

**SUPREME COURT OF NIGERIA**

30TH MAY, 2008 SC. 238/2007

**CORAM:- N. TOBI, D. MUSDAPHER, G. A. OGUNTADE,  
S. A. AKINTAN, F. F. TABAI, JJSC**

1. BARR. (MRS.) AMANDA  
PETERS PAM

2. ALL NIGERIA PEOPLES ..... APPELLANTS  
PARTY (ANPP)

AND

1. NASIRU MOHAMMED

2. INDEPENDENT NATIONAL ..... RESPONDENTS  
ELECTORAL COMMISSION (INEC)

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ELECTION PETITIONS - Substitution of candidates - Validity - Purported substitution of 1st respondent is invalid - As Exhibit NAS 4 did not give any reason - Contrary to requirements of s. 34 (1) & (2) of the Electoral Act 2006 (H1)

EVIDENCE - Proof - Sufficiency - Expulsion of 1st respondent was not satisfactorily proved - From the nature of evidence before the trial court - Exhibit NAS 4 ought reasonably to have mentioned the expulsion - If it were true but did not (H2)

FAIR HEARING - Applicability - Requirements - Application of the doctrine - Essentially requires that from the totality of proceedings - Court gave equal opportunity to parties - To ventilate their grievances - As was done in this case (H3)

PRACTICE & PROCEDURE - Actions - Commencement of - Originating Summons - Propriety of - It is the appropriate means of instituting action - Where what is in dispute is construction of documents - In respect of which pleadings are unnecessary (H4)

**FACTS**

The 1st Respondent as plaintiff brought an action against the 2nd Respondent and the Appellants as Defendants before the Fed-

eral High Court at Abuja. The 1st Respondent prayed the court for a total of three declarations and seven orders the essence of which was to secure his candidacy of the 2nd Appellant political party for the April 2007 general elections into the National Assembly against substitution with the name of the 1st Appellant. The case of the 1st Respondent was that he was a member of the 2nd Appellant who had contested and won the party primaries of the 2nd Appellant for AMAC/Bwari National Assembly elections. He was duly sponsored by the 2nd Appellant to the 2nd Respondent as a House of Representative candidate for the elections for AMAC/Bwari Federal Constituency. However, to his surprise, by a letter dated 19th February, 2007, the 2nd Appellant purported to apply to the 2nd Respondent to substitute the name of the 1st Respondent with that of the 1st Appellant as the 2nd Appellant's flag-bearer for the said elections. The letter is marked Exhibit NAS 4. Exhibit NAS 4 was purported to have been written by the 2nd Appellant in exercise of its powers under section 34(1) and (2) of the Electoral Act 2006 but gave no reason for the purported substitution of the 1st Respondent as required by that law. It also appears that there was a document, form CF.004A, purportedly signed by the 1st Respondent by which he withdrew his candidature in favour of the 1st Appellant. But the 1st Respondent denies signing any such document. On her part, the 1st Appellant, in response to the affidavit in support of the originating summons, filed a counter-affidavit in which she, inter alia, deposed that the 1st respondent was expelled from the 2nd appellant on 2nd February, 2007. Accordingly, 1st Respondent lacked the locus standi to contest the substitution of his name done on 19th February, 2007.

On 5th April, 2007, the trial court had heard and determined the case of the 1st Respondent after the bailiff deposed to an affidavit of his unsuccessful attempts at serving the 1st Appellant with the originating processes. The court granted the reliefs as prayed for. Subsequently, 1st Appellant became aware of the judgment and by a motion filed on 17th April, 2007 and moved on 18th April, 2007 prayed the court to set aside the judgment for non-service of the originating processes. Her prayer was granted on the same 18th April, 2007. Whereupon counsel to the 1st Respondent urged the court to hear the matter de novo immediately, which the court did after granting

two applications for stand down by counsel to 1st Appellant to enable him file his papers. In the judgment delivered later on that date, the court gave judgment to the 1st Respondent as prayed. Appellants appealed against the judgment to the Court of Appeal. 1st Respondent also cross-appealed. The court dismissed both the appeal and the cross-appeal. Appellants have brought this further appeal against the judgment of the Court of Appeal contending, inter alia, that they were not given fair hearing by the trial court.

### ***ISSUES FOR DETERMINATION***

*“1. Whether the Court of Appeal was right in affirming that 1st respondent had locus standi to institute the suit to challenge his substitution as a candidate of the ANPP, 2nd appellant to contest the AMAC/BWARI Federal Constituency when at the time of institution of the suit i.e. March 22nd, 2007, he had ceased to be a member of ANPP by reason of expulsion on February 2nd, 2007?*

*2. Whether the Court of Appeal was right in holding that the 1st appellant’s Right to Fair Hearing was not breached in the determination of the issues before the trial court?*

*3. Whether Originating Summons was appropriate procedure in the determination of the issues raised in the suit?”*

***HELD*** (Dismissing the appeal per **OGUNTADE JSC**, Tobi JSC dissenting)

### ***Substitution of candidates - Validity***

1. The 1st issue raises the question whether or not the 1st respondent had the requisite locus standi to have commenced the suit before the trial court. It seems to me however that in the nature of the dispute brought before the trial court, the issue of 1st respondent’s locus standi was inexorably tied to the larger issue which was as to whether or not the 2nd appellant gave a cogent and verifiable reason in its letter to the 2nd respondent on 19-02-07 substituting the 1st appellant for the 1st respondent as its candidate for AMAC/BWARI Federal Constituency in the elections held on 21-04-07.

The cornerstone of the case of the 1st respondent was that he was substituted in a manner that did not conform with the law. This explains in my view why the two courts below saw no reason to examine the issue of the 1st respondent’s locus standi. This is be-

cause the issue of absence of locus standi raised by the appellants was inexorably linked with the validity of 1st respondent's substitution when the same is viewed against the provisions of Section 34(1) and (2) of the Electoral Act, 2006, which provides;-

B “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.”

C The conclusion to be arrived at is that the issue of locus standi raised by the appellants is fully subsumed under the issue whether or not the 2nd appellant gave a cogent and verifiable reason for the attempted substitution of the 1st respondent with the 1st appellant. It is noteworthy that the appellants throughout the proceedings from D the trial court to this court never at any stage contended that the letter Exhibit NAS 4 dated 19-02-07, by which the 1st appellant was substituted for 1st respondent gave any cogent or verifiable reason for the substitution.

E The 2nd appellant in its letter Exhibit NAS 4 dated 19-02-07, wherein it purported to substitute the 1st respondent with the 1st appellant no reason whatsoever was given for the substitution. In the letter from the 2nd appellant, the writer one Senator Sa'idu Umar Kumo simply wrote:-

F “I am forwarding herewith details of approved substitutions in respect of the National Assembly candidates for your necessary action please.”

G Clearly, the 2nd appellant did not comply with the provisions of Section 34 in substituting the 1st appellant with the 1st respondent as the candidate for the National Assembly election on 21-04-08. (pp. 2379 G/2384 D/2386 C)

### ***Expulsion of 1st respondent was not satisfactorily proved***

H 2. It seems to me that the objection made by the appellants as to the standing of the 1st respondent to bring this suit depended wholly on whose version of the evidence the trial court accepted. If, as contended by the appellants the 1st respondent had lost his membership of the 2nd respondent on 2-02-07, he would not have a platform to

bring his suit on 22-03-07. But the contention of the 1st respondent was that the said letter by which he was allegedly expelled was a forgery and was never served on him.

The trial court did not make a specific finding on the point.

Similarly, the court below did not express its opinion on the point as no issue of locus standi was raised before it. B

It seems to me that from the nature or drift of evidence available before the trial court it was not satisfactorily established that the 1st respondent had been expelled from the 2nd appellant by a letter dated 2-02-07. Elementary prudence and common sense dictate that if indeed the 1st respondent had been expelled from ANPP on 2-02-07, the letter allegedly written by ANPP on 19-02-07, Exhibit NAS 4 ought to have given as reason for the substitution of the 1st respondent the fact that he had been expelled from the party. It is remarkable that the fact of the expulsion of the 1st respondent was never brought up anywhere until the 1st respondent had sued. C D (p. 2383 E)

### ***FAIR HEARING - Applicability - Requirements***

3. The 2nd issue for determination is a complaint that the court below was in error by not holding that the 1st appellant's Right to Fair Hearing was compromised by the manner the trial court handled the hearing of the suit on 18-04-07. I stated earlier that the judgment previously given in favour of the 1st respondent on 5-04-07, was set aside on 18/04/07, on the ground that the appellants had not been served with the processes leading to the judgment. The proceedings of the trial court reveals that the 1st respondent's counsel Mr. Dodo, SAN., prayed the trial court to hear the suit immediately after the previous judgment was set aside. Mr. Nwankwo, SAN., for the appellants however insisted that he could not be rushed as he needed time to file a counter-affidavit. The trial court granted appellants a stand-down till 11.30 a.m. Mr. Nwankwo, SAN., later sought a further stand-down till 3p.m. to enable him file a counter-affidavit notwithstanding that Mr. Dodo, SAN., had opposed a further stand-down. The trial court granted a further stand-down till 1.30 p.m. After the second stand-down, all the parties by their counsel made submissions to the trial Judge after they had filed their respective affidavits. None of the E F G H

parties was disabled from putting across to the trial court his arguments in the matter.

B Can it be said that there was a denial to the appellants of their Right to Fair Hearing? I think not. I have no doubt that the proceedings before the trial court on 18/4/07, were rushed and conducted in a hurry. This was so because the elections to the National Assembly which formed the subject-matter of the suit were to be conducted on 21-04-07. In other words, there was only a period of 3 days available to the parties and court to come to a determination of the matter. Given the nature of the special circumstances that prevailed, I am C unable to conclude that the appellants were denied their Right to Fair Hearing.

The question of Fair Hearing is not just an issue of dogma. Whether or not a party has been denied of his Right to Fair Hearing D is to be judged by the nature and circumstances surrounding a particular case. The crucial determinant is the necessity to afford the parties equal opportunity to put their case to the court before the court gives its judgment. In the instant case, there has been no complaint that the respondents were granted advantages or special favours E in the presentation of their case which were denied to the appellants. A complaint founded on a denial of Fair Hearing is an invitation to the court hearing the appeal to consider whether or not the court against which a complaint is made has been generally fair on the basis of equality to all the parties before it. F

It is wrong and improper to approach the meaning of Fair Hearing by placing reliance on any a priori assumptions as to its technical requirements. The simple approach is to look at the totality of the proceedings before the court and then form an opinion on objective standards whether or not an equal opportunity has been G afforded to parties to fully ventilate their grievances before a court. The principle of Fair Hearing cannot be applied as if it were a technical rule based on prescribed pre-requisites. It seems a sufficient satisfaction of the principle if parties were afforded an equal opportunity H without any inhibition to put across their case. (p. 2386 F/ 2388 A)

### ***Actions - Originating Summons - Propriety of***

4. The complaint of the appellants under their third issue is that the

use of Originating Summons was not appropriate in the circumstances of this case. Let me consider Order 40 Rules 1 and 2 of the Federal High Court (Civil Procedure Rules), 2000, which deal with the use of Originating Summons in proceedings at the Federal High Court from where this suit originates.

The rules Order 40 Rules 1 & 2 provide:-

*“(1) A person claiming to be interested under a deed, will or other written instrument may apply by Originating Summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested.”*

*“(2) A person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of an enactment may apply by Originating Summons for the determination of the question of construction and for a declaration as to the right claimed.”*

In the instant case, the simple question for the trial court to determine was whether or not the letter by which the 2nd appellant sought to substitute the 1st respondent with the 1st appellant was in conformity with the requirements of Section 34 of the Electoral Act, 2006. This was not a case in which the truth of the relevant facts was in serious controversy. The trial court needed to determine whether or not there was cogent and verifiable reason given for the substitution of the 1st appellant for 1st respondent. In my humble opinion, this is the type of case in which the procedure of Originating Summons is eminently reasonable and relevant. The procedure of Originating Summons ought not to be used where the facts are likely to be in dispute.

The procedure of Originating Summons is the appropriate one to be used in a dispute as this, where what is in dispute is the simple construction or interpretation of documents in respect of which pleadings are unnecessary. This issue must be resolved against the appellants. (p. 2389 D)

## **NOTABLE POINTS OF INTEREST**

**TOBI JSC** (Dissenting)

*1. A party endangered by another's conduct has locus standi*

It is the law that, to have locus standi to sue, the plaintiff must show

sufficient interest in the suit or matter. One criterion of sufficient interest is whether the party could have been joined as a party in the suit. Another criterion is whether the party seeking the redress or remedy will suffer some injury or hardship arising from the litigation. If the Judge is satisfied that he will so suffer, then he must be heard as he is entitled to be heard. A party who is in imminent danger of any conduct of the adverse party has the locus standi to commence an action.

The submission of learned counsel for the appellants is that since the 1st respondent was expelled from the party, he lacked the locus standi to sue. With respect, I am not with her. I am rather with the two counsel for the 1st and 2nd respondents that the 1st respondent has the locus standi to bring this action. It is on record that the 1st respondent was the candidate of the party before he was substituted for the 1st appellant. All the parties are in agreement on this. I am of the view that the 1st respondent has the locus standi to contend his expulsion from the party and the appellants cannot deny him of that standing. It is rather too simplistic, abstract and technical to say that because he has been expelled from the party, he has no standing to sue. If he has no standing to sue, and the expulsion was unconstitutional, how will the courts of law pronounce on it? As the 1st respondent sued on the legality or lawfulness of his expulsion from the party, I cannot see a better person to sue in the matter. Accordingly, issue No. 1 fails and it is dismissed. (p. 2406 D)

## 2. *Reasonableness of time depends on facts of the case*

Section 36 of the Constitution of the Federal Republic of Nigeria, 1999, 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 in such manner as to secure its independence and impartiality. The operative words for our purpose in this appeal are “*reasonable time*”; words which in their docile content are vague, and nebulous. A reasonable time is a time justified by reason. Reasonable time in its nebulous content cannot be determined in vacuo but in relation to the fact of each case. This is because what constitutes a reasonable



time in one case may not necessarily constitute a reasonable time in another case.

Reasonable time in Section 36 presupposes the granting of an adjournment in cases. In dealing with the reasonable time concept in Section 36, the court will take into consideration the nature of the case in terms of the magnitude, intricacies, versatilities, complexities and volume of the work involved. In this respect, the court will consider the assemblage of witnesses and documents, if any and the likely or possible time to get all these. Above all, the court will take into consideration the procurement of exculpatory or inculpatory evidence as the case may be. A reasonable time is also a moderately and practically possible time within which a court or tribunal could complete a trial and pronounce its decision. Reasonable time means the period of time which, in the search for justice, does not wear out the parties and their witnesses and which is required to ensure that justice is not only done but appears to a reasonable person to be done.

Although the case law is to the effect that a court of law is entitled to a reasonable time in the hearing of a matter and delivery of judgment (see Chief Egbo v. Chief Agbara (1997) 1 NWLR (Pt.481) 292), the provision of Section 36(1) is in respect of the parties and not the court. Therefore where there is a conflict between a reasonable time for the parties and the court, the former must prevail. When I say this, I am not unaware of the fact that the reasonable time of the court, relates to delay in the administration of justice, which is vital in the judicial process. In sum, what constitutes reasonable time within the meaning of Section 36(1) of the Constitution depends on the facts and circumstances of each case. (p. 2407 C)

### 3. *An impossible order is as good as not made*

If a trial Judge gives an order which he knows or ought to know as an expert of law and procedure that in the circumstances of time cannot be implemented, such an order is as good as not made. And here, I have in mind the order given by the learned trial Judge to the 1st appellant to file her papers after 11.00a.m and stood down the case to 1.30 p.m. In my humble view, the order was almost like a smoke-screen if not really one. It was a fairly smart one on the part of the

learned trial Judge and the smartness was portrayed when he said that learned counsel was given time to file his counter-affidavit and written address and he made elaborate submission.

Let me pause here to take two cases of this court on address of counsel. One is Obodo v. Olomu (1987) 3 NWLR (Pt.59) 111. The other is Ihom v. Gaji (1997) 6 NWLR (Pt. 509) 526. In Obodo v. Olomu, at the close of the cases of the parties, the learned trial Judge ordered them to send their addresses to him in writing and he adjourned to the 2nd of August, 1983, for judgment. Judgment was not delivered on 2nd of August, 1983, but on 14th of September, 1983. Only counsel to the defendant submitted written address ordered to be submitted to the trial court. The written address of the defendant was not served on the plaintiff's counsel. The plaintiff's counsel had no opportunity of replying to the defendant's submission. This court held that: (1) address of counsel form part of the case and failure to hear the address of one party however overwhelming the evidence on one side vitiates the trial; (2) in the instant case, since the Judgment of the trial court was based almost solely on the defendant's counsel address, there is a miscarriage of Justice; (3) in a written address, the court must ensure that the parties exchanged addresses. In Ihom v. Gaji, this court also held that addresses form part of a case and failure to hear the address of one party, however overwhelming the evidence seems to be on one side, vitiates the trial, because in many cases, it is after the addresses that one finds the law on the issues fought not in favour of the evidence adduced.

I foresee a possible argument that the cases are not applicable because learned counsel for the 1st appellant addressed the court. That may well be so in the head but certainly not in the heart. In my view, as long as counsel for the 1st appellant was not given opportunity to write a written address in response to that of the 1st respondent, she was denied the Right to Fair Hearing and that is the point I am labouring to make. (p. 2415 G)

#### H 4. *A breach of court rule is a denial of fair hearing*

Section 294(1) of the Constitution of the Federal Republic of Nigeria, 1999, provides for final address. Perhaps it is better for me to state part of the ipsissima verba of the subsection:-

*“Every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses....”*

The plural “addresses” in my view anticipate the addresses of all the parties in the case and relevantly the appellants and the respondents in this appeal. As it is impossible and not the practice for the parties to file their addresses at the same time, one of the parties must do so and send the address to the other party for a Reply. In this appeal, the 1st respondent was under a constitutional duty to send his written address to the 1st appellant for a possible Reply. That was the point this court made in Obodo. But unfortunately that did not happen. Why, I ask? I have no answer. And that constitutes a breach of the Fair Hearing provision in the Constitution. And the case law is in great proliferation that a breach of the law and Rules of Court amounts to a denial of Fair Hearing. And a fortiori the breach of the Constitution, the alpha and the omega of the legal system.

In Okafor v. Attorney-General and Commissioner for Justice (1991) 7 S.C. (Pt.II) 138; (1991) 6 NWLR (Pt.200) 659, this court held that a judgment which is given without compliance with Rules of Court and which non-compliance has breached a Fundamental Human Right such as the Right to Fair Hearing, is a nullity and is capable of being set aside either by the court that gave it or by an appellate court. (p. 2417 A)

##### 5. *Justice should not be done illegitimately*

Justice, that elusive and generic expression, is the cynosure or fulcrum of the administration of justice because it is the aim of the administration of justice to obtain it. Justice, which means in its simplistic content, quality of being just, fair play and fairness, possessing an element of egalitarianism in its functional content, must be done in a case. As a matter of law, the main hire of a Judge is to do justice to the parties. Lord Denning said in his well written book, *Family Story* at page 174:-

*“My root belief is that the proper role of a Judge is to do justice between the parties before him. If there is any Rule of Law which impairs the doing of justice, then it is the province of the Judge to do all he legitimately can to avoid that rule - or even to change it - so as*

*to do justice in the instant case before him. He need not wait for the legislature to intervene; because that can never be of any help in the instant case. I should emphasis however, the word legitimately; the Judge is himself subject to the law and must abide by it. ”*

Lord Denning has said it all. He has not put the position open ended. He has qualified the position by the use of the word “*legitimately*”, which means that if it is not legitimate to do justice in a particular case because of the strength of the law, the Judge must succumb to the law. This means that the Judge can only apply the principles of justice if they do not conflict with the Statute, because the Judge himself, in the words of Lord Denning, is “*subject to the law and must abide by it.*” (p. 2419 E)

#### 6. *Courts should create environment for fair hearing*

A trial Judge has a legal duty to create an environment for Fair Hearing and not a caricature or make do of it. He must be seen by an appellate court to have obeyed the Fair Hearing provision in Section 36 of the 1999 Constitution to the letters of the alphabet. He cannot be miserly with his apportionment of time to the parties in the hearing of the case. He cannot be over generous with the court’s time too, to the extent that the hearing of the case is unusually delayed. The Judge as a man and master of discretion has to exercise that discretion judicially and judiciously. As long as he does that, an appellate court will not intervene. In this appeal, the learned trial Judge, in my view, did not exercise his discretion judicially and judiciously because he refused the application of counsel for the 1st appellant to stand down the matter from 1.30p.m to 3.00 p.m. By the refusal of the application to stand down the matter for a period of ninety minutes, the learned trial Judge did not create the environment of Fair Hearing but kept it for himself under lock and key. That is wrong, very wrong indeed. (p. 2423 D)

#### 7. *Courts should adhere to their cause list*

I was almost forgetting the argument of learned counsel for the appellants that as the case was on the Cause List for mention, it was wrong for the learned trial Judge to hear it and give judgment. I entirely agree with the submission. I still remember a judgment of this

court to the effect that a trial Judge should follow the Cause List in the sense that where a matter is set down in the Cause List as a motion, it should not be heard on its merits. I have forgotten the case. However, in the most unlikely situation that there is no such decision of this court, I will give one now and here. A Cause List is “*in English practice, a roll of actions to be tried in the order of their entry, with the names of the solicitors for each litigant, made out for each day during the sittings of the courts.*” See Black’s Law Dictionary (6th Edition) page 221. I will be more comfortable in changing the word “*solicitors*” as used by the dictionary to “*Barristers*”. A Cause List in our jurisprudence is a list showing or indicating the cases to be taken by the court for the day. It includes the action to be taken in each case and counsel to do the cases. In respect of the action, the Cause List clearly indicates whether the case is for mention, motion, hearing or judgment. A trial Judge, or an appellate Judge, must obey the Cause List in the sense that he must not go outside the action to be taken in each case. Where a case is for hearing of motion, the trial Judge must hear the motion and adjourn for any other process. On no account should he hear a motion and hear the merits of the matter, not to talk about delivering judgment. He may consider doing that in the very rare circumstance of consent by parties.

I should liken a Cause List to an Agenda of a Meeting minus AOB, the cognomen for any other business, because Cause List has no such business.

The business of the court is exact and so exactly put in the list. The aim or objective of the Cause List is to give notice in advance to the parties, the business of the day in respect of the case. It enables the parties and their counsel, if any, to prepare in advance. The parties should not be taken by surprise. When the learned trial Judge decided to hear the merits of the matter after granting the motion for setting aside the judgment, he took the 1st appellant by surprise. (p. 2423 H)

#### 8. *Exercise of discretion should be justified by reason*

A trial Judge has not the unfettered discretion in the adjournment of matters. He must exercise his discretion judicially and judiciously. An appellate court will intervene if he does not exercise his discretion

judicially and judiciously. The court must balance its discretionary power to grant or refuse an adjournment with its duty to endeavour to give an appellant the opportunity of obtaining substantial justice in the sense of his appeal being granted a Fair Hearing on its merits provided always that no injustice is thereby caused to the other party and where the court erred in its balancing exercise an appeal court is at liberty to interfere. Where a refusal of an adjournment will amount to a denial of Fair Hearing, as in this case, an appellate court will intervene. Where a Judge wrongly exercises his discretion in refusing an application for adjournment, as in this case, the result is that the party applying for adjournment has been denied Fair Hearing. Although a trial Judge has the judicial discretion either to grant or refuse an application for adjournment, he must, however, consider the application carefully, that is judicially and judiciously on its merits, and state his reasons for his decision to grant or refuse it.

In this appeal, the learned trial Judge did not give any reason for refusing the application of counsel for the 1st appellant to stand down the case till 3.00p.m. Again, he kept the reason to himself. The law does not allow him to keep the reason to himself. (p. 2424 H)

### **REPRESENTATION**

Chief V. O. Awomolo, (with her; Nnodu Okeke, O. A. Adalumo, M. K. Olawale and Teniola Ojuolape), for the Appellants.

D. D. Dodo, SAN., (with him; C. U. Ekomaru, Audu Anuga, G. W. Nanbol and Chinedu Umeh), for the 1st Respondent/Applicant.  
Okon W. Efut, (with him; Ifunanya Obunselu, John Ochogwu and Okwa Enebeli), for the 2nd Respondent/Applicant.

### **CASES REFERRED TO**

Ugwu & Anor. v. Araraume & Anor. (2007) 6 S. C. (Pt.1) 88  
Amaechi v. INEC & Ors. (2008) 1 S. C. (Pt.I) 36  
Mohammed v. Kano N.A. (1968) All NLR 411 at 413  
University of Lagos v. Aigoro (1985) 1 NWLR (Pt.I) p 142  
Ogundoyin v. Adeyemi (2001) 7 S.C. (Pt.II) 98  
National Bank of Nigeria v. Ayodele Alakija (1978) 9 & 10 S.C. 59  
Adefulu v. Oyesile (1989) 12 S.C. 43  
Thomas v. Olufosoye (1986) 1 NWLR (Pt.18) 669

Owoduni v. Registered Trustees of CCC (2000) 6 S.C. (Pt.III) 60  
Adigun v. Attorney-General of Oyo State (1987) 1 NWLR (Pt.53) 678

Danesi v. Yerima (2003) 10 NWLR (Pt.827) 182

Bankole v. Dada (2003) 11 NWLR (Pt.830) 201

Adenuga v. Odumeru (2003) 4 S.C. (Pt.I) 1 (2003) 7

Araraume v. INEC (2007) 6 S.C. (Pt.1) 12 NWLR (Pt.1038) 127

B

### **STATUTES & RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1999, s. 36

Electoral Act, 2006, s. 34 (1), (2) & (3)

Federal High Court (Civil Procedure Rules) 2000, O. 40 rr. 1 & 2

C

### **BOOK REFERRED TO**

Black's Law Dictionary (6th Edition) Page 221.

D

### **LEAD JUDGMENT BY OGUNTADE JSC**

The 1st respondent was the plaintiff at the Federal High Court, Abuja where he brought a claim against the appellants and the 2nd respondent as the defendants claiming the following reliefs:-

E

*"1. A declaration that the 2nd defendant's letter of 19th February, 2007, to the 1st defendant applying to substitute the plaintiff Nasiru Muhammed as the 2nd defendant's candidate for the April, 2007, Abuja Municipal Area Council, AMAC/BWARI Federal House of Representative Election is illegal, null, void and of no effect whatsoever.*

F

*2. A declaration that the 1st defendant cannot in law act upon the 2nd defendant's application as contained in the letter of 19th February, 2007, to effect a substitution of the plaintiff with 3rd defendant as the 2nd defendant's candidate for the April, 2007. AMAC/BWARI Federal House of Representative Election.*

G

*3. A declaration that by virtue of the provision of Section 34(2) of the Electoral Act, 2006, the letter dated 19th February, 2007, written by the 2nd defendant to the 1st defendant seeking to substitute the plaintiff's name does not provide any cogent and verifiable reason sufficient in law to warrant a substitution of the plaintiff's name by the 1st defendant.*

H

4. *An Order of injunction restraining the 1st defendant from acting, carrying into effect or doing anything whatsoever based on the 2nd defendant's application for substitution as contained in the letter of 19th February, 2007, to the 1st defendant as same is illegal, null, void and of no effect whatsoever.*

B 5. *An Order setting aside anything and everything done by the 1st defendant pursuant to the letter of 19/2/07, for the 2nd defendant to the 1st defendant.*

C 6. *An Order setting aside the substitution form purported to have been filed by the plaintiff as illegal, null, void and of no effect whatsoever.*

D 7. *An Order against the 1st defendant by itself, its agent, privies, servants or howsoever described directing a retention of the plaintiff's name as the duly nominated candidate of the 2nd defendant for the AMAC/BWARI Federal House of Representatives.*

8. *An Order quashing and nullifying the purported substitution of the plaintiff by the letter dated 19th February, 2007, purporting to have been issued by the 2nd defendant.*

E 9. *An Order quashing, nullifying and setting aside the Forged Form CF004 A, purportedly signed by the plaintiff in favour of the said Austen Peter-Pam Amanda 1.*

F 10. *An Order affirming the plaintiff as the legitimate and bonafide candidate of the 2nd defendant for the April 2007 election into the Federal House of Representatives in respect of the Abuja Municipal Area Council/Bwari Federal Constituency."*

G At the completion of hearing on 5-04-07, the trial court gave judgment in favour of the 1st respondent in accordance with the reliefs he sought from the court. Later however, the 1st appellant brought an application that the judgment given on 5-04-07, be set aside on the ground that she had not been served with the processes leading to the judgment. The 1st respondent in whose favour the judgment on 5-04-07, had been given did not oppose the application. The trial Judge, Tijani Abubakar, J., had no difficulty in setting H aside the said judgment on 18-04-07.

It needs be said here that the 1st respondent's suit related to the National Assembly elections which were scheduled to be held on 21-04-07. It ought therefore to have been clear to the parties that



the case needed to be disposed of early enough so as not to interfere with the elections to be held on 21-04-07.

The 1st respondent's suit was heard on the same day i.e. 18-04-07 and judgment given a second time that day in favour of the 1st respondent. The earlier judgment in the case was similar in favour of the 1st respondent. The appellants were dissatisfied. They brought an appeal before the Court of Appeal, Abuja (hereinafter referred to as 'the court below'). The 1st respondent also filed a cross-appeal. On 5-07-07, the court below dismissed both the appeal and the cross-appeal. The appellants were dissatisfied with the judgment of the court below and have come before this court on a final appeal. In their appellants' Brief, the issues for determination in the appeal were identified as the following:-

*"1. Whether the Court of Appeal was right in affirming that 1st respondent had locus standi to institute the suit to challenge his substitution as a candidate of the ANPP, 2nd appellant to contest the AMAC/BWARI Federal Constituency when at the time of institution of the suit i.e. March 22nd, 2007, he had ceased to be a member of ANPP by reason of expulsion on February 2nd, 2007?"*

*2. Whether the Court of Appeal was right in holding that the 1st appellant's Right to Fair Hearing was not breached in the determination of the issues before the trial court?"*

*3. Whether Originating Summons was appropriate procedure in the determination of the issues raised in the suit?"*

The 1st respondent in his Brief of Argument raised three issues for determination which said issues are in substance similar to the appellant's issues. The 2nd respondent also filed a Brief of Argument on 15-02-08 which we deemed properly filed at the hearing of the appeal on 4-03-08.

I intend in this judgment to consider each of the issues raised for determination in the appeal serially. ***The 1st issue raises the question whether or not the 1st respondent had the requisite locus standi to have commenced the suit before the trial court. It seems to me however that in the nature of the dispute brought before the trial court, the issue of 1st respondent's locus standi was inexorably tied to the larger issue which was as to whether or not the 2nd appellant gave a cogent and verifiable reason***

**in its letter to the 2nd respondent on 19-02-07 substituting the 1st appellant for the 1st respondent as its candidate for AMAC/BWARI Federal Constituency in the elections held on 21-04-07.**

I observed earlier that the 1st respondent commenced his suit  
 B at the trial court by an Originating Summons. In paragraphs 3(a) to  
 (m) of the affidavit in support of the Originating Summons, the 1st  
 respondent deposed thus:-

“a. That the plaintiff is a Chattered Accountant with office at  
 C No. 4 Toamansina Street, off Kolda Link, off Adetokunbo Ademola  
 Crescent, Wuse, Abuja.

b. That the plaintiff is a registered and *bona fide* member of  
 the All Nigerian Peoples Party, the 2nd defendant herein. Attached  
 herewith is a copy of plaintiff party membership card marked Exhibit  
 D NAS 1.

c. By virtue of the plaintiff’s membership of the 2nd defen-  
 dant, he contested the 2nd defendant’s party’s primaries for the Abuja  
 Municipal Area Council (AMAC)/Bwari National Assembly Elections  
 and won, and was duly sponsored by the 2nd defendant to the 1st  
 E defendant as a House of Representative candidate for the April 2007,  
 House of Representative Elections for the AMAC/BWARI Federal  
 Constituency. Attached herewith is a copy of the Summary of Results  
 for the Primary Elections 2006, is annexed herewith as Exhibit NAS  
 F 2.

d. That upon the submission of plaintiff’s name by the 2nd  
 defendant to the 1st defendant, the 1st defendant as required by  
 Law, published his name both at its Headquarters and his constitu-  
 ency as the authentic candidate of the 2nd defendant for the April  
 G 2007, Federal House of Representatives Elections.

e. That upon the submission of his name to the 1st defendant  
 by the 2nd defendant he participated in the 1st defendant’s verifica-  
 tion exercise and was confirmed to contest the Federal House of Rep-  
 resentatives Election for the AMAC/Bwari Federal Constituency in  
 H the forthcoming April 2007, National Assembly Elections. Copy of  
 the acknowledgment (Form CF 001) issued by the 1st defendant is  
 annexed herewith as Exhibit NAS 3.

f. That surprisingly by a letter dated 19th February, 2007, the

*2nd defendant wrote the 1st defendant applying to substitute the plaintiff with the 3rd defendant (Austen Peters-Pam Amanda 1) as the 2nd defendant's candidate for the April, 2007 National Assembly elections. A copy of the 2nd defendant's letter dated 19th February, 2007, to the 1st defendant is attached herewith marked Exhibit NAS 4.* B

*g. That the 2nd defendant's application as contained in the said letter to the 1st defendant dated 19th February, 2007 gave no reason for the application to substitute the plaintiff with Austen Peters-Pam Amanda 1, as the 2nd defendant's candidate for the April, 2007 National Assembly election and notice of the purported attempt of substitution came very late to the plaintiff.* C

*h. That he did not at any time withdraw his candidature in favour of the said Austen Peter-Pam Amanda 1, as he had no reason whatsoever to do so. That the signature appearing on Form CF004A is a forgery consistent with the scanned (instead of original) passport photograph appearing on said form. Copy of the said Form CF004A is annexed herewith marked Exhibit FORGERY 1.* D

*i. That the said letter of 19/2/07, which was signed only by the Secretary of the party is contrary to the requirements of the 2nd defendant's party Constitution. Copy of the party Constitution is annexed herewith marked Exhibit NAS 4.* E

*j. That if effect is given to the said letter dated 19th February, 2007, it is going to cause the plaintiff severe damage mentally, physically, psychologically and financially, which no monetary compensation can assuage.* F

*k. That pursuant to his sponsorship by the 2nd defendant, plaintiff has commenced intense political campaign for the upcoming April, 2007 National Assembly elections in the AMAC/Bwari Federal Constituency.* G

*1. That I have been informed by D. D. Dodo, SAN., on the 15th Day of March, 2007 at about 7.00 p.m. at No. 10, Atbara Street, Wuse II and I very believe him -*

*'(a) that the 2nd defendant's application as contained in the letter dated 19th February, 2007, does not meet the requirement of law for substitution of the plaintiff to contest the April 2007, National Assembly elections under the platform of the 2nd defendant in the* H

*AMAC/Bwari Federal Constituency.*

*m. That except the 1st and 2nd defendants are restrained, they will proceed to act pursuant to the application of the 2nd defendant to substitute the plaintiff with Austen Peters-Pam Amanda 1, as the 2nd defendant's candidate for the April 2007, National Assembly election as contained in the said letter dated 19th February, 2007 and in the process prevent the plaintiff from contesting the April 2007, National Assembly elections."*

It is apparent from the extracts of the affidavit in support of the Originating Summons reproduced above that that foundation and cornerstone of the 1st respondent's case before the trial court was that he was the candidate of ANPP (i.e. - the 2nd appellant); and that he was validly nominated at the A.N.P.P. primaries to contest the April 2007 election for the AMAC/Bwari Federal Constituency. It was further deposed to that by a letter dated 19-02-07, the 2nd appellant wrote to the 2nd respondent applying to substitute the 1st appellant's name for the 1st respondent's. The 1st respondent deposed that he remained ready and willing to be A.N.P.P. candidate for the said election and that the 2nd appellant wrongfully attempted to substitute 1st appellant for him. It is noteworthy that the 1st respondent made the point that the attempt by the 2nd appellant to substitute the 1st appellant for him did not conform with the law.

In her reaction to the 1st respondent's affidavit, the 1st appellant in a counter-affidavit, sworn to on her behalf by one Ifeanyi M. Nriallike stated in paragraphs 5 to 8 thereof thus:-

*"5. That the plaintiff was expelled from the ANPP - the 2nd defendant on the 2nd of February, 2007 and is not a member of the party, the letter of expulsion is marked Exhibit A1 and this fact was communicated to the 1st defendant.*

*6. That the plaintiff was duly substituted with 3rd defendant having been expelled from the All Nigeria Peoples Party.*

*7. That EXHIBIT FORGERY 1 - Form CF 004A is not forged by the 3rd defendant or any other person but duly signed by the National Chairman and Secretary of the 2nd defendant. A letter to this effect written to the Chairman of INEC by the Chairman of ANPP, FCT Abuja is marked Exhibit A2.*

*8. That the National Secretary as the Chief scribe of the 2nd*

*defendant in the absence of the National Chairman has authority to write correspondence and letters on behalf of the 2nd defendant."*

It is obvious that the cause of the dispute between the parties was that whereas the 1st respondent claimed he was the properly nominated candidate of the 2nd appellant, the 1st appellant claimed that the 1st respondent could not be such candidate as the 1st respondent had by a letter dated 2-02-07, been expelled from the party.

In the appellants' Brief the contention of appellants' counsel was that the 1st respondent had not the locus standi to bring the suit because by his expulsion from the party on 2-02-07, had lost the platform upon which to bring the suit as a member of the 2nd appellant.

In his address before the trial court 1st respondent's counsel argued that there was no indication that the 1st respondent ever acknowledged that he got a letter dated 2-02-07, which expelled him from the 2nd respondent; and that in any case the letter by which the 2nd appellant tried to substitute the 1st appellant for the 1st respondent did not make any reference to a letter of expulsion of 1st respondent dated 2-02-07.

***It seems to me that the objection made by the appellants as to the standing of the 1st respondent to bring this suit depended wholly on whose version of the evidence the trial court accepted. If, as contended by the appellants the 1st respondent had lost his membership of the 2nd respondent on 2-02-07, he would not have a platform to bring his suit on 22-03-07. But the contention of the 1st respondent was that the said letter by which he was allegedly expelled was a forgery and was never served on him.***

***The trial court did not make a specific finding on the point.***

***Similarly, the court below did not express its opinion on the point as no issue of locus standi was raised before it.***

***It seems to me that from the nature or drift of evidence available before the trial court it was not satisfactorily established that the 1st respondent had been expelled from the 2nd appellant by a letter dated 2-02-07. Elementary prudence and***

**common sense dictate that if indeed the 1st respondent had been expelled from ANPP on 2-02-07, the letter allegedly written by ANPP on 19-02-07, Exhibit NAS 4 ought to have given as reason for the substitution of the 1st respondent the fact that he had been expelled from the party. It is remarkable**  
 B **that the fact of the expulsion of the 1st respondent was never brought up anywhere until the 1st respondent had sued.** It is to be expected that if in truth the 1st respondent was expelled it would have formed a valid basis to substitute his name with that of the 1st  
 C appellant. **The cornerstone of the case of the 1st respondent was that he was substituted in a manner that did not conform with the law. This explains in my view why the two courts below saw no reason to examine the issue of the 1st respondent's locus standi. This is because the issue of absence of locus**  
 D **standi raised by the appellants was inexorably linked with the validity of 1st respondent's substitution when the same is viewed against the provisions of Section 34(1) and (2) of the Electoral Act, 2006, which provides;-**

**"34 (1) A political party intending to change any of its**  
 E **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."**

**The conclusion to be arrived at is that the issue of locus**  
 F **standi raised by the appellants is fully subsumed under the issue whether or not the 2nd appellant gave a cogent and verifiable reason for the attempted substitution of the 1st respondent with the 1st appellant. It is noteworthy that the appel-**  
 G **lants throughout the proceedings from the trial court to this court never at any stage contended that the letter Exhibit NAS 4 dated 19-02-07, by which the 1st appellant was substituted for 1st respondent gave any cogent or verifiable reason for the substitution.**

H In Ugwu & Anor. v. Araraume & Anor. (2007) 6 S. C. (Pt.1) 88, this court considered the import and effect of Section 34 of the Electoral Act, on the substitution of a candidate where no cogent reason was given for the substitution. At page 134 of the report this

court per Tobi, JSC., said:-

*“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.”*

I made the same point at pages 155 to 156 of the report where I said:-

*“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 candidate 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 dic-*

tionary 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.

B 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 C 34 of the Electoral Act."

See also Amaechi v. INEC & Ors. (2008) 1 S. C. (Pt.I) 36.

**The 2nd appellant in its letter Exhibit NAS 4 dated 19-02-07, wherein it purported to substitute the 1st respondent D with the 1st appellant no reason whatsoever was given for the substitution. In the letter from the 2nd appellant, the writer one Senator Sa'idu Umar Kumo simply wrote:-**

**"I am forwarding herewith details of approved substitutions in respect of the National Assembly candidates for your E necessary action please."**

**Clearly, the 2nd appellant did not comply with the provisions of Section 34 in substituting the 1st appellant with the 1st respondent as the candidate for the National Assembly election on 21-04-08.**

**The 2nd issue for determination is a complaint that the court below was in error by not holding that the 1st appellant's Right to Fair Hearing was compromised by the manner the trial court handled the hearing of the suit on 18-04-07. I stated G earlier that the judgment previously given in favour of the 1st respondent on 5-04-07, was set aside on 18/04/07, on the ground that the appellants had not been served with the processes leading to the judgment. The proceedings of the trial court reveals that the 1st respondent's counsel Mr. Dodo, H SAN., prayed the trial court to hear the suit immediately after the previous judgment was set aside. Mr. Nwankwo, SAN., for the appellants however insisted that he could not be rushed as he needed time to file a counter-affidavit. The trial court**



**granted appellants a stand-down till 11.30 a.m. Mr. Nwankwo, SAN., later sought a further stand-down till 3p.m. to enable him file a counter-affidavit notwithstanding that Mr. Dodo, SAN., had opposed a further stand-down. The trial court granted a further stand-down till 1.30 p.m. After the second stand-down, all the parties by their counsel made submissions to the trial Judge after they had filed their respective affidavits. None of the parties was disabled from putting across to the trial court his arguments in the matter.**

**Can it be said that there was a denial to the appellants of their Right to Fair Hearing? I think not. I have no doubt that the proceedings before the trial court on 18/4/07, were rushed and conducted in a hurry. This was so because the elections to the National Assembly which formed the subject-matter of the suit were to be conducted on 21-04-07. In other words, there was only a period of 3 days available to the parties and court to come to a determination of the matter. Given the nature of the special circumstances that prevailed, I am unable to conclude that the appellants were denied their Right to Fair Hearing.**

**The question of Fair Hearing is not just an issue of dogma. Whether or not a party has been denied of his Right to Fair Hearing is to be judged by the nature and circumstances surrounding a particular case. The crucial determinant is the necessity to afford the parties equal opportunity to put their case to the court before the court gives its judgment. In the instant case, there has been no complaint that the respondents were granted advantages or special favours in the presentation of their case which were denied to the appellants. A complaint founded on a denial of Fair Hearing is an invitation to the court hearing the appeal to consider whether or not the court against which a complaint is made has been generally fair on the basis of equality to all the parties before it.**

In *Mohammed v. Kano N.A.* (1968) All NLR 411 at 413 (Re-print), Ademola, CJN., considering the meaning of Fair Hearing said:-

*“It has been suggested that a Fair Hearing does not mean a fair trial. We think that a Fair Hearing must involve a fair trial, and a fair trial of a case consists of the whole hearing. We therefore see no*

*difference between the two. The true test of Fair Hearing, it was suggested by counsel, is the impression of a reasonable person who was present at the trial whether from his observation, justice has been done in the case. We feel obliged to agree with this."*

- It is wrong and improper to approach the meaning of Fair Hearing by placing reliance on any a priori assumptions as to its technical requirements. The simple approach is to look at the totality of the proceedings before the court and then form an opinion on objective standards whether or not an equal opportunity has been afforded to parties to fully ventilate their grievances before a court. The principle of Fair Hearing cannot be applied as if it were a technical rule based on prescribed pre-requisites. It seems a sufficient satisfaction of the principle if parties were afforded an equal opportunity without any inhibition to put across their case.**

The court below at pages 289 to 291 of the record in its judgment examined the appellants' complaint as to absence of Fair Hearing and said:-

- "It must be noted that the court must balance its discretionary power to grant or refuse an adjournment with its duty to endeavour to give an appellant the opportunity of obtaining substantial justice in the sense of his appeal being granted a Fair Hearing or even in the court below. This is because of the need that in granting the hearing on the merits no injustice is done to the other party where that opportunity or Fair Hearing existed in the court below, the appellate court has no business interfering. See University of Lagos v. Aigoro (1985) 1 NWLR (Pt.1) page 142, Ogundoyin v. Adeyemi (2001) 7 S.C. (Pt.II) 98; (2001) 13 NWLR (Pt.730) 403 at 421.*
- The very essence of Fair Hearing under Section 36 of the Constitution of the Federal Republic of Nigeria, 1999, is a hearing which is fair to both parties to the suit, be they plaintiffs or defendants or prosecution or defence. The section does not contemplate a standard of justice which is biased in favour of one party and to the prejudice of the other. Rather, it imposes an ambidextrous standard of justice in which the court must be fair to both sides of the conflict. The hearing must be fair and in accordance with the twin pillars of justice, read as pillars of justice, namely audi alteram partem and*

*nemo judex in causa sua* per Onu, JSC., at 421. See also *Ndu v. State* (1990) 11-12 S.C. 122; (1990) 7 NWLR (Pt.164) 550.

A party who will be affected by the result of a judicial inquiry must be given an opportunity of being heard, otherwise, the action taken following the inquiry will be unconstitutional and illegal. See *Ogundoyin v. Adeyemi* (2001) 7 S.C. (Pt.II) 98; (2001) 13 NWLR (Pt. 730) 403 at 423, per Onu, JSC., See also *Atande v. State* (1988) 3 NWLR (Pt. 85) 681.

In the light of the above I have no difficulty in resolving this issue of Fair Hearing or not against the appellant. Therefore, this appeal lacking in merit is hereby dismissed.”

I agree with the views expressed by the court below above. I am unable to hold that the appellants were denied their Right to Fair Hearing as enshrined in Section 36 of the 1999 Constitution.

**The complaint of the appellants under their third issue is that the use of Originating Summons was not appropriate in the circumstances of this case. Let me consider Order 40 Rules 1 and 2 of the Federal High Court (Civil Procedure Rules), 2000, which deal with the use of Originating Summons in proceedings at the Federal High Court from where this suit originates.**

**The rules Order 40 Rules 1 & 2 provide:-**

**“(1) A person claiming to be interested under a deed, will or other written instrument may apply by Originating Summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested.**

**(2) A person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of an enactment may apply by Originating Summons for the determination of the question of construction and for a declaration as to the right claimed.”**

In the instant case, the simple question for the trial court to determine was whether or not the letter by which the 2nd appellant sought to substitute the 1st respondent with the 1st appellant was in conformity with the requirements of Section

**34 of the Electoral Act, 2006. This was not a case in which the truth of the relevant facts was in serious controversy. The trial court needed to determine whether or not there was cogent and verifiable reason given for the substitution of the 1st appellant for 1st respondent. In my humble opinion, this is the type of case in which the procedure of Originating Summons is eminently reasonable and relevant. The procedure of Originating Summons ought not to be used where the facts are likely to be in dispute: See Theophilus Doherty v. Richard Doherty (1968) NMLR. 241 and National Bank of Nigeria v. Ayodele Alakija (1978) 9 & 10 S.C. 59; (1978) 9-10 S.C. (Reprint) 59. The procedure of Originating Summons is the appropriate one to be used in a dispute as this, where what is in dispute is the simple construction or interpretation of documents in respect of which pleadings are unnecessary: See Joseph Din v. Attorney-General of the Federation (1986) 1 NWLR (Pt.17) at page 471. This issue must be resolved against the appellants.**

In the final conclusion, I am of the view that this appeal has no merit. It is accordingly dismissed with N50,000.00 costs in favour of 1st respondent against the appellants.

### MUSDAPHER JSC

I was privileged to read before now the judgment of my Lord, Oguntade, JSC., just delivered in this matter with which I entirely agree. For the same reasons so comprehensively set out in the judgment which I, with respect, adopt as mine, I too find this appeal unmeritorious. I accordingly dismiss it. I abide by the order for costs proposed in the aforesaid judgment.

### AKINTAN JSC

This action was instituted by the present 1st respondent as plaintiff at the Federal High Court Abuja against the 1st appellant and 2nd respondent as defendants. His claim before the court was, inter alia, for a number declaratory reliefs and orders quashing or setting aside the letter purporting to substitute the said plaintiff's nomination as

the candidate nominated by the 2nd appellant political party (ANPP) as the candidate to contest for the April, 2007 AMAC/BWARI Federal House of Representatives Election. The action was commenced by way of Originating Summons and affidavits setting out the facts relied on were also filed. The case was expeditiously taken and judgment was delivered in which the reliefs sought were granted by the learned trial Judge. B

But an application to set aside the judgment was later brought by the 1st appellant on the ground that she was not served with the processes leading to the judgment. Her request was granted and the judgment earlier given was set aside. An order that the processes be served on the 1st appellant was then made. The case thereafter came up for hearing de novo before the same learned trial Judge after the 1st appellant had filed her defence to the action. The learned trial Judge took submissions from learned counsel for the parties in the case and thereafter delivered his judgment in which the reliefs sought by the plaintiff were granted. The defendants were not satisfied with the judgment. An appeal filed against the judgment to the Court of Appeal was dismissed. The present appeal is from the judgment of the Court of Appeal. C D E

The parties filed their respective Briefs of Argument in this court. The appeal was premised on the following three issues in this court:-

*“1. Whether the Court of Appeal was right in affirming that 1st respondent had locus standi to institute the suit to challenge his substitution as a candidate of the ANPP, 2nd appellant, to contest the AMAC/BWARI Federal Constituency when at the time of institution of the suit, i.e. March 22nd, 2007, he had ceased to be a member of ANPP by reason of expulsion on February 2nd, 2007?”* F

*2. Whether the Court of Appeal was right in holding that the 1st appellant’s Right to Fair Hearing was not breached in the determination of the issues before the trial court?”* G

*3. Whether Originating Summons was appropriate procedure in the determination of the issues raised in the suit?”* H

It is necessary to state that the 1st respondent had to embark on the action when information got to him that his nomination as the candidate of the ANPP (2nd appellant) was about to be reversed by substituting the 1st appellant in his place. The 1st respondent had

won the contest at the party primaries and his name had been forwarded to the 2nd respondent (INEC) as the party's candidate for the elections scheduled for 21st April, 2007. There was therefore need for speedy action by the plaintiff if the reliefs he sought from the court were to materialise before the date fixed for the elections.

B Similarly, the court seized of such action had to act swiftly too so as to avoid the court being used to defeat the end of justice in case the matter was not heard and concluded before the elections scheduled for 21st April, 2007.

C The action was commenced by way of Originating Summons. The main thrust of attack by the appellants in issue 1 was that as at the time the 1st respondent was challenging the application for his substitution, he had no locus standi since he had ceased to be a member of the 2nd appellant political party. This submission was premised on D the contention that the man had been expelled from the party and reliance to that effect was placed on a letter of expulsion dated 2nd February, 2007.

It is not in doubt that the main issue in contention was the application of the provisions of Section 34 of the Electoral Act, 2006.

E The section 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.*

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

In the instant case, the intention of the 2nd appellant to replace the 1st respondent as its candidate was contained in a letter dated 19th February, 2007. The letter reads thus:-

G *“19th February, 2007,*

*The Chairman,*

*Independent National Electoral Commission (INEC),*

*Zambezi Crescent,*

*Maitama, Abuja.*

H *Dear Sir,*

*Submission of Substitution for National*

*Assembly Candidates*

*I am forwarding herewith details of approved substitutions in*

*respect of the National Assembly candidates for your necessary action, please.*

*Yours faithfully,*

*For: All Nigeria Peoples Party (ANPP). ”*

The above letter was filed by the 1st defendant (now 1st appellant) as Exhibit NAS 4 to his counter-affidavit to Originating Summons where it was deposed as follows in paragraphs 6, 7 and 8:-

*“6. That by virtue of a letter dated 19th February, 2007, the 2nd defendant wrote to the 1st defendant applying to substitute the plaintiff with the 3rd defendant (Austen Peters-Pam Amanda 1), as the 2nd defendant’s candidate for the April, 2007 National Assembly elections. The plaintiff exhibited the letter as Exhibit NAS 4.*

*7. That the substitution was done within time in accordance with the Electoral Act.*

*8. That the 1st defendant acted within the Electoral Act and the constitutional powers vested on them in the matter.”*

Among the requirements which must be met in respect of a valid substitution of any candidate as prescribed in Section 34 of the Electoral Act are: (1) that such substitution must be made not later than 60 days to the election; and (2) the request must be supported with cogent and verifiable reasons. In the instant case, although the defence averred in paragraph 7 of the counter-affidavit to the Originating Summons *“that the substitution was done within time in accordance with the Electoral Act,”* there was a complete silence as regards giving *“cogent and verifiable reasons.”* In fact no reason was given in either the letter or the counter affidavit to the Originating Summons.

The question whether the 1st respondent was expelled from the political party was in fact introduced by the 3rd defendant (now 1st appellant). It was in her counter-affidavit to the affidavit and further and better affidavit of the plaintiff where it was deposed in paragraph 5 as follows:-

*“5. That the plaintiff was expelled from the ANPP - the 2nd defendant, on 2nd of February, 2007 and is not a member of the party, the letter of expulsion is marked Exhibit A1 and this fact was communicated to the 1st defendant.”*

It is quite clear therefore that the request for the substitution

failed to satisfy the requirement of Section 34(2) of the Electoral Act, in that, no cogent and verifiable reasons for the substitution were given.

Again there is the need for any court assigned to handle a case of this nature to act swiftly by ensuring that the matter was disposed of on time and before the date fixed for the elections. That was what the learned trial Judge did in the instant case. He deserved to be commended for taking all the steps he took in the case by warding off all attempts by opposing counsel in the case to frustrate the early completion of the case which was before the date fixed for the elections.

In conclusion, I had the privilege of reading the draft of the leading judgment written by my learned brother, Oguntade, JSC. I agree with the reasons given therein for dismissing the appeal. For the above reasons I have given and the fuller reasons given in the leading judgment which I also adopt, I hold that there is no merit in the appeal and I accordingly dismiss it and abide with the order on costs made in the leading judgment.

E

### **TABAI JSC**

I had the advantage of reading in draft the leading judgment of my learned brother, Oguntade, JSC., and I agree entirely with his reasoning and conclusion. The case was initiated by way of Originating Summons filed at the Federal High Court on the 29/3/2007, by the plaintiff who is the 1st respondent herein. The claim was against INEC, All Nigeria Peoples Party and Austen Peters-Pam Amanda as 1st, 2nd and 3rd defendants respectively. The plaintiff/respondent claimed ten reliefs against the defendants. In support of the reliefs claimed was a 4 paragraph affidavit to which were attached Exhibits NAS 1, NAS 2, NAS 3, NAS 4 and FOGERY 1. There was a further and better affidavit of 6 paragraphs to which were attached Exhibits PAM FORGE 1, PAM FORGE 2 and PAM FORGE 3.

In opposition of the claim the 3rd defendant who is the 1st appellant herein filed a 12 paragraph counter-affidavit deposed to by Ifeanyi M. Nriahike to which were attached Exhibits A1, A2 and A3. INEC also filed a 10 paragraph counter-affidavit. The reliefs claimed



and relevant paragraphs of the affidavits are reproduced in the leading judgment and so I need not repeat them.

Briefly, the case of the plaintiff/respondent is that he is a member of ANPP and that by virtue thereof, he contested and won the party's primary election for the party's candidature for the House of Representatives election for the AMAC/BWARI constituency in the April 2007, elections. His name was accordingly submitted by the ANPP to the 1st respondent as its candidate for the election. All these are evidenced in Exhibits NAS 1, NAS 2 and NAS 3. Surprisingly, he got Exhibit NAS 4, a letter dated 19/2/2007, by which the ANPP purportedly substituted the 3rd defendant for the plaintiff as its candidate for the aforementioned election. He thus, filed this action to claim the reliefs sought. The submission of the plaintiff/respondent is that the letter Exhibit NAS 4 contained no reasons for the substitution and therefore in violation of the provisions of the Electoral Act, 2006. It was also his case that the letter of substitution was forged.

The case of the 1st respondent, INEC is simply that the letter of the 19/2/2007, which conveyed the substitution of the plaintiff with the 3rd defendant/appellant was done within the time prescribed by law. The ANPP did not file any counter-affidavit. The case of the 3rd defendant/appellant as contained in the 12 paragraph counter-affidavit is that she was the ANPP candidate for the Abuja Municipal Area Council/Bwari Federal Constituency for the 21/4/07 elections. That the plaintiff/respondent was expelled from the ANPP on the 2/2/2007 and was therefore duly substituted with her. She denied that the letter of substitution dated 19/2/2007, was forged.

The core issue for determination in this appeal is whether the substitution of the plaintiff/respondent with the 3rd defendant/appellant met the requirements of the Electoral Act, 2006. The relevant provision is Section 34(1) and (2) of the Electoral Act, 2006. The section provides:-

*“34 (i) 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 sub-section (1) of this section shall give cogent and verifiable reasons.”*

The learned trial Judge identified compliance with the Elec-

toral Act, as the key issue for determination and held that the substitution presented no cogent and verifiable reasons and granted all the reliefs sought.

At the court below the issue of the locus standi of the plaintiff/respondent was raised and it was resolved against the appellants. It is again seriously raised before us. The issue is founded on the purported expulsion which, according to the appellants, formed the basis of the plaintiff's substitution with the 3rd defendant/appellant. Yet in Exhibit NAS 4, no mention was made of the plaintiff's expulsion as a reason for his substitution. As a matter of fact no reason, let alone, cogent and verifiable reason, was given for the substitution.

If indeed the plaintiff/respondent was expelled on the 2/2/07, the letter of the 19/2/07, substituting him with the 3rd defendant/appellant would have highlighted the expulsion as the reason for the substitution. In the absence of anything on the face of Exhibit NAS 4 from which the plaintiff's earlier expulsion could reasonably be inferred, I hold that the assertions about the plaintiff's expulsion in the 3rd defendant's counter-affidavit notwithstanding expulsion was not proved.

And in the face of Exhibit NAS 4 which contains no reason for the substitution, I will endorse the concurrent finding of the two courts below that there was no substitution as provided in Section 34(2) of the Electoral Act, 2006.

For the foregoing and the fuller reasons contained in the leading judgment of Oguntade, JSC. I also dismiss the appeal. I abide by the order on costs contained in the leading judgment.

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**G TOBI JSC (DISSENTING)**

Nasiru Mohammed, the 1st respondent, commenced this matter by Originating Summons on 29th March, 2007, at the Federal High Court, Abuja. He asked for ten reliefs. They included his expulsion from the All Nigeria Peoples Party (bearing the acronym ANPP) the 2nd appellant, and his substitution for Barrister (Mrs.) Amanda Austen Peters-Pam, the 1st appellant. 1st respondent asked the court to set aside his substitution and affirm him as the legitimate and bona fide candidate of the ANPP for the Abuja Municipal Area Council

(AMAC/Bwari Federal House of Representatives Constituency). He relied on Section 34(2) of the Electoral Act, 2006.

The matter was heard by Abubakar, J. Based on a written address by counsel for the 1st respondent, Mr. Chinedu Umeh, the learned trial Judge gave judgment in favour of the 1st respondent. That was on 5th April, 2007. B

As the 1st appellant was not served the court processes in respect of the judgment delivered on 5th April, 2007, Mr. Nwankwo brought an application to set aside the judgment. The application was argued on 18th April. The learned trial Judge set aside the judgment and insisted hearing the merits of the matter that same day of 18th April, 2007. All efforts by counsel for the 1st appellant to give him time to prepare the case of the 1st appellant failed. The Judge delivered judgment in favour of the 1st respondent. He granted all the reliefs sought. C

Aggrieved, the appellants went to the Court of Appeal. Their appeal was dismissed. They have come to this court. Briefs were filed and duly exchanged. The appellants formulated three issues for determination:- D

*“5.2.1 Whether the Court of Appeal was right in affirming that 1st respondent had locus standi to institute the suit to challenge his substitution as a candidate of the ANPP, 2nd appellant to contest the AMAC/Bwari Federal Constituency when at the time of institution of the suit, i.e. March 22nd, 2007, he had ceased to be a member of ANPP by reason of his expulsion on February 2nd, 2007?”* E

*2.2 Whether the Court of Appeal was right in holding that the 1st appellant’s Right to Fair Hearing was not breached in the determination of the issues before the trial court?*

*2.3 Whether Originating Summons was appropriate procedure in the determination of the issues raised in the suit?”* F

The 1st respondent also formulated three issues for determination:-

*“3.1 Whether or not the 1st respondent (Nasiru Mohammed) had the locus standi to institute this action?”* G

*3.2 Whether from the evidence on record, the appellants were given Fair Hearing both at the trial court and the Court of Appeal?*

*3.3 Whether Originating Summons was appropriate procedure*

*adopted in the determination of the suit filed by the 1st respondent challenging his substitution with that of the 1st appellant (Barr. (Mrs.) Amanda Peters-Pam)?”*

The 2nd respondent also formulated three issues for determination:-

B “1. Whether the Court of Appeal was right in affirming that 1st respondent had *locus standi* to institute the suit to challenge his substitution as a candidate of the ANPP when at the time of the institution of the suit, i.e. March 22nd, 2007, he had ceased to be a member of ANPP by reason of his expulsion on March 2nd, 2007?

C 2. Whether the Court of Appeal was right in holding that the appellant’s Right to Fair Hearing was not breached in the determination of the issues before the trial court?

D 3. Whether Originating Summons was the appropriate procedure in the determination of the issues raised in the suit?”

Learned counsel for the appellants. Mrs. V. O. Awomola, submitted on issue No. 1 that the learned Justices of the Court of Appeal were wrong in their conclusion that the 1st respondent had *locus standi* to institute the action for the following reasons:-

E “1. The allegation that the plaintiff/1st respondent had no *locus standi* to institute the action and seek the reliefs claimed in the Originating Summons was made on oath in the counter-affidavit. Paragraphs 5, 6 and 11, page 102 of the records.

F 2. The affidavit was reinforced with a copy of a letter of expulsion written to the plaintiff/1st respondent; Exhibit A1 attached to the counter-affidavit.

G 3. There was no denial of the deposition neither was there anything from the plaintiff/1st respondent to contradict, controvert or challenge the deposition and the letter exhibited to the counter-affidavit.

H 4. The learned trial Judge did not make any finding on the fact and evidence that the plaintiff/1st respondent had ceased to be a member of ANPP since 2nd February, 2007, whereas the suit was filed on 22nd March, 2007.

5. The conclusion of the Court of Appeal was not derived from any evidence on the records. It is with respect a mere feeling or presumption of their Lordships which cannot translate to evidence to

*nullify a deposition in an affidavit, which the law presumes to be admission requiring no further proof.*

6. *The conclusion of the Court of Appeal had the effect of making a defence for the 1st respondent and upon which the appellants were neither heard nor given opportunity of hearing before the court adopted it to defeat the appeal of the appellants.*” B

Learned counsel submitted that the obligation of the political party under Section 34(1), (2) and (3) of the Electoral Act, 2006, implies that the candidate being substituted is a subsisting member of the political party. A dismissed member, by his removal, lost all rights C and claims to the party and cannot benefit or sue under the section, learned counsel submitted. She referred to Exhibit A1.

Learned counsel submitted that for any person to be entitled to file an action in court and seek the reliefs claimed in the suit, such a person must be a legal member of the political party. He must at D the time of the institution of the suit be a candidate sponsored by the party or whose sponsorship subsists in fact and law. A plaintiff also has no legal capacity based upon no sufficient interest in the subject matter and cannot be given declarations and order, as were made in this appeal, counsel argued. She cited Adefulu v. Oyesile (1989) 12 E S.C. 43; (1989) 5 NWLR (Pt.122) 377, Thomas v. Olufosoye (1986) 1 NWLR (Pt.18) 669 and Owoduni v. Registered Trustees of CCC (2000) 6 S.C. (Pt.III) 60; (2001) 10 NWLR (Pt.675) 315. She urged the court to hold that the Court of Appeal was wrong in its determi- F nation of the issue of the 1st respondent’s locus standi.

On issue No.2, learned counsel, after narrating the scenario of the procedure adopted in paragraphs 8.1 to 8.3 of the Brief, pointed out that Fair Hearing has been interpreted to mean fair trial where all the parties are given equal right, opportunities and privileges. Coun- G sel claimed that the 1st respondent filed written address which was relied upon but the same right, privilege and opportunity was not given to the 1st appellant. She regarded this as double standard, which prejudiced the right of the 1st appellant. She contended that H where a court conducting a trial in addition to written address also took oral hearing, all the parties affected must be given equal benefit and opportunity. She cited Adigun v. Attorney-General of Oyo State (1987) 1 NWLR (Pt.53) 678.

Counsel submitted that justice rushed is justice denied because every litigant is entitled to know the totality of argument against him and entitled to respond to the argument submitted to the court. To counsel, the oral submission made by counsel for the 1st appellant is not enough to satisfy equal treatment and it is not a fair argument to say that the 1st appellant was given every opportunity to submit written submissions but she failed to do so.

Learned counsel argued that since the case was scheduled on 18th April, 2007, for the motion of the 1st appellant to set aside the judgment delivered on 5th April, 2007, the hearing of the case on the merit on the same day is wrong in that the case was not on record scheduled for hearing of the Originating Summons but for motion to set aside the judgment of 5th April, 2007. The law is that when a case is adjourned for mention, it cannot be turned to a date for hearing. Such change nullifies the judgment delivered on such date, counsel argued. She pointed out that the speed adopted by the court robbed on the quality of the judgment whereby valid objections were dealt with as an unimportant issue. She urged the court to have regards to and take judicial notice of the hardship and fait accompli foisted upon the counsel for the 1st appellant who was misled to address the court at 1.30 p.m. even when he was least ready or prepared to address the court.

On issue No.3, learned counsel relied on the affidavit in support by the 1st respondent, particularly paragraphs 4, 5 and 6 and the counter-affidavit, particularly paragraphs 7, 8 and 9 and submitted that there are allegations which are seriously contentious and cannot be resolved by mere assumptions. She also called in aid reliefs 7, 8 and 9. She argued that the allegations of fraud and forgeries cannot be dealt with under Originating Summons as the procedure is not appropriate for a matter which is contentious, controversial and complicated as this. Counsel urged the court to allow the appeal.

Learned Senior Advocate for the 1st respondent, Mr. D. D. Dodo on issue No.1, examined the meaning of locus standi. He cited Danesi v. Yerima (2003) 10 NWLR (Pt.827) 182, Bankole v. Dada (2003) 11 NWLR (Pt.830) 201, Adenuga v. Odumeru (2003) 4 S.C. (Pt.1) 1; (2003) 7 NWLR (Pt.821) 184; Araraume v. INEC (2007) 12 NWLR (Pt.1038) 127 and Amaechi v. INEC. (2008) 1 S.C. (Pt.

1) 36; (2008) 5 NWLR (Pt.1080) 227, and submitted that the trial court and the Court of Appeal were right in holding that the 1st respondent had locus standi to bring the action. He also examined Section 34(2) of the Electoral Act.

Learned Senior Advocate submitted on issue No. 2, that by the nature of the case and the res being an election matter which was to extinguish on 21st April, 2007, the appellants were given a fair trial. Citing the case of Dapianlong v. Dariye (2007) 4 S.C. (Pt.III) 118; (2007) 8 NWLR (Pt.1036) 286, learned Senior Advocate submitted that the trial court was right to have ordered the appellants to file their counter-affidavits to the 1st respondent's Originating Summons on 18th April, 2007, in which all the parties were given equal opportunities to canvass arguments with respect to their pleadings before judgment was finally delivered. Citing the case of Adeleke v. Oyo State House of Assembly (2006) 16 NWLR (Pt.1006) 608, learned Senior Advocate submitted that the appellants were given fair trial in the suit.

On issue No. 3, learned Senior Advocate submitted that the lone issue raised in the Originating Summons was whether the 2nd appellant complied with Section 34(2) before substituting the name of the 1st respondent with that of the 1st appellant, an issue capable of and was indeed properly resolved under the Originating Summons Procedure. Learned Senior Advocate submitted that where the issue to be determined by a court is one of interpretation of a Statute as in this case, the proper procedure for commencing such an action is by Originating Summons. Relying on Order 40 Rules 1, 2 and 3 of the Federal High Court (Civil Procedure) Rules, 2000 and the case of Ugwu v. Araraume (2007) 6 S.C. (Pt.I) 88; (2007) 12 NWLR (Pt.1048) 475, counsel urged the court to dismiss the appeal.

Learned counsel for the 2nd respondent, Mr. Okon N. Efut, raised a Preliminary Objection. He raised objection on grounds 1, 2, 4 and 5 of the grounds of appeal. He raised the objection as follows:-

*"1. That the said grounds of appeal (except ground 3) from which the issues for determination were purportedly distilled are fundamentally defective in that no nexus exists between them and the decision appealed against.*

*2. All but ground 3 of the grounds of appeal are either incom-*

*petent or deemed abandoned, rendering them liable to be struck out.*

*3. All the issues for determination (except issue No.3) are based on incompetent or abandoned grounds of appeal.*

*4. Upon a critical examination of the 5 grounds of appeal vis-a-vis the corresponding issues for determination as formulated by the appellants, we are of the humble view that grounds 1, 2, 4, and 5 are highly objectionable and ought to be struck out for the reasons stated hereunder."*

Taking ground 1, learned counsel submitted that it is not a ground of law as the portion of the judgment of the Court of Appeal being questioned or challenged did not decide any issue in controversy at the Court of Appeal. He appeared to be concerned with the words "*the exotic argument*" used by the Court of Appeal. He cited MV Gongola v. Smurfit Cases Limited (2007) 1-2 S.C. 145; (2007) 30 NSCQR (Pt.1) 534, Nwankwo v. EDCS (2007) 1-2 S.C. 145; (2007) 29 NSCQR 73, NDIC v. Okem Limited (2004) 4 S.C. (Pt.II) 77; (2004) 18 NSCQR 42, CCB v. Ekperi (2007) 1 S.C. (Pt.II) 130; (2007) 29 NSCQR 175, YADIS Limited v. GNIC Limited (2007) 4-5 S.C. 236; (2007) 30 NSCQR (Pt.1) 485 and Umana v. Attah (2004) 7 NWLR (Pt.871) 63. Counsel submitted that ground 2 which alleges error in law is equally incompetent as no issue for determination has been formulated by the appellants as arising from the ground. He cited Iyoho v. Effiong (2007) 4 S.C. (Pt.III) 90; (2007) 30 NSCQR (Pt.1) 207. On ground 4, counsel also submitted that it is deficient of an issue for determination and therefore deemed abandoned and should be struck out. He cited Adah v. Adah (2001) 2 S.C. 1; (2001) 5 NWLR (Pt.705) Pt. 1).....; Adelusola v. Akinde (2004) 5 S.C. (Pt.II) 71; (2004) 18 NSCQR (Pt.1) 371 and the cases of Iyoho v. Effiong (supra) and Nwankwo v. EDCS (supra) which he cited earlier.

On ground 5 which alleges an error in law, counsel contended that there are no particulars of error properly so-called, as the particulars of error have no nexus with the facts, reasoning and conclusion of the judgment of the Court of Appeal. He urged the court to strike out the ground as well as issue No.2 based on it.

Taking issue No. 1 on the merit of the appeal, learned counsel



submitted that the 1st respondent had standing to institute the action. He cited *Oloriode v. Oyebe* (1984) 1 SCNLR 390, *Adesanya v. President* (1981) 5 S.C. 112; (1981) 5 S.C. (Reprint) 69, *Attorney-General of Lagos State v. Eko Hotels Ltd* (2006) 9 S.C. 46; (2006) 18 NWLR (Pt.1011) 378 and *UBA Plc. v. BTL Ind. Ltd.* (2006) 12 S.C. 63; (2006) 17 NWLR (Pt.1013) 61. B

On issue No. 2, learned counsel submitted that the 1st appellant was not denied Fair Hearing. He cited *Magna Maritime Ltd. v. Oteju* (2005) 5 S.C. (Pt.1) 55; (2005) 22 NSCQR 295. Counsel argued that the urgency of the matter dictated that the controversy C be resolved in order for the right candidate to stand the election. Accordingly, the court was right in hearing the matter expeditiously.

Taking issue No. 3, learned counsel, while conceding that the Originating Summons Procedure is used where the facts are not in dispute or there is no likelihood of their being in dispute, submitted D that the procedure was rightly invoked in the case. He submitted that the following questions were put for determination:-

*“1. Whether the letter by the 2nd defendant/All Nigeria Peoples Party (ANPP) dated 19th February, 2007, to the 1st defendant (Independent National Electoral Commission- INEC) applying for the substitution of the plaintiff with Austen Peters-Pam Amanda 1 gave any reason for the application for substitution?”* E

*2. Whether the withdrawal/substitution Form CF004A February, 2007, purporting to substitute the plaintiff with the 3rd defendant is valid having not been signed by the plaintiff?”* F

*3. Whether the application for substitution of the plaintiff with 3rd defendant (Austen Peter Pam Amanda 1) as contained in the letter by the 2nd defendant dated 19th February, 2007, to the 1st defendant ought to give reasons for the application?”* G

*4. Whether the letter dated 19th February, 2007, purportedly signed only by secretary of the 2nd defendant and addressed to the 1st defendant seeking to substitute the plaintiff’s name earlier is valid and lawful?”*

Learned counsel contended that as the issue in controversy H narrows down to the validity of the letter of substitution dated 19th February, 2007, having regard to the relevant provision of the Electoral Act, 2006, it merely calls for the interpretation of the letter and

the relevant section of the Electoral Act. He submitted that the issue could not be said to be contentious as the facts are non-contentious. Counsel relied on the concurrent findings of the two courts and asked the court not to interfere with the findings. He urged the court to dismiss the appeal.

B Learned counsel for the appellants in her Reply Brief submitted that what the 2nd respondent required the appellants to state in ground 1 are arguments, amplifications and narratives, all of which are specifically prohibited by the Rules of the Supreme Court. She submitted on ground 2 that a ground of appeal together with another in an issue forms part of the issue and argued together as a reason for seeking reversal of the decision appealed against. In so far as the appellants ground 2 complied with the Rules of Court, the 2nd respondent's perception is immaterial. She relied on Akuneziri v. Okenwa (2000) 12 S.C. (Pt.II) 75; (2000) FWLR (Pt.132) 96, Hambe v. Hueze (2001) 2 S.C. 26; (2001) 4 NWLR (Pt.703) 272 and Aigbobahi v. Aifuwa (2006) 2 S.C. (Pt.1) 82; (2006) 6 NWLR (Pt.976) 270.

E On ground 4, counsel conceded the complaint under the ground to the effect that it was technically abandoned. The reason for this is that the appellants' contention is that the 1st respondent cannot have any cause of action, if he has no locus standi to institute the action 48 days after his expulsion.

F On ground 5, counsel contended that particulars of a ground of appeal are the amplifiers of the complaint in the ground not the narration of errors. They support the ground and should not be an elaboration or a submission or narration sought to be proffered at the hearing of the appeal, counsel argued. She relied on Adodo v. Ismaila (1998) 11 NWLR (Pt.573) 214, Oge v. Ede (1995) 3 NWLR (Pt.385) 564 and Nwadike v. Ibekwe (1987) 4 NWLR (Pt.67) 710.

H On the locus standi of the 1st respondent, counsel referred to what she called the appropriate dates in the record and submitted that 1st respondent had no locus standi. She submitted that the cases relied upon by the 2nd respondent are unhelpful as they are irrelevant.

Let me first take the Preliminary Objection. First, on ground 1. A ground on lack of standing is certainly a ground of law. It is not a

ground of fact. *Locus standi* is a hard matter of law which must be donated either by Section 6 of the Constitution or by any other enabling law. I do not agree with learned counsel for the appellants that the Court of Appeal did not decide the issue of lack of standing. It did and admirably too. It appears to me that learned counsel was carried away by the expression: “*the exotic argument*.” In the determination of the competence or incompetence of grounds of appeal, the court will not take pockets of the formulation of the grounds in isolation or in quarantine but the totality of the grounds in union or in unison. As I do not think the expression “*the exotic argument*” taints the well formulated grounds of appeal, the word “*exotic*” which means excitingly different, strange, or unusual, as used by the Court of Appeal, does not destroy the merits of the ground. B  
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Ground 2 which deals with the expulsion of the 1st respondent is the cynosure, crux or fulcrum of the matter. Issue No. 1 clearly zeros on the ground as it deals with the expulsion of the 1st respondent. As a matter of fact, issue No. 1 uses the expression “*expulsion*” an expression which clearly follows the words “*on February 2nd, 2007*.” D

I think the 2nd respondent has a point on ground 4. I do not see any issue formulated on ground 4 which complains of the reason for the substitution of the 1st respondent. This ground cannot be accommodated by any of the three grounds. As issues are formulated from grounds of appeal, ground 4 which is not ventilated by any issue is incompetent. See *Idika v. Erisi* (1988) 2 NWLR (Pt.78) 563, *Management Enterprises Ltd. v. ABC Merchant Bank* (1996) 6 NWLR (Pt.452) 429, *General Oil Limited v. Chief Ogunyade* (1997) 4 NWLR (Pt.501) 613, *Chinwuba v. Alade* (1997) 6 NWLR (Pt.507) 85, *Madumere v. Okafor* (1996) 4 NWLR (Pt.445) 637. I therefore agree with the submission of learned counsel for the 2nd respondent. Ground 4 therefore goes and is out. Counsel for the appellants conceded that much and she is right to have conceded. E  
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I do not agree with the submission of counsel on ground 5. The particulars ably vindicate the ground, particularly, particular (c.) which says:- H

*“Parties in court have an inherent right to know the allegations against them and be given equal and adequate time and facilities to*

*prepare for their cases.”*

As learned counsel conceded that ground 3 is competent, I will not touch it. In sum, only ground 4 is incompetent. The other four grounds can carry the weight of the appeal. Even a single ground can do the same work. And so I will go to the merits of the appeal now.

The first issue is on the locus standi of the 1st respondent. The term locus standi denotes legal capacity to institute proceedings in a court of law. It is used interchangeably with the terms like standing or title to sue. It is the right of a party to appear and be heard on a question before any court or tribunal. See generally Senator Adesanya v. President of the Federal Republic of Nigeria (1981) 5 S.C. (Reprint) 69; (1981) 2 NCLR 358, Chief Dr. Thomas v. The Most Rev. Olafosoye (1986) 1 NWLR (Pt.18) 669, Fawehinmi v. Col. Akilu (1987) 4 NWLR (Pt.67) 797.

It is the law that, to have locus standi to sue, the plaintiff must show sufficient interest in the suit or matter. One criterion of sufficient interest is whether the party could have been joined as a party in the suit. Another criterion is whether the party seeking the redress or remedy will suffer some injury or hardship arising from the litigation. If the Judge is satisfied that he will so suffer, then he must be heard as he is entitled to be heard. See Chief Ojukwu v. Governor of Lagos State (1985) 2 NWLR (Pt.10) 806, Busari v. Oseni (1992) 4 NWLR (Pt.237) 557, Albian Construction Co. Ltd. v. Rao Investment and Property Ltd. (1992) 1 NWLR (Pt.219) 583, United Bank for Africa Ltd. v. Obianwu (1999) 12 NWLR (Pt.629) 78.

A party who is in imminent danger of any conduct of the adverse party has the locus standi to commence an action. See Olawayin v. Attorney-General of Northern Region (1961) 1 All NLR 269, Gamioba v. Ezesi (1961) 1 All NLR 584, Olagunju v. Yahaya (1998) 3 NWLR (Pt.542) 501.

The submission of learned counsel for the appellants is that since the 1st respondent was expelled from the party, he lacked the locus standi to sue. With respect, I am not with her. I am rather with the two counsel for the 1st and 2nd respondents that the 1st respondent has the locus standi to bring this action. It is on record that the 1st respondent was the candidate of the party before he was substi-

tuted for the 1st appellant. All the parties are in agreement on this. I am of the view that the 1st respondent has the *locus standi* to contend his expulsion from the party and the appellants cannot deny him of that standing. It is rather too simplistic, abstract and technical to say that because he has been expelled from the party, he has no standing to sue. If he has no standing to sue, and the expulsion was unconstitutional, how will the courts of law pronounce on it? As the 1st respondent sued on the legality or lawfulness of his expulsion from the party, I cannot see a better person to sue in the matter. Accordingly, issue No. 1 fails and it is dismissed.

I go to the issue of Fair Hearing. Section 36 of the Constitution of the Federal Republic of Nigeria, 1999, 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 in such manner as to secure its independence and impartiality. The operative words for our purpose in this appeal are “*reasonable time*”; words which in their docile content are vague, and nebulous. A reasonable time is a time justified by reason. Reasonable time in its nebulous content cannot be determined in vacuo but in relation to the fact of each case. This is because what constitutes a reasonable time in one case may not necessarily constitute a reasonable time in another case.

Reasonable time in Section 36 presupposes the granting of an adjournment in cases. In dealing with the reasonable time concept in Section 36, the court will take into consideration the nature of the case in terms of the magnitude, intricacies, versatilities, complexities and volume of the work involved. In this respect, the court will consider the assemblage of witnesses and documents, if any and the likely or possible time to get all these. Above all, the court will take into consideration the procurement of exculpatory or inculpatory evidence as the case may be. A reasonable time is also a moderately and practically possible time within which a court or tribunal could complete a trial and pronounce its decision. See *Effiom v. State* (1995) 1 NWLR (Pt.373) 507. Reasonable time means the period of time which, in the search for justice, does not wear out the parties and their witnesses and which is required to ensure that justice is not only

done but appears to a reasonable person to be done. See Ariori v. Elemo (1983) 1 SCNLR 1; Chief Atejioye v. Ayeji (1998) 6 NWLR (Pt. 552) 132.

Although the case law is to the effect that a court of law is entitled to a reasonable time in the hearing of a matter and delivery of judgment (see Chief Egbo v. Chief Agbara (1997) 1 NWLR (Pt.481) 292), the provision of Section 36(1) is in respect of the parties and not the court. Therefore where there is a conflict between a reasonable time for the parties and the court, the former must prevail. When I say this, I am not unaware of the fact that the reasonable time of the court, relates to delay in the administration of justice, which is vital in the judicial process. In sum, what constitutes reasonable time within the meaning of Section 36(1) of the Constitution depends on the facts and circumstances of each case, an issue I will determine in the light of the facts of this appeal.

Fair Hearing, in essence, means giving equal opportunity to the parties to be heard in the litigation before the court. See INEC v. Alhaji Musa (2003) 1 S.C. (Pt.I) 106; (2003) 3 NWLR (Pt.806) 72. Fair Hearing means a trial conducted according to all legal rules formulated to ensure that justice is done to the parties. See Ntukidem v. Oko (1986) 5 NWLR (Pt.45) 909, Union Bank of Nigeria Limited v. Nwaokolo (1995) 6 NWLR (Pt.400) 127. Fair Hearing in relation to a case means the trial of a case or the conduct of the proceedings therein in accordance with the relevant laws, Rules of Court and principles of natural justice. See Ekpeto v. Wanogho (2004) 11-12 S.C. 201; (2004) 18 NWLR (Pt.905) 394. See also Brifina Ltd. v. Intercontinental Bank Ltd. (2003) 5 NWLR (Pt.814) 540.

The true test of a Fair Hearing is the impression of a reasonable person who was present at the trial whether from his observation justice has been done. The fundamental basis underlying the principle of Fair Hearing is the doctrine of audi alteram partem which means to hear the other side. See ASTO v. Quorum Consortium Ltd. (2004) 1 NWLR (Pt.855) 601. See also Ogundoyin v. Adeyemi (2001) 7 S.C. (Pt.II) 98; (2001) 13 NWLR (Pt.730) 403. Fair Hearing, in other words, involves situations where, having regard to all the circumstances of a case, the hearing may be said to have been conducted in such a manner that an impartial observer will conclude that

the court was fair to all the parties in the proceedings. See Somai Sonka Co. Nig. Ltd. v. Adzege (2001) 9 NWLR (Pt. 718) 312.

The reasonable person and the impartial observer mean the same. They mean a complete stranger, an unbiased person to the proceedings. A reasonable person is a person with reason having a faculty of the mind by which he distinguishes truth from falsehood, good from evil. A reasonable person is a fair, proper and just and unbiased person. An impartial observer is not partial. He favours neither the plaintiff nor the defendant. He is disinterested in the matter, as he treats both the plaintiff and the defendant alike. He is an unbiased person. Both the reasonable person and the impartial observer are the hypothetical legal standard for determining or judging fairness, fair play and equity. The test of the reasonable man in Nigerian courts is no more the man at the Clapham junction in London but one in anywhere in the Nigerian cities.

I have talked some law of Fair Hearing. I should relate the law to the facts to see whether the 1st appellant had a Fair Hearing in the matter. Let me draw a chronological sequence from the record.

On 28th March, 2007, Bulus M. Bot, a bailiff of the Federal High Court, was given the court processes of Originating Summons, written address in support of the Originating Summons and hearing notice issued in the suit to serve on the 1st appellant, Barrister (Mrs.) Amanda Peters Pam. See paragraph 1 of the affidavit of non-service by Bulus M. Bot. As the 1st appellant was on campaign tour, the bailiff could not serve her. I do not want to paraphrase the affidavit. Let me reproduce it here from page 97 of the record:-

*"I, Bulus M. Bot, bailiff of Federal High Court, Abuja do hereby declare and state as follows:-*

*1. That on the 28th day of March, 2007, I was given court G processes (Originating Summons, written address in support of the Originating Summons and Hearing Notice) issued in Suit No. FHC/ABJ/CS/17407 to serve on the 3rd defendant, Austen Peters-Pam Amanda 1) at No.4, Biska Street, Off Suez Crescent, Wuse Zone 4, Abuja.*

*2. That on the said 28th March, 2007, I went to the said address, but discovered that the address of service is incorrect. The correct address of service of the defendant is No. 4, Lubumbashi*

*Street, off Biska Street, Wuse Zone 4, Abuja.*

3. *That I was informed by the person I met of the absence of the defendant. He also informed me that the 3rd defendant is on campaign tour and it will only be by luck that I can meet her if I should come again.*

B 4. *That I could not serve the 3rd defendant the processes because I did not meet her.*

5. *That I make this affidavit in good faith and in accordance with the provisions of the Oaths Act of 1990."*

C On the same day and date of 28th March, 2007, the 1st respondent's counsel, Chinedu Umeh filed a written address in support of the Originating Summons, which was not filed. In other words, there was no proof of service before the written address was served. I do not see anywhere in the record where the learned trial Judge D ordered the filing of a written address. As if that is not enough injustice to the appellants, the learned trial Judge delivered judgment in favour of the 1st respondent on 5th April, 2007, nine days after the filing of the written address and also nine days after the bailiff swore to an affidavit of non-service of the court processes. It is most unfortunate and sad that a trial Judge can do such a thing. It is this type of thing and its prototype that make the Hausa man exclaim, *Haba!* E The only capable conclusion one can draw from this, and which is most favourable to the Judge, is that he was in such a hurry to complete the case. I should stop here. That will be kind to the learned trial F Judge.

In the judgment of 5th April, 2007, the learned trial Judge made the following orders:-

G "1. *That the 1st defendant is restrained from acting, carrying into effect or doing anything whatsoever based on the 2nd defendant's application for substitution as contained in the letter of 19th February, 2007, to the 1st defendant as same is illegal, null, void and of no effect whatsoever.*

H 2. *That anything and everything done by the 1st defendant pursuant to the said letter of 19/2/2007, is set aside.*

3. *That the substitution form, purported to have been filed by the plaintiff is illegal, null, void and of no effect whatsoever is set aside.*



4. That 1st defendant retains the name of the plaintiff as the duly nominated candidate of the 2nd defendant for the AMAC/Bwari Federal Capital Territory April 2007, election into the Federal House of Representatives.

5. That an order is made by this court quashing, nullifying and setting aside the Form CF004, as purportedly signed by the plaintiff<sup>B</sup> in favour of the said Austen Peter-Pam Amanda 1.

6. That the plaintiff is affirmed as the legitimate candidate of the 2nd defendant for the April 2007, election into the Federal House of Representatives in respect of the AMAC/Bwari Federal Constitu-<sup>C</sup>ency.

*ISSUED AT ABUJA under the seal of the court and the hand of the presiding Judge, this 5th day of April, 2007.*"

Let me still continue with the sequence of events. On 17th April, 2007, counsel for the 1st appellant filed a motion to set aside<sup>D</sup> the judgment delivered on 5th April, 2007, on the ground that the 1st appellant was not served. The motion was moved the following day, 18th April, 2007. The motion was not opposed. The learned trial Judge set aside his judgment of 5th April, 2007. He said at page 104 of the record:-<sup>E</sup>

*"Application for setting aside is granted. I hereby set aside the judgment of this court entered on 5th April, 2007."*

Thereafter, the following dialogue ensued:-

*"Dodo: There is regard to the need to hear the matter. I urge<sup>F</sup> the court to hear this matter today from the affidavits. Applicant became aware on the 9th April, 2007. Applicant had enough time to acquaint herself. The issue is confined to Section 34(2) of Electoral Act. This is purely a matter of law. If it goes beyond today the effort will be worthless, a diligent defendant would have filed counter-affi-<sup>G</sup>davit. To answer the summons, they should have filed anything. They ought to have filed all their papers before this court. By paragraph 3 of applicant's affidavit she became aware on 9th April, 2007. Applicant had sufficient time to file her papers. I urge the court to be<sup>H</sup> guided by the urgency in this matter, I urge that if the court must grant adjournment, it should be for 30 minutes for applicant to file her papers. I apply that the matter be heard or determined today.*

*Nwankwo: The court has just set aside... We cannot be rushed*

*to file counter-affidavit. Is not in the interest of justice. We come for a purpose to set aside; in the absence of service of these processes the court has no jurisdiction to do this case. The court cannot proceed.*

*Dodo: We are granting time for 3rd defendant papers*

*Nwankwo: I was just served. The papers are bulky. I am human. I am working on the documents. I am ready to file. I want to file a counter. I am not in a position to file my papers. I am still working. I want further stand down to 3.00 p.m.*

*Dodo: I oppose the application for stand down. It is clear it is a trick to frustrate the proceedings. They are bidding for time. By sworn testimony, applicant was aware 9 days ago. At this point the defendant must tender all documents.*

*Court: This matter is stood down to 1.30 p.m for 3rd defendant to file their papers."*

The above was what transpired in the High Court and which is the subject of complaint by the appellants in respect of their Right to Fair Hearing. The million naira question is whether, the appellants were given Fair Hearing by the learned trial Judge in the matter.

The statutory time for courts to sit in Nigeria is usually 9.00 a.m. I know as a matter of fact that most High Courts do not sit at 9.00 a.m prompt. As I do not know when the trial Judge sat on the 18th April, 2007, I will not speculate. After all, I lack the jurisdiction to speculate, the Judge that I am. But the position is not hopeless. I have got the time the motion to set aside the judgment was moved. It was 11.00 a.m. 1st appellant said in paragraph 8.2 of her Brief as follows:-

*"The 1st appellant on the 18th day of April, 2007, at about 11.00 a.m moved the motion to set aside its judgment delivered on April 5th, 2007. The court set aside the judgment and ordered that hearing of the substantive summons be heard at 1.30 p.m. 1st appellant's counsel was served all the processes in court on the order of the court. He protested the rush and sought for an adjournment having just been served with all the processes filed by the 1st respondent/plaintiff."*

From 11.00 a.m to 1.30 p.m, by my calculation is 2 hours and thirty minutes. By the order of the learned trial Judge, the 1st appellant was to reply to the affidavit in support of the Originating Sum-

mons of the length of pages 7 to 10 of the record and the exhibits running from pages 11 to 72. I do not think any human being can do that. Certainly not Mr. Nwankwo, the human being that he is and so he asked for more time. Only God can do that because he is the most knowledgeable and most omnipresent and omnipotent.

As Mr. Nwankwo could not perform, the miracle he was expected to perform, he was almost on his knees pleading that the matter be further stood down till 3.00 p.m. Let me repeat his most pathetic plea at page 187 of the record:-

*"I was just served. The papers are bulky. I am human. I am working on the documents. I am ready to file. I want to file a counter. I am not in a position to file my papers. I am still working. I want further stand down to 3.00 p.m."*

At page 188, the learned trial Judge, refusing the application, ruled:-

*"This matter is stood down to 1.30 p.m for 3rd defendant to file their papers."*

The impression is created that Mr. Nwankwo's application that the matter be stood down till 3.00 p.m. was granted and that the 1st appellant had no reason to complain that she was denied Fair Hearing. I do not think that is correct because it is not borne out from the record. The application to stand down the matter till 3.00 p.m at page 187 of the record was refused by the trial Judge at page 188 of the record. And so the matter was stood down till 1.30 p.m. Although the judgment was delivered at 5.00 p.m or so, that cannot be reason that the learned trial Judge granted the application of counsel for the 1st appellant. What the court used the time between 1.30 p.m to 5.00 p.m for is best known to the court. I have the feeling that the court used the period to write the judgment.

It was submitted, I think by counsel for the 2nd respondent, that the 1st appellant presented a counter-affidavit and that she cannot be heard to complain of Fair Hearing. I think counsel for the 1st respondent made similar submission at page 5.16 of his Brief. In the determination of whether a party was given Fair Hearing, a respondent cannot be heard to say that a court process (in this appeal, the counter-affidavit) was so detailed or comprehensive that an appellant cannot be heard to complain. No. That is rather a simplistic way

of treating the serious matter of breach of Fair Hearing. The party who wears the shoes knows where they pinch and that party is the victim of the breach of Fair Hearing. And his counsel now says, by implication arising from the complaint of lack of Fair Hearing, that he should have done more for his client if he was given time to do so.

B That is the complaint here.

I entirely believe counsel for the 1st appellant that he had not enough time to prepare the defence in answer to the processes of the 1st respondent. In the affidavit in support of the Originating Summons, 1st respondent annexed four exhibits running from pages 11 to 55 of the record. Some of the exhibits, like the Constitution of the 2nd appellant, the ANPP is quite bulky and needed time to study by counsel. And counsel cannot undertake that study in the court within the period of two hours and thirty minutes.

D In the counter-affidavit filed by Ifeanyi M. Nriali, a legal practitioner in response to the affidavit in support of the Originating Summons, the deponent averred in paragraph 3 as follows:-

*"That I was informed by the 3rd defendant in the premises of the Federal High Court Abuja on the 18th April, 2007, at about 1.00 p.m. of the following facts....."*

It is a well established and accepted practice that counsel procure facts from a client in his chambers in the course of either pre-trial or trial interviews. I know of no practice where counsel procures facts from a client in the court premises. Mr. Ifeanyi M. Nriali was pushed to the wall and rushed to interview his client for the facts for the counter-affidavit. This is all because the learned trial Judge stood down the matter to 1.30 p.m. By paragraph 3 of the counter-affidavit, the interview took place about thirty minutes before the case was heard. I will take it that counsel used the thirty minutes to type the counter-affidavit. Poor counsel. Poor secretary! They all have my sympathy. What a soldiering or regimental order of a court of law operating a democracy and in a democracy? The learned trial Judge said in his judgment at page 208 of the record:-

H *"Learned counsel for the 3rd defendant was given time to file his counter-affidavit and written address."*

Yes, he did so but purely on paper and of no practical, utilitarian value to the appellants. Mr. Ifeanyi M. Nriali had only thirty

minutes to prepare a counter-affidavit as deposed to in paragraph 3 (the paragraph was not denied) what time had he to file a written address in Reply to the one filed by the 1st respondent at pages 111 to 132 of the record? In the written address prepared by Mr. Chinedu Umeh, four serious legal issues were raised and counsel cited a total of about nineteen cases. The learned trial Judge expected counsel for the 1st appellant to reply to that formidable written address within a period of less than two hours. Where could counsel have made reference to the authorities cited in the written address? Was the FCT High Court library equipped for that assignment? Even if it was equipped, where was the time to do the research? Even if there was time to do the research, where was the time for the secretary to type the written address? Even if there was time to type the written address, where was the time for counsel to read over the typed work? There are questions and questions galore. I think I should stop here. D

The learned trial Judge in his judgment said at page 214 of the record that Mr. Nwankwo made “*elaborate submissions on behalf of the 3rd defendant.*” What were the elaborate submissions, I ask? Were the submissions that Mr. Nwankwo was rushed to make at the middle of page 195 and ending at the beginning of page 197 elaborate? The adjective “*elaborate*” means full of detail carefully worked out and with a large number of parts. Unless the word used by the learned trial Judge has lost its dictionary meaning, there was no elaborate submission on the part of Mr. Nwankwo. I have read the submissions which were recorded by the learned trial Judge and I come to the conclusion that they were rather sketchy and skeletal. They are a very far cry from the most comprehensive written address by counsel for the 1st respondent. I do not want to say that the word was used by the learned trial Judge purposely to cover up the impact of the denial of Fair Hearing. E F G

If a trial Judge gives an order which he knows or ought to know as an expert of law and procedure that in the circumstances of time cannot be implemented, such an order is as good as not made. And here, I have in mind the order given by the learned trial Judge to the 1st appellant to file her papers after 11.00a.m and stood down the ease to 1.30 p.m. In my humble view, the order was almost like a smokes-screen if not really one. It was a fairly smart one on the part H

of the learned trial Judge and the smartness was portrayed when he said that learned counsel was given time to file his counter-affidavit and written address and he made elaborate submission.

Let me pause here to take two cases of this court on address of counsel. One is Obodo v. Olomu (1987) 3 NWLR (Pt.59) 111. The other is Ihom v. Gaji (1997) 6 NWLR (Pt. 509) 526. In Obodo v. Olomu, at the close of the cases of the parties, the learned trial Judge ordered them to send their addresses to him in writing and he adjourned to the 2nd of August, 1983, for judgment. Judgment was not delivered on 2nd of August, 1983, but on 14th of September, 1983. Only counsel to the defendant submitted written address ordered to be submitted to the trial court. The written address of the defendant was not served on the plaintiff's counsel. The plaintiff's counsel had no opportunity of replying to the defendant's submission. This court held that: (1) address of counsel form part of the case and failure to hear the address of one party however overwhelming the evidence on one side vitiates the trial; (2) in the instant case, since the Judgment of the trial court was based almost solely on the defendant's counsel address, there is a miscarriage of Justice; (3) in a written address, the court must ensure that the parties exchanged addresses. In Ihom v. Gaji, this court also held that addresses form part of a case and failure to hear the address of one party, however overwhelming the evidence seems to be on one side, vitiates the trial, because in many cases, it is after the addresses that one finds the law on the issues fought not in favour of the evidence adduced.

I foresee a possible argument that the cases are not applicable because learned counsel for the 1st appellant addressed the court. That may well be so in the head but certainly not in the heart. In my view, as long as counsel for the 1st appellant was not given opportunity to write a written address in response to that of the 1st respondent, she was denied the Right to Fair Hearing and that is the point I am labouring to make.

That apart, Obodo held that there must be exchange of written addresses. There was no such exchange in this appeal. It was a one way affair, an affair of the 1st respondent who had a field day. This destroys the age long adage that what is good for the goose is also good for the gander. And by way of analogy, the goose is the 1st

respondent and the gander is the 1st appellant.

Section 294(1) of the Constitution of the Federal Republic of Nigeria, 1999, provides for final address. Perhaps it is better for me to state part of the ipsissima verba of the subsection:-

*“Every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses....”*

The plural “addresses” in my view anticipate the addresses of all the parties in the case and relevantly the appellants and the respondents in this appeal. As it is impossible and not the practice for the parties to file their addresses at the same time, one of the parties must do so and send the address to the other party for a Reply. In this appeal, the 1st respondent was under a constitutional duty to send his written address to the 1st appellant for a possible Reply. That was the point this court made in Obodo. But unfortunately that did not happen. Why, I ask? I have no answer. And that constitutes a breach of the Fair Hearing provision in the Constitution. And the case law is in great proliferation that a breach of the law and Rules of Court amounts to a denial of Fair Hearing. And a fortiori the breach of the Constitution, the alpha and the omega of the legal system.

In Okafor v. Attorney-General and Commissioner for Justice (1991) 6 NWLR (Pt.2000) 659, this court held that a judgment which is given without compliance with Rules of Court and which non-compliance has breached a Fundamental Human Right such as the Right to Fair Hearing, is a nullity and is capable of being set aside either by the court that gave it or by an appellate court. See also Military Governor Imo State v. Nwauwa (1997) 2 NWLR (Pt.490) 675.

Learned Senior Advocate submitted orally that the demand of the appellants for a written address was not justified because the written address by the 1st respondent ended with the 5th April, 2007, judgment that was set aside by the learned trial Judge. That is supposed to be the legal position but was that what really happened? That is the question. The position of the law is that where a judgment is set aside, it includes and affects all documents used therein, including oral or written addresses of counsel. But that was not the position.

The learned trial Judge made use of the written address of the

1st respondent filed on 28th March, 2007. Let me give an example. At page 114 of the record, the 1st respondent, as plaintiff, made the following submission:-

B “*Exhibit NAS 4, which is the letter of 19th February, 2007, cannot be said to have satisfied the first arm of the provision of Section 34(2), which states that a cogent reason must be given for the substitution sought and we do strongly urge this Honourable Court to so hold.*”

C At page 213 of the record, the learned trial Judge, in summary of the submission of counsel, said:-

D “*Mr. Dodo addressed the court on the substantive suit and submitted that Exhibit NAS 4 does not satisfy Section 34(2) of the Electoral Act. That the party seeking to substitute must provide cogent and verifiable reasons. He urged the court to grant all the reliefs sought.*”

I am of the view that the learned trial Judge was influenced by the written address in his judgment of 18th April, 2007.

E Learned Senior Advocate for the 1st respondent, Mr. Dodo, cited the Court of Appeal judgment of Dapianlong v. Dariye (2007) 4 S.C. (Pt.III) 118; (2007) 8 NWLR (Pt.1036) 286 as follows:-

F “*A court cannot be expected to remain static. Rather, for the case to progress from day to day for a just conclusion of the matter before it, there must be orders. A Judge is the master of his court, and so long as there is no miscarriage of justice against any of the parties, a court can make such orders as are necessary to bring the matter to a just conclusion within the Rules of Court and according to law. In the instant case, Order 47 of the High Court of Plateau State (Civil Procedure) Rules, 1987, is relevant and covers the order made on 15/12/06, by the trial court. The order of 15/12/06, was within the competence of the trial court, it did not occasion miscarriage of justice on either of the parties before it and was the just order to make in the circumstances of the case.*”

H Learned Senior Advocate also quoted the following passage from the judgment of this court, approving the decision of the Court of Appeal:-

“*Where the res in a case before the court is in danger of being wiped out, the court must take the fast track or lane and do all that is*



*possible to conduct a speedy hearing of the case.*”

I entirely agree with both the Court of Appeal and this court. The two courts have clearly stated the legal position and there is no qualm about it. The issue is whether the case applies in favour of the 1st respondent. I do not think so. If anything, the case, in my humble view, applies in favour of the appellants. B

Let me first take the decision of the Court of Appeal. The decision is not at large but is carefully qualified by the expression “*miscarriage of justice*.” The court used the expression twice. Miscarriage of justice is simply justice miscarried. I do not think I have said much. I should go further to say that miscarriage of justice is failure of justice. It is the failure on the part of the court to do justice. It is justice misapplied, misappreciated or misappropriated. It is an ill conduct on the part of the court which amounts to injustice. See *Onagoruwa v. The State* (1993) 7 NWLR (Pt.303) 49. Miscarriage of justice arises in a decision or outcome of legal proceedings that is prejudicial or inconsistent with substantial right of a party. See *Joshua v. The State* (2000) 5 NWLR (Pt.658) 591, *Sanusi v. Ameyogun* (1992) 4 NWLR (Pt.237) 527. D

Justice, that elusive and generic expression, is the cynosure or fulcrum of the administration of justice because it is the aim of the administration of justice to obtain it. Justice, which means in its simplistic content, quality of being just, fair play and fairness, possessing an element of egalitarianism in its functional content, must be done in a case. As a matter of law, the main hire of a Judge is to do justice to the parties. Lord Denning said in his well written book, *Family Story* at page 174:- E

*“My root belief is that the proper role of a Judge is to do justice between the parties before him. If there is any Rule of Law which impairs the doing of justice, then it is the province of the Judge to do all he legitimately can to avoid that rule - or even to change it - so as to do justice in the instant case before him. He need not wait for the legislature to intervene; because that can never be of any help in the instant case. I should emphasis however, the word legitimately; the Judge is himself subject to the law and must abide by it.”* H

Lord Denning has said it all. He has not put the position open ended. He has qualified the position by the use of the word “*legiti-*

*mately*”, which means that if it is not legitimate to do justice in a particular case because of the strength of the law, the Judge must succumb to the law. This means that the Judge can only apply the principles of justice if they do not conflict with the Statute, because the Judge himself, in the words of Lord Denning, is “*subject to the law and must abide by it.*”

The Court of Appeal rightly held in Dariye that the Judge is the master of his court. I should say that as the master of the court, the law requires him to do the correct thing as required by law. He cannot do the wrong thing and beat his chest by saying that “*after all, I am the master and therefore not answerable to any other person, apart from myself.*” No. That is not correct. Although as a master, the trial Judge is in full control of his court, an appellate court will order him to hold the brakes where he goes wrong in the interpretation of the law or where he fails or refuses to follow the rules of his court. That is the situation here because there is a miscarriage of justice.

And that takes me to the decision of this court. I am still on Dariye. This court held that where the res in a case is in danger of being wiped out, the court must take the fast track or lane to conduct a speedy hearing of the case. The whole essence of litigation in a matter where there is a res, is to ensure that it is protected and not destroyed or annihilated. The res in this appeal is the candidature of the 1st respondent.

The million naira question I have to ask is whether the res could have been destroyed if the learned trial Judge stood down the matter to 3.00p.m as requested by counsel for the 1st appellant? This is the relevant question. In my view, it should have not made any difference if the matter was stood down till 3.00 p.m. What difference really could it have made in a matter of ninety minutes?

I should go further, and here I will deal with some calculation of days and dates. By my manual calculation (and I had no access to the 2007 calendar) 18th April, 2007, was a Wednesday and the election was to take place on 21st April, 2007, a Saturday. What harm could have been done to the res in terms of destruction if the matter was adjourned to the following day, Thursday, 19th April, 2007, to enable 1st appellant to prepare her case, by way of counter-affidavit and written address, even if in a hurry? What difference could it have

made between Wednesday and Thursday? I did not see any difference as the election was to come up on 21st April, 2007, which was two days to the election. What the 1st respondent could do in three days he should have been able to do in two days. But fundamentally, counsel for the 1st appellant asked that the case be stood down till 3.00p.m on Wednesday? Again, I ask what difference could it have been made if the learned trial Judge granted the application to stand down the case till 3.00 p.m. The only difference I see is that the learned trial Judge could not have had the opportunity to exhibit his trial power, which was clearly an abuse of the constitutional Right to Fair Hearing by the 1st appellant. That is bad, very bad indeed. B  
C

So much storm is made in respect of the 1st appellant filing a motion to set aside the judgment of the court on ground of non-service. Learned Senior Advocate submitted that the 1st appellant waited for nine days before filing a motion to set aside the judgment of the learned trial Judge. Putting the position in naked language, the 1st respondent saw in the 1st appellant some gimmick and smartness to overreach the 1st respondent by waiting till 18th April, 2007, to move the motion for setting aside the judgment. D

Should the 1st appellant receive or suffer the punishment the learned trial Judge meted to her because of the delay in filing the motion for setting aside the judgment? Parties in opposing litigation are never friends in the court and so are ready to take the slightest chance in their favour to defeat or destroy the case of the opponent. In so far as such a position is not against the law, a court of law cannot punish the party in such a state of tenacity on when to commence a court process. E  
F

I do not think the 1st respondent behaved better in this regard. The cause of action arose on 19th February, 2007, when the 2nd appellant wrote to the 2nd respondent applying to substitute the 1st respondent with the 1st appellant. The 1st respondent commenced the action on 22nd March, 2007, a period of about thirty-three days. Why did he wait for such a period to file the action? Why did he not file the action immediately the cause of action arose? Why did he not remember his long period of delay and lull of thirty-three days and remember lesser period of nine days which is almost four times the period of his delay? This is a very good example of the selfishness of G  
H

human beings. I think the law of equity will not allow 1st respondent to raise that issue. This is because he did not come with clean hands and he did not do equity. His hands are tainted by his period of inactivity of thirty-three days. And he has not done any equity. As a matter of fact, 1st respondent's failure to commence the action in time would seem to have a telling effect on the 1st appellant filing her motion late. If the 1st respondent had commenced the action earlier, there could have been the possibility of the 1st appellant filing the motion earlier. I think the point I am struggling to make will come clearly to the fore if time is counted backwards from 18th April, 2007, by thirty-three days. By my calculation that should have given a possible date of 15th March, 2007, in which case the 1st respondent could not now be talking about a possible delaying tactics on the part of the 1st appellant. If 1st respondent had remembered the delay on his part, he should not have raised the storm. I have reminded him and I do hope the storm will abate.

Learned counsel for the 2nd respondent cited the case of Magna Maritime Ltd. v. Oteju (2005) 5 S.C. (Pt.1) 55; (2005) 22 NSCQR 295. He called in aid at page 14, paragraph 11.0 of his Brief what I said:-

*"A court of law can indulge a party only within the confines of its rules. In other words, a court of law can indulge a party in so far as its rules permit. Where Rules of Court in line with the Fair Hearing Principles order a specific conduct on the part of the parties, the court has a duty to enforce the rules. In such a situation, the defence of Fair Hearing is not available to the aggrieved party because the rule itself has complied with Fair Hearing."*

With respect, the case is of no assistance to the 2nd respondent. If anything, it is of assistance to the appellants. I say this because the learned trial Judge did not comply with the provision of Section 36 of the Constitution and the Rules of the Federal High Court. I know of no rule in the Federal High Court (Civil Procedure) Rules, 2000, where a defendant is not given adequate time to file counter-affidavit and written address.

Learned counsel also cited the following passage of what Edozie, JSC., said in the judgment:-

*"Where a party to a suit has been given a reasonable opportu-*

*nity of being heard and in the manner prescribed under the law and for no satisfactory explanation it fails or neglects to attend the sitting of the court or boycotts same, that party cannot thereafter be heard to complain about lack of Fair Hearing.”*

The facts of Magna Maritime Ltd. are diametrically opposed to the facts of this case. In that case, all the opportunity was given to the party to be heard but it did not take advantage of the opportunity. Edozie, JSC., said that where a party to a suit has been accorded a reasonable opportunity of being heard, he cannot complain. That is the correct position of the law. That is what Section 36(1) of the 1999 Constitution says. And here, reasonable opportunity in Magna Maritime Ltd. is the same as reasonable time in Section 36(1) of the Constitution. Should I hold that a Judge who refused to stand down a case from 1.30 p.m to 3.00 p.m gave an applicant reasonable time to present his case? No. I will not. On the contrary, I hold that the learned trial Judge denied the 1st appellant reasonable time to present her case, and thus, violated Section 36(1) of the Constitution.

A trial Judge has a legal duty to create an environment for Fair Hearing and not a caricature or make do of it. He must be seen by an appellate court to have obeyed the Fair Hearing provision in Section 36 of the 1999 Constitution to the letters of the alphabet. He cannot be miserly with his apportionment of time to the parties in the hearing of the case. He cannot be over generous with the court's time too, to the extent that the hearing of the case is unusually delayed. The Judge as a man and master of discretion has to exercise that discretion judicially and judiciously. As long as he does that, an appellate court will not intervene. In this appeal, the learned trial Judge, in my view, did not exercise his discretion judicially and judiciously because he refused the application of counsel for the 1st appellant to stand down the matter from 1.30p.m to 3.00 p.m. By the refusal of the application to stand down the matter for a period of ninety minutes, the learned trial Judge did not create the environment of Fair Hearing but kept it for himself under lock and key. That is wrong, very wrong indeed.

I was almost forgetting the argument of learned counsel for the appellants that as the case was on the Cause List for mention, it was wrong for the learned trial Judge to hear it and give judgment. I

entirely agree with the submission. I still remember a judgment of this court to the effect that a trial Judge should follow the Cause List in the sense that where a matter is set down in the Cause List as a motion, it should not be heard on its merits. I have forgotten the case. However, in the most unlikely situation that there is no such  
 B decision of this court, I will give one now and here. A Cause List is “*in English practice, a roll of actions to be tried in the order of their entry, with the names of the solicitors for each litigant, made out for each day during the sittings of the courts.*” See Black’s Law Dictionary (6th  
 C Edition) page 221. I will be more comfortable in changing the word “*solicitors*” as used by the dictionary to “*Barristers*”. A Cause List in our jurisprudence is a list showing or indicating the cases to be taken by the court for the day. It includes the action to be taken in each case and counsel to do the cases. In respect of the action, the Cause  
 D List clearly indicates whether the case is for mention, motion, hearing or judgment. A trial Judge, or an appellate Judge, must obey the Cause List in the sense that he must not go outside the action to be taken in each case. Where a case is for hearing of motion, the trial Judge must hear the motion and adjourn for any other process. On  
 E no account should he hear a motion and hear the merits of the matter, not to talk about delivering judgment. He may consider doing that in the very rare circumstance of consent by parties.

I should liken a Cause List to an Agenda of a Meeting minus  
 F AOB, the cognomen for any other business, because Cause List has no such business.

The business of the court is exact and so exactly put in the list. The aim or objective of the Cause List is to give notice in advance to the parties, the business of the day in respect of the case. It enables  
 G the parties and their counsel, if any, to prepare in advance. The parties should not be taken by surprise. When the learned trial Judge decided to hear the merits of the matter after granting the motion for setting aside the judgment, he took the 1st appellant by surprise. The 1st appellant left the experience of surprise to embarrassment when  
 H the learned trial Judge refused to stand down the case to 3.00 p.m. What a rush!

A trial Judge has not the unfettered discretion in the adjournment of matters. He must exercise his discretion judicially and judi-

ciously. An appellate court will intervene if he does not exercise his discretion judicially and judiciously. See University of Lagos v. Aigoro (1980) 1 NWLR (Pt.1) 143, Ebong v. Reicon Company Limited (1998) 4 NWLR (Pt.547) 655, Chief Akpan v. Ekpo (2001) 5 NWLR (Pt.707) 50. The court must balance its discretionary power to grant or refuse an adjournment with its duty to endeavour to give an appellant the opportunity of obtaining substantial justice in the sense of his appeal being granted a Fair Hearing on its merits provided always that no injustice is thereby caused to the other party and where the court erred in its balancing exercise an appeal court is at liberty to interfere. See University of Lagos v. Aigoro (supra). See also Chief Ntukidem v. Chief Oko (1986) 5 NWLR (Pt.45) 909, Demuren v. Asuni (1967) 1 All NLR 94, Agbolohun v. Balogun (1990) 2 NWLR (Pt.134) 576. Where a refusal of an adjournment will amount to a denial of Fair Hearing, as in this case, an appellate court will intervene. Where a Judge wrongly exercises his discretion in refusing an application for adjournment, as in this case, the result is that the party applying for adjournment has been denied Fair Hearing. See Obeta v. Okpe (1996) 9 NWLR (Pt.473) 401. Although a trial Judge has the judicial discretion either to grant or refuse an application for adjournment, he must, however, consider the application carefully, that is judicially and judiciously on its merits, and state his reasons for his decision to grant or refuse it. See Nigeria Bank for Commerce and Industry v. Marine and General Insurance Company Limited (1992) 2 NWLR (Pt.371) 71, Effiom v. The State (1995) 1 NWLR (Pt.373) 507, Opara v. Chinda (1996) 3 NWLR (Pt.494) 496. In this appeal, the learned trial Judge did not give any reason for refusing the application of counsel for the 1st appellant to stand down the case till 3.00p.m. Again, he kept the reason to himself. The law does not allow him to keep the reason to himself.

In Kotoye v. Central Bank of Nigeria (1989) 2 S.C. (Pt.1) 1; (1989) 1 NWLR (Pt.98) 419, this court held as follows: (1) Fair Hearing is fair trial and it implies that every reasonable and fair minded observer who watches the proceedings should be able to come to the conclusion that the court or other tribunal has been fair to all the parties concerned. (2) The basic criteria and attributes of Fair Hearing include: (a) that the court or tribunal shall hear both sides not

only in the case but also in all material issues in the case before reaching a decision which may be prejudicial to any party in the case; (b) that the court or tribunal shall give equal treatment, opportunity and consideration to all concerned; (c) that the proceedings shall be heard in public and all concerned shall have access to and be informed of such a place of public hearing and (d) that having regard to all the circumstances in every material decision in the case, justice must not only be done but must manifestly and undoubtedly seem to have been done. I have no difficulty in coming to the conclusion that the learned trial Judge violated 2(a), (b) and (d) above. The only one he complied with is 2(c).

Dealing with the issue of Fair Hearing, the Court of Appeal said at page 289 of the record:-

*“From the records and from the review of the learned trial Judge the appellant was given a Fair Hearing or equal opportunity to present her side of the story. In fact from the counter-affidavit of the appellant she on her own volition chose to limit her time of response being aware of the threat to her political fortune and stayed away only to surface to claim her statutory time for response. Where a party fails to appear in court, the court owes it as its duty to examine its records to determine whether the party was served with hearing notice but deliberately absented himself, including his counsel, from court and did not take the opportunity of being heard.”*

With the greatest respect, the conclusions of the Court of Appeal are not borne out from the record. I have gone through very carefully the 12-paragraph counter-affidavit and I cannot place my hands on the conclusion of the Court of Appeal that *“she on her own volition chose to limit her time of response being aware of the threat to her political fortune and stayed away only to surface to claim her statutory time for response.”*

I do not also see in the record that the 1st appellant was *“served with hearing notice but deliberately absented herself, including counsel from court and did not take the opportunity of being heard.”* The evidence on the record is that the 1st appellant was not served and that resulted in the setting aside of the 5th April, 2007 judgment.

Appellate courts are bound by the record. They cannot add to the record what is not there and they cannot subtract from the record



what is there. In view of the fact that the Court of Appeal was influenced by the wrong assessment of the evidence at the trial court in arriving at its conclusion that the 1st appellant had a Fair Hearing, this court is in the best position to reverse that decision because it is wrong. The findings are clearly perverse and this court is competent to interfere and I do interfere. B

I now go to the 3rd issue on Originating Summons. Learned Senior Advocate for the 1st respondent, Mr. Dodo, submitted that by Order 40 Rules 1, 2 and 3, the Federal High Court (Civil Procedure) Rules, 2000, the 1st respondent was right to have commenced the action by Originating Summons. While I agree with learned Senior Advocate that Order 40 provides for the commencement of proceedings by Originating Summons, I do not, with the greatest respect, agree with him that the action was properly commenced by way of Originating Summons. C D

The English Common Law which Nigeria received has developed a corpus juris on when an action can and cannot be commenced by Originating Summons. The procedure for Originating Summons came into the English Legal System by the Chancery Procedure Act of 1852, which replaced the old mode of commencing proceedings in the Court of Chancery by “*bill*” with the commencement of a suit in certain cases only by summons originating proceedings in chambers. In 1883, the Rules of the Supreme Court, 1875, were stated and the term Originating Summons was for the first time introduced. See Re Holloway (A Solicitor ex-parte Pallister) (1894) 2 QB 163. See also Re Priver, Lindsell v. Phillips (1885) 30 Ch. D. 291, In Re Giles Real and Personal Coy. v. Michell (1890) 43 Ch. D. 391, Nutten v. Holland (1894) 3 Ch. 408. E F

In 1907, Neville, J., clearly stated the principle in the English case of Re King Mellor v. South Australian Land Mortgage and Agency Coy. (1907) 1 Ch. 72:- G

*“In other words, it is our considered view that Originating Summons should only be applicable in such circumstances as where there is no dispute on questions of fact or the likelihood of such dispute. Where, for instance, the issue is to determine short questions of construction, and not matters of such controversy that the justice of the case would demand the settling of pleadings, Originating Summons H*

*could be applicable. For, it is to be noted that Originating Summons is merely a method of procedure and not one that is meant to enlarge the jurisdiction of the court."*

As a child of the English Common Law, the Nigerian legal system spontaneously followed the above position of the law.

- B In Lagos Executive Development Board v. Awode (1995) 21 NLWR 50, where plaintiff brought an action by Originating Summons for: (i) forfeiture of a lease; (ii) arrears of rent by virtue of Sections 12, 38, 47, 50 and 53 of the Lagos Town Planning Ordinance, the court held that the section did not entitle the plaintiff to proceed by Originating Summons in a claim of that nature and that the action must be commenced by writ in the ordinary way. In Doherty v. Doherty (1968) NMLR (Pt.2) 241, the court held that it is generally inadvisable to employ an Originating Summons for proceedings C against an invitee, and this procedure is of course quite unsuitable where the facts are in dispute, as the evidence is by way of affidavit. In National Bank of Nigeria v. Alakija (1978) 9-10 S.C. (Reprint) 42; (1978) 2 NWLR 78, the court held that justice could only be done D between the parties if all the facts were presented to the court in formal pleadings and the proceedings should have been commenced E by writ rather than by Originating Summons. In Oloyo v. Alegbe Speaker Bendel State House of Assembly (1983) 2 SCNLR 35, it was held that the action was misconceived in that it was not a dispute F to be resolved by way of Originating Summons in view of the conflicts on crucial issues and facts. It should have been begun by a writ. In Din v. Attorney General of the Federation (1986) 1 NWLR (Pt. 17) 471, the Court of Appeal re-echoed the decision of the Supreme G Court in the National Bank case and held that commencement of actions by Originating Summons is a proceeding which should only be used in cases where the facts are not in dispute or there is no H likelihood of their being in dispute. Originating Summons is also reserved for issues like the determination of questions of a Constitution and not matters of such controversy that justice of the case could demand the settling of pleadings. Since the affidavits in the case were conflicting, the matter could be taken by Originating Summons.

It is clear from the above that an action could be brought by Originating Summons if the issues involved are not in dispute or in

controversy or not likely to be in dispute or in controversy. Putting it negatively, where the issues are in dispute or are contentious, an Originating Summons procedure will not lie. In such a situation, the party must initiate the action by a Writ of Summons, a procedure which accommodates pleadings of facts. An action could be brought by Originating Summons where the sole or principal question in issue is or is likely to be one of construction of a Statute, or of any instrument made under a Statute or of any deeds, will, contract, or other document or some other question of law. B

It is not the law that once there is dispute on facts, the matter should be commenced by Writ of Summons. No. That is not the law. C The law is that the dispute on facts must be substantial, material, affecting the live issues in the matter. Where disputes are peripheral, not material to the live issues, an action can be sustained by Originating Summons. After all, there can hardly be a case without facts. D Facts make a case and it is the dispute in the facts that give rise to litigation.

Are the facts in dispute in this case substantial or not? That is my next consideration. And that will take me to the reliefs and the affidavit evidence. I do not think I am wrong when I say that the prop or crux of the action is on the substitution of the 1st respondent for E the 1st appellant. And the substitution is based on the expulsion of the 1st respondent from the 2nd appellant, the All Nigeria Peoples Party. In my view, the whole dispute is the combination of the substitution and the expulsion. Added to the package of substitution and F expulsion is the aspect of forgery. That is the essence of the whole dispute. While it is the case of the 1st respondent that he was not properly expelled from the party and substituted by the 1st appellant, it is the case of the 1st appellant that the 1st respondent was G properly expelled from the party and substituted by her. Perhaps the dispute will be clearer, if I go into the correspondence on the matter. At page 104 of the record is the letter of expulsion of the 1st respondent by the State Chairman of the 2nd appellant: -

*"2nd February, 2007.*

*Nasiru Mohammed*

*Wuse II*

*Abuja*

H

Sir,

EXPULSION FROM THE PARTY

News of your meetings with the PDP has been brought to our attention. We have investigated and found out to be true, that not only do you meet with the PDP candidates to serve as a SPY to the PDP on our Great Party.

We are also aware that you have negotiated and collected money from the PDP.

A Disciplinary Committee was set up and you were invited to appear before us; and you refused to honour the invitation. By this act, it is an indication by your refusal to attend, that the allegations made against you are correct.

By this letter you are expelled from our party.

Yours faithfully,

SGD

Zakari Angulu

State Chairman."

Following the expulsion, the 1st respondent was substituted for the 1st appellant:-

"19th February, 2007.

ANPP/HDQ/INEC/19

The Chairman

Independent National Electoral Commission

INEC

Zambezi Crescent

Maitama - Abuja

Dear Sir,

SUBMISSION OF SUBSTITUTION

FOR NATIONAL ASSEMBLY CANDIDATES

I am forwarding herewith details of approved substitutions in respect of the National Assembly Candidates for your necessary actions. Please.

Yours faithfully

For: All Nigeria Peoples Party, ANPP

SGD

Senator Sa'idu Umar Kumo

(Garkuwan Gombe)

*National Secretary.”*

On 13th March, 2007, the 1st respondent wrote a letter to the Chairman of INEC against his substitution. The letter reads:-

*“13th March, 2007.*

*The Chairman.*

*Independent Electoral Commission*

B

*INEC Headquarters*

*Maitama, Abuja*

*Dear Sir,*

*PETITION AGAINST SUBSTITUTION BY FORGERY: ANPP*

C

*AMAC/BWARI FEDERAL CONSTITUENCY, FCT*

*Please I humbly wish to refer you to the attached Certified True Copy of INEC Withdrawal Substitution of Candidate Form CF 004A which was forged to substitute my name, the winner of our Party primary election (see attached copy of result) for AMAC/BWARI Federal Constituency, FCT Abuja, based on which INEC used to change my name with that of Mrs. Amanda Pam as the new candidate.*

*The forgery was that they scanned my poster and reduced it to passport size and pasted it on the Form and purported a signature, which was not mine. Also they purported signatures of the ANPP Party Chairman and Secretary which were not their real signatures.*

E

*Not only on account of the above forgery but also on the contents of the Form as presented contravened the provisions of the Electoral Act, 2006, Sections 34 and 36 pursuant to which the Form was made. As such, any change made on that substance is not valid.*

F

*I seek the indulgence of your good office not to recognize the new name of candidate, Mrs. Amanda Pam but mine who won the election and passed INEC screening for ANPP AMAC/BWARI Constituency.*

G

*Please accept assurances of my highest regards.*

*SGD*

*Alhaji Nasiru Muhammad*

*ANPP CANDIDATE AMAC/BWARI FEDERAL CONSTITU-  
ENCY”*

H

On 16th March, 2007, Mr. Oluwole Osaze-Uzzi, reacting to the petition of 13th March, 2007, wrote the following letter to the

National Chairman of ANPP:-

“16th March, 2007.

The National Chairman

All Nigeria Peoples Party

Plot 759, Bassan Plaza

B Behind NICON Insurance Plaza

Central Area

Abuja

Re: Allegation of Substitution by Forgery: ANPP AMAC/Bwari

C Federal Constituency, FCT

The Commission has received a petition by one Alhaji Nasiru Muhammed alleging forgery regarding his substitution with one Mrs. Amanda Pam for the AMAC/Bwari House of Representatives, FCT both on your party’s sponsorship.

D 2. You may wish to confirm if there is, to the best of your knowledge any truth in the allegations, specifically, if you and the National Secretary of the party signed the attached substitution Form CF004 as required by extant regulations and if you authorized the substitution.

E SGD

Oluwole Osaze-Uzzi, Esq.

(Head, Legal Services Department)

F In reply to the above letter, Mr. H. H. Dederi, National Legal Adviser for the 2nd appellant, on 27th March, 2007, wrote the following letter to the Head of Department of Legal Services of INEC:-

“27th March, 2007.

*The Head of Department*

*Legal Services Department*

G *Independent National Electoral Commission*

*Abuja - Nigeria*

RE: ALLEGATION OF SUBSTITUTION BY FORGERY: ANPP  
AMAC/BWARI FEDERAL CONSTITUENCY, FCT

H *Please refer to your letter to us dated March 16th, in respect of the above subject.*

*I am instructed to write and confirm to you that the National Chairman never signed and/or authorized the substitution of the petitioner. Further, the Form CF 004A attached to your letter is a forged*

*document as confirmed by our legal department.*

*The candidate's signature was forged and his poster was probably scanned and reproduced to serve as passport.*

*The National Secretariat hereby dissociates itself from this fraudulent act of forgery.*

*You may wish to deal with the situation as appropriate, please.* B

*Thank you.*

*Yours faithfully*

*SGD*

*H. I. Dederi Esq.*

*National Legal Adviser*

*For National Chairman".* C

I have taken the time to reproduce the above to make the point that there is a dispute in respect of Form CF004A at page 26 of the record. The alleged forgery is that of the signature of the 1st respondent. It is on the left hand side of the document. The signature of the 1st appellant is also on the left hand side, immediately below that of the 1st respondent. They are all on the right of the photograph of the 1st appellant. D

By the above and paragraph 10 of the counter-affidavit of the 1st appellant, the issue of forgery of Form CF004A is in violent and riotous dispute. Forgery as an offence must be proved beyond reasonable doubt. In *Domingo v. Queen* (1963) 1 All NLR 81, this court held that one of the intents set out in Section 465 of the Criminal Code, must be proved. In the offence of forgery, the prosecution must prove that the document is a forgery and that it was forged by the accused. The prosecution must prove facts which will enable the court to infer mens rea. See *Dr. Aina v. Jinadu* (1992) 4 NWLR (Pt.233) 91. E F

Where a party denies making a document which is a forgery, as in this appeal (see paragraph 10 of the counter-affidavit), the burden of proof is on the party alleging the forgery, who is the 1st respondent. And proof is by evidence and evidence can only be procured by facts. In view of the fact that the facts are very much in dispute an Originating Summons ought not to lie in this matter. G H

The Court of Appeal cited the case of *Jimoh v. Olawoye* (2003) 10 NWLR (Pt.828) 307, and relied on the following passage of

Onnoghen, JCA., (as he then was):-

*"It is however very important to note that the law does not envisage a situation of no dispute at all in a proceeding commenced with Originating Summons but that of absence of substantial dispute. In other words, there can be disputed facts but such dispute must not be substantial. Where the disputed facts are substantial then Originating Summons Procedure is inappropriate, the proper mode of commencing such an action is by Writ of Summons so that pleadings can be filed and exchanged to determine the issue in controversy between the parties..... When you look at the facts, it is very clear that the facts as presented by the respondent in the supporting affidavit; there was no counter-affidavit by the appellants, cannot be said to be in substantial dispute since it is agreed that the respondent was at the material time the Chairman of Ifelodun Local Government and was suspended from office."*

Onnoghen, JCA., (as he then was), has correctly stated the law and I agree entirely with him. The case is however not applicable to the facts of this case. As opposed to Jimoh where Onnoghen, JCA., (as he then was) said that there was no counter - affidavit, there is a counter-affidavit in this matter and so there is a clear dispute. That apart, as stated above, there is a dispute in respect of the expulsion and substitution of the 1st respondent, and the dispute in my view is substantial, material and tangible. As a matter of fact, that is the legal basis for the action and it cannot be played down at all.

Learned Senior Advocate for the 1st respondent cited the case of Ugwu v. Araraume (supra), to support his argument that as the only issue in the matter is in respect of substitution, the matter was commenced by Originating Summons. Although this court was involved in the construction of Section 34(2) of the Electoral Act, the exercise was beyond the law to the facts of the case. Section 34(2) provides:-

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

The word "reason" means the cause of an event or situation; a fact, event, or statement that provides an explanation or excuse for something. In my view, a court of law cannot interpret the provision of Section 34(2) without moving into the facts of the case. And that



was what this court did in Araraume when it examined the words “*cogent, verify and verifiable*.” The point I am making is that Section 34(2) cannot be examined in vacuo outside the factual milieu.

I have never come across a more oppressive and hostile litigation than this in my life as a Judge. Here is a case where the trial Judge refused to stand down a matter for ninety minutes. Here is a case where very hostile proceedings (using the expression of Ademola, CJN., (as he then was) in Doherty v. Doherty (1967) NMLR 241, in which the facts were violently and notoriously in dispute, were not converted to a Writ of Summons, all in the name of speedy hearing. Here is a case where, a matter fixed for a motion was rushed to give judgment in favour of the 1st respondent the same day, again all in the name of speedy hearing. It is a matter where all known principles of Fair Hearing were thrown overboard to destroy the case of the appellants, again in the name of speedy hearing. The ambition and desire of a Judge to hear a matter speedily cannot be substituted for Fair Hearing of the case.

It is for the above reasons that I am unable to go along with the majority decision of the court dismissing the appeal. I will allow the appeal on the ground that there is a miscarriage of justice. I order that the case be tried by another Judge of competent jurisdiction by converting the Originating Summons to a Writ of Summons. I award N50,000.00 costs in favour of the appellants.

F

G

H