoned. In the instant case the 1st respondent, upon application before the lower court introduced the judgment of the Federal High Court in suit No. FHC/ABJ/CS/74/2007 as fresh or additional evidence on appeal in alleged proof of the fact of indictment and 'acceptance of same by the Federal Government of Nigeria. I had earlier in this judgment found and held that the said judgment contained no such evidence as the court never dealt with the issue of indictment at all.

Granted, for the purpose of argument only, that there is an evidence of such an indictment, can that without more be enough to satisfy the requirement of cogent and verifiable reason for substitution or change of a nominated candidate for election? I do not think so. In the first place, what is an indictment?

An indictment is defined by Blacks Law Dictionary, 8th Edition page 788 as follows:-

"1. The formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused

person.

2. *The act or process of preparing or bringing forward such a formal written accusation."*

From the above, it is very clear that an indictment is a formal charge or accusation against a person before a court of law made in writing. It does not extend to the trial of the person accused nor his being found liable on the said charge or indictment. What is being proposed as being the intention of the legislature under section 34(2) of the Electoral Act, 2006 is that once there is a charge against a person whether framed up or not he can be substituted by his political party without more. Is that what the law says, particularly when one realizes that the word indictment connotes the commission of crime. Should one be punished by substitution before being tried and found liable by a court of law upon the said indictment/charge? What of if the charge/indictment is a frame up for political expediency?

There are many more questions arising from accepting the existence of a charge or indictment against a candidate as sufficient cogent and verifiable reason for substituting him with another candidate than answers. In any event, I do not accept the argument that a mere accusation or charge or indictment is sufficient for the purpose of section 34 of the Electoral Act, 2006 having regard to the requirement that the reason of indictment must be cogent and verifiable particularly as the word "verify" connotes to prove to be true, to confirm, to establish the truth of: to examine or test the correctness or authenticity of something. If the word is used, as in the instant case in a statute, it is presumed to have been used in its legal sense meaning to confirm or substantiate by oath or affidavit - see *Action Congress vs INEC* (2007) 12 NWLR (pt. 1048) 222 at 304.

The above being the position it follows therefore that even if an indictment was proved to exist, there is the additional requirement that it be proved to be true, which still does not exist in this case.

It should not be forgotten that the learned Senior Counsel for the respondents have argued that the issue of indictment constitutes a very distinguishing feature in this case vis a vis the case of *Ugwu vs Ararume supra* thereby rendering the *Ararume's* case inapplicable.

However, it has been demonstrated in this judgment that the alleged distinction does not exist - it is a mirage. That being the case, it is my considered view that there is no significant difference between the facts of *Ugwu vs Ararume supra* and the instant case particularly having regard to the fact that both cases used the word "error" as the reason for seeking the change or substitution of candidates. The two cases being similar, I hold the further view that the principles of law decided or determined in the case of *Ugwu vs Ararume supra*, by the operation of the principles of judicial precedent or *stare decisis*, apply to the facts of the instant case and therefore the lower court was in grave error when it held otherwise.

Before leaving the issue of indictment, it is important to note that the issue of appellant's indictment is, from the facts available on record clearly an after thought because it appears to have emerged long after exhibit D was written giving the reason of "error" for the substitution and much after the appellant had sued.

There is also the issue of members of a political party being bound by the Constitution of the party which is good law. I agree that article 21 of the Constitution of the 3rd respondent provides, in effect, that a person who never participated in a primary election can be adopted as a candidate for any election by the party and that, that being the contract between the parties the appellant is bound by it and by extension the substitution of the 2nd respondent for the appellant was valid. I have no quarrel with that submission. It is still the same argument that a political party reserves the power or right to nominate and change its candidate for any election. What the argument seems to overlook is the fact that with the present state of the law, particularly section 34 of the Electoral Act, 2006, that power is exercisable subject to the giving of cogent and verifiable reasons for the change or substitution. It is therefore no more business as usual.

There is the argument to the effect that the right to nominate or change a candidate being that of a political party, appellant has no justiciable civil right or any right worthy of any judicial protection. I think that argument does not fully appreciate the provisions of section 34 of the Electoral Act, 2006. As stated earlier in this judgment, the section does not only provide that a political party desiring to change or substitute its nominated candidate for any election must

do so 60 days to the election except where the change or substitution is necessitated by the death of the nominated candidate, for that substitution or change of candidate to be legal the political party must assign cogent and verifiable reasons in writing to the "2nd respondent, it also provides that if the change is not done 60 days to the election or done less than 60 days to the election except where the candidate died, no such change or substitution shall be allowed - see section 34(3) of the Electoral Act, 2006. B

It is clear that subsection 3 of section 34 crystallizes the right of a nominated candidate to represent his party at the election 59 days C to the election since the party cannot, in law, be allowed to effect any change or substitution of the candidate. I hold the considered view that the subsection, apart from subsection 2, confers a justiciable cause of action on the candidate sought to be wrongfully changed or substituted. D

The above notwithstanding, it must always be remembered that the political parties have the power to nominate and change or substitute any nominated candidate for any election 60 days to any election subject only to the giving of cogent and verifiable reasons for the intended change or substitution. The political parties lose the power or right to effect the change or substitution in any period less than 60 days to the election except where the nominated candidate dies. It will therefore be wrong for any candidate to say that a political party has no right or power to substitute him 60 days to the election. It can F do so except where no cogent and verifiable reasons are given by the party for the intended change or substitution. The right of a candidate to represent a political party in any election becomes absolute and inviolate from 59 days to any election. That accounts for the lower courts holding that the substitution of the appellant was validly G done as it was done sixty days to the election and I hold the view that they are right in that respect only.

On issue No. 6, learned Senior Counsel for the appellant submitted that the effect of declaring the substitution of appellant null and void is that the name of the appellant was never changed as the 3rd respondent's candidate for the Rivers State Governorship election relying on *Adefulu vs Okulaja* (1996) 9 NWLR (pt. 475) 668 at 694; that the 2nd respondent was declared the Governor of Rivers H

State despite the pendency of the suit which is against the principles of *lis pendens*; that the respondents have demonstrated that they have no respect for the rule of law, and should not be allowed to benefit from that conduct, relying on *Obi vs INEC* (2007) 11 NWLR (pt. 1046) 565 at 645; that the court should set aside the declaration of the 2nd respondent as the Governor of Rivers State as the declaration was predicated on a nullity; that irrespective of the reliefs being sought by an appellant, this Court should invoke its general powers under section 22 of the Supreme Court Act and give appropriate and deserving orders to meet the justice of the case, relying on *Dantata vs Mohammed* (2000) 7 NWLR (pt. 664) 176 at 220 per Ayoola. JSC; *Yusuf vs Obasanjo* (2003) 9 - 10 S.C 53 at 94 per Tobi, JSC; *Okoya vs Santilli* (1990) 2 NWLR (pt. 131) 72 at 207; *Onuaguluchi vs Ndu* (2001) 7 NWLR (pt. 712) 309 at 319 - 320; *Arcon vs Fassassi* (No. 2) (1987) 3 NWLR (pt. 59) 1 at 4 - 5. Finally learned Counsel urged the court to resolve the issue in favour of the appellant and allow the appeal.

On his part, learned Counsel for the 1st respondent submitted that the submission of his learned friend silk is completely untenable as the Governorship election had taken place and the 2nd respondent had been declared the winner and sworn in as Governor unlike in *Ararume's* case where the election was yet to take place; that the name of the appellant was excluded from the ballot so he could not be declared the winner of the election; the appellant had filed an election petition against the 2nd respondent in respect of that election confirming the fact that it was the 2nd respondent rather than the appellant who won the election. Referring to section 140(1) of the Electoral Act, 2006, learned Senior Counsel submitted that the return of the 2nd respondent can only be questioned before an election tribunal, not in this Court; that section 22 of the Supreme Court Act cannot aid the appellant in this case as the 2nd respondent had been duly elected and declared winner and sworn in; that since this Court has no jurisdiction in election matters such as in the instant case where appellant seeks to be declared the Governor of Rivers State by operation of the powers of this Court under section 22 of the Supreme Court Act, the said section of the Act cannot be invoked and the case relied upon by counsel for the appellant in invit-

ing the court to so act are irrelevant as the powers can only be invoked where this Court has jurisdiction in the matter, relying on *Madukolu vs Nkemdilim* (1962) 1 All NLR 587 at 585. Finally learned counsel urged the court to resolve the issue in favour of the 1st respondent and dismiss the appeal.

On his part, learned counsel for the 2nd respondent submitted that there are limits to the remedies (if any) available to the appellant and that at best the appellant is entitled only to damages if he establishes any fault against the 3rd respondent on the authority of *Dalhatu vs. Turaki* supra; that the appeal has been overtaken by events as a result of a combination of events thereby rendering same academic, such as the unchallenged dismissal of the appellant from the 3rd respondent; the fact that, elections in issue had been held, the declaration of the 2nd respondent as Governor; the existence of appellant's election petition before the Election Tribunal have all rendered the reliefs otiose and urged the court to dismiss the appeal. B C D

Learned Senior Counsel for the 3rd respondent submitted that the arguments and reliefs sought in issue 6 run contrary to the claim of the appellant before the lower courts; that since the appellant was not a candidate at the election, it would be a rape on democracy and grave injustice to declare the appellant Governor of Rivers State and urged the court to dismiss the appeal. E

The issue under consideration deals with the general powers of this Court as contained in section 22 of the Supreme Court Act and Order 8 particularly Rule 12(2) and (5) of the Supreme Court Rules which provide as follows:- F

"8(12)

(2) *The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require, including any order as to costs.* G

(5) *The powers of the Court under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the court may make any order, on* H

such terms as the court thinks just, to ensure the determination on the merits of the real question in controversy between the parties."

The above provisions specifically show the enormity of the supervisory power of the Supreme Court being the final court in the land, to ensure that the determination of cases on appeal to it is reached on the merits of the real questions in controversy between the parties which resulted in the litigation. The expansive power of this Court as stated above is not in doubt and is recognized by both counsel in this matter. However, it is the case of the respondents that having regard to the facts of the instant case, this court lacks the jurisdiction to make the order being requested for by the appellant, that is a declaration that appellant is the Governor of Rivers State particularly as this court is not the appropriate Election Tribunal clothed with the requisite jurisdiction. I must however observe that the learned Senior Counsel for the respondents have used or employed the terms, "election matter" and pre-election matter" to describe the action as instituted by the appellant depending on the convenience of counsel having regard to the purpose of the presentation. The above notwithstanding, it is not in doubt that the Federal High Court has the jurisdiction to hear and determine the case of the appellant as couched in the reliefs claimed before that court - at least it has not been argued that it has no such jurisdiction. Equally not being disputed is the fact that the Court of Appeal has the jurisdiction to hear and determine an appeal arising from the decision of the Federal High Court on the case. The above being the case, it follows therefore that this Court, which by Constitutional arrangement is empowered to hear and determine appeals from the decision of the Court of Appeal is eminently qualified to hear and determine the instant appeal and as has been demonstrated in Order 8 Rules 12(2) and (5) of the Rules of this Court has the additional powers to make consequential order(s) aimed at ensuring that justice is done to the main questions or issues in controversy between the parties. The question that arises therefore is not whether this Court has the vires to make the consequential order as requested but whether this is the appropriate case to make such an order.

It has been submitted that the relief being sought in this Court does not form part of the reliefs sought in the lower courts and ought

not to be granted. It is settled law that the court is no father Christmas to grant to a party a relief not specifically prayed for - see *Ekpenyong vs Nyong* (1975) 9 NSCC 28; *Kalio vs Kalio* (1975) 9 NSCC 16; *Union Breweries Ltd vs Owolabi* (1988) 1 NWLR (pt. 68) 128 at 135.

The appellant's Senior Counsel does not deny the fact that the relief was being prayed for the first time in this Court but argued that the said relief is a necessary consequence flowing from a declaration of the nullity of the purported substitution or change of the appellant as the nominated candidate of the 3rd respondent for the Rivers State Governorship election which this Court is empowered to grant by virtue of order 8 Rule 12 (2) and 5 of the rules of the court.

Authorities abound to the effect that the court can, as in any other equitable remedy, grant an order of injunction where it is not specifically claimed but appears to it incidentally necessary so as to protect established right on record - see *Williams vs Showden* (1880) AN 124; *Atolagbe vs Shorn* (1985) 1 NWLR (pt. 2) 360. A consequential order is one giving effect to the judgment which it follows; it is not an order made subsequent to a judgment, which detracts from the judgment or contains extraneous matters - see *Obayagbona vs Obaze* (1972) 5 S.C 247. In *Garba vs University of Maiduguri* (1986) 1 NWLR (pt. 18) 550 this Court held that where a person has not specifically asked for a relief from trial court, a trial court has power to grant such a relief as a consequential relief - see *Okupe v F.B.I.R* (1974) 1 All NLR 314.

In the instant case, it has been held that the substitution of the appellant is null and void. This means that in the eyes of the law appellant was never substituted and therefore remained the nominated candidate of the 3rd respondent for the Rivers State Governorship election. The only way the substitution would have been valid is if the 3rd respondent had not only applied for same 60 days to the date of election but has proffered cogent and verifiable reason for the same. At the moment, the 60 days to the election had long gone and in fact the election held making it impossible for the 3rd respondent to effect any further substitution. Meanwhile the respondents have presented the court with a fait accompli leaving the appellant with an empty victory except this Court can invoke its expan-

sive supervisory power to do justice to the parties in the determination of the questions or issues in controversy between the parties. I do not see any clearer instance worthy of the exercise of the powers of this Court under order 8 Rule 12 (2) and (5).

B Learned Senior Counsel for the appellant has urged the court, as a ground for granting the consequential orders sought in this appeal to invoke the principle of *lis pendens*, as the alleged substitution of the 2nd respondent for the appellant was done during the pendency of the action at the trial court. I do not agree with the learned C Senior Advocate on that point. As can be gathered from the record, the action of the appellant was preemptive in that it was taken initially to prevent the 1st and 3rd respondents from substituting the appellant. Unfortunately, it was instituted before the expiration of the 60 days allowed the 3rd respondent by section 34(1) of the Electoral D Act, 2006 to effect the substitution. In short, at the time the action was instituted, the 3rd respondent still had the right/power under the law to effect the substitution though subject to the giving of cogent and verifiable reasons for same. *Lis Pendens* therefore cannot operate to deny the 3rd respondent of that right/power to effect the change E or substitution. In the circumstance it is my considered view that the decision is better anchored on the fact that there being no cogent and verifiable reason for the change or substitution, the purported change or substitution was null and void and of no legal effect whatsoever thereby opening the door to this Court to consider the conse- F quential orders to be made in the circumstances.

I hold the considered view that justice demands that the consequential order sought by the appellant in the instant appeal be ordered as prayed and consequently grant same. I therefore resolve G the issue under consideration in favour of the appellant.

On the cross appeals, learned Senior Counsel for the 2nd respondent/cross appellant, whose cross appeal is hereby treated as the first cross appeal, has identified three issues for determination, to wit:

H "66. *Whether the Court of Appeal was correct when it held that the appeal in issue did not abate upon the 2nd respondent being sworn in as the Governor of Rivers State whereupon he acquired constitutional immunity pursuant to section 308 of the 1999 Consti-*

tution ?

67. *Whether the Court of Appeal was correct in law when after finding that the entire gamut of appellant's dispute arose from nomination and sponsorship (matters within the domestic sphere of the 3rd respondent) it did not rule the entire dispute non justiciable?* B

68. *Whether the proceedings are not void ab initio on the basis that evidence viva voce was not taken in a suit commenced by writ of summons/statement of claim in respect of reliefs that were all declaratory in nature."*

In arguing the cross appeal, it is the submission of learned Senior Counsel that the Court of Appeal was in error when it held that the appeal did not abate upon the 2nd respondent being sworn in as the Governor of Rivers State at which point the 2nd respondent is said to have acquired constitutional immunity by virtue of the operation of section 308 of the 1999 Constitution; that the lower court erred in law when after finding that the gamut of the appellant's dispute arose from nomination and sponsorship which are matters within the domestic affairs of the 3rd respondent it failed to rule the dispute non justiciable; and that the proceedings were null and void on the ground that evidence viva voce was not taken at the trial in a suit commenced by writ of summons and statement of claim having regards to the declaratory nature of 'the reliefs claimed by the appellant, notwithstanding that the parties appeared to have consented. He urged the court to allow the cross appeal. D E F

On his part, learned Senior Counsel for the 3rd respondent/cross appellant in respect of the 2nd cross appeal identified a single issue for determination which is as follows:-

"Whether the court below was right in law to hold that the appeal before it was an election related matter and having so held G went further to hold that the second respondent was not entitled to enjoy the benefits of the immunity conferred on him by virtue of section 308 of the Constitution of the Federal Republic of Nigeria, 1999 having taken the oath of office and the oath of allegiance as the Governor of Rivers State and placing reliance on the cases of AD v. Fayose (2004) 8 NWLR (Pt. 876) p. 639 and Obi v. Mbakwe (1984) I SCNLR 192 to arrive at this conclusion." H

In arguing the issue learned Senior Counsel, in a rather very

lengthy brief spanning fifty pages, went on to define an election petition by citing many legal authorities including *Onitiri vs. Benson* (1960) 5 FSC 150 at 153; *Oyekan vs Akinjide* (1965) NSCC 152 at 153 - 154; *Unongo vs. Aper Aku* (1985) 6 NCLR 262 at 270; *Awuse vs Odili* (2004) 8 NWLR (pt. 876) 481 at 508 - 509; *Obih vs Mbakwe* (1984) 1 SCNLR 192 at 230; section 129 (1) and (2) of the Electoral Act, 1982; and section 151 of the Electoral Act, 2006. As to the question whether the instant appeal qualifies as an election petition, learned senior counsel answered in the negative after citing and relying on sections 140 of the Electoral Act, 2006; sections 141, 144, 145 and 147 of the Electoral Act, 2006; that this Court lacks the jurisdiction to determine election petitions, relying on section 285 (2) of the 1999 Constitution; section 246 (1) of the 1999 Constitution; *Umanah vs. Attah* (2006) 17 NWLR (pt. 1009) 503; *Okonkwo vs D Ngige* (2007) 12 NWLR (pt. 1047) 191 and *Awuse vs Odili* (2003) 18 NWLR (pt. 851) 116. Finally learned Senior Counsel submitted that an incumbent governor such as the 2nd respondent is entitled to immunity under section 308 of the 1999 Constitution, relying on *Tinubu vs IMB Securities PLC* (2001) 16 NWLR (pt. 740) 670 at 693 - 695 and urged the court to allow the cross appeal.

On his part, learned Senior Counsel for the appellant/cross respondent submitted the following three issues for the determination of the cross appeals:

- F *"(1) Whether plaintiff's suit being an election related matter and one challenging the process by which 2nd respondent was made to substitute the appellant, which case was filed before election, can be defeated by reason of the Cross-Appellant becoming the Governor of a state.*
- G *(2) Whether Plaintiff/Appellant/Cross-Respondent's Brief in this suit is justiciable;*
- (3) Whether the procedure adopted in determining the plaintiff's claim can vitiate the plaintiff's action."*

H I have to observe that the grounds of appeal in the cross -appeal are those filed by the cross appellants and that none was filed by the cross respondent. One then wonders under which of the grounds of cross appeal cross respondent's issue No. 2 can be said to have ema-

nated. There is nothing to ground the said issue which is accordingly discountenanced by me as a consideration of same will definitely lead to a colossal waste of time serving no useful purpose at all.

In arguing the relevant issues, learned Senior Counsel cited and relied on section 308 of the 1999 Constitution but submitted that the courts have been consistent in holding that the said section 308 of the 1999 Constitution does not apply to election matters, relying on *Obi vs Mbakwe supra*; *Unongo vs Aku supra*; and *AD vs Fayose supra*; *Dalhatu vs Turaki (2003) FWLR (pt. 170) 1378 at 1396*; that parties did not protest the procedure adopted at the trial of the matter and can therefore not be heard to complain at this stage in the proceedings; in any event, that documents were tendered at the trial by consent which constitute evidence on which to ground the declaratory reliefs and urged the court to dismiss the cross appeals.

The position of the cross appellants was adopted and supported by the 1st respondent/cross respondent in its brief filed on 18/10/07. Section 308 of the 1999 Constitution provides as follows:-

"308. (1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section -

(a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;

(b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and

(c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued:

Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.

(3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office."

B From the above provisions, it is very clear that section 308 of the 1999 Constitution confers immunity on the 2nd respondent in an appropriate case and circumstance - see the case of Tinubu vs IBM securities PLC supra at 693 - 695 where the court, per IGUH, C JSC., stated the law as follows:

"Turning now to section 308 (1) (a) of the 1999 Constitution, if is beyond dispute that the present suit instituted by the plaintiff/ respondent was to enforce the repayment of an overdraft facility granted to the 1st defendant. It is also clear that the action was insti-
D *tuted against the appellant in his personal capacity and did not arise by virtue of his position as the Governor of Lagos State. It is admitted by both sides that the appellant as at the time the decision of the Court of Appeal in issue was handed down, was and still remain the Governor of Lagos State. Section 308 (1) (a) of the Constitution of*
E *the Federal Republic of Nigeria, 1999 provides in the clearest possible language that notwithstanding anything to the contrary in that Constitution, no civil or criminal proceedings shall be instituted or, if already instituted, continued against any person to whom that sec-*
F *tion of the Constitution applies during his period of office ... section 308(3) provides that the said section 308 of the 1999 Constitution applies to a person holding the office of President or Vice-President, Governor or Deputy-Governor. Section 308(2) however lays down that the provision of the said subsection (1) of section 308 shall not*
G *apply to civil proceedings instituted against any of the relevant public officers in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party... if was during the pendency of this appeal that the appellant was sworn in as the Governor of Lagos State and it was thereafter that the question whether or not*
H *the suit could lawfully be continued against him as the Governor of Lagos State arose before the Court of Appeal. The appellant remain the Governor of Lagos State till this day. The claim against him did not arise by virtue of any act executed by him in his official capacity*

as Governor of Lagos State nor was he, as the said Governor, sued in the action as a nominal party. It is thus clear that applying the mandatory provisions of section 308(1) (a) of the 1999 Constitution no civil proceedings may be instituted or, if already instituted as in the present action, shall be continued against him while he holds the office of the Governor of Lagos State ... It suffices to say that this is a suit in which the appellant is sued as a defendant. The suit therefore falls directly within the ambit of the provision of section 308(1) (a) of the 1999 Constitution. Nor do I accept that the appellant may waive the immunity granted to him under section 308 (1) (a) of the 1999 Constitution. In my view, the immunity granted to the incumbent of the relevant office under section 308 (1) (a) of the Constitution prescribes an absolute prohibition on the courts from entertaining any proceedings, civil or criminal, in respect of any claim or relief against a person to whom that section of the Constitution applies during the period he holds such office. No question or waiver of the relevant immunity by the incumbent of the offices concerned or, indeed, by the court may therefore arise. In my view, the Court of Appeal was absolutely right to have declined to entertain the appellant's appeal pending before it as to do otherwise would amount to continuing the plaintiff/appellant, a suit which under section 308 (1) (a) of the 1999 Constitution shall not be continued against the appellant while he remained the Governor of Lagos".

The above position is a general principle of law, which like every such principle admits of certain exception(s) such as that the constitutional immunity so conferred does not extend to election matters but is limited to purely civil and criminal matters neither does the immunity create a corollary duty on the occupant of that office not to institute action(s) against any party while in that office - see Global Excellence Communications Ltd & ors vs. MR DONALD DUKE (2007) 16 NWLR (pt. 1059) 22.

I hold the view that in an election matter or election related matter before the courts, the right of the Governor to remain in office is very much in dispute. In the instant case, I agree with the lower court that the matter is an election related matter or dispute as it involves the issue as to who was the nominated candidate of the 3rd respondent for the Rivers State governorship election held on 14/4/

07. While appellant claims to be the candidate, the 2nd and 3rd respondents claim that appellant was duly substituted with the 2nd respondent and that it was therefore the 2nd respondent that was the candidate of the party at the election. If one says that such a matter is not an election related, I wonder what else could be better so related. I hold the further view that if the 2nd respondent, or any State Governor for that matter in similar situation, is considered to be immune from court proceedings it would send wrong signals to the polity as it would encourage sitting Governors to flout the electoral laws/processes and regulations to the disadvantage of their opponents and get away with it under the guise of constitutional immunity. I hold the view that section 308 of the 1999 Constitution was not crafted or designed to encourage injustice or deprive an aggrieved party the exercise of his right to a remedy under the law.

That brings me to the effect of the proviso to section 308 of the 1999 Constitution which suspends the principles of limitation of action or time during the period the person concerned occupied the office. What that means is that time would begin to run or continue running after the occupant of the relevant office to which the immunity attaches, leaves office. It is settled law that by constitutional arrangement, a Governor remains in office for a period of four years from the date he swears to the oaths of office and allegiance. In which case an action against such an occupant cannot be commenced or continued until after the four years tenure has expired. Unfortunately in the instant case, the lis is the tenure and would become spent at the expiration of the four years. So to say that section 308 of the 1999 Constitution applies to the instant case is to deprive the appellant of the right to have the dispute as to who is entitled to be or remain the Governor of Rivers State settled once and for all and before the expiration of the tenure. It would amount to gross injustice in the circumstances of the case and this Court will not be associated with that colossal error.

On the issue as to whether the proceedings in the lower court is a nullity on the ground that no oral evidence was tendered at the trial, I hold the firm view that it is misconceived as there is evidence on record that exhibits were tendered and admitted from the Bar which exhibits, including exhibit D were used in the proceeding lead-

ing to and including the judgments of the courts. It is erroneous to argue that evidence is limited to oral testimony whereas it includes documents and objects duly tendered and admitted as exhibits in any legal proceedings.

In short, I find no merit in the cross appeals which are accordingly dismissed. B

In conclusion, I agree with my learned brother Oguntade, JSC that the appeal is meritorious and should be allowed while the cross appeals are without merit and ought to be dismissed. I accordingly allow the appeal and dismiss the cross appeals with costs as assessed C in the said lead judgment.

Appeal allowed. Cross appeals dismissed.

MUHAMMAD JSC

On the 25th day of October, 2007, this court allowed the main appeal, made some consequential orders and dismissed the cross-appeals of the 2nd and 3rd respondents/cross-appellants. I deferred giving my reasoning to today. I now give my reasoning herein below. D E

From the facts contained in the printed record of appeal placed before this court, the appellant's story of the case is that, the appellant was the duly nominated River State People's Democratic Party (PDP) candidate for the governorship election scheduled for the 14th of April, 2007. He was a member of PDP and was elected two times F as a member and speaker of Rivers State House of Assembly under the platform of the PDP. Before he became the candidate of PDP, he went through party screening, clearance and primaries. Upon being screened and cleared to contest the primaries, the appellant contested the party primaries with about six other governorship aspirants and came first with six thousand five hundred and twenty seven votes (6,527). Following the conclusion of the party primaries, the national chairman and national secretary of PDP submitted plaintiff's name and that of Tele Ikuru as the PDP's governorship and , deputy candidates respectively for River State for the April 2007 governorship election to the Independent National Electoral Commission (INEC), the defendant/1st respondent. The defendant upon receipt of the name of the appellant/plaintiff published on their notice board H

and went further to publish the information on sworn affidavit in support of the particulars of the appellant in their offices in all the Local Government Areas in River State. The plaintiff/appellant averred that on the 16th of January, 2006, the defendant started what it called the verification of the documents of the candidates of all political parties in Nigeria. He went through INEC mandatory screening exercise on 21st day of January, 2007. The plaintiff's name and that of his running mate were the only names submitted to INEC as governorship and deputy governorship candidates respectively of PDP for River State in respect of April 14th 2007 governorship election. The plaintiff averred further that the verification exercise mentioned above will last for ten days (16th - 26th January, 2007) and between 29th January and 12th of February, 2007, the defendant will start disqualifying candidates in a manner contrary to the Electoral Act, 2006 which says that only a court order can disqualify a duly nominated candidate of a political party. Under the Electoral Act, 2006, the plaintiff asserted that the defendant has no power to screen, verify or disqualify a candidate once the candidate's political party has done its own screening and submitted the name of the plaintiff to the defendant. The plaintiff avers that he is very sure that he has not committed any offence to warrant disqualification. The plaintiff alleged that he would suffer irreparable and irretrievable damages if his name was wrongfully removed and a new name was brought to INEC by the party. The plaintiff averred that under the Electoral Act, 2006, a political party is not allowed to change or substitute any of its candidates once it is 60 days to a general elections and by 12th of February, 2007, it will be 60 days to the April 2007 governorship election. The plaintiff said that since the submission of his name and the subsequent publication of his name no person had challenged the veracity of the information subscribed and no High Court had issued an order disqualifying him or his running mate from contesting the April, 2007 governorship election in River State. He alleged further that INEC was about accepting the substitution of his name without any cogent or verifiable reasons and without a court's order to that effect. Unless and until the respondents were restrained by the trial court, the plaintiff's name might be removed without cogent and verifiable reasons as stipulated under the Electoral Act, 2006. The plaintiff made

the following claims in his amended statement of claim before the trial court:

"i. A declaration that the option of changing or substituting a candidate whose name is already submitted to INEC by a political party is only available to a political party and/or the Independent National Electoral Commission (INEC) under the Electoral Act, 2006 only if the candidate is disqualified by a Court Order.

ii. A declaration that under Section 32(5) of the Electoral Act, 2006 it is only a Court of law, by an order that can disqualify a duly nominated candidate of a political party whose name and particulars have been published in accordance with Section 32(3) of the Electoral Act, 2006.

iv. A declaration that under the Electoral Act, 2006, Independent National Electoral Commission (INEC) has no power to screen, verify or disqualify a candidate once the candidate's political party has done its own screening and submitted the name of the Plaintiff or any candidate to the Independent National Electoral Commission (INEC).

iv. A declaration that the only way Independent National Electoral Commission (INEC) can disqualify, change or substitute a duly nominate candidate of a political party is by Court Order.

v. A declaration that under section 32(5) of the Electoral Act, 2006 it is only a court of law, after a law suit, that a candidate can be disqualify(sic) and it is only after a candidate is disqualify(sic) by a Court order, that the Independent Nations Electoral Commission (INEC) can change or substitute a duly nominate candidate.

vi. A declaration that there are no cogent and verifiable reasons for the defendant to change the name of the plaintiff with that of the 2nd defendant candidate of the People's Democratic Party (PDP) for the April, 13, 2007 governorship Election in River State.

vii. A declaration that it is unconstitutional, illegal and unlawful for the 1st and 3rd defendants as the governorship candidate of People's Democratic Party (PDP) for River State in the forthcoming governorship election in Rivers State, after the plaintiff has been duly nominated and sponsored by the People's Democratic Party as its candidate and after the 1st defendant has accepted the nomination and sponsorship of the plaintiff and published the name and particu-

lars of the plaintiff in accordance with section 32(3) of the Electoral Act, 2006 the 3rd defendant having failed to give any cogent and verifiable reasons and there being no High Court Order disqualifying the plaintiff.

- B *viii. An order of perpetual injunction restraining the defendants jointly and severally by themselves, their agents, privies or assigns from changing or substituting the name of the plaintiff as the River State People's Democratic Party governorship candidate for the April, 2007 River State Governorship Election unless or until a court order*
 C *is made disqualifying the Plaintiff and or until cogent and verifiable reasons are given as required under section 34(2) of the Electoral Act, 2006".*

Meanwhile, leave was sought for and granted by the trial court on the 13th day of February, 2007, for the joinder of the 2nd and D 3rd defendants as parties to the suit. The 2nd and 3rd defendants/respondents filed and served their respective statements of defence. Each of the defendants denied the allegations of the plaintiff/appellant. The appellant filed a reply to each of the defendants statements of defence.

E Due to the urgent nature of the action, the trial court granted leave to the parties to formulate and file issues for determination in order to save time.

On the hearing date, learned counsel for the respective parties F adopted their submissions in their respective briefs and made further oral amplification on some points. On the 15th day of March, 2007, the learned trial judge, B. F. M. Nyako, J., delivered her judgment. The learned trial judge held, inter alia, as follows:

G *"I believe that the framers of the law particularly wants (sic) Independent National Electoral Commission to be able to verify or confirm the reason proffered for the intention to substitute. If however Independent National Electoral Commission is able to verify the reason from the reason 'error' (sic), then I do not see how the court can question their verification or acceptance of the substitution.*

H *No matter how it is couched the final say as to whom a political party sponsors for an election is their ultimate decision. When they run foul of the procedure the remedy is not for the court to substitute a candidate for it. No its folly will be in not fielding a candidate at all.*

Independent National Electoral Commission has not told us that they were not able to verify the cogent reason of error given to it by the defendant for wanting to substitute its candidate. That the plaintiffs name was in same indicted list is not before the court and I shall refrain from touching on that extensive issue.

On Independent National Electoral Commission acting on Exhibit D while, the case is sub-judice I find that, that is a reprimandable act and the proper thing to have done is await the outcome of the suit and on the authority of the case of Ojukwu v Government of Lagos State, any action done pursuant to exhibit D C while this case is subjudice is hereby set aside.

The only time the court will interfere with the candidates of a political party by virtue of section 34(1) and (2) is when the procedure is not complied with."

Consequent upon the above findings, the learned trial judge arrived D at the following conclusions:

"Consequent upon all the above and all the reasons and conclusions in the case of Senator I. Ararume (supra) I can only find that the submission of the name of the 2nd defendant in replacement for the plaintiff was done within time.

Secondly, any action taken by the 1st defendant pursuant to exhibit D while this case is sub-judice is set aside.

Thirdly, Independent National Electoral Commission has the responsibility to verify the reason given to it by a political party for wanting to change or substitute its candidate for another and if they require more particulars to so verify it is for it to ask for more particulars and not for the court."

The learned trial judge in the end granted some of the reliefs sought and refused others.

Dissatisfied with the trial court's decision, the plaintiff as appellant, appealed to the Court of Appeal, Abuja Division (Court below). The 2nd and 3rd defendants filed notices of cross-appeal as well. Learned counsel for the respective parties filed and exchanged briefs in respect of the main and cross-appeals. A definite date for hearing the appeals, i.e. 11th April, 2007, was set down.

On the said hearing date however, both 2nd and 3rd respondents filed a motion on Notice, each, praying for an order of court

striking or dismissing the appeal for lack of jurisdiction. The grounds upon which both motions were premised were given as follows:

"1. The appeal is now incompetent by reason of the expulsion of the appellant/respondent from the Peoples Democratic Party (PDP) thereby making the outcome of the suit a mere academic exercise.

2. The appellant/respondent has no locus standi to continue with the prosecution of this appeal by reason of his expulsion from the Peoples Democratic Party."

Because of the fundamental nature of the issue of jurisdiction raised by the motions first to enable it ascertain whether or not it had jurisdiction to proceed with the appeals. Accordingly, learned counsel for the respective parties made their oral submissions in respect of the two motions.

After having considered the affidavit evidence and the submissions of respective counsel for the parties, the court below, per Omoleye, JCA, held as follows:

"Consequent upon the totality of my above reasoning and conclusions, I hold that because there is no longer in existence any relationship and dispute between the appellant and the respondents in view of the reliefs being sought by the appellant, this court has no jurisdiction to adjudicate upon the appeal. All the issues in the substantive appeal and the cross-appeals cease to be live and any consideration of them will not just amount to mere expression of opinion, a moot debate and academics which activities courts are precluded from engaging in, it will indeed be an exercise in futility, a further waste of precious judicial time, energy and resources.....The Applications of the 2nd and 3rd respondents are meritorious and they succeed. The Appeal No CA/A/70/07 and the Cross-Appeals are hereby struck out for incompetence...."

Adekeye and Aboki, JJCA., concurred with the above decision.

Dissatisfied with the above ruling the respondent/appellant cross respondent appealed to this court. His Notice of Appeal which contained twelve grounds of appeal is contained on pages 412 - 418 (1) of Vol. (ii) of the Record of Appeal. I shall refer to this appeal simply as "the 1st appeal."

Upon hearing the learned counsel for the respective parties, this court, on the 11th day of May, 2007, delivered its judgment as

follows:

"It is ordered

1. that the Court of Appeal was in error in declining jurisdiction to hear the appeal and the Cross-Appeal on merit; and

2. that the matter be remitted to the Court of Appeal, Abuja to hear the two appeals expeditiously." B

Before the hearing of the two appeals by the court below, a Motion on Notice was filed by the learned SAN, J. B. Daudu for the 2nd respondent asking the court below to grant him the following reliefs:

"1. An order of this Honourable Court staying further proceedings in this appeal (just remitted for hearing by order of the Supreme Court dated the 11th of May, 2007) pending the delivery of the full judgment which will provide the basis of the determination of the appeal by way of reasons for the judgment (as was announced by Hon. Justice A. I. Katsina-Alu (presiding) in open court) C D

Alternatively

2. An order of this Honourable Court staying further proceedings in this appeal, particularly the hearing of the appeal until the Supreme Court is approached by any of the parties to apply the provisions of Order 8 Rule 16 to correct the clerical error in her judgment to the effect that the pronouncement of Katsina-Alu, JSC made in open court that reasons for the judgment will be provided at a later date, which pronouncement was not reflected in the certified copy of the proceedings of 11th of May 2007 be reflected in the said judgment. E F

3. And for such further or other orders as this Honourable Court may deem fit to make in the circumstances."

The grounds upon which the application was premised were as follows: G

"i. By the combined effect of the provisions of the 1999 Constitution, Supreme Court Act and Rules made in that behalf, together with the Court's practice, judgment of court must demonstrate in full a dispassionate consideration of the issues properly raised and heard and must reflect the results of such an exercise. H

ii. Because of the variety of issues put before the Supreme Court as demonstrated by exhibits 1-4 annexed to this application, this Honourable Court cannot carry out her constitutional functions

of hearing appeals from the High Court without knowing how and where she was faulted in her previous judgment so as to avoid a situation where the mistakes (if any) made in the court's decision now overturned is not repeated.

B *iii. Fundamental jurisdictional issues were raised before the Supreme Court, which also affects the jurisdiction of this Honourable Court particularly in respect of post election matters and which issues were not adverted to in the Supreme Court judgment, rendering them liable to be raised again before the Court of Appeal.*

C *iv. This appeal is therefore, for the foregoing reasons not ripe for hearing."*

After considering the affidavit evidence of the parties and the oral submissions made by learned Senior counsel for the respective parties, the court below, per R. D. Muhammad, JCA concurred by D Adekeye, Omoleye, Aboki and Uwa, JJCA, granted the application by making the following order:

"That proceedings in this appeal, particularly the hearing of the appeal is hereby stayed until the Supreme Court is approached by the respondent/applicant to apply the provisions of Order 8 Rule
E *16 to correct the clerical error (if any) in her judgment to the effect that the pronouncement of Katsina-A!u, JSC made in open court that reasons for the judgment will be provided at a later date, which pronouncement was not reflected in the certified copy of the proceedings of 11th of May, 2007 be reflected in the said judgment.*
F

The respondent/applicant is ordered to file his application at the Supreme Court within seven days from today."

Dissatisfied with the above order, the appellant again appealed to this court (Notice and Grounds of Appeal are on pages 535 - 537
G of Vol. III of the record of appeal}. This court again ordered the court below that this appeal and cross-appeal be heard expeditiously as previously ordered and that Justice must not only be done, it must be seen to be done. This is what I call "the 2nd appeal."

H The main appeal and the cross-appeals before the court below were finally determined. The main appeal was dismissed for lacking in merit and the cross - appeals succeeded in part. It is against this that the appellant filed his appeal to this court.

The parties filed and exchanged briefs of argument. Issues for-

mulated by the parties were well set out by my learned brother Ogun-
tade in his judgment. I need not reproduce them. My learned brother
had also painstakingly summarized the submissions of all the respec-
tive learned senior counsel for the respective parties. Unless where
necessary, I need not make another summary.

Both the 1st, 2nd and respondents filed separate Notice of
preliminary objection against the hearing of the appeal. The grounds
upon which each of the objections was raised were fully quoted by
my learned brother in his judgment. I need not repeat them here. I
am also contended with the way the preliminary objections were
handled by my learned brother.

Now, considering the issues formulated by the appellant, issue
one is on the propriety or otherwise for the court below to admit in
evidence on appeal the ruling of an Abuja Federal High Court in suit
No FHC/ABJ/C5/74/2007 delivered on 30th March, 2007. The first
respondent prayed the court below for the following:

*"An order granting leave to the 1st Respondent/Applicant to
adduce further evidence in this Appeal by tendering certified true
copy of judgment in Suit No: FHC/ABJ/CS/29/2007 between Rt Hon.
Chibuike Rotimi Ameachi v (1) Attorney General of the Federation
(2) Economic and Financial Crimes Commission (3) Independent
National Electoral Commission (4) Peoples Democratic Party (5)
Celestine Omehia delivered by Federal High Court Abuja by
Kuewumi, J., on 30th March, 2007."*

The grounds upon which the application was made were as follows:

*"1. The evidence sought to be led on Appeal was not available
at the time of the trial or during the trial but came after the trial or
hearing and judgment."*

*"2. The evidence will assist in determining one way or the other
the issue of indictment and the challenge to same and will generally
meet the ends of justice."*

It is to be recalled that when the issue of indictment of the appellant
was averred to in the statement of defence of the 1st respondent
(para 7 of page 87 of the record) and the reply thereof by the appel-
lant (para 1 of pages 137 of the record), the trial court held as fol-
lows:

"That the plaintiff's name was in same indicted list is not before

the court and I shall refrain from touching on that extensive issue."

I think the main issue in contention here is not whether the appellant was indicated or not. Rather, the issue is whether it was correct for the court below to admit in evidence the ruling of the Abuja Federal High Court in suit No FHC/ABJ/C5/74/2007 delivered by Kuewumi, J; on the 30th day of March, 2007.

Order 19(2) of the Court of Appeal Rules 2002 provides:

"(2) The court shall have power to receive further evidence on questions of fact either by oral examination in court, by affidavit or by deposition taken before an examiner or commissioner as the court may direct, BUT IN THE CASE OF AN APPEAL TRIAL OR HEARING of any cause or matter on the MERITS NO SUCH further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."

(emphasis added)

It is now trite that for an appeal court to admit additional evidence of facts on appeal, there must exist special grounds. In *Asaboro v Aruwaji* (1974) 1 All NLR (Pt.1) 140, such special grounds were stated as follows;

- i. The evidence sought to be adduced must be such as could not have been, with reasonable diligence, obtained for use at the trial.
- ii. The evidence shall be such as if admitted, it would have an important not necessarily crucial, effect on the whole case, and
- iii. The evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible,
- iv. The additional evidence may be admitted if the evidence sought to be adduced would have influenced the judgment at the lower court in favour of the applicant had it been available at the trial court.
- v. The evidence should be weighty and material, where evidence sought to be admitted is irrelevant and immaterial, it will be rejected.

See: *Owatta v Anyizor* (1993) 2 SCNJ 1 at pp 12-13; *Obasi v Onwuka* (1987) 2 NSCC, 981; *A-G Federation v Alkali* (1972) 12 SC.

In its reasoning process, the court below, after stating the correct position of the law, stated further:

"The application for leave to adduce further evidence on appeal is not one of Regular applications in the judicial process, it is the procedural practice in the Nigerian adjectival law that parties should adduce all the evidence they need or require in the trial court, it is the court that has jurisdiction to hear further evidence on appeal except in very compelling circumstances such as..... In the instant case the document sought to be brought in this document sought to be brought in this appeal by way of further adduced evidence came into existence on 30/3/07. Hearing was completed and judgment delivered in this case before the trial court on 15/03/07..... The objection is overruled while the document, the Ruling of the lower court in suit No FHC/ABJ/C5/74/2007 delivered on the 30th of March, 2007 is hereby admitted as part of evidence in this appeal."

(underlining supplied for emphasis)

The affidavit evidence laid by the parties before the court below, and upon which that court arrived at its conclusion is worth looking at. The 1st respondent applicant averred as follows:

1. That I am informed by the Senior Counsel for the 1st Respondent/Applicant Chief Amaechi Nwaiwu, SAN whom I verily believe as follows:-

"(a) That he did not participate in the trial in the Court below but was only briefed on 3/4/2007.

(b) That in the court below, the issue of indictment of the 2nd Defendant/Appellant by the Economic and Financial Crimes Commission (EFCC) and the acceptance of the report by the panel set up by the Federal Government was raised, but no oral evidence was taken.

(c) The Plaintiff/Appellant challenged his indictment

(d) That in Suit No FHC/ABJ/CS/74/2007 between Rt. Hon. Chibuike Rotimi Amaechi v Attorney General of the Federation and 3 others, the Appellant challenging his indictment and disqualification by the 1st respondent/Applicant the suit was dismissed on 30/3/2007. The certified true copy of the Ruling is hereby exhibited and marked as Exhibit "A".

(e) *That the evidence sought to be led was not available at the time of the trial or during the trial but came after the trial or hearing and Ruling in the said suit No FHC/ABJ/CS/74/2007.*

B (f) *The evidence sought to be led will assist in determining one way or the other the issue of indictment and will generally meet the ends of justice.*

(g) *That the evidence sought to be admitted is credible and capable of being believed.*

C (h) *That the evidence if admitted would have an important effect on the whole case."*

The appellant as respondent to the application filed a counter - affidavit in which he averred as follows:

D "1. *That the 1st Respondent was at all time maternal represented by counsel at the lower court.*

2. *That the issue of indictment raised by the 1st Respondent was never proved before the trial court.*

E 3. *That the 1st Respondent had all the opportunity to call oral evidence if thought necessary but chose to abandon the issue of indictment for that of "error" advanced by the 3rd Respondent*

4. *That the issues for determination formulated by the parties at the trial court took cognizance of the two reasons of "error" and "indictment" advanced but no address was made in respect of reason of indictment.*

F 5. *That the plaintiffs suit No FHC/ABJ/CS/74/2007 was not heard on merit but dismissed in limine for reasons devoid of any findings on the indictment of the Plaintiff/Appellant.*

6. *That the evidence sought to be led is irrelevant to the just determination of this appeal*

G 7. *That all the facts relevant to the evidence sought to be led were in existence at the lower court and none was pleaded by the 1st respondent in its statement of defence dated 28th February, 2007 and contained on pages 142 - 145 of the record.*

H 8. *The proceedings in the suit referred to in paragraph 9 (supra) lasted between 2nd March, 2000 9th March, 2007 and contained on pages 167 - 178 of the record and no allusion was made to it by the 1st Respondent or any of the defendants during addresses at the lower court.*

9. That I know as a fact that the evidence sought to be led will have no effect on the instant appeal in any way."

In the case of *Owata v Anyigor* (supra) particularly at page 16, this court stated that all the condition listed above must be satisfied together and at the same time before an appeal court can admit further or fresh evidence on appeal. I observe that the only reason relied upon by the court below to admit that fresh evidence was because the document sought to be admitted came into existence on 30/3/07 when judgment had already been delivered on 15/03/07. Then, what happened to the other conditions? This makes it difficult for me to agree with the argument advanced by J. B. Daudu, SAN who argued on same point, that it is automatic to admit such documents as further or additional evidence so long as it is pleaded and or is relevant to the fact in issue. Further, it must be taken that the 1st respondent/applicant abandoned his case on indictment at the trial court as he failed to support what he pleaded with oral evidence. It is trite that any pleadings with no evidence to support it goes to no issue. See: *Odunsi v Bamgbala* (1995) 1 NWLR (pt 374)641. B C D

Again, looking critically at what was sought to furnish evidence on the alleged "indictment" one would come to the inevitable conclusion that the document, on its face value, was bereft of any credibility. That document lacked all the characteristics of what constitutes proper indictment in law. The whole saga was thus no more than allegation. It was therefore wrong of the court below to admit the document i.e. judgment of Kuewumi, J., in suit No FHC/ABJ/CS/74/2007 as fresh/further evidence on appeal. Accordingly, I allow issue No 1. E F

On the appellant's second issue which is on whether the court below ought to have followed the decision of this court in *Ugwu v G Ararume* in appeal No SC/63/07. For a better appreciation of this issue, I think it is important that I should reproduce the major events of the proceedings of the 4th of April, 2007 conducted by the court below, it reads as follows:

"Mr. Fagbemi - informs the court he was briefed only yesterday. He realizes the position in the appeal. He should be allowed till tomorrow to file his brief. It is wise to wait for the Supreme Court in respect of section 34(1) of the Electoral Act so that the Supreme H

court decision can become the precedent on the matter.

Mr. Daudu, SAN submits that in view of the seriousness of the matter briefs must be filed. The case of Ararume is now at appeal in Supreme Court, the court can depart from its earlier decision but to do that the court shall decide that on a panel of five. Application shall be taken by a panel of five being a constitutional decision. Time is of essence so that the decision of the court shall be taken expeditiously.

Chief Gadzama, SAN submits that the position of section 34 is known. The court should allow parties to file briefs in view of the fact that two senior counsels are coming in for the first time. Ararume shall be heard tomorrow and the judgment shall be delivered on Tuesday. This court shall wait for the judgment of Supreme Court applies that parties shall file briefs. The Supreme Court sat as a panel of seven on Ararume it appears we have a constitutional matter and a panel of five should have sat section 145(1) (d) can be invoked at the tribunal on this matter. There is need to adjourned this matter to allow five justices to sit and to order filing of briefs.

Mr. Fagbemi - submits the court to read between the lines. The antecedent is to frustrate this case. This case was adjourned on two occasions. There was emphasis on oral submission in respect of this appeal. There have been procedural delays in the hearing of this appeal. Election is only about ten days away. Vide section 247(1) of the constitution refers by counsel.

The position of the constitutional panel is provided for by the Supreme Court and as provided for under the constitution. The appeal should have been heard today and there is a cross-appeal which is separate and distinct Re. Fagbemi informs the court that he asked for a panel of seven so that there can be a departure from the decision in Ohuoha v Okafor. Justice should be seen to be done in this case and it can only be done by the hearing of this appeal now before election. This is not an election matters but a pre-election matter. The case of Amaechi cannot go on until it has been determined. Time is of essence. There is an undertaking that if the Supreme Court upturns the judgment of this court then the appellant shall abide by it. Parties were served with papers on Friday. Court to take a serious view of this situation go on.

Court: it is the decision of this court and going by the doctrine

of stare decisis -judicial precedent that not (sic) wait for the judgment of the Supreme Court on section 34 of the Electoral Act - since that decision shall be law and applicability shall be binding on the parties particularly political parties INEC. This court shall also base other decision on any appeal involving section 34 on the decision of the Supreme Court, this appeal shall be adjourned to the 11th of April 2007." B

The last paragraph from the above excerpts is the ruling/decision of the court below on the application that that court should await the pronouncement of this court in Ugwu v Ararume (supra). That ruling C remained valid and subsisting up to the time this court gave its decision in Ugwu v Ararume and up to the very moment the court below took a decision either way. The position of the law is that once the Court of Appeal made a decision or a statement of its guiding principles, it is bound by it and must follow it. See: Oyeyemi v Irewole D Local Government (1993) 1 NWLR (Pt.270) 462 at 477. Learned Senior counsel for both the 1st and the 2nd respondents respectively, submitted that the appellant was wrong in arguing that the Court of Appeal was bound by its statement quoted at pages 372 - E 373 of the record. Both submitted further that so many issues arose between 14/04/07 and 20/7/07, being features that distinguished the Ararume's case from the present appeal. Learned senior counsel for the 1st respondent cited the following instances: (i) the issue of additional evidence admitted, (ii) election had taken place on 14/4/07 F and 2nd respondent declared elected and returned, (iii) issue of immunity of the 2nd respondent under section 308 was raised. Learned senior counsel for the 2nd respondent submitted that the court of Appeal never refused to follow the Supreme Court in the Ararume's case and on the contrary it obediently applied Ararume's case to the G distinct facts of this case. He submitted that the result reached by the Court below was the correct one in the process. He argued that at no point was there an undertaking by all counsel to apply Ararume's case without further reflection. It was only the appellant's counsel H that promised to be bound by Ararume if the appeal succeeded.

At the risk of repetition, I need to reproduce what the court below said on 4/4/07- It reads as follows:

"Court: it is the decision of this court and going by the doctrine

of stare decisis - judicial precedent that not (sic) wait for the judgment of the Supreme Court on section 34 of the Electoral Act - since that decision shall be law and applicability (sic) shall be binding, on the parties particularly political parties INEC. This court shall also base
 B *other decision on any appeal involving section 34 on the decision of the Supreme Court. "*

I think there is no ambiguity in the above decision. It is very clear, at least to me, that the court below intended to wait for and be bound by whatever decision this court might come up with. Thus,
 C this court's decision, whether sweet or bitter, has to be swallowed, hook - line and sinker, by the court below. To now say that there were some distinguishing features in this appeal as against Ararume's, I think, is to embark on a needless and aimless jamboree. It is a distinction without difference. None of the features mentioned by the
 D 1st and 2nd respondents can, in my view, be sustained in law to effect a change on the actual case of the appellant. The main bone of contention in Ararume's case and this appeal is the interpretation of section 34 of the Electoral Act, 2006. By the doctrine of Stare decisis,
 E and by the provisions of the Constitution, the court below and any other court in Nigeria, and all persons and authorities must follow and enforce the interpretation given by this court in Ararume's case. See section 287 (1) of the Constitution of the Federal Republic of Nigeria, 1999. It is not a matter of choice or preference. I hereby
 F allow appellant's issue No 2.

Appellant's issues 3, 4 and 5 were argued together by the learned SAN for the appellant. I will treat them in the same manner as well.

Section 34 of the Electoral Act, 2006, provides as follows:
 G *"1. A political party intending to change any of its candidates for any election shall inform the Commission of such change in writing not later than 60 days to the election.*

2. Any application made pursuant of subsection (1) of this section shall give cogent and verifiable reasons.
 H

3. Except in the case of death, there shall be no substitution or replacement of any candidate whatsoever after the date referred to in subsection (1) of this section."

It is quite clear from the above that substitution of candidates by a

political party is allowed by the law but within the time framework given by the law and that is that it must be done within a period not later than 60 days to the election. Not only that the written application for the substitution must give cogent and verifiable reasons.

Yes! cogent and verifiable reasons. Let me repeat here what I said in the case of Ugwu v Ararume (supra):

"it is my humble understanding that the word 'shall' used in the subsection, imposes a duty, on a political party that makes the application to INEC for an election, to supply, as a matter of necessity, to INEC what the Act terms 'Cogent' and 'Verifiable' reasons, which prompted the application for the substitution. Where no 'Cogent' and 'Verifiable' reasons are given, then INEC has no power to allow the substitution. Thus, where a member of a political party feels aggrieved because both the political party to which he belongs and INEC sidelined him, after having been initially and properly screened and nominated to contest for an election but, at the nick of time, had been substituted by another member of the party, I think he has every right to ask a court of law to intervene and protect his right to be allowed to contest the election. By the provisions of the Constitution of the Federal Republic of Nigeria, 1999 every citizen of this country, subject to satisfaction of qualifications stipulated by the Constitution for election to any of the political offices created by the Constitution, is entitled to contest for an elective post as aforesaid- (see various sections of the Constitution e.g. sections 65, 66, 106, 107, 131, 137, 142; which provide for the qualifications and disqualifications for election into some political offices.

The Electoral Act and Party Constitutions must be seen to be complementing the constitution in formulating broader rules, regulations and operation mechanisms for both INEC and the political parties for administrative convenience. Where any of such enactment, rules or policies comes in conflict, with any section of the Constitution, that enactment, rule or policy must surrender to the Constitution. Except where it is meant to say that a member of a political party has no right at all, in election matters, I cannot see why a political party should be permitted, once it has given its commitment or mandate to a candidate whom it had already nominated whether wrongly or rightly to bulldoze its way to rescind that mandate for no

justifiable cause. Politics is not anarchy; it is not disorderliness. It must be punctuated by justice, fairness and orderliness.

It is unfortunate to observe that the legislature has not assigned any specific meaning to the phrase "Cogent and Verifiable" as used in section 34(2) of the 2006 Act. It appears to me to be an oversight, or a lacuna created by the Legislature. Where such happens, the courts, though not usurping the power of the Legislature, taking the totality of the legislation under review, assigns a meaning to the missing link.

In its ordinary connotation, the word "Cogent" according to the Lexicon Webster Dictionary means:-

"Something which has the power to convince, compel or persuade by means of a clear, forcible presentation of facts, idea and arguments."

If a thing is referred to as "Verifiable", it means it is susceptible to verification. Verification is an act of checking that thing that it is true by careful examination or investigation. (Collins Learner's Dictionary, latest print, 2001)

This, to me, means that the reason(s) to be adduced by a political party to INEC before the latter can accede to the substitution must be genuine, convincing, compelling and persuading. It should not be flimsy or dubious, it must be dear and unequivocal again, should INEC venture to confirm the veracity of these reasons, the political party must be willing and ready to subject such reasons to the scrutiny of INEC for self satisfaction."

In spite of the fact that the appellant crossed the hurdle by overwhelmingly scoring the highest votes at the primaries with 6,527 votes which ranked him to be first among other contestants, yet his party (PDP) for no apparent, cogent, justifiable and verifiable reasons decided at the end of the primaries to submit to INEC the name of the 2nd respondent in substitution thereof. The only reason for the substitution, like in the case of Ugwu v Ararume (supra) was because of "error" in sending the appellant's name to the 3rd respondent. This is what Exhibit 'A' says. Let me for the avoidance of doubt quote Exhibit "A" and it reads as follows:

"Peoples Democratic Party
Power to the people
Motto: Justice, Unity and Progress

National Secretariat: Plot 1970, Wadata Plaza,
Micheal Okpara Street, Wuse, Zone 5, Abuja.
Tel: 09-5232569, 5233429, Fax: 09-5231299
February, 2nd, 2007

Prof. Maurice Iwu
Chairman
INEC, Abuja.

B

Re: Forwarding of PDP governorship candidate and deputy-
Rivers State

This is to confirm that Barrister Celestine Ngozichim Omehia C
and Engineer Tele Ikuru are PDP governorship and deputy gover-
norship candidates for Rivers State. Barrister Celestine Ngozichim
Omehia substitutes Hon. Rotimi Amaechi whose name was submit-
ted in error. This is for your necessary action,

(signed)

(signed)

D

Sen. (Dr.) Amadu Ali. GCON

Ojo Maduekwe

CFR

National Chairman

National Secretary

That letter (Exh. 'A') was signed and counter signed by Sen. E
(Dr.) Arnadu Ali, GCON, National Chairman of PDP and Ojo
Maduekwe, CFR, National Secretary PDP, respectively.

In her judgment, the learned trial judge found and concluded
that the letter (as reproduced above) written by PDP to INEC on 2nd
February, 2007 at a time when appellant's suit was subjudice was F
improper and the letter was set aside. Again, the learned trial judge
held that the reason given by PDP for the substitution satisfied the
requirements of the Electoral Act, 2006.

This was the reason that took the appellant on appeal to the
court below. The 2nd and 3rd respondents cross-appealed as well. It G
was during the pendency of the appeal and the cross-appeals at the
court below that some occurances which include the incidences which
gave rise to the legal tussle in Ugwu v Ararume's case (supra) took
place. The trial Federal High Court in Ugwu v Ararume's case dis- H
missed Ararume's suit. He appealed to the same court below. That
appeal and the one on hand happened to be before the court below
at the same time. In its judgment in Ararume's case, the court below
held that the reason "error" did not satisfy the requirement of the

Electoral Act, 2006. The respondent therein appealed to this Court. This court affirmed the decision of the court below in Ugwu v Ararume's case.

B As a result of our decision in Ararume's case the appellant's party PDP, expelled him from the party. It also expelled the appellant in this appeal.

C On 11th April, 2007, the court below struck out the appellant's appeal on the reason that it lacked jurisdiction as a result of the expulsion of the appellant by the 1st respondent. This court, on 11th May, 2007 heard the appeal and held that the court below had jurisdiction and that the appellant's appeal and the cross-appeals be heard expeditiously

Several legal tussles in between took place in the court below. These have well been set out in the leading judgment of my brother, D Oguntade, JSC which I need not to reproduce. At the end, the court below departed from its earlier decision in Ugwu v Ararume on some points which the court below considered to make this appeal distinct from that of Ugwu v Ararume.

E I find it difficult to agree with the court below that there exist some distinguishing features between this appeal and that of Ararume. I find it difficult to depart from my earlier decision in Ugwu v. Ararume (supra). 1 therefore hold that the appellant's name in this appeal was wrongly substituted by the 3rd respondent in favour of the 2nd respondent- In my view, it was the appellant who qualified as the right- F ful candidate presented by the 3rd respondent for the Rivers State Gubernatorial Election. I resolve this issue in favour of the appellant.

Issues Nos 4 and 5 are clearly on the issue of indictment of the appellant. I already held earlier that the issue of indictment remained G an allegation and the document adopted by the court below lacked evidential value.

I consider any further discussion on the issue to be a moot trial into which I am not ready to enter.

H On issue 6, I completely agree with my learned brother Oguntade in his reasoning that the suit now on appeal was taken to the trial court as an intra party dispute and the question concerning which party or candidate would win the governorship election in River State was irrelevant and not an issue. I emphasize that what came before

us is a civil appeal simpliciter and cannot transform itself into an election petition. Accordingly, I also hold that this court has no jurisdiction to nullify the election conducted by the 3rd respondent on April 14th 2007, as this appeal was not rooted to this court through any Election Tribunal, but through a Federal High Court and Court of Appeal in exercise of their jurisdiction on civil matters. This is what conferred jurisdiction on this court as the settled law is that it is the claim before the trial court that determines the appellate court's jurisdiction- See: *Gombe v P. W. (Nig.) Ltd.* (1995) 6 NWLR (Pt. 402) 402; *Ege Shipping & Trading Ind. v Tigris Int. Corp.* (1999) 14 NWLR (Pt. 637) 70. These are my reasons for allowing the main appeal.

With regards to all the cross - appeals, I am contented with my learned brother Oguntade JSC's reasoning which I adopt as mine. I do not intend to add anything.

D

ADEREMI JSC

On Thursday, 25th of October 2007, 1 delivered my judgment in the open court in this matter sequel to taking the addresses of the respective counsel representing the parties in this appeal and I did say that I would give my reasons for the said judgment today. I now proceed to give my reasons.

The appeal before us is against the judgment of the Court of Appeal, (Abuja Division) delivered on the 20th day of July 2007 dismissing the appeal of the appellant lodged against the judgment of the Federal High Court sitting in Abuja, delivered on the 15th of 2 March 2007 in Suit No. FHC/ABJ/CS/20/2007: *Chibuike Rotimi Amaechi v Independent National Electoral Commission (INEC) & 2 Ors.* In the action which was commenced by a writ of summons, the appellant, as plaintiff in the trial court was challenging the 1st respondent, as at that stage, the only defendant in the trial court for changing or substituting his candidature for the April 2007 gubernatorial election. Sequel to filing his writ of summons and the statement of claim the plaintiff/appellant brought an application to join the 2nd and 3rd respondents as the 2nd and 3rd defendants in the trial court, and upon the grant of the application for joinder, the plaintiff/appellant accordingly amended his statement of claim to reflect the join-

der. Suffice it to say that the amended writ of summons and the amended statement of claim were thereafter served on defendants/respondents. Perhaps, I should here add that each of the defendants filed separately a statement of defence with the plaintiff filing a reply to the statement of defence of the 2nd defendant. The plaintiff/ap-
 B appellant claimed against the defendants the following reliefs; -

*"(1) A declaration that the option of changing or substituting a candidate whose name is already submitted to INEC by a political party is only available to political party and/or the Independent Na-
 C tional Electoral Commission (INEC) under the Electoral Act, 2006 and if the candidate is disqualified, by a court order.*

*(2) A declaration that under Section 32 (5) of the Electoral Act, 2006, it is only a court of law, by an order, that can disqualify a
 D duly nominated candidate of a political party whose name and particulars, have been published in accordance with Section 32 (1) of the Electoral Act 2006.*

*(3) A declaration that under the Electoral Act, 2006, Independent National Electoral Commission (INEC) has no power to screen, verify or disqualify a candidate once the candidate's political party}'
 E has done its own screening and submitted the name of the plaintiff or any candidate to the Independent National Electoral Commission (INEC)*

*(4) A declaration that the only way Independent National Elec-
 F toral Commission (INEC) can disqualify, change or substitute a duly nominated candidate of a political party is by a court order*

*(5) A declaration that under Section 32 (5) of the Electoral Act, 2006, it is only a court of law, after a law suit, that a candidate
 G can be disqualified and it is only after a candidate is disqualified by a court order, that the Independent National Electoral Commission (INEC) can change or substitute a duly nominated candidate.*

*(6) A declaration that there are no cogent and verifiable reasons for the defendant to change the name of the plaintiff as the
 H candidate of the Peoples Democratic Party (PDP) for the April 13 2007 Governorship Election in Rivers State.*

(7) A declaration that it is unconstitutional, illegal and unlawful for the defendant to change the name of the plaintiff as the governorship candidate of Peoples Democratic Party PDP for Rivers State

in the forthcoming governorship election in Rivers State after the plaintiff has been duly nominated by the Peoples Democratic Party as its candidate has accepted the nomination and published the name and particulars of the plaintiff in accordance with Section 32 (3) of the Electoral Act 2006, the 3rd defendant having failed to give any cogent and verifiable reasons and there being no High Court order disqualifying the plaintiff. B

(8) An order of perpetual injunction restraining the defendant from changing or substituting the name of the applicant as the Rivers State Peoples Democratic Party Governorship candidate for the April C 2007, Rivers State Governorship Election unless or until a court order is made disqualifying the plaintiff and/or with cogent and verifiable reasons are given as required under Section 34 (2) of the Electoral Act. "

After exchange of their pleadings, the parties, with the leave of the trial judge, formulated issues for determination in the case and thereafter addressed the trial judge on those issues. In a reserved judgment delivered on the 15th of March, 2007, the learned trial judge in dismissing the suit, ruled that the substitution of the 2nd respondent/defendant for the appellant/plaintiff as a candidate for the April 14, 2007 gubernatorial election was in accordance with the provisions of Section 34 (1) and (2) of the Electoral Act, 2006. E

Dissatisfied with the said decision, the plaintiff/appellant appealed to the court below. In view of the urgency of the suit having regard to the fact that the elections were fast approaching, the process of appeal was abridged. When the appeal first came up for hearing before the court below, the respondents raised a preliminary objection to the hearing of the appeal contending that the appeal was no longer competent on the ground that the party (Peoples Democratic Party - PDP) that initially sponsored the appellant for the gubernatorial election had expelled him from the party. After taking arguments on the preliminary objection, the court below upheld the objection and declined to entertain the appeal relying on the provisions of Section 177 (c) of the 1999 Constitution that the appellant had to be sponsored by a political party to contest the election. An appeal by the appellant on this point succeeded before this court, and this court (the Supreme Court) held that the lower court was H

wrong in law, to have declined jurisdiction in the appeal and ordered the lower court to hear the appeal on its merit.

Before the parties were heard on their briefs, the 1st respondent brought a motion praying for an order granting leave to it to adduce further evidence in this appeal by tendering the certified true
B copy of judgment in Suit No. FHC/ABJ/CS/29/2007: Chibuike Rotimi Amaechi v. A-G Fed, Economic and Financial Crimes Commission, INEC, PDP and Celestine Omehia which was delivered on 30/3/07 by Kuewumi J., at the Federal High Court, Abuja. After taking the
C arguments of counsel for and against the admission into evidence of the said document, the court below in its ruling, admitted the said document as part of the evidence before the court. In another application filed on 12/6/07, the 2nd respondent/cross-appellant/applicant prayed the court below to strike out the appeal or alternatively
D stay further proceedings thereon on the ground that the 2nd respondent having acquired immunity under Section 308 of the 1999 Constitution as the recently sworn in Governor of Rivers State, further proceedings in this appeal must abate until he loses the said immunity- Again, arguments of counsel were taken by the court below. In
E its ruling dismissing the application, the court below said inter alia: -

"On that score I hold that in an election related matter where the status of the 2nd respondent as Governor is being challenged, the immunity conferred on him by the Constitution is equally in question. The 2nd respondent/cross-appellant does not enjoy any immunity from being sued in this suit This application therefore lacks merit, it is hereby struck out."
F

The court below eventually heard the appeal on its merit on the 16th of July 2007. After taking the arguments of the various
G counsel appearing in the matter, in a reserved judgment delivered on the 20th of July 2007 covering all the issues raised before it, the court in the leading judgment made copious findings inter alia: -

*"This case is distinguishable from Ararume's case. That Section 34 (2) must be interpreted in a way to sustain the candidature after
H the political party sponsoring the candidate has informed INEC of the change of that candidate as its candidate. If the candidature of a withdrawn candidate is sustained because no cogent and verifiable reason had been given the court would be sustaining the candida-*

ture of a person who is no longer being sponsored by a political party as the court has no power to impose a candidate on a political party. The court should take cognizance of the position of the law especially the interplay between Section 34 of the Electoral Act and Section 177 of the Constitution. The facts of the indictment of the Appellant as pleaded in paragraph 7 of the 1st Respondent's statement of defence is enough to satisfy the requirement of cogent and verifiable reason as stipulated in Section 34 (1) and (2) of the Electoral Act, 2006. The substitution of the appellant on Exhibit D is justified in the prevailing circumstance of the case I have carefully considered the submission of the learned senior counsel for the parties. I have no doubt in my mind that the main grouse of the appellant which is the bone of contention in this appeal is the interpretation of Section 34 (1) and (2) as it is applicable to the substitution of the appellant in this case with the 2nd respondent/cross-appellant based on Ex. D a letter dated 2nd of February 2007 acted upon by the 1st respondent/cross-appellant."

While adopting the interpretation of the provisions of Section 34 (1) and (2) of the Electoral Act, 2006 as given by this court in the Ararume's case, the court below went ahead to hold that the interaction between Section 34 (1) and (2) and Section 177 (1) (c) of the 1999 Constitution on the issue of membership and sponsorship by the political party is very strong. And on the issue of the indictment of the appellant by the EFCC, the court below held: -

"It is not disputed and hence of common ground that the issue of indictment of the appellant came up before the lower court and parties joined issues on same. What then is the essence of this indictment to this case and the role of INEC on the fact of the indictment of the appellant in the interpretation of Section 34 (1) and (2) of the Electoral Act? From where should the reason of indictment emanate, is it from INEC or the party PDP? Has INEC the power to embark on a voyage of discovery to bring in the matter of the indictment of the appellant as a missing link. One peculiar circumstance of this case and where it differs from Ararume's case (supra) is that the 2nd respondent did not go through any party primaries. In effect, he was selected by the party The published list of the appellant's indictment supplied the link which made the reason verifiable. At that pe-

riod of our electoral history it would have been contra public policy for INEC or the 3rd respondent who sponsored and nominated the appellant to shy away from the list and dump same in the archives of political documents. The error which necessitated the substitution was verified from the surrounding circumstance of the information then already at the disposal of INEC. This case I must explain is different from Ararume's case It is not the intention of law makers to force a candidate on the party. The selection must always be interpreted to reflect that aspect. It is the order of this court that the appellant was properly substituted in accordance with the provisions of Section 34 (1) and (2) of the Electoral Act. The appeal lacks merit and it is accordingly dismissed. Judgment of the lower court is affirmed."

On the cross-appeal which was on whether the learned trial judge properly considered the issue of indictment of the plaintiff/appellant by the EFCC, the court below held inter alia: -

"It is also my conclusion in the judgment that the issue of nomination and sponsorship of candidates by the political parties to contest elections are considered to be an intra party or domestic dispute to be determined by the rules and constitution of the party. A court of law lacks the jurisdiction to adjudicate on intra-party contest or nomination of candidate On the procedure before the trial court, which is for this court to decide whether to set aside and enter an order for retrial of this issue, this issue strikes me as odd as the court adopted the procedure with the consent of the parties. The 2nd cross-appellant had adequate opportunity to protest and decline being part of the procedure.

The 2nd cross-appellant is now estopped from making a request that the procedure be set aside after fully participating in it. The request is very much belated. In the final analysis, the main appeal lacks merit and is dismissed, the judgment of the lower court is affirmed, while the cross-appeal succeeds in part."

With the leave of court below, the appellant appealed against the judgment to this court by a Notice of Appeal deemed properly filed on the 25th of October 2007. The 3rd respondent also cross-appealed against part of the decision of the court below.

The appellant distilled six issues from the grounds of appeal

contained in his Notice of Appeal and as set out in this brief of argument, they are as follows: -

"(1) Whether the Court of Appeal was not in error in allowing fresh evidence on appeal, when no exceptional circumstance was shown to warrant such admission.

(2) Whether having regard to the undertaking before the Court, the court below might not to have followed the decision of the Supreme Court in Ugwu v. Ararume (supra)? B

(3) Whether there exists cogent and verifiable reasons to warrant the substitution of plaintiffs name with that of any other person in breach of Section 34 of the Electoral Act, 2006 and if not, whether the purported substitution of plaintiffs name is null and void? C

(4) Whether INEC (1st respondent) can rely on extraneous fact or any fact not presented by a political party seeking substitution to verify reason given for seeking substitution? D

(5) Whether there was in existence any indictment of the plaintiff for same to be used as a basis to verify the reason of error given by the 3rd respondent for seeking substitution of plaintiffs name; and

(6) Whether having regard to the concept of Lispendens and the fact that, at the material time of the election, plaintiff, being the only lawful candidate of the Peoples Democratic Party, he ought not to be declared the winner of 14th April, 2.007 general election in Rivers State." E

The 1st respondent also identified four Issues for determination and as contained in its brief of argument, they are as follows: - F

"(1) Was the Court of Appeal bounded by itself and bound to apply the decision in Ugwu v. Ararume (2007) 12 NWLR (pt. 1048) 367 in the event of subsequent distinguishable features and circumstances? G

(2) Whether the Court of Appeal was right in refusing to declare the appellant as the winner of the Rivers State Governorship Election of 14/4/07.

(3) Whether the Court of Appeal was right in allowing the application of the 1st respondent for further evidence on appeal, admitting copy of ruling in FHC/ABJ/CS/74/2007 and was it held to operate as indictment of appellant. H

(4) Was the Court of Appeal right in holding that this case is

distinguishable from the case of Ugwu v. Ararume (supra), in coming to the conclusion that the appellant was properly substituted in accordance with the provisions of Section 34 (1) and (2) of the Electoral Act, 2006."

B The issues identified for determination by this court by the 2nd respondent as set out in his brief of argument are as follows: -

"(1) *Whether the appeal is still a live issue when there is pending before an Election Tribunal, a petition filed by the appellant at the Rivers State Governorship Election Tribunal challenging the election of the 2nd respondent as the Governor of Rivers State?*

(2) *Whether Supreme Court has jurisdiction to entertain this application and in the long run, the appeal?*

(3) *Whether this is a proper instance to grant the appellant leave to appeal to the Supreme Court of Nigeria."*

D The 2nd respondent who also cross-appealed as the 1st cross appellant, for his part, identified six issues for determination; and as set out In his brief of argument, they are as follows: -

E "(1) *Whether additional evidence of indictment admitted by the Court of Appeal is proper in the circumstances and relevant to a determination of the propriety of the process of substitution challenged herein by the appellant?*

F (2) *Having regard to the peculiar facts and circumstances of this appeal, whether the Court of Appeal was right in her findings that the provisions of Section 34 of the Electoral Act have been complied with in this instance and that there was proper substitution of the appellant as Governorship candidate of the 3rd respondent with the 2nd respondent?*

G (3) *Granted that this Honourable Court has affirmed the justifiability of Section 34 of the Electoral Act in Ugwu v Ararume (supra), which the court below has followed in this instant appeal, assuming but not conceding that there have been a breach of Section 3 of the Electoral Act, are these limits to the remedies (if any) available to the plaintiff/appellant?*

H (4) *Whether the entire appeal is not academic or overtaken by events as a result of a combination of events, to wit, the unchallenged dismissal of the appellant from the fold of the P.D.P., the fact that the elections in issue have been held in which several other po-*

litical parties participated, the declaration of the 2nd respondent as winner of the said Governorship election and his being sworn in, the existence of appellant's election petition and other petitions in the Rivers State Governorship Election Tribunal?

(5) What is the real scope and extent of Section 34 of the Electoral Act in the light of the peculiarities of this instant case? B

(6) Whether the appellant's exercise of his access to court in the challenge of alleged breaches of perceived rights in any way derogates from the constitutional power given to 1st respondent to conduct elections under the 1999 Constitution and the Electoral Act and if so, whether the Supreme Court can at this point in time venture into a declaration of who is the winner of the Governorship election in Rives State?" C

The 3rd respondent in his brief of argument raised up four issues for determination, and they are: - D

"(1) Whether the lower court was right in granting the 1st respondent's application to adduce fresh evidence on appeal.

(2) Whether or not the lower court was right in holding that the substitution of the name of the appellant for the 2 respondent was valid having regard to the indictment of the appellant. E

(3) Whether the lower court was right in holding that the fact of indictment of the appellant is a fact which the court can take judicial notice of and as such the 1st respondent cannot turn a blind eye to this fact. F

(4) Whether or not this Honourable Court can grant the prayer of the appellant for a declaration that he is the duly elected Governor of Rivers State having regard to his claim before the trial court."

The 2nd cross-appellant who is also the 3rd respondent in this appeal identified only one issue for the determination of its cross-appeal; it is in the following terms: - G

"Whether the court below was right, in law, to hold that the appeal before it was an election-related matter and having so held, went further to hold that the second respondent was not entitled to enjoy the benefits of the immunity conferred on him by virtue of Section 308 of the Constitution of the Federal Republic of Nigeria, 1999 having taken the oath of office and the oath of allegiance as the Governor of Rivers State and placing reliance on the cases of AD v H

Fayose (2004) 8 NWLR (pt. 876) 639 and Obi v Mbakwe (1984) 1 SCNLR 192."

The appellant who is the cross-respondent to the two cross-appeals in his response to their (cross-appeals of the 2nd and 3rd respondents) briefs raised three issues for the determination of the two cross-appeals and contained in his brief, they are as follows: -

"(1) Whether plaintiffs suit being an election related matter and one challenging the process by which 2nd respondent was made to substitute the appellant, which case was filed before election, can be defeated by reason of the cross-appellant becoming the Governor of a State.

(2) Whether plaintiff/appellant/cross-respondent's brief in this suit is justiciable.

(3) Whether the procedure adopted in determining the plaintiffs claim can vitiate the plaintiffs action."

When this appeal came before us on the 25th of October 2007, Mr. Fagbemi, learned Senior Counsel appearing for the appellant, while referring to, adopting and relying on the briefs filed on behalf of his client submitted that the present case is similar to Ararume's case in all material respects. As the present appeal calls for the interpretation of the provisions of Section 34 of the Electoral Act so did the Araraumes' case already decided by this court; he submitted while urging us to adopt the interpretation of the aforesaid provision of the Electoral Act as given by this court in the Ararume case, he added that going by the facts of the case at hand, the facts of this case (present appeal) are stronger than those of Ararume's case. He cited the case of Action Congress v. INEC (2007) 12 NWLR (pt. 1048) 222 and submitted that the indictment foisted on the appellant which formed the basis of his substitution was a ruse and could not advance the case of the respondents. As to what order this court should eventually make, learned Senior Counsel submitted that it was the party that the electorate voted for and that as at the time the election was being conducted, the lawful candidate of the Peoples Democratic Party was the appellant and this - court should so declare and consequently, the appellant should be declared by this court as the candidate that won the election on the platform of the P.D.P. He finally urged that the appeal be allowed.

For his part, Chief Nwaiwu, learned Senior Counsel for the 1st respondent/cross-respondent referred to, adopted and relied on the 1st respondent's brief filed on the 15th of October 2007 and the 1st respondent-cross-respondent's brief filed on 18th October 2007 and the Notice of Preliminary Objection filed on 15th October 2007 which contends that the issues identified for determination have no relationship with the grounds of appeal, reliefs not claimed should not be granted. On Section 308 of the 1999 Constitution, the learned senior counsel submitted that the reliefs sought were pre-election matter, election having now taken place and the 2nd respondent-cross-appellant having been sworn in as the Governor of Rivers State - the provisions of Section 308 of the Constitution of 1999 would avail him - immunity from court action - the court, he finally urged, should dismiss the appeal and allow the two cross-appeals. Mr. Daudu, learned Senior Counsel for the 2nd respondent and 1st cross-appellant referred to, adopted and relied on the 2nd respondent's brief of argument filed on 15th October 2007, the 1st cross-appellant's brief of argument which embodied 2nd respondent/1st cross-appellant's reply brief and the Notice of Preliminary Objection filed on 24th October 2007 submitting that all the live Issues in this appeal had migrated to the Election Tribunal, secondly, the appellant no longer being a member of the PDP cannot maintain the action and thirdly, that the appellant had already filed an election petition. It was the learned Senior counsel's further submission that the principles of *Lis Pendens* do not apply to the instant case., as, according to him, the principles only apply to property and not to rights; he placed reliance on the decisions in *Alakija & Ors v. Abdullahi* (1998) 6 NWLR (pt. 552) 1 and *Nnoji v. Thanks Inv Ltd* (2005) 11 NWLR (pt. 935) 29. He again urged that the Notice of Preliminary Objection be upheld. To him, it is the whole of Section 34 of the Electoral Act that calls for interpretation and not Section 34 (2) of the Act as contended by Mr. Fagbemi, senior counsel. While adopting the interpretation of the provisions of Section 34 of the Electoral Act as given by this court in the *Ararume's* case, it was his final submission, that the section is justiciable, while he urged that the appeal be dismissed. On the cross-appeal of the 2nd respondent, it was the submission of the learned senior counsel, that since the proceedings in this matter are election-

related, the invocation of constitutional matters is excluded after the person has been sworn in as the Governor; he finally urged us to allow the cross-appeal. Mr. Gadzama, learned senior advocate, referred to, adopted and relied on the 3rd respondent's brief of argument filed on 15th October 2007 and the 3rd respondent/2nd cross-appellant's brief filed on 15th October 2007 and opined that the main issue that calls for resolution here is, whether the appellant was validly nominated and unlawfully excluded from the election in accordance with the provisions of Section 145 (1) (d) of the Electoral Act and while further submitting that the facts of the Ararume's case are quite different from the facts of the present case, he urged that this appeal be dismissed. On the cross-appeal of his client, he further submitted that the only course open to the appellant is to seek a redress at the Election Tribunal as enjoined by the provisions of Section 285 (2) of the 1999 Constitution. This court, it was further submitted, has no jurisdiction to entertain this matter for the reason that the appellant not having taken part in the election, he could not be declared the winner of the election - the party notwithstanding. He finally urged that the cross-appeal be allowed. On points of law only, Mr. Fagbemi, learned senior counsel for the appellant, submitted that the whole of the provisions of Section 34 of the Electoral Act were construed in the Ararume's case while still urging that the appeal be allowed and the cross-appeal be dismissed.

I have had a careful reading of all the issues raised for determination by the parties in their respective briefs of argument as they relate to the appeal and cross-appeals. To me, the cardinal issue that calls for determination in this appeal is whether, the name of the second respondent/1st cross-appellant was, in compliance with the provisions of all the laws relating to this matter, substituted for that of the appellant as the Gubernatorial candidate for Rivers State at the April 2007 election under the platform of the Peoples Democratic Party (P.D.P.). That is the substratum of the entire case. If, after examining all the relevant provisions of the law, the 3rd respondent/2nd cross-appellant could be said to be on a *firma terra* in substituting the name of the 2nd respondent/1st cross-appellant (Celestine Omehia) for that of the appellant (Chibuike Rotimi Amaechi) as its Governorship candidate for the said elections of April 2007, this appeal will not

have any merit and it would have to be dismissed.

Going through their pleadings, it is not in dispute among the parties that the appellant, who was the plaintiff before the trial court, was the gubernatorial candidate for the Peoples Democratic Party (P.D.P.) in the Rivers State for the April 2007 Polls and the party (P.D.P.) had accordingly submitted his name to the 1st respondent (INEC, the 1st defendant at the trial court). Exhibit B, a letter dated 14th December 2006 was the means by which the party (P.D.P.) - 3rd respondent/2nd cross-appellant sent it to the 1st respondent. Suffice it to say that Exhibit B contains all the names of P.D.P.'s gubernatorial candidates -the appellant was number 6 on Exhibit B. The 1st respondent acknowledged the receipt of Exhibit B by its Note of Acknowledgment dated 15th of December 2006. Perhaps I should also say that it admits of no dispute between the parties that the appellant went through the mandatory primaries of his party and he had overwhelming votes consequent upon which his name was forwarded to the 1st respondent. However, by a letter dated February 2, 2007, addressed to the 1st respondent by the 3rd respondent, P.D.P, informed the 1st respondent that it was substituting the name of the 2nd respondent/1st cross-appellant (Celestine Omehia) for that of the appellant (Rotimi Chibuike Amaechi) as its gubernatorial candidate for the said election. That letter was attached as an annexure to the amended statement of claim and 17 later tendered as Exhibit D at the hearing of the case; it reads: -

"PEOPLES DEMOCRATIC PARTY (P.D.P.)

February 2, 2007

Prof. Maurice Iwu

Chairman

INEC, Abuja

RE: FORWARDING OF P.D.P. GOVERNORSHIP
CANDIDATE AND DEPUTY - RIVERS STATE

This is to confirm that Barrister Celestine Ngozichukwu Omehia and Engineer Tele Ikuru are P.D.P. Governorship and Deputy Governorship Candidates for Rivers State Barrister Celestine Ngozichukwu Omehia substitutes Hon. Rotimi Amechi (sic) whose name was submitted in error. This is for your necessary action.

Signed _____

Signed _____

(DR) AMADU ALI. GCON

OJO MADUEKWE (CFR)

National Chairman

National Secretary"

(Underlining supplied by me)

I pause to say that it is the duty of political parties under the law to submit to the Independent National Electoral Commission, the names of candidates they may wish to field or sponsor for an elective office not later than 120 days before the date fixed for a general election and 14 days before the date fixed for a bye-election. See Section 32(1) and Section 32 (7) of the Electoral Act 2006. I should here also reiterate the limit of the powers of INEC as it relates to candidates for election while some duties are conferred on INEC per Section 32 (supra) it is obvious from the clear and unambiguous provisions of the aforesaid section of the Electoral Act 2006, that the Commission lacks the power to disqualify any candidate on its own. The power of disqualification of any candidate from contesting an election after his name has been forwarded to the Commission belongs exclusively to the Federal High Court or the State High Court. This court (Supreme Court) has reiterated this principle in a number of its decided cases. Having submitted the name or names of its candidates to contest in an election, a political party still reserves the right to withdraw the name or names of such candidates by applying to the Commission in writing, not later than 60 days to the election stating cogent and verifiable reasons; Section 34 (2) of the Electoral Act 2006 provides:-

Sub-Section (1);

"A political party intending to change any of its candidates for any election shall inform the Commission of such change in writing not later than 60 days to the election."

Sub-Section (2)

"Any application made pursuant to sub-section (1) of this section shall give cogent and verifiable reasons"

(Underlining mine for emphasis)

Arguments have been advanced by the appellant in his brief of argument that there has not been due compliance with the aforesaid provisions by the 3rd respondent/cross-appellant. Exhibit D the letter by the PD.P the content of which I have reproduced above, has not complied with the provisions of the aforesaid section of the

Act, it was further argued. Therefore, it was finally argued on this point that the 1st respondent (INEC) was wrong in law, to have acted on the said exhibit and effected the substitution. On the contrary, the respondents have vigorously argued that Exhibit D - the said letter from PDP to INEC was in full and valid compliance with the aforesaid provisions of the Electoral Act. By sub-section (2) of Section 34 supra, a political party who is minded to effect a change or substitution to the name of the candidate or candidates earlier submitted by it to INEC must advance, in writing, cogent and verifiable reasons for so doing. The catch-words in this sub-section are "Cogent and "Verifiable" reasons. In Burton's Legal Thesaurus 3rd Edition by William C. Burton, the word "cogent" is defined thus: *"appealing conclusively, appealing forcibly, authoritative, incontestable, unanswerable, undeniable, undoubtable, unquestionable, weighty, well founded and well-grounded."*

In The New Webster's Dictionary International Edition, the word "cogent" is accorded this definition;

"compelling, convincing"

The word "verify" which is the verb from the adjective "verifiable" is defined in Black's Law Dictionary 6th Edition thus:

"To confirm or substantiate by oath or affidavit; to prove to be true; to confirm or establish the truth or truthfulness of; to check or test the accuracy or exactness of; to confirm or establish the authenticity of; to affirm; to support."

Again, in The New Webster's Dictionary Int. Edition, the word "verify" is defined thus: -

"to confirm; to test the truth or accuracy of; to substantiate by proofs."

The word "and" standing between the two words "Cogent" and "Verifiable" in Section 34 (2) supra, is conjunctive and its ordinary meaning is "in addition". So the reasons to be adduced before the substitution of candidates can be allowed in law must be cogent in addition to being verifiable. See *Ezekwesili v. Onwuagbu* (1998) 3 NWLR (pt.541) 217 and *Adebusuyi v. Oduyoye* (2004) 1 NWLR (pt. 854) 406, This court in the often quoted decision of it in *Ugwu v. Ararume* (2007) 12 NWLR (pt. 1048) 367 after giving the definitions of "cogent" and "verifiable" said, providing or adducing cogent reason and

providing materials upon which to confirm the truthfulness of these reasons must co-exist. Had the court below followed the decision, of this court in *Ararume* case (*supra*) which it had in the open court given an undertaking to follow apart from the fact that being a judgment of a superior court, is binding on it, there again being no material distinguishing factors, it should have had no difficulty in upholding the appeal of the appellant to it. To hold as the court below did, that Section 34 (2) *supra* must be interpreted in a way to sustain the candidature after the political party sponsoring the candidate has informed INEC of the change of that candidate as its candidate is to do incalculable violation to the time-honoured principle of interpretation of provisions of statutes and the Constitution. The fundamental duty of the judge is to expound the law and not to expand it. He must decide what the law is and not what it might be. Where the words used in couching the provisions are clear and unambiguous as the provisions of Section 34 aforesaid, they must be given their ordinary and grammatical meanings, no more. Yes, it is true that it is said, that the *judex* must always have a resort to the intention of the legislators; that intention can only be found in the words used to frame the provisions and nowhere else. Thus, merely providing cogent reason without providing the platform upon, which to authenticate the truthfulness is not enough. As I have pointed out *supra*, giving "Error" as the reason for substituting Barrister Celestine Omehia for Rotimi Amaechi does not meet the requirements of the provisions of the law. The principle as to compliance with the requirements of the law is that, where a statute has made provisions for the steps to be taken, no other steps than those prescribed, must be followed. See *U.N.T.H.M.B. v. Nnoli*. (1994) 8 NWLR (pt. 363) 404; *Ejikeme v. Okpara* (1998) 9 NWLR (pt.567) 587 and *Kamba v. Bawa* (2005) 4 NWLR (pt. 914) 43. Having failed to adhere strictly to the provisions of Section 34 (2) of the Electoral Act 2006, the 3rd respondent could not in law, have withdrawn the candidature of the appellant from the 1st respondent to whom it had earlier voluntarily submitted his name and later claimed to substitute that name with that of the 2nd respondent. Issues Nos. 2, 3 and 4 contained in the brief of the appellant are consequently resolved in his favour; Issues Nos. 1 and 2 on the 1st respondent's brief are resolved against it; Issues Nos. 2, 3 and

4 in the brief of the 2nd respondent/1st cross-appellant are resolved against it; Issue No. 1 on the 3rd respondent's brief is resolved against it.

The reason for the substitution of the name of the 2nd respondent for that of the appellant to contest the April 2007 election on the platform of the PDP is the alleged indictment of the latter. The lower court held the view that the issue of the indictment of the appellant was staring the trial court in the face, for according to it, it (indictment) was pleaded in paragraph 7 of the 1st defendant/respondent's statement of defence before that court; paragraph 7 reads: -

"Further to paragraph 18, the 1st defendant states that the indictment of the plaintiff by the EFCC and the acceptance of the Report of the Panel set up by the Federal Government provide cogent and verifiable reasons for the plaintiff's substitution by his political party."

The plaintiff/appellant in his reply to the statement of defence of the 1st defendant/respondent denied that he was indicted by the Economic and Financial Crimes Commission or any panel. The learned trial judge on the issue of indictment by EFCC held: -

"Independent National Electoral Commission has not told us that they were not able to verify the cogent reason of error given to it by the defendant for wanting to substitute its candidate. That the plaintiff's name was in the same indicted list is not before the court and I shall refrain from touching on that exclusive issue."

Both the appellant on one side and the respondents on the other side were dissatisfied with the pronouncement of the trial judge on the issue of indictment and so the appellant appealed thereon while the 2nd and 3rd respondents cross-appealed. I hasten to say that the matter of indictment came into being on 20th February 2007 but the substitution of the 2nd respondent for the appellant on the ground of "error" was by Exhibit D dated 2nd February 2007- The court below held inter alia: -

"Veracity of the contents of the published list captioned Investigated and Indicted is a matter for the court. The fact remains that at the time of screening of the candidates nominated after screening, the list is available to bodies interested in the electoral process. The

published list being a public document is a document at large. The 3rd respondent which forwarded the letter Exh. D alleging error for substituting the appellant and INEC the 1st respondent which has a duty and role to verify the alleged error in the prevailing circumstance.

B *Is INEC supposed to turn a blind eye on the published list after the party has requested for the substitution of the appellant with the list at its disposal and vital information that the appellant kept a date with EFCC -Federal Government Panel It is however noteworthy that the appellant was not disqualified by INEC from contesting based on the list captioned Investigated and Indicted, but it was the party which substituted his name under the provisions of Section 34 (1) and (2) of the Electoral Act."*

D I have said in this judgment that the 3rd respondent did not comply with the provisions of Section 34 (1) and (2) of the Act. In continuation, the court below further held: -

"The published list of the appellant's indictment supplied the link which made the reason verifiable."

E Curiously enough, the court below on the issue of indictment further held thus: -

"If the issue of indictment is the alleged error it is not for the court to furnish the evidence of the indictment to substantiate the error being the reason for substitution of the appellant."

F The question that I now ask is, what is "Indictment"? In The Chambers Dictionary, the New 9th Edition, it is defined thus: -

"a formal accusation; the written accusation against someone who is to be tried by jury."

Indictable Offence has been judicially defined thus: -

G *"An indictable offence is an offence triable on information whether or not under the express provisions of Section 304 (1) of the Criminal Procedure Ordinance"*

H See Ejoh v. IG of Police (1963) 1 ALL NLR 250. Let me here say that it is important to bear in mind that the question as to whether a person is qualified or not qualified to contest an election can only be resolved by leading evidence at the hearing. From the definitions of "indictment" that I have set out above; indictment is just a formal accusation; it cannot be assimilated to a sentence and/or conviction

after a criminal trial for a criminal offence. For the accusation of a criminal offence to be successfully levied against a person, such an offence, ordinarily must be established before an impartial court of law. The cardinal principle here is that once a person is accused of a crime and once the adjudicating body is anything less than a judicial body vested with criminal jurisdiction, the person so subjected to that trial before that body is as good as not having undergone any criminal trial. No matter how well conducted the trial might be, its verdict is null and void and can never foist a conviction or sentence, known to law, on the person. Perhaps I should further say that an administrative body lacks the jurisdiction and competence to try the issue of crime, for such a body is not a court much less a criminal court. Only a court vested with criminal jurisdiction is competent to hear and determine the criminality of the person accused. See *F.C.S.C. v. Laoye* (1990) 2 NWLR (Pt. 106/652; *Garba v. University of Maiduguri* (1986) 1 NWLR (Pt.18) 550 and *Unthmb v. Nnoli* (1994) 8 NWLR (Pt.363) 376. The so-called indictment has not advanced the case of the respondents any further and by no strained interpretation can it be said to have supplied any missing link in the quest to comply with the provisions of Section 34 of the Electoral Act. Issue No. 5 on the appellant's brief is therefore answered in the negative; Issue No. 2 on the 3rd respondent's brief is also answered in the negative.

An issue that is common to all parties is where the question was posed as to whether the court below was right in granting the application of the 1st respondent (INEC) for further evidence on appeal admitting the judgment of the Federal High Court in Suit No. FHC/ABJ/CS/29/2007; Rt. Hon. Chibuike Rotimi Amaechi v. A-G Of Federation & 3 Ors delivered by Kuewumi J., on the 30th March 2007. Judgment of the trial court had been delivered on 15th March 2007. I have had a deep study of the judgment of 30th March 2007; it did not say that the appellant was never indicted. The application to tender the document did not go without the appellant opposing it vehemently. Yet the court below overruled the objection and consequently admitted in evidence, on appeal, the ruling of Federal High Court in Suit No. FHC/ABJ/CS/74/2007. In admitting the said ruling, the court below had reasoned thus: -

"On perusal of the pages on the record it is observed that the

issue of indictment of the appellant was pleaded both by the appellant on page 137 of the record at paragraph one in the plaintiffs Reply to the Statement of Defence of the 1st defendant and on page 86 of the record in the defendant's statement of defence paragraph seven. Even the appellant made heavy weather of the learned trial judge's refusal to make a finding on the indicted list in her judgment in the appellant's brief. The objection is overruled -while the document, the ruling of the lower court in Suit No. FHC/ABJ/CS/74/07 delivered on the 30th of March 2007 is hereby admitted as part of evidence in this appeal."

The aforementioned paragraph of the plaintiffs reply to the statement of defence of the 1st defendant reads: -

"Plaintiff states that he was not indicted by the Economic and Financial Crimes Commission otherwise known as "EFCC" in any panel set up by the Federal Government and the Federal Government of Nigeria never accepted any report in this regard."

In paragraph 7 of the 1st defendant's statement of defence, it is averred thus: -

"Further to paragraph 18, the 1st defendant states that the indictment of the plaintiff by the EFCC and the acceptance of the report by the Panel set up by the Federal Government provides cogent and verifiable reasons for the plaintiffs substitution by his political party."

For a proper understanding of the point here being raised, I wish to start by saying that I have earlier in this judgment held that the purported "Indictment" of the appellant by whatever body under any guise has no legal efficacy since it is not an act of a competent criminal court. He was never convicted by a competent court of law. Then, what is the nature of the ruling in Suit No. FHC/ABJ/CS/74/2007: RE: Hon. Chibuike Rotimi Amaechi v. Attorney-General Of The Federation & 3 ORS delivered by Kuewumi J at Federal High Court, Abuja on the 30th of March 2007? The plaintiff in that case (Amaechi) had approached the trial court by an originating summons presenting four questions for the court's determination and also claiming five reliefs: -

The Questions Posed Are: -

"(1) Whether or not the plaintiff is entitled to a fair hearing in

the determination of his civil rights and obligations, including any question or determination by or against any government or authority and particularly whether the purported indictment and disqualification of the plaintiff as the governorship candidate of the 4th defendant by the 2nd and 3rd defendants without affording him a reasonable or any opportunity to be heard is in breach of the plaintiff's rights to a fair hearing as enshrined in Section 36 of the 1999 Constitution. B

(2) Whether or not it is lawful for the defendants to purport to indict the plaintiff and to publish or cause to be published a report that the plaintiff is not qualified to hold the office of Governor and when the plaintiff has not been convicted or indicted by any court or tribunal of competent jurisdiction as envisaged by Section 182 of the 1999 Constitution.

(3) Whether or not the plaintiff having been duly nominated as the governorship candidate of the Peoples Democratic Party can be substituted or disqualified by 3rd and 4th defendants without compliance with the provisions of the 1999 Constitution.

(4) Whether or not it is constitutional and within the powers of the 1st and 2nd defendants to unilaterally set up an ad hoc inquisitorial panel to inquire into official acts of public officers of the Rivers State Government or any State Government under a Federal Presidential system of government as prescribed by the 1999 Constitution." E

The five reliefs consequentially sought by the appellant are:- F

"(1) A Declaration that by virtue of Section 36 of the 1999 Constitution, the plaintiff is entitled to a fair hearing in the determination of his civil rights and obligations as to whether or not the plaintiff is guilty of any offence and as to his candidature in the 2007 governorship election on the platform of the 4th defendant without according him a fair hearing as envisaged by Section 36 of the Constitution is unconstitutional, illegal, null and void and of no effect whatsoever.

(2) A Declaration that it is ultra vires the powers of the 1st and 2nd defendants to purport to "investigate and indict" the plaintiff and to publish or cause to be published an allegation that the plaintiff being an indicted person was not fit to hold public office or recom- H

mend to the 4th defendant not to sponsor the plaintiff as its Governorship Candidate for Rivers State in the 2007 general election when the plaintiff has not been convicted or indicted by any court or tribunal of competent jurisdiction as envisaged by the 1999 Constitution.

B (3) *A Declaration that all the actions taken by the 1st, 3rd and 4th defendants in reliance on the list published by the 2nd defendant titled "Investigated and Indicted" in which the plaintiff was falsely presented as a person who has been found guilty of financial impropriety, including the setting up of a Panel of Inquiry, the purported sub-*
C *mission and/or adoption of the Panel's Report by the Federal Government and the purported substitution, of the plaintiff as the governorship candidate of the 4th defendant for Rivers State as a result thereof are unconstitutional, illegal, Null and void and of no effect whatsoever.*

D (4) *An Order setting aside the report of the Panel of inquiry which purportedly indicted the plaintiff without hearing the plaintiff or giving him a reasonable opportunity or any opportunity at all to be heard and also setting aside the purported acceptance of the recommendation of the said Panel by the Federal Government vide a*
E *Gazette or any other Instrument whatsoever.*

(5) *An Order of Perpetual Injunction restraining the defendants by themselves or through their agents, privies, servants or hirelings from purporting to substitute the plaintiff as the Rivers State*
F *Governorship Candidate of the 4th defendant in the 2007 General Elections or purporting to act upon or do anything whatsoever prejudicial to the interest of the plaintiff as such candidate pursuant to or in reliance on the publication of the plaintiffs name as Investigated and*
G *Indicted by the 2nd defendant, or act upon or give effect to the purported report of the Panel of Inquiry set up by the 1st defendant based on the said list prepared by the 2nd defendant."*

In dismissing the plaintiff's summons, Kuewumi J., of the Federal High Court, Abuja, after taking arguments of counsel, held on the 30th March 2007 *inter alia*: -

H *"The court has an inherent duty to ensure its processes are not abused. Having found that this case constitutes an abuse of court's process, the appropriate order is that of dismissal. Consequently, plaintiffs case is accordingly dismissed."*

This is the certified true copy of the ruling in FHC/ABJ/CS/74/2007 which the 1st respondent sought and obtained the leave of the court below to adduce as additional evidence. Could it be said that the certified true copy of the ruling in FHC/ABJ/CS/74/2007 or the material facts relating to indictment in the said ruling were pleaded in either paragraph 1 of the Statement of Defence of the 1st defendant or paragraph 7 of the 1st defendant's statement of defence? I do not hesitate in proffering an answer in the negative having carefully read those paragraphs again. For a party to tender a document in evidence, there must have been contained in the pleading, statements of fact relating to that document. See *O.H.M.B. v. B.B. Apugo & Sons Ltd* (1995) 8 NWLR (Pt. 416) 750. Let me say that an appellate court reserves the discretion, under the rules of court, to grant leave to adduce new evidence or new facts in a matter that is on appeal to it. That discretion if, properly exercised, is for the furtherance of justice. The exercise must however be judicious and it is in this respect that the appellate court must take into consideration, certain guide-lines before granting leave to adduce new evidence: the guidelines are: -

"(1) The evidence sought to be adduced must be such as could not have been, with reasonable diligence, obtained for use at the trial,

(2) The evidence should be such as if admitted, it would have an important, not necessarily crucial effect on the whole case; and

(3) The evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible."

See *Asaboro v. Aruwaji & Anor.* (1974) 1 All NLR (Pt.1) 140. I have earlier said in this judgment that the so called "Indictments" said to have been foisted by EFCC on the appellant has no legal efficacy. And if the ruling in FHC/ABJ/CS/74/2007 is intended to buttress the issue of indictment on the appellant, apart from the fact that the document was not pleaded, it is totally devoid of evidential value. Issue No. 1 on the appellant's brief of argument is therefore resolved in his favour; Issue "No. 3 in the 1st respondent's brief is answered in the negative; I also answer Issue No. 1 on the 2nd respondent/1st cross-appellant's brief as well as Issue No. 1 in the 3rd respondent's

brief of argument in the negative.

I now proceed to address Issue No, 6 on the appellant's brief which issue finds expression as to the correctness or otherwise of substitution of the 2nd respondent (Celestine Omehia) for the appellant (Rt. Hon. Rotimi Chibuike Amaechi) as the governorship candidate of the PDP for the April 2007 election in some of the issues raised in the briefs of the respondents. The question then posed by the parties to this appeal is, whether the doctrine of *Lis Pendens* applies to this case or not. It is common ground that the 2nd respondent was declared as the Governor of Rivers State notwithstanding the pendency of law suits relative to who should lawfully occupy that position. The lawful occupation of the office of Governor of Rivers State is the subject matter of the appeal. The right to the subject matter was already in court for adjudication before the 1st respondent went ahead to conduct the election of 14th April 2007 and eventually swore-in the 2nd respondent as the Governor of the State. The doctrine of *Lis Pendens* finds expression in the assertion that it prevents any transfer of any right or the taking of any steps capable of foisting a state of helplessness and/or hopelessness on the parties or the court during the pendency in court of an action and even after. By that doctrine, the law does not allow to litigant parties or give to them during the currency of the litigation involving the rights in it so as to prejudice any of the litigating parties. The doctrine negates and disallows any transfer of rights or interest in any subject-matter that is being litigated upon during the pendency of litigation in respect of the said subject-matter. The well-known Maxim is "*Pendente Lite Nihil Innovetur*" meaning: During a Litigation Nothing New Should Be Introduced. See *Dan-Jumbo v. Dan-Jumbo* (1999) 11 NWLR (Pt. 627) 445. Going by the facts of this case as set out above, it is my humble view that the doctrine applies. The declaration of the 2nd respondent as the Governor of Rivers Stated founded upon an illegal and/or unlawful election is null and void; that Issue No. 6 is resolved in favour of the appellant while I resolve similar issue in the briefs of all the respondents against them.

The 2nd respondent/cross-appellant had in his brief of argument, submitted that having been sworn-in as the Governor of Rivers State, he has acquired constitutional immunity pursuant to Sec-

tion 308 of the 1999 Constitution, consequently, the appellant/cross-respondent could not maintain, this action against him. Section 308 provides: -

"308. (1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section -

(a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;

(b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and

(c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued:

Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.

(3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office."

The 2nd respondent/cross-appellant in his brief, In support of his contention that Section 308 of the Constitution confers immunity on him having been sworn-in as the Governor of Rivers State has argued in his quest to dislodge the holding of the court below that the 2nd respondent did not enjoy any Immunity under Section 308 of the Constitution, that the issue at stake in this appeal is not election related because; the seat of Governor is not at stake by candidature and time for determining that has lapsed. It was his further submission that any pre-election matter not concluded before the election is displaced by post election provisions of the Constitution. On this is-

sue, he finally urged us to hold that the court below was wrong to have held that the provisions of Section 308 of the 1999 Constitution did not inure to his benefit. Let me say, In haste, that the issue under consideration in this matter is not a post election matter. Rather, it is one challenging the process by which the alleged beneficiary of the provisions of the aforementioned section came to office i.e. how the 2nd respondent came to be sworn in as the Governor. Put in a simple but very clear manner, it is the right of the 2nd respondent to step into the office of the Governor of Rivers State that is in issue. It will be against the concept of true justice to hold or to permit such a candidate in the person of the 2nd respondent to take a cover under the provisions of Section 308 and thereby ward off the right of an aggrieved and genuine person to examine, in the open, the process by which he became the Governor. That will be injustice at a very high level. It will be tantamount to shielding a person away from seeking a redress from the seat of justice. The complaint here is not a post election grievance; it is one in which the appellant is saying that the 2nd respondent ought not, in law, to have been allowed to participate in the gubernatorial race. In other-words, he is questioning the right of the 2nd respondent to stand for the gubernatorial election in Rivers State. The provisions of Section 308 of the Constitution are not there to be used as an engine of fraud. Such a complaint or grievance pre-dates our election. It is an inalienable right of the appellant as a person lawfully interested in the position of the governorship of Rivers State to initiate process to examine how his opponent, the 2nd respondent, came to occupy that position at his (appellant) own expense. And as I have said, such a complaint is a pre-election matter. It is the regular court as opposed to the election tribunal that has jurisdiction to entertain such a suit. By taking the action in the regular court, the 2nd respondent is not in any way prejudiced and he cannot take a cover under the provisions of Section 308 of the Constitution. Let it be said that exercise of one's right injures nobody. Issue No. 1 on the cross-appellant's brief is consequently answered in the negative. Issue No. 1 on each of the 1st cross-appellant and 2nd cross-appellant is also answered in the negative.

The 2nd respondent/1st cross-appellant has in Issue No. 3 of the brief relating to his cross-appeal contended that the entire pro-

ceedings relating to this appeal are a nullity for reason of failure to take viva voce evidence in a suit commenced by a writ of summons/ statement of claim in respect of reliefs claimed by the appellant. It was his (cross-appellant) argument that, having regard to the type of the reliefs sought which is declaratory in nature and which, according to him, by a long line of judicial decisions, is never granted without evidence in support; the whole proceedings, he finally submitted should be declared a nullity. The appellant/cross-respondent has argued to the contrary. It is clear from the record of proceedings that the parties voluntarily settled issues for determination at the trial court. Again, by consent, all the parties tendered documents which they would rely upon. Let it be said that evidence can take the form of documents or oral testimonies. There is nothing on the record to show that any of the parties objected to this mode of trial. Indeed, they all conducted the case to the logical conclusion before the trial court. That a court, particularly, a court of last resort has a fundamental duty to safeguard fundamental rights of citizens admits of no doubt. A right that inures to the benefit of the entire public can never be waived. Nobody, not even the State can waive the rights entrenched in statutory or constitutional provisions which have been made in favour of the whole country. It is clearly not *Pro Publico* but *Contra Publico* to introduce the doctrine of waiver to such rights. See *A-G Bendel State v. A-G Of The Federation & Ors.* (1985) 10 S.C. 1. But where, as in the instant case, a person in dealing with another is confronted with two alternatives and mutually exclusive procedures, in dealing with the case, between which he can make his election and he has voluntarily made his election in favour of one of the procedures to the exclusion of the other and he has, by that conduct, led the other to believe that he was voluntarily adopting that particular line of approach, he cannot, in law and equity, afterwards resort to the cause which he has voluntarily declared his intention of rejecting. This, in a nutshell, is the simple explanation of principle of waiver. The right here as to how to start his case is conferred solely for the benefit of any of the parties to litigation. Each party or litigant is *sui juris*; none of them is under any legal disability to forgo or waive any of the two procedures open to them in the instant case. Having made an election, a party cannot later set to revert to the other. That prin-

ciple is to the effect that where an action was commenced by any irregular procedure and a defendant took steps to participate in the proceedings, as in the instant case, he cannot later be heard to complain of the irregularity as a person will not be allowed to complain against an irregularity which he himself has accepted, waived or acquiesced. See *United Calabar Co. v. Elder Dempster Lines Ltd* (1972) 1 All NLR (Pt. 2) 244 and *Ariori & Ors v. Elemo & Ors* (1983) 1 S.C. 13. Issue No. 3 on the 1st cross-appellant's brief is therefore answered in the negative and similar Issue No. 3 on the appellant/cross-respondent's brief is answered in the negative.

What Order to Make?

Before I embark on answering this all-important question, I wish to say that this court (the Supreme Court) being the final court of the land, is under a compelling duty to settle all issues arising from or appurtenant to any appeal before it. The judgments of this court must not be final only in name, but must be seen to be really final in the sense that they have legal bite that makes the judgments truly conclusive. All issues that will make its judgments reasonable and conclusive must be clearly addressed by the Supreme Court. This court has a standing and rigid invitation to do substantial justice to all matters brought before it. Justice to be dispensed by this court must not be allowed to be inhibited by any paraphernalia of technicalities. I go further to say that it is now gradually becoming a cardinal feature of judicial impartiality in this country that judges serving on the bench should be and indeed, are generally political eunuchs. But sight must never be lost of the fact that judges do decide political matters daily. They are human beings like the rest of members of our larger society. When restraint is constantly exercised by judges in passing harsh comments in their judgments on "matters of monumental importance to our society and they (judges) subtly send across wise counselling in the most temperate language, which is often ignored, a judge must then realize that a just decision is more likely to rear its head if he (the judex) recognises the responsibility to be very frank and pungent in his advice. It is in the true realisation of this highly valued judicial responsibility that I shall approach this case that produces a sour taste in the mouth; that desecrate all decency in human environment- I shall preface this discourse with certain facts which are very much

germane. In the instant matter, certain crucial facts admit of no controversy among the parties. The appellant in this appeal was one of the eight members of the political party called Peoples Democratic Party - the 3rd respondent/2nd cross-appellant, he participated in the primaries organized by the said PDP under its constitution and electoral guidelines for the purpose of electing the party's governorship candidate for the 14th April 2007 governorship election in Rivers State. He won the primaries convincingly; he scored 6,527 to come first, while the second person to him scored zero; suffice it to say the third person scored 28, the fourth scored 4; the fifth person scored 6; the sixth scored 10 and the seventh and eight candidates scored zero each. Thus, the appellant scored 6,527 out of the total votes of 6,577 cast at the primaries- The 3rd respondent (P.D.P.) the sponsoring political party voluntarily forwarded the name of the appellant to the 1st respondent (Independent National Electoral Commission - INEC) as the party's candidate for the governorship election in Rivers State slated for the 14th April, 2007. The 1st respondent not only acknowledged the name of the appellant as the party's candidate for the said election, it went ahead to cause the said name to be published in the constituency as required by the Electoral Act, 2006. But, by a letter dated 2nd February 2007 admitted as Exhibit D, the 3rd respondent (P.D.P.) purported to substitute the name of the 2nd respondent/1st cross-appellant for that of the appellant as its candidate for the same election scheduled for 14th April, 2007. It is important for me to say at this stage, that the 2nd respondent/1st cross-appellant (Celestine Omehia) did not participate in the primaries organised by the party (P.D.P.). I have said above that the substitution was illegal, null and void and of no legal efficacy - the party having failed to comply with the provisions of Section 34 (2) of the Electoral Act 2006. I need not go over the reasoning I advanced for declaring the substitution a nullity. The effect of what I said above is that the appellant remained for the purpose of the 14th April 2007 election, the candidate of the 3rd respondent (P.D.P.). When the appellant noticed what the party did, he wasted no time in seeking redress the particulars of which I have set out above. Despite the fact that he (appellant) was in court, the 1st respondent (INEC) went ahead to conduct the gubernatorial election and later swore-in the

2nd respondent/1st cross-appellant as the Governor of Rivers State. The conduct of 1st respondent, to say the least, is a brazen disrespect to the institution called The Judiciary, it is a terrible slap on the face of The Law. Must the court of law fold its arms and allow this brazen lawlessness go unchecked? I think not. While the case was still pending before the trial court, the 3rd respondent (P.D.P.) went ahead to dismiss the appellant as a member of its party, in my view, to foist a situation of fait accompli. I still repeat that the primary duty of the court is to do justice to all manner of men who are in all matters before it. It then seems to me clear, that when the court sets out to do justice so as to cover new conditions or situations placed before it, there is always that temptation, a compelling one, to have recourse to equitable principles. A court, in the exercise of its equitable jurisdiction must be seen as a court of conscience. And judges who dispense justice, in this court of law and equity must always be ready to address new problems and even create new doctrines where the justice of the matter so requires.

Having said that the substitution was null and void; the appellant's position as the candidate of the PDP remains unshaken. This is so because equity looks on that as done which ought to be done or which is agreed to be done; the Maxim is *Aequitas Factum Habet Quod Fieri Oportuit*. I must not fail to say that this Latin Maxim only applies to those who have a right to pray that the thing should be done - the appellant, given the facts of this case, is certainly within that bracket. It is said that the true meaning of the Maxim is that equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been done exactly as they ought to have been. See Fonblanque's *Treatise Of Equity* (5th Edition) page 419. This Maxim was practically and clearly explained in the case of *Adefulu V. Okulaja* (1996) 9 NWLR (pt. 475) 668 cited by the appellant in his brief of argument; at page 694 Ogundare, JSC (of blessed memory) reasoned thus: -

"Much consideration was given by the trial judge to the fact that the 1st defendant/appellant occupied the throne of Olofin of *Ilisha/Remo* defacto from March 1981 up to 7th December 1989. With profound respect to the learned trial judge, I think, he was with-

out realising it swimming in a deep sea. When an appointment is declared null and void, all it means is that the appointment was never made and all acts of the purported appointee when the defacto held the appointment are unlawful, null and void and of no effect. The result of a decree of nullity of marriage is that not only are the parties not now married, but they never were Null and void means that which binds no one or is incapable of giving rights under any circumstances, or that which is of no effect. B

By the judgment of the Court of Appeal in 1987, and affirmed by the Supreme Court in 1989 declaring the 1981 appointment of the 1st appellant null and void, that appointment had no force or effect; it had no legal efficacy and became incapable of confirmation or ratification. It is not merely avoidable but void ab initio that is from the beginning. A nullified appointment cannot in my respectful view, be a legal foundation upon which any lawful right could be hoisted. It may however be that the doctrine of necessity or implied mandate may apply to give validity to some acts of a usurper during the period of his de facto control of the office, that issue will only come up for consideration when the validity of his acts is called into question." C D E

From what I have been saying, the law recognises the appellant as the lawful candidate of P.D.P. for the 14th April 2007 gubernatorial election for Rivers State. But, in reality, the appellant never stood for that election or better put, he was prevented from standing for the election. It has therefore been argued that having not stood for that election, he could not be heard to be occupying the exalted position. However, I hasten to say that under the present dispensation, independent candidates are no longer permitted to contest an election. To be eligible to contest an election, a candidate must be a member of a political party. The Constitution of the Federal Republic of Nigeria, 1999 recognises this fact hence it vests the political parties with the exclusive function of canvassing for votes for candidates at election and of contributing to the campaign funds of candidates at election. Section 221 of the 1999 Constitution provides: "No association, other than a political party, shall canvass for votes for any candidate at any election or contribute to the funds of any political party or to the election expenses of any candidate at an election." F G H

Flowing from the above provision of the Constitution, it is my view that it is the political parties that the electorate do vote for at election time-. For the umpteenth time, I say that is my judgment that the candidate of the PDP in the afore-mentioned election was the appellant. Also, the person held out by Mr. Celestine Omehia as his running mate for the position of Deputy Governor of the State must, in practice, have received the approval and the blessing of the party (P.D.P). He must be deemed to have been held out as the deputy to the person they (P.D.P) presented as their lawful candidate, who, in the instant ease, is the appellant. To now order a fresh election will be most unjust. The political parties that contested the election against Peoples Democratic Party and lost out will now have an unmerited second bite. From the record before us, one of such political parties is already before the Election Tribunal seeking to up- turn the purported return of Celestine Omehia as the candidate of the party that" won the election. To now order a fresh election in the circumstances of this case will negate all notions of equitable principles and of course, true justice. That is why I have had resort to equitable principles for one purpose alone and that is to assist law. After all, equity does not make law, it is only there to assist law. As was said by Eso JSC in *Trans Bridge Co. Ltd v. Survey Int. Ltd* (9186) 4 NWLR (pt. 37) 576, Law Lord said at page 592 and I quote him: -
"Equity is not a warlord determined to do battle with the law. It is part of a legal system which has mixed with the law and the admixture is for the purpose of achieving justice."

The well known Maxim is

"Aequitas Non Facit Jus, Sed Juri Auxiliatur"

Before I end the discourse in this appeal, I shall like to say a few words about the unfortunate scenario that has avoidably led to this calamitous situation. It is true that in modern democratic societies, judges occupy a privileged position. Let me say that that privilege springs from public recognition that democratic government and society as a whole can only function fairly and properly within a framework of laws, justly, fearlessly and fairly administered by men and women who have no obligation save to justice itself. I hasten to enter a caveat, and it is that it does not of course mean that judges are licensed to do exactly as they like; quite the opposite. They must

allow themselves to be guided by well tested principles so fashioned that lead to justice. The decision to substitute Celestine Omehia for Rotimi Chibuike Amaechi by the 3rd respondent (P.D.P) during the period of pending gubernatorial election represents a display of very grave display of political rascality and an irresponsible and wanton disrespect for rule of law. No responsible person or group of persons who parade themselves as having respect for rule of law and due process, can be credited with such a dastardly act. The 1st respondent, by acceding to the request of the 3rd respondent for the substitution, has painted a picture of itself as a spineless body whose pre-occupation is dissemination of injustice. It (1st respondent) has forgotten or it has thrown into the winds the position carved for it by the Constitution of the land - An Unbiased Umpire.

Finally, on this point, I wish to say that in all countries of the world which operate under the rule of law, politics are always adapted to the laws of the land and not the laws to politics. Let our political operators allow this time-honoured principle to sink well into their heads and hearts. The vicious acts of the dramatis personae in this case that have led to this unfortunate and time-wasting court case must not be allowed to repeat themselves. No decent and polished characters can be credited with such vicious acts.

In conclusion, for the little reasons I have given above, but most especially for the comprehensive and very lucid reasoning contained in the lead judgment of my learned brother, Oguntade JSC, which reasoning I hereby adopt, it is my judgment that this appeal is very much meritorious. The appeal is hereby allowed while the cross-appeal is dismissed. I also declare Amaechi as the winner of the said election. I abide by all other consequential orders made by my learned brother in the lead judgment including order as to costs.