

**SUPREME COURT OF NIGERIA**  
27TH DAY OF JUNE, 2008. S.C. 291/2007  
**CORAM:- A. I. KATSINA-ALU, G. A. OGUNTADE, S. A.**  
**AKINTAN, M. MOHAMMED, I. T. MUHAMMAD, JJSC**

SENATOR HOSEA EHINLANWO ..... APPELLANT  
AND

1. CHIEF OLUSOLA OKE
  2. PEOPLES DEMOCRATIC PARTY (PDP) ..... RESPONDENTS
  3. INDEPENDENT NATIONAL  
ELECTORAL COMMISSION (INEC)
- 

APPEALS - Further evidence - Admission of - Guiding principles - It must be shown that evidence sought to be admitted - Is credible, important and could not have been obtained for use at trial with reasonable diligence - Which was not the case herein (H1)

APPEALS - Validity - Absence of prior necessary leave - Whether cured by leave to amend - Leave to appeal initiates an appeal process where leave is required - Leave to amend grounds relates to and presupposes an existing valid appeal - One cannot take the place of other (H2)

APPEALS - Grounds of appeal - Nature of - It does not depend on branding by counsel - It is to be determined by examining the ground - Together with its particulars - In the instant case only five grounds are of pure law (H3)

ELECTIONS - Candidates - Nominations - Power of political parties - Whatever method adopted - Nomination of candidates to be sponsored by a political party - Remains within the absolute jurisdiction of respective parties - To the exclusion of courts (H4)

ELECTIONS - Candidates - Substitutions - Electoral Act 2006, s. 34 (2) - It is mandatory that party seeking substitution must provide cogent and verifiable reasons for it - It also has the burden of proving valid substitution when challenged (H5)

ELECTIONS - Candidates - Substitutions - Cogency of reason - Reason that a name was submitted "without enough information" is neither cogent nor verifiable - As such it does not satisfy statutory requirements (H6)

### ***FACTS***

Before the Federal High Court Abuja, by an originating summons, the Plaintiff/Appellant had sued the Defendants/Respondents. Appellant questioned the power of the 2nd respondent to substitute him with another person as the candidate of the 2nd respondent for the April 2007 senate elections in respect of Ondo South Senatorial Zone after he had been nominated. He also questioned the validity of any purported substitution/disqualification of his candidature after he has been cleared by the 3rd respondent during its screening exercise. The material facts, none of which is in dispute, are that during the primary elections of the 2nd respondent, the 1st respondent had roundly defeated the appellant. Appellant's appeal to the relevant committee of the 2nd respondent was dismissed. Yet when the 2nd respondent was to present a list of its candidates to the 3rd respondent, it presented the name of the appellant instead of that of the 1st respondent. Appellant was accordingly screened by the 3rd respondent as 2nd respondent's candidate. Appellant admitted using the party's machinery to effect the change in the list prior to the presentation of the list to the 3rd respondent.

Subsequently, 2nd respondent sought to have the name of the appellant substituted with that of the 1st respondent by a letter addressed to the 3rd respondent in which it was stated that appellant's name was submitted "without enough information". At end of trial, learned trial court held that 2nd respondent had no power to remove the appellant's name having been cleared by 3rd respondent. It granted consequential, declaratory and injunctive reliefs accordingly. Respondent's appeal to the Court of Appeal was allowed. Hence appellant has brought this appeal to the Supreme Court.

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

*“(a) Having regard to the decision of this Honourable Court in Onuoha v. Okafor, Dalhatu v. Turaki. Ugwu v. Ararume. Amaechi v.*

*INEC, the PDP Constitution and electoral guidelines and the provisions of the Electoral Act, 2006, whether the 2nd respondent (The Peoples Democratic Party) has a right to nominate the appellant, and did in fact nominate the appellant despite the fact that the 1st respondent won the primaries?*

*(b) Having forwarded the name of the appellant, whether the 2nd respondent (PDP) has provided any cogent and verifiable reason(s) to warrant the purported substitution in compliance with Section 34(2) of the Electoral Act, 2006?*

*(c) Whether having regard to the legal requirements of the provisions of Section 32 of the Electoral Act, 2006, the 1st respondent has proved the existence of a nomination that is capable of being illegally supplanted?"*

**HELD** (Unanimously allowing the appeal per **ONNOGHEN JSC**)  
**APPEALS - Further evidence - Admission of**

1. It is settled law that it is within the discretion of the court to decide whether or not to admit further/ additional evidence on appeal. It is also settled that for the court to exercise that discretion one way or the other, it must act not only judicially but judiciously. It is in an effort at attaining the standard of exercising its discretion judicially and judiciously that the courts have set down certain principles/conditions as guides. The principles are:-

*"i. the evidence sought to be adduced must be such that could not have been with reasonable diligence obtained for use at the trial;*  
*ii. the evidence should be such that if admitted would have an important, not necessarily crucial effect on the whole case, and,*  
*iii. the evidence must be such that is apparently credible in the sense that it is capable of being believed and it need not be incontrovertible.*

The above conditions must co-exist for the court to exercise its discretion in favour of the applicant.

For the appellant to seek to adduce the documents as additional evidence, it means they are relevant to his case at the trial and being so relevant, it was the duty of the appellant to deliberately seek and obtain them. In the instant case, the documents - certified true copies thereof - could have been obtained from the 3rd respondent.

From the above, it is very clear that the appellant became wiser after the event and can therefore not be accommodated under the rules. (pp. 2507 D/2508 D)

***APPEALS - Validity - Absence of prior necessary leave***

B 2. In the appellant's joint Reply to 1st-3rd respondents' Brief filed on 25/4/08, the learned senior counsel for the appellant submitted that the Preliminary Objection as to failure to seek leave of court is be-  
 C lated as the appellant has sought and obtained leave to amend the grounds of appeal without objection from the respondents, which  
 leave, learned senior counsel further submitted has cured whatever defect.

The above submission is, with respect, very strange as it cannot, by any stretch of imagination be said that a grant of an applica-  
 D tion for leave to amend grounds of appeal amounts to a grant of leave to appeal. The two concepts are poles apart. Whereas leave to appeal initiates an appeal process where the leave of the court is required as provided under Section 233(3) of the 1999 Constitu-  
 E tion, leave to amend grounds of appeal does not; it is a process which relates only to an existing appeal which might either be as of right or by leave of the court; one cannot take the place of the other as the learned senior counsel appears to submit. The submission of learned  
 F senior counsel on the matter with respect has no foundation in law particularly as an amendment relates to an existing legal process duly filed in court, whereas leave to appeal is a legal requirement for initi-  
 G ating an appeal process where such leave of court is required by law/statute. It is settled law that, where no leave to appeal is obtained where one is required before appeal, such appeal is incompetent  
 and is liable to be struck out. (p. 2511 C/E)

***Grounds of appeal - Nature of***

3. It is settled law that in determining whether a ground of appeal is one of law or of fact, it is relevant and crucial to construe the ground  
 H of appeal together with the particulars of error alleged, as the branding of a ground of appeal as a ground of law by the appellant is not sufficient to make it a ground of law without more. In short, counsel for the appellant may brand a ground of appeal as a ground of law

whereas it is in fact, a ground of fact or mixed law and fact that is why it is always necessary when the issue as to whether a ground of appeal is that of law or fact or mixed law and fact, to examine the ground in contention together with its particulars.

In the instant case, it is clear that in ground 1, the appellant is complaining about the wrong application of the decision and/ or principle of law set out in a case or statute to the case before it. There is also a complaint that the lower court failed to follow the decision of a higher court when it is its duty to do so. In both instances, I hold the considered view that the grounds are clearly of law particularly as it is the duty of the Judge to apply the principles of law as laid down by the Supreme Court.

Looking at the other grounds of appeal and applying the principles equally to them it is obvious that grounds 2, 3, 5 & 8 are ground of law while grounds 4,6,7 & 9 are grounds of fact or mixed law and fact for which the leave of the court was needed to validate same. Since no leave of the court was first sought and obtained, it is my view that grounds 4,6,7 & 9 are incompetent and liable to be struck out. I therefore, order accordingly. (pp. 2513 D/2520 H)

### ***ELECTIONS - Candidates - Nominations***

4. The parties agree that the law still remains that the courts do not interfere in the affairs of political parties and that matters raising political questions as to how a political party should be run or who should be its candidate at an election is strictly a matter within the exclusive jurisdiction of the political parties which the courts lack the jurisdiction to interfere.

It is therefore clearly the law that a political party such as the 2nd respondent, has the unfettered right to nominate or sponsor a candidate it likes for any election and the courts have no jurisdiction to inquire into that issue except in circumstances as decided in the case of Ugwu v. Araraume supra and the provisions of Section 34(2) of the Electoral Act, 2006. The above exception has to do with substitution of a candidate already nominated and submitted to INEC, 120 days to the election in which case the substitution must be done 60 days to the election and the political party intending the change or substitution of the nominated candidate must give cogent and

verifiable reasons before the change or substitution can be effected. The nomination by the party may be by way of primary election, selection, appointment etc, or a combination of the above. Whatever the method adopted the law is that, nomination of a candidate to be sponsored by a political party remains within the absolute jurisdiction of the political parties. It is therefore my view that issue 1 be and is hereby resolved in favour of the appellant.  
(pp. 2527A/E/2530 C)

***Candidates - Substitutions - Electoral Act 2006, s. 34***

5. It has been held by this court in Ugwu v. Araraume supra, that Section 34(2) is mandatory and that it protects the right of the candidate originally presented by the political party for the election from arbitrary change by the party. It follows that for a candidate to be deprived of the sponsorship of the party there must be cogent and verifiable reason for the change or substitution. It has been argued strenuously by the respondents' counsel that the appellant did not complain against the reason for substitution given by the 2nd respondent neither did he ask for the interpretation of the said Section 34(2). With respect, I hold the considered view that the submission is very much erroneous particularly as the appellant's case is a challenge of the substitution and by the provisions of Section 34(2), it is the duty of the party seeking the substitution that must not only provide reasons for the change or substitution but must make sure that the reasons are cogent and verifiable otherwise, the change or substitution must fail. In the instant case, the appellant challenged his substitution on the ground that it was wrongful as claimed in relief (b) supra, so he thereby put the burden of proving that the substitution was valid or satisfied the statutory requirements on the 2nd respondent who applied for same. The appellant need not go further to specifically challenge the reasons for the substitution before the court would examine same once the substitution is challenged as being wrongful. (p. 2534 D)

***Candidates - Substitutions - Cogency of reason***

6. Coming now to the reason given for the substitution which is stated to be "without enough information," I agree with the trial court and

the learned senior counsel for the appellant that the said reason, if it may be so considered/regarded, amounts to no reason at all neither is it cogent and verifiable, as statutorily required. I have to emphasize the point that Section 34(2) seeks to protect the right of sponsorship of a candidate whose name had been submitted to the 3rd respondent by the 2nd respondent as its candidate for any election irrespective of how he emerged as the candidate as the means by which a candidate of a political party emerges is within the domestic affairs of the political parties in respect of which the courts lack the jurisdiction to interfere. In the instant case, it cannot be said that the 2nd respondent who conducted the primaries according to its Constitution and guidelines in which the 1st respondent emerged an overwhelming winner and even decided the appeal of the appellant against the declaration of the 1st respondent as the winner of that primaries, was “without enough information” as to the actual winner of the primaries when it sent its list of candidates without the name of the 1st respondent but included the name of the appellant instead. It really does not matter how the name of the appellant got onto the list of candidates- the fact remains that it is there and he was duly screened for the election before the application to substitute him. In any event, the 2nd respondent never said that the reason it was seeking the substitution was because the 1st respondent, rather than the appellant, won the primaries. (p. 2535 B)

## **NOTABLE POINT OF INTEREST**

### **ONNOGHEN JSC**

#### *1. It is counsel's duty to establish his complaints*

I have to point out that apart from the respondents' stating that the grounds of appeal are either of facts or mixed law and fact and thereby requiring the leave of the court, they have not gone further to demonstrate to the court why the said grounds are said to be of fact; or mixed law and fact. The actual examination of the grounds are left for the court to do so as to arrive at a decision. I hold the view that it is the duty of counsel who objects to the competence of a ground of appeal to establish the complaint, as it is settled law that, he who alleges must prove. The instant case is a clear situation where learned counsel shifts his responsibilities to the bench, which is very unfortunate.

nate. (p. 2519 C)

### **REPRESENTATION**

D. D. Dodo, SAN., (with him; K.U. Ekomaru; Victor Emerson, Audu Amiga, Paulyn Abhulmen, Chinedu Umeh, Jumbo Festus, Chief  
B Nkereuwem Akpan), for the Appellant.

L. O. Fagbemi, SAN., (with him, J. K. Gadama, SAN., R. O. Yusuf, H.O. Afolabi, F. G. Ezema, K.O. Fagbemi, A. O. Popoola, I.G. Araraume, B. A. Onyu, A.C. Ozioko and Ebun Adegboruwa), for  
C the 1st Respondent.

J. O. Adesina, (with her, A. M. Kayode and Ronke Ifayefunmi), for the 2nd Respondent.

Wole Adebayo, (with him, Ikechukwu Maledo), for the 3rd Respondent.

D

### **CASES REFERRED TO**

Asaboro v. Aruwaji (1974) 4. S.C. 119 at 123-125

Obasi v. Onwuka (1987) 3 NWLR (Pt.61) 364

Akanbi (1989) 5 S.C. 1; (1989) 3 NWLR (Pt.108) 118

E Agwuna III v. Isiadinso (1996) 5 NWLR (Pt.451) 705

UBA Plc, v. BTL Ind. Ltd. (2005) 10 NWLR (Pt.933) 356

Okoro v. Egbuaoh (2006) 15 NWLR (Pt.1001) 1

Orakson v. Menkiti (2001) 9 NWLR (Pt.701) 527 at 550

F Aja v. Okoro (1991) 9 - 10 S.C. 27; (1991) 7 NWLR (Pt.203) 260

Abidoeye v. Alawode(2001) 6 NWLR (Pt.709) 463 at 472,

Adenuga v. Odumeru (2001) 2 NWLR (Pt.696) 184 at 198

INCAR Nig. Plc, v. Bolex Ent. Nig. Ltd. (2001) 12 NWLR (Pt.728) 646 at 665

G Sparkling Breweries Ltd v. UBN Ltd. (2001) 7 S.C. (Pt.II) 146; (2001) 15 NWLR (Pt.737) 539 at 556

Ifediora v. Ume (1988) 1 NWLR (Pt.74) 5

Chime v. Chime (2001) 1 S.C. (Pt.II) 1; (2001) 3 NWLR (Pt.701) 527 at 550

H Ojo v. Azama (2001) 1 S.C. (Pt.II) 62; (2001) 18 NWLR (Pt.702) 57 at 69

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

Constitution of the Federal Republic of Nigeria, 1999, s. 233 (3)  
 Electoral Act, 2006, ss. 32 (1), (2), 33 & 34 (2)  
 Supreme Court Rules, 1985, O. 2 r. 12 (1)

**LEAD JUDGMENT BY ONNOGHEN JSC**

This is an appeal against the judgment of the Court of Appeal, holden at Abuja in appeal No. CA/A/112/2007, delivered on the 2nd day of October, 2007, in which it allowed the appeal of the present 1st respondent, then the appellant against the judgment of the Federal High Court holden at Abuja in Suit No. FHC/ABJ/CS/159/2007, delivered on the 18th day of April, 2007, in favour of the plaintiff, now the appellant in this court.

The said Suit No. FHC/ABJ/CS/159/2007, was by way of Originating Summons in which the plaintiff/appellant sought answers to the following questions :-

*“1. Whether the Peoples Democratic Party (PDP) can substitute the plaintiff with another from contesting for the office of the Ondo South Senatorial Zone in the forthcoming Senatorial Election?”*

*2. Whether the plaintiff can be substituted/disqualified to contest for the office of the Senatorial Seat in the Ondo South Senatorial Zone after having been cleared by Independent National Electoral Commission (INEC) during its screening exercise?”*

The plaintiff/appellant then sought the following reliefs from the court:-

*“(a) A declaration that the Peoples Democratic Party (PDP) has no power to remove the name of the appellant as the candidate on the platform of PDP for the Ondo South Senatorial Seat, having been cleared by INEC.*

*(b) A declaration that the substitution of the applicant’s name G with that of Chief Olusola Oke having been cleared by INEC was wrongful.*

*(c) A declaration that the applicant is the party rightful candidate to contest for the office of Senator in the Ondo South Senatorial Zone in forthcoming election.*

*(d) An order that the name of the applicant be restored as the sole candidate on the platform of the PDP for the Ondo South Senatorial Seat.*

*(e) An order restraining the 1st respondent from further presenting or recognizing Chief Olusola Oke or any other candidate than the applicant to contest for the office of the Senatorial Seat in the Ondo South Senatorial Zone in the forthcoming election on the platform of the PDP.”*

B This action was initiated against the 2nd and 3rd respondents only. However, in the course of the proceedings, the 1st respondent was joined as a defendant upon his application to that effect. As stated earlier in his judgment, the trial court granted the reliefs sought resulting in an appeal to the lower court, which court reversed the decision of the trial court. The instant appeal is against the judgment reversing the decision of the trial court.

C It is not disputed that on the 2nd day of December, 2006, the appellant and the 1st respondent together with another contestant D took part in the 2nd respondent’s primaries to elect and nominate a candidate for the Ondo South Senatorial Seat. The exercise was won by the 1st respondent who scored a total of 2,024 votes as against the appellant’s 323 votes. The 1st respondent thus obtained 75% of the total votes cast at the primary election. The appellant was not E satisfied with the result of the election and consequently appealed against same to the relevant committee of the party (PDP) and lost. It is also not disputed that somehow, when the list of the candidates of the 2nd respondent for the National Election comprising candidates of the 2nd respondent throughout the Federation was sent to the F 3rd respondent, it was not the name of the 1st respondent that was on the list but that of the appellant as the 2nd respondent’s candidate for Ondo South Senatorial Seat. The appellant was screened by the 3rd respondent. The appellant admitted using the party’s (PDP’s) G machinery to effect the change in the nomination of the 1st respondent before the list of nominated candidates was sent to the 3rd respondent.

When the party, 2nd respondent was later informed that the person who won the primaries for the Senatorial Seat and whose H name ought to have been sent to the 3rd respondent was the 1st respondent, a letter dated 5th February, 2007, was written by the 2nd respondent requesting the 3rd respondent to effect a substitution of the name of the 1st respondent for the appellant on the ground

that the nomination of the appellant was without enough information as a result of which when the final list of candidates for the elections was published by the 3rd respondent around the 24th day of February, 2007, it was the name of the 1st respondent, rather than that of the appellant that appeared as the candidate for the 2nd respondent in respect of the election to the Ondo South Senatorial Seat. It was the substitution of the 1st respondent for the appellant that resulted in the institution of the action. It must be noted, the letter seeking the substitution dated 5/2/07, did not state the reason for the substitution to be that it was the 1st respondent that won the primary election rather than the appellant.

There are preliminary issues to be determined in this appeal before dealing with the merits or otherwise of the appeal.

The preliminary issues are:-

*“(a) A motion filed by the appellant praying the court for an order, inter alia, granting leave to the appellant to adduce further or additional or fresh evidence on appeal.*

*(b) Preliminary Objections by the respondents as to the competence of the grounds of appeal.”*

*I therefore proceed to deal with these preliminary issues.*

*On the 14th day of November, 2007, the appellant filed a Motion on Notice in this court praying for the following orders:-*

*"i. An order granting leave to the appellant herein to amend his Notice of Appeal dated 3rd October, 2007, in the manner set out in the Amended Notice of Appeal attached and marked as Exhibit A.*

*ii. An order deeming the already filed and served Amended Notice of Appeal as duly file and served.*

*iii. An order granting the applicant/appellant herein leave to raise and argue a new issue not raised at the lower court.*

*iv. An order granting leave to the appellant/applicant herein to adduce the documents marked Exhibits JH1-4 as further/additional evidence at the hearing of the appeal.”*

The grounds on which the application relied are stated as follows:-

*“(i) Upon the receipt of the certified true copy of the judgment of the lower court, it has become necessary for the just and proper determination of the appeal to amend the Notice of Appeal dated*

3rd October, 2007.

(ii) *The 1st respondent has perpetrated a fraud on the courts below in that he presented some forged and fictitious documents in proof of his averments and the courts below; especially the lower court relied on these documents.*

B (iii) *It has become necessary to introduce additional evidence that will prove the 1st -respondent's fraud."*

The application is supported by an affidavit, further and better affidavit etc., while the respondents filed counter-affidavits in opposition.

C On the 18th day of February, 2008, when the appeal came up for hearing, prayers 1 and 2 of the motion papers were granted by the court while prayers 3 and 4 were adjourned to be considered along with the appeal after arguments.

D Learned senior counsel for the appellant, D. D. Dodo, Esq., SAN., filed the appellant's brief on the 28th day of February, 2008, in which he abandoned prayer 3 on the motion papers but argued prayer 4.

E Learned senior counsel submitted that an appellate court has the discretion, under the rules of court, to grant leave to adduce new evidence on appeal when certain conditions co-exist to wit:-

*"(a) the evidence sought to be adduced, must be such as could not have been, with reasonable diligence obtained for use at the trial;*

F *(b) the evidence should be such as if admitted could have an important, not necessarily crucial effect on the whole case; and,*

G *(c) the evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible, which he cited many cases, including Asaboro v. Aruwaji (1974) 4. S.C. 119 at 123-125; (1974) 4 S.C. (Reprint) 87, Obasi v. Onwuka (1987) 3 NWLR (Pt.61) 364, Akanbi (1989) 5 S.C. 1; (1989) 3 NWLR (Pt.108) 118. Agwuna III v. Isiadinso (1996) 5 NWLR (Pt.451) 705, UBA Plc, v. BTL Ind. Ltd. (2005) 4 S.C. 40; (2005) 10 NWLR (Pt.933) 356, Okoro v. Egbuaoh (2006) 6 S.C. 183; (2006) 15 NWLR (Pt.1001) 1."*

H Learned senior counsel then stated that the additional/fresh evidence, he seeks the leave of the court to adduce are Exhibit JH-1 which is the 1st respondent's 2nd Form CF001 dated 20/2/07; Ex-

hibit JH-2 being a letter of the PDP National Chairman dated 19/2/07; Exhibit JH-3 which is the appellant's Form CF001 dated 21/12/06; Exhibit JH-4 the PDP Constitution; Exhibit JH-3a which is INEC certified true copy of appellant's Form CF001 and Exhibit JH-5 being the INEC certified document titled "*Candidates of Political Parties whose documents on Oath were verified and were present for verification.*" B

It is the submission of learned senior counsel that the above documents satisfy the conditions required by law to be admitted as additional evidence on appeal and urged the court to exercise its discretion in favour of the appellant as the documents were not obtainable at the time of trial except Exhibits 1 and 4; that even though Exhibits JH-2, JH-3, JH-3a, and JH-5, were in existence at the time of trial, they could not be obtained with reasonable diligence as explained in the Brief; that though Exhibit - 1 is the 1st respondent's document which ought to have been tendered by him at the trial in good faith, his failure to do so raises a presumption that it is unfavourable to his case, relying on *Daniel-Kalio v. Daniel-Kalio* (2005) 5 NWLR (Pt.915) 305 at 323. Learned senior counsel however concedes that Exhibit 4- PDP Constitution does not satisfy the condition of admission and abandoned his prayer for its introduction as additional evidence. C D E

It is the further submission of learned senior counsel that the documents sought to be admitted are very relevant for the just and proper determination of some of the issues in controversy between the parties particularly as Exhibit JH-1 reveals that 1st respondent deposed to another Form CFOO1 on the 20th day of February, 2007, long after the time allowed for substitution of candidates had lapsed etc, that the documents are credible and speak for themselves and are virtually incontrovertible. Finally, learned counsel urged the court to grant the prayer and admit the documents as additional evidence in the proceedings. F G

On his part, the 1st respondent, in opposing the application filed a 10 paragraphed counter-affidavit. In his argument in opposing the admission of the documents in issue, learned senior counsel, L.O Fagbemi, SAN., in the 1st respondent's Brief of Argument filed on 3/4/08, referred to Order 2 Rule 12(1) of the Supreme Court H

Rules, 1985; UBA Plc, v. BTL Ind. Ltd. (2005) 4 S.C. 40; (2005) 10 NWLR (Pt.933) 356 at 370 -371, Asaboro v. Aruwaji supra and submitted that the appellant has not contended that as at the time of trial, the documents were not in existence neither has the appellant  
 B deposited to any fact to the effect that he made any attempt to get copies of the documents from the relevant bodies and failed; that the documents were never pleaded and therefore inadmissible; that the appellant is trying to remedy the lapses which became apparent after the judgment of the lower court and should not be allowed to do so-  
 C relying on UBA Plc, v. BTL Ind. Ltd., supra and urged the court to refuse the application.

In the 2nd respondent's Brief of Argument filed on 7/3/08, by J. O. Adesina (Mrs.), learned counsel referred to Order 2 Rule 12 (1) of the rules of this court and submitted that the said Rule cannot be  
 D exploited by the appellant so as to:-

- “(a) Fill the gap in his case at the lower court.*
- (b) Contradict the findings and conclusions of the lower court against which he has not appealed.*
- (c) Raise a completely new defence/case which was not raised*  
 E *or anticipated at the trial or lower court.*
- (d) Take the adverse party by surprise; or*
- (e) Correct mistakes in the case or repair damages done to it*  
 F *by the judgment on appeal or supply omission which the other party has taken advantage of and in respect of which there is unchallenged findings and conclusion of a competent court.”*

Learned counsel submitted that with minimum reasonable care and diligence, the appellant would have been able to produce and tender the documents now sought to be tendered on appeal, as they  
 G were in existence at the time of trial; that the additional evidence relate to issues against which the appellant did not appeal; the application tantamounts to a formulation of a completely new case for the appellant in relation to his non-compliance with the requirements of Section 32(2) of the Electoral Act, 2006; that a grant of the prayer  
 H would surprise, overreach and embarrass the respondents; that the evidence is not credible as the same would have no important effect on the appeal, and urged the court to refuse same.

On his part, learned counsel for the 3rd respondent, in the 3rd

respondent's Brief of Argument signed by Ikechukwu Maledo, Esq., and filed on 10/3/08, restated the principles earlier produced in this judgment guiding the court on the issue of admission of additional/fresh evidence on appeal and submitted that the conditions to be fulfilled for the court to exercise its discretion in favour of the appellant do not co-exist in the instant case as a result of which counsel urged the court to refuse the application. B

Order 2 Rule 12(1) of the Supreme Court Rules which guides the court in applications of this nature provides, thus:-

*"A party who wishes the court to receive the evidence of witnesses (where they were or were not called at the trial) or to order the production of any document, exhibit or other thing connected with the proceedings in accordance with the provisions of Section 33 of the Act, shall apply for leave on Notice of Motion prior to the date set down for the hearing of the appeal."* C

***It is settled law that it is within the discretion of the court to decide whether or not to admit further/ additional evidence on appeal. It is also settled that for the court to exercise that discretion one way or the other, it must act not only judicially but judiciously. It is in an effort at attaining the standard of exercising its discretion judicially and judiciously that the courts have set down certain principles/conditions as guides. The principles are:-*** D

***"i. the evidence sought to be adduced must be such that could not have been with reasonable diligence obtained for use at the trial;*** F

***ii. the evidence should be such that if admitted would have an important, not necessarily crucial effect on the whole case, and,*** G

***iii. the evidence must be such that is apparently credible in the sense that it is capable of being believed and it need not be incontrovertible - See UBA Plc, v. BTL Ind. Ltd. (2005) 4 S.C. 40; (2005) 10 NWLR (Pt.933) 356 at 370-371."***

***The above conditions must co-exist for the court to exercise its discretion in favour of the applicant.*** H  
The question therefore is whether they do co-exist in the instant case. Taking the first condition into consideration, it is not in doubt whatsoever, that

the documents now sought to be admitted as additional evidence were in existence at the time of trial. The learned senior counsel for the appellant has not said that they were not. He however, gave reasons why they were not produced and tendered at the trial. The question is whether the reasons are tenable.

B The reasonableness of the explanation as to why the documents though available at the time of trial but were not tendered therein, has to be examined having at the background the caution sounded by my learned brother, Oguntade, JSC., in UBA Plc, v. BTL Ind. Ltd. supra at 371:-

C “.....Human experience shows that we often get wiser after an event. When judgment has been given in a case, parties with the advantage of what the court said in the judgment get a new awareness of what they might have done better or not done at all. If the door were left open for everyone who has fought and lost a case at the court of trial to bring new evidence on appeal there would be no end to litigation and all the parties would be worse for the situation.”

**For the appellant to seek to adduce the documents as additional evidence, it means they are relevant to his case at the trial and being so relevant, it was the duty of the appellant to deliberately seek and obtain them. In the instant case, the documents - certified true copies thereof-could have been obtained from the 3rd respondent.** Even though the appellant, allegedly lost his own copies of Exhibits JH-3 & JH-3a as stated in the Brief, he could still have obtained a certified copy from the 3rd respondent if he had regarded the document relevant to his case and not a case of becoming wiser after the event. With respect to Exhibit JH-1 learned senior counsel for the appellant submitted thus at page 12 of the appellant’s Brief:-

F “Admittedly, Exhibit JH- 1 was obtained from the 3rd respondent on the course of the trial and ought to have been tendered ordinarily together with Exhibits Senator 4,5, & 6 (On pp. 104-106 of the record of appeal). Regrettably its true import and significance H was not appreciated until well after judgment had been given in favour of the appellant.....” Underlines supplied by me.

From the above, it is very clear that the appellant became wiser after the event and can therefore not be accommodated under the

rules.

In conclusion, I find no merit in the application to adduce further evidence on appeal and consequently dismiss same.

Next to be considered is the Preliminary Objection on the competence of the appeal as raised by the respondents.

The learned senior counsel for the 1st respondent, L.O. Fagbemi, Esq., SAN., has contended, in the 1st respondent's Brief of Argument, that grounds 1,3,4, 5,6,7,8,9 and 10 of the grounds of appeal are grounds of fact or mixed law and facts for which leave of the court is required and that since the appellant received no such leave, the grounds are incompetent and ought to be struck out, relying on Section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999, (hereinafter referred to as the 1999 Constitution) and the case of Erisi v. Idika (1987) 4 NWLR (Pt.66) 503 at 513, Coker v. UBA (1997) 2 NWLR (Pt.490) 641 at 665, that since issues 1 and 3 related to the incompetent grounds of appeal, the issues are consequently incompetent and should be struck out. It is however, clear from the submissions of learned senior counsel for the 1st respondent that ground 2 of the grounds of appeal is competent and can in law, sustain the appeal.

On the other hand, the objection of the learned counsel for the 2nd respondent concerns grounds 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the grounds of appeal on the ground that "they are not competent or that they have been abandoned" while requesting the court to strike out and/or dismiss the appeal on the ground that the appeal lacks competence. It is clear that the 2nd respondent does not contend the validity of ground 10 of the grounds of appeal. In short, learned senior counsel for the 1st respondent; considers ground 2 as valid while the counsel for the 2nd respondent consider the said ground invalid but consider ground 10 as valid which counsel for the 1st respondent considers invalid.

However, the grounds on which learned counsel for the 2nd respondent contends that the grounds are incompetent are that:-

*"(a) the entire grounds are incompetent being grounds of facts or of mixed law and facts;*

*(b) no leave of court was first sought and obtained before filing the appeal;*

*(c) most of the grounds relate to issues that were either not canvassed in the lower court or do not arise from the judgment of the lower court;*

*(d) no leave of court was sought and obtained to raise fresh issues;*

B *(e) no issue is formulated on most of the grounds of appeal;*

*(j) issues formulated do not arise from or relate to any of the grounds of appeal;*

C *(g) canvassing arguments against crucial and specific findings of fact made by the lower court against which no appeal was filed.”*

In support of the above grounds of objection, learned counsel cited and relied on Section 233(2)&(3) of the 1999 Constitution; the case of Orakson v. Menkiti (2001) 5 S.C. (Pt.I) 72; (2001) 9 NWLR (Pt.701) 527 at 550, Aja v. Okoro (1991) 9 - 10 S.C. 27; (1991) 7 NWLR (Pt.203) 260, Abidoye v. Alawode (2001) 3 S.C. (2001) 6 NWLR (Pt.709) 463 at 472, Adenuga v. Odumeru (2001) 1 S.C. (Pt.I) 72; (2001) 2 NWLR (Pt.696) 184 at 198, INCAR Nig. Plc. v. Bolex Ent. Nig. Ltd. (2001) 5 S.C. (Pt.II) 224; (2001) 12 NWLR (Pt.728) 646 at 665, Sparkling Breweries Ltd v. UBN Ltd. (2001) 7 S.C. (Pt.II) 146; (2001) 15 NWLR (Pt.737) 539 at 556, Ifediora v. Ume (1988) 1 NWLR (Pt.74) 5. Chime v. Chime (2001) 1 S.C. (Pt.II) 1; (2001) 3 NWLR (Pt.701) 527 at 550, Ojo v. Azama (2001) 1 S.C. (Pt.II) 62; (2001) 18 NWLR (Pt.702) 57 at 69, Amayo v. State (2001) 12 S.C. (Pt.I) 1; (2001) 4 NWLR (Pt.745) 251 at 272. Learned counsel finally urged the court to strike out the grounds of appeal and dismiss the appeal for being incompetent. Learned counsel for the 3rd respondent did not raise a Preliminary Objection against the appeal as known to law. He adopted the issues for determination as formulated by the senior counsel for the appellant but proceeded to state on paragraph 5.3 of the 3rd respondent's Brief of Argument filed on 10/3/08 as follows:-

H *“However, before we proceed to treat the issues on their merit, it is pertinent to draw the attention of this Honourable Court to certain deficiencies inherent in the appellant's case running from his Amended Notice of Appeal to the issues for determination formulated by him and the arguments canvassed thereon.”*

Learned counsel then proceeded to point out the deficiencies to be the absence of leave to appeal on grounds of facts, mixed law and facts in respect of grounds 1, 2, 3, 4, 5, 6, 7, 8 and 9; formulating issues for determination not arising from the grounds of appeal and thirdly, failure to canvass arguments on some of the issues formulated, without identifying the alleged issues involved. The above mode of raising a Preliminary Objection to an appeal is both novel and unknown to law and is consequently not worthy of any consideration in this judgment. That being the case, it is clear that there are two Preliminary Objections against the appeal as raised by the 1st and 2nd respondents and argued in their Briefs of Argument.

***In the appellant's joint Reply to 1st-3rd respondents' Brief filed on 25/4/08, the learned senior counsel for the appellant submitted that the Preliminary Objection as to failure to seek leave of court is belated as the appellant has sought and obtained leave to amend the grounds of appeal without objection from the respondents, which leave, learned senior counsel further submitted has cured whatever defect.*** In a rather strange way, learned senior counsel made the following submission in paragraph 5.9 of the joint Reply Brief:

*"Submit that by granting the leave to amend, the Honourable Court had in effect granted leave to appeal."*

***The above submission is, with respect, very strange as it cannot, by any stretch of imagination be said that a grant of an application for leave to amend grounds of appeal amounts to a grant of leave to appeal. The two concepts are poles apart. Whereas leave to appeal initiates an appeal process where the leave of the court is required as provided under Section 833(3) of the 1999 Constitution, leave to amend grounds of appeal does not; it is a process which relates only to an existing appeal which might either be as of right or by leave of the court; one cannot take the place of the other as the learned senior counsel appears to submit. The submission of learned senior counsel on the matter with respect has no foundation in law particularly as an amendment relates to an existing legal process duly file in court whereas leave to appeal is a legal requirement for initiating an appeal process where such***

***leave of court is required by law/statute. It is settled law that, where no leave to appeal is obtained where one is required before appeal, such appeal is incompetent and is liable to be struck out.***

B However, submitting in the alternative, learned senior counsel is of the view that the grounds of appeal complained of are really grounds of law for which no leave of court is required; that even if it is only one ground of law that exists out of all the grounds filed, the said ground of law is sufficient to sustain the appeal for which counsel  
C cited and relied on Global Transport Oceanico S. A. v. Free Enterprises (2001) 2 S.C. 154 and Mohammed v. Olawunmi (1990) 4 S.C. 40; (1990) 2 NWLR 458 at 480; that the 1st respondent concedes that ground 2 is a ground of law which concession is sufficient to sustain the appeal; that in determining whether a ground of ap-  
D peal is one of law or fact, it is relevant to construe the ground together with the particulars of alleged error, relying on the case of Metal Construction (WA) Ltd. v. Migliore (1990) 2 S.C. 33; (1990) 1 NWLR (Pt.126) 299 at 314; 321 and 325, Chief of Air Staff v. Iyen (2005) 1 S.C. (Pt.II) 121; (2005) 6 NWLR (Pt.922) 496 at 542, that  
E ground 1 complains against the lower court's interpretation of the law as laid down in Onuoha v. Okafor. Dalhatu v. Turaki (2003) 7 S.C. 1 and Ugwu v. Ararume (2007) 6 S.C. (Pt.I) 88, relying on Maigoro v. Garba (1999) 7 S.C. (Pt.III) 11; (1999) 10 NWLR (Pt.624)  
F 555, E.S. & C.S. Ltd. v. N.M.B. Ltd. (2005) 7 NWLR (Pt.924) 215 and submitted that a complaint against a wrong application of a decision and/or principle of a case in a subsequent case is a question of law, not fact as it is the duty of the Judge to interpret and apply the law.

G On ground 2, learned senior counsel submitted that it is a ground of law despite counsel for the 2nd respondent labeling it as a ground of mixed law and fact; that the ground complains against the lower court's perception of the issue for determination before the trial court. Learned senior counsel further submitted that the ground  
H also queries the decision of the lower court that Section 34 of the Electoral Act, 2006, did not apply to the appellant's case at the trial court contrary to the trial court's decision.

On ground 3, it is the submission of learned senior counsel

that it is also a ground of law as it is against the decision of the lower court treating the averments of the plaintiff as an admission when same does not qualify as such in the eyes of the law.

On ground 4, it is submitted that since it queries the use to which the evidence presented was put by the lower court, particularly, when the said court closed its eyes to the relevance and purpose to which Exhibits Senator 4,5, & 6 were tendered, an error in law was thereby committed resulting in the ground being that of law; that the lower court misconceived the law as laid down in the Electoral Act, 2006, thereby giving rise to ground 5; that ground 6 complains of the failure of the lower court to apply the correct principles of law to established facts thereby making the ground one of law, relying on Anoghalu v. Oraelosi (1999) 10-12 S.C. 1; (1999) 13 NWLR (Pt.634) 299. In short, it is the contention of the learned senior counsel that all the grounds of appeal in this case are grounds of law for which no leave of the court is required and urged the court to dismiss the Preliminary Objections.

***It is settled law that in determining whether a ground of appeal is one of law or of fact, it is relevant and crucial to construe the ground of appeal together with the particulars of error alleged, as the branding of a ground of appeal as a ground of law by the appellant is not sufficient to make it a ground of law without more. In short, counsel for the appellant may brand a ground of appeal as a ground of law whereas it is in fact, a ground of fact or mixed law and fact that is why it is always necessary when the issue as to whether a ground of appeal is that of law or fact or mixed law and fact, to examine the ground in contention together with its particulars*** in the instant case, the grounds of appeal complained of are grounds 1-9 which, for the purpose of clarity I have to reproduce as follows:-

***“GROUND ONE***

*The lower court erred in law when it held as follows:-*

*“This (Section 34 sic) protects a lawful mandate secured after primaries contrary to the trial court’s opinion in the present case that Section 34 protects any mandate irrespective of the result of the primaries.” P. 726 of the records and*

*"I am in agreement with the learned counsel to the appellant that the trial court wrongly applied the decision in Araraume's case which should be in favour of the appellant with a valid mandate following his victory in the primary election." See P. 727 of the records.*

**PARTICULARS**

B 1. Section 34 protects a nomination received from a political party by INEC pursuant to Sections 32 & 33 of the Electoral Act.

2. The decision in Onuoha v. Okafor, Dalhatu v. Turaki, as affirmed by this Honourable Court in Ugwu v. Ararume has settled the law on the point to the effect that a party has the right to nominate its own candidate and the issue as to

4. whether the nominated candidate is the winner of the primaries is a domestic affair and remains consigned to the realms of intra-party affairs.

D 3. The lower court failed to apply the law as stated in those decisions to the facts of this case But appears to have rather applied its own decision in Araraume v. INEC.

E 4. Onuoha v. Okafor and other similar decision is still good law in Nigeria only as qualified by Section 34(2) of the Electoral Act, 2006.

**GROUND TWO**

The lower court erred in law when it held at P. 727 of the records as follows:-

F "The issue before the trial court was not:-

'(a) whether a reason was given to INEC for substitution:

(b) whether the reason given was cogent and verifiable."

**PARTICULARS -**

G 1. The appellant's suit at the trial court challenged his unlawful substitution by the 2nd respondent (PDP) after his name had been sent to the 3rd respondent (INEC) who has since screened and cleared him.

2. Section 34 of the Electoral Act, applies by operation of law and is triggered once the conditions stated therein are satisfied.

H 3. It is the requirement of Section 34(2) Electoral Act, that such substitution must be predicated upon cogent and verifiable reasons.

4. The trial court rightly invoked Section 34 to meet the justice

of the case but the lower court sadly failed to do this.

### GROUND THREE

The lower court erred in law when it held that the appellant admitted that he supplanted the name of the 1st respondent who had been validly nominated without compliance with the relevant provisions of the Electoral Act. See P. 727 of the records. B

### PARTICULARS

1. No such admission can be found on the face of the records.

2. The trial court in arriving at the conclusion above had made recourse to paragraph 5(a) & (b) of the counter-affidavit on page 222 of the records but in doing so ignored entirely the fact that the statement in the said paragraph relates to intra-party affairs and was an admission without a basis or in error. C

3. The court having recourse to paragraph 5(a) & (b) entirely ignored the immediate proceeding averments in paragraphs 3b, c & d which were unequivocally averred. See P. 221 of the records. D

4. The averments, paragraphs 5(a) & (b) of the counter-affidavit on page 222 of the records were in any event specifically denied by the 1st respondent in his affidavit dated 18/4/07, thus rendering it unreliable and shaky at the very least. See P. 163 of the records. E

### GROUND FOUR

The lower court erred in law when it held as follows:-

“that Exhibit Senator 4 presented by the appellant was to establish fraud and fictitiousness not that the reasons given by the PDP was not cogent and verifiable before the substitution.” P 730 of the records. F

### PARTICULARS

1. Exhibits Senator 4, 5, & 6 were principally tendered by the appellant in proof of the attempts to substitute him in violation of Section 34 (2) Electoral Act. See P. 780 of the records. G

2. In addition, the appellant went on to highlight the peculiarly fraudulent nature of these documents in order to establish that the attempted substitution was enshrouded in fraud involving the use of forged documents. H

3. The appellant challenged the cogency and verifiability of

*the reasons for the substation as borne out by the record. See P. 781 of the records of appeal.*

*4. Sections 34 protects a nomination received from a political party by INEC pursuant to Sections 32 & 33 of the Electoral Act.*

**GROUND FIVE**

B *The lower court erred in law when it held that Exhibit C which is Form E.C. 4B (V) could be issued to more than one candidate, as well as Senator 3, and Senator 5. P. 722 of the records.*

**PARTICULARS**

C *1. Exhibit C which is the same as Senator 3 is a form which is normally issued by INEC to the party's candidate after screening and clearance, by INEC.*

D *2. By the provisions of Section 33 of the Electoral Act, 2006, a party can only nominate one candidate at any given time and it is an offence under this provision to nominate more than one candidate.*

*3. Senator 5 is a form which is used to substitute/withdraw a party's candidate and as such cannot be issued to more than one candidate.*

**GROUND SIX**

E *The lower court misdirected itself on the facts leading to a decision at variance with the weight of evidence before it, which said misdirection led to a miscarriage of justice.*

**PARTICULARS**

F *1. The lower court ignored the fact that the 1st respondent (Oke) failed to produce any document showing his nomination to the 3rd respondent (INEC) while the appellant was able to tender Exhibit Senator 2.*

G *2. The lower court ignored the fact that 1st respondent (Oke) failed to establish his compliance with Section 32(1) of the Electoral Act, 2006 and therefore had no foundation or basis for relying on his purported compliance with Section 32(2).*

H *3. The lower court ignored the fact that Exhibit Senator 3 (which can only be issued to one candidate after screening and clearance) was issued to the appellant by the 3rd respondent on 6th February, 2007, after he had been screened and cleared and that the appellant returned the form to INEC through his party on the 19th February, 2007,*

4. *The lower court ignored the fact that Exhibits Senator 4, 5 & 6 which were the documents used to attempt to substitute the appellant bore some patent irregularities and tell-tale signs of finding which should have affected the weight placed on them.*

5. *The lower court shut its eyes to the fact that the signature purporting to be that of the National Chairman of the 2nd respondent on Exhibits Senator 4, 5, & 6 was inconsistent and at variance with the signature of the said Chairman on other documents namely Senator 2 (P. 79 of the records), Senator 1 (P. 78), including the 1st respondent party ID Card and the letter purportedly expelling the appellant from the 2nd respondent. See pages 201 and 374 respectively of the records.*

6. *The lower court failed to note that Senator 5 does not bear any discernible date nor does it reflect that any reasons were adduced for the substitution and that essential particulars are missing even on the face of it.*

7. *The court shut its eyes to the fact that both the 2nd (PDP) and 3rd (INEC) respondents who are in support of the 1st respondent failed to produce any documents that would have assisted the court in resolving the live issue before it despite the fact that they are the sole custodians of these documents.*

8. *The court ignored the fact that all the documents tendered by the 1st respondent with the exception of Exhibits Senator 4, 5, & 6 (which was tendered by the appellant in proof of his attempted substitution) were all concerned with or associated with the PDP party primaries.*

9. *The finding and conclusion of the lower court is therefore perverse and inconsistent with the evidence before it.*

10. *A proper and holistic consideration of all the documents before it rather than an undue reliance on Exhibit Senator 4 ought to have led the court to a different conclusion.*

#### GROUND SEVEN

*The lower court erred in law when it held that “without enough information” constitutes cogent and verifiable reasons to justify the substitution of the appellant by the 1st and 2nd respondents. See P. 726 of the records.*

#### PARTICULARS

1. *No information was provided on the face of Exhibits Sena-*

tor 4, 5 or 6 and there was therefore no reason available to either the 3rd respondent or the lower court to verify for cogency.

2. The lower court went beyond Exhibits Senator 4, 5, & 6 to fish for cogent and verifiable reasons.

GROUND EIGHT

- B The lower court erred in law when it failed to take into account the full provisions of the 2nd respondents' Constitution and electoral guidelines governing the nomination of candidates for election.

PARTICULARS

- C 1. The 2nd respondents' electoral guidelines which both parties relied upon and referred to in the proceedings contain an overriding provision which is to the effect that the party has the final say on which candidate to nominate or present for election (*Onuoha v. Okafor*).

- D 2. Under this provision, the winner of the primaries is not automatically made the nominated candidate of the 2nd respondent.

3. Under the electoral guidelines and Constitution of the 2nd respondent, a person is not nominated until his name is submitted to the 3rd respondent by the 2nd respondent.

- E 4. By relying on the fact that the 1st respondent won the primaries without more, the lower court clearly failed to appreciate that the winner of a primary election does not automatically become a sponsored/nominated candidate of the party.

- F The lower court thus usurped the function of the 2nd respondent by engaging itself in the resolution of an intra-party dispute and or controversy, a dispute which the trial court rightly disassociated itself from.

GROUND NINE

- G The lower court erred in law when it descended into the arena and completely took over the case of the 1st respondent.

PARTICULARS

- H 1. The lower court held that the letter of 19/27/07, could be explained and preferred an explanation not put forward by the parties.

2. The lower court held that the appellant could not explain how his name got into the National List of candidates thus, applying a different standard of proof to the appellant's own documents.

3. *The lower court without regard to the full provisions of the PDP electoral guidelines and Constitution held that Ondo South Senatorial Seat is not a National position, but a senatorial position in the State and thus, the nomination should start at the State level.*

4. *After concurring with the trial court's finding that the appellant was initially/originally nominated, the lower court made a turn around to hold that the appellant had unlawfully and illegally and in contravention of Section 34 supplanted the 1st respondent's name.*

5. *The law is trite on the duty and role of the court in disputes between parties and the lower court abandoned this duty by descending into the arena.*

I have to point out that apart from the respondents' stating that the grounds of appeal are either of facts or mixed law and fact and thereby requiring the leave of the court, they have not gone further to demonstrate to the court why the said grounds are said to be of fact; or mixed law and fact. The actual examination of the grounds are left for the court to do so as to arrive at a decision. I hold the view that it is the duty of counsel who objects to the competence of a ground of appeal to establish the complaint, as it is settled law that, he who alleges must prove. The instant case is a clear situation where learned counsel shifts his responsibilities to the bench, which is very unfortunate.

However, I have carefully gone through the grounds of appeal together with their particulars, as reproduced in this judgment.

It should be noted that a ground of appeal is the totality of the reasons why the decision complained of is considered wrong by the party appealing or the appellant or the aggrieved party while the term, question of law or ground of law can be said to have three meanings to wit-

*"(i) a question the court is bound to answer in accordance with a Rule of Law, the process of answering of which question the court would exercise no discretion in whatever manner it is a question pre-determined and authoritatively answered by the law.*

*(ii) the second meaning is as to what the law is; an appeal in which the question for argument and determination is what the true Rule of Law is on a certain matter which question usually arises out of the uncertainty of the law.*

(iii) *the third meaning is in respect of those questions which are committed to and answered by the authority which normally answers questions of law only; that is any question which is within the province of the Judge instead of a jury is a question of law, even though in actual sense it is a question of fact. Within this meaning can be identified, the interpretation of documents, which is often a question of fact; but is within the province of the Judge. In addition to the above is the determination of the reasonable and probable cause for a prosecution in the tort of malicious prosecution, which is one of fact, but is a matter of law to be determined by the Judge - See Anoghalu v. Oraelosi (1999) 10-12 S.C. 1; (1999) 13 NWLR (Pt.634) 297.*"

On the other hand, a "question of fact" also has more than one meaning. It would mean:-

- D     *"(a) a question which is not determined by a Rule of Law;  
 (b) any question except the question as to what the law is;  
 (c) any question that is to be answered by the jury rather than the Judge, is a question of fact - See Anoghalu v. Oraelosi supra."*

E     The principles guiding the court in determining whether a ground of appeal is one of law or fact or mixed law and fact have long been settled. They are however as follows:-

- F     *"(i) Where the court is being invited to investigate the existence or otherwise of certain facts upon which the award of damages to the respondent was based, such a ground is of mixed law and fact.*

*(ii) A ground which challenges the findings of fact made by the trial court or involves issues of law and fact can only be argued with the leave of the appellate court.*

- G     *(iii) Where the evaluation of facts established by the trial court before the law in respect thereof is applied is under attack or question, the grounds of appeal if one of mixed law and fact.*

*(iv) Where the evaluation of evidence tendered at the trial is exclusively questioned, it is a ground of fact.*

- H     *(v) A ground of law arises where the ground of appeal shows that the court of trial or appellate court misunderstood the law or misapplied the law to the proved or admitted facts."*

**In the instant case, it is clear that in ground 1 , the appellant is complaining about the wrong application of the de-**

**cision and/ or principle of law set out in a case or statute to the case before it. There is also a complaint that the lower court failed to follow the decision of a higher court when it is its duty to do so. In both instances, I hold the considered view that the grounds are clearly of law particularly as it is the duty of the Judge to apply the principles of law as laid down by the Supreme Court.** B

**Looking at the other grounds of appeal and applying the principles equally to them it is obvious that grounds 2, 3, 5 & 8 are ground of law while grounds 4,6,1 & 9 are grounds of fact or mixed law and fact for which the leave of the court was needed to validate same. Since no leave of the court was first sought and obtained, it is my view that grounds 4,6,7 & 9 are incompetent and liable to be struck out. I therefore, order accordingly.** To that extent, the Preliminary Objection partially succeeds. It will however, be decided later in the judgment whether the striking out of the incompetent grounds of appeal has affected the issues formulated for the determination of the appeal. C D

Turning now to the substantive appeal, the learned senior counsel for the appellant has identified three issues for determination in the appellant's Brief of Argument. These are:- E

*“(a) Having regard to the decision of this Honourable Court in Onuoha v. Okafor, Dalhatu v. Turaki. Ugwu v. Ararume. Amaechi v. INEC, the PDP Constitution and electoral guidelines and the provisions of the Electoral Act, 2006, whether the 2nd respondent (The Peoples Democratic Party) has a right to nominate the appellant, and did in fact nominate the appellant despite the fact that the 1st respondent won the primaries? (Grounds 1, 5 & 8 of the Amended Notice of Appeal).* F G

*(b) Having forwarded the name of the appellant, whether the 2nd respondent (PDP) has provided any cogent and verifiable reason(s) to warrant the purported substitution in compliance with Section 34(2) of the Electoral Act, 2006, (Grounds 2, 4, 7 & 9 of the Amended Notice of Appeal).* H

*(c) Whether having regard to the legal requirements of the provisions of Section 32 of the Electoral Act, 2006, the 1st respondent has proved the existence of a nomination that is capable of*

*being illegally supplanted? (Grounds 3 & 6 of the Amended Notice of Appeal). ”*

On his part, learned senior counsel for the 1st respondent submitted the following issues for determination :-

- B *“(i) Whether the plaintiff’s claim is one not formulated within the province of Section 34 of the Electoral Act, 2006 and if not, whether the court below was wrong in its reasoning that trial court changed the nature of the plaintiff’s claim by determining same within the intendment of Section 34 of the Electoral act, 2006?”*
- C *“(ii) Whether in the particular circumstances of this case, plaintiff’s name was lawfully removed? and*  
*(iii) Whether the Court of Appeal was wrong in the eventual order it made?”*

D The issues formulated by learned counsel for the 2nd respondent are substantially the same as those formulated by learned senior counsel for the appellant, the alleged modification of appellant’s issue 2 notwithstanding. Learned counsel for the 3rd respondent also adopted the issues as formulated by the learned senior counsel for the appellant.

E I had earlier in this judgment posed the question whether the striking out of the incompetent grounds of appeal has any effect on the issues for determination. I do not think it has any significant effect, the basic reason, as would soon be demonstrated in this judgment being that the facts relevant to the determination of the issues are really not in dispute. It should be borne in mind that the proceedings were initiated not by Writ of Summons but by Originating Summons. Secondly, the 1st respondent did not counter-claim against the appellant.

G Before proceeding to consider the arguments for and against the appeal, it is necessary to note that the 2nd respondent filed what it considered a respondent notice of intention to contend that the decision of the court below be affirmed on grounds other than those relied on by the lower court. It was filed on 21/12/07. However,  
 H going through the Brief of Argument filed by learned counsel for the 2nd respondent no argument has been canvassed on the respondent notice which said notice is hereby deemed abandoned. I need not say more as what is termed a respondent notice is, for all intents

and purposes, an appeal against the decision of the lower court.

In arguing issue 1, learned senior counsel for the appellant referred to Section 32(1) of the Electoral Act, 2006, and submitted that the act of nomination of a candidate by a political party does not start from the winning of the party primaries but from the time the party submits its list of candidates to the 3rd respondent (INEC) and that the Electoral Act, 2006, recognizes the right of a political party to nominate its candidate for sponsorship at an election and the issues as to who won the primaries are irrelevant, relying on Ugwu v. Araraume (2007) 6 S.C. (Pt.I) 88; (2007) 12 NWLR (Pt.1048) 367 at 444 and 482. B  
C

Referring to Article 21 of the Constitution of the Peoples Democratic Party (PDP), and the dictum of Onnoghen, JSC., in Amaechi v. INEC (2007) 7-10 S.C. 172, learned senior counsel submitted that the said Article 21 gives the 2nd respondent the power to even drop a winner at its primaries and nominate another person as its candidate for an election; that the 2nd respondent acted within its Constitution in nominating the appellant instead of the 1st respondent who won the primaries. To further buttress the point, learned senior counsel cited and relied on the cases of: Onuoha. Okafor (1983) 2 SCNLR 244, Dalhatu v. Turaki (2003) 7 S.C. 1; (2003) 15 NWLR (Pt.843) 310, Ugwu v. Araraume (2007) 6 S.C. (Pt.I) 88; (2007) 12 NWLR (Pt.1048) 367 and Amaechi v. INEC (2007) 7-10 S.C. 172. D  
E

Learned senior counsel then submitted that the decisions in Onuoha v. Okafor and Dalhatu v. Turaki remain good law as this court has not overruled them and urged the court to use same in determining the appeal; that a right of a political party to nominate its own candidate being a domestic right cannot be questioned in a court of law as decided in Onuoha v. Okafor, Dalhatu v. Turaki, Ugwu v. Araraume (all supra), that the lower court was in error when it held that the decision of this court in Araraume's case was to protect a mandate obtained only by the winning of primaries when in actual fact the court held otherwise or did not make such a distinction; that the decision of the court in the said Araraume's case protects the mandate of a candidate who has not been lawfully substituted. F  
G  
H

Turning to the sub-issue as to whether the appellant was nominated by the 2nd respondent, learned senior counsel submitted that

the appellant complied with the provisions of Section 32 of the Electoral Act, 2006, in relation to nomination as evidenced in Exhibits Senator 2 at page 79 of record; Senator 3, at page 84 thereof; that Senator 2 shows compliance with Section 32(1) while Senator 3 shows appellant's compliance with Section 33(1) both of the Electoral Act, 2006; that the lower courts found as a fact that the appellant was indeed and in fact nominated by the 2nd respondent, referring to pages 245 and 722-723 of the record; that since there is no appeal against the finding it is deemed accepted by the respondents-relying on Iyoho v. Effiong (2007) 4 S.C. (Pt.II) 90; (2007) 8 SCM 21. Learned senior counsel urged the court to resolve the issue in favour of the appellant.

It is necessary to note that the 1st respondent's issue 1 is not on all fours with appellant's issue 1, though there are areas of similarities which should be our concern in the resolution of appellant's issue 1 as the 1st respondent filed no appeal against the judgment of the lower court. The issues formulated by learned senior counsel for the 1st respondent must of necessity be circumscribed within the confines of the grounds of appeal as filed by the learned senior counsel for the appellant.

However, learned senior counsel for the 1st respondent concedes at page 18, paragraph 5.5 of the Brief of Argument thus:-

*"The age-long practice in Nigeria and some other common law jurisdictions is that, the courts do not interfere in the affairs of political parties. Hence, matters raising political question as to how a political party is to be run or who should be a candidate of a political party at an election is a matter falling within the exclusive province of political parties which the courts cannot intervene in. See Onuoha v. Okafor (1983) 2 SCNLR 244 at 262-263, Dalhatu v. Turaki (2003) 7 S.C. 1; (2003) 15 NWLR (Pt.843) 310."*

Learned senior counsel however proceeded to submit that by the enactment of the Electoral Act, 2006, particularly by the provision of Section 34(2) thereof, the absolute powers hitherto enjoyed by the political parties to sponsor or nominate a candidate for any given election has been qualified as also decided by this court in the case of Ugwu v. Araraume supra at pages 484-485; that under Section 34(2) of the Electoral Act, 2006, where a political party had

complied with Section 32 of the Act, by forwarding the name of a candidate to the Independent National Electoral Commission (INEC), it can only change or substitute that name if it acted before sixty (60) days to the election and its application for substitution must contain cogent and verifiable reasons, otherwise the substitution will not be allowed, learned senior counsel further submitted. B

Referring to the questions posed by the appellant and the reliefs claimed in the Originating Summons, learned senior counsel submitted that the appellant, as plaintiff did not ask the court to determine whether or not the reasons given for his substitution were cogent and verifiable, and that the failure to do so means that the jurisdiction of the court to interpret Section 34(2) of the Electoral Act, 2006, had not been activated; that since appellant did not seek umbrage under subsection 2 of Section 34 of the Electoral Act, 2006, his case is meant to determine a political question as to the powers of the 2nd respondent, a political party, to change his name and therefore a political question which the courts have no jurisdiction to determine and urged the court to strike same out. C D

In arguing issue 1, learned counsel for the 2nd respondent submitted that the alleged Article 21 of the Constitution of the Peoples Democratic Party (PDP) vests in the National Executive Committee of the 2nd respondent power to resolve all disputes over and relating to the choice of party candidates and for confirming the names or list of names of party candidates for any election which does not include the power to drop the winner of its primaries and adopt a candidate who lost, that the issue was being raised for the first time and should be struck out; that the issue as to whether or not the National Executive Committee exercised its power in his favour is a question of fact which ought to be pleaded and proved; that the views of Onnoghen, JSC., relied upon by her learned friend is obiter; that the appellant did not win the primaries; that even if the decision of this court in Onuoha v. Okafor supra, is still good law in view of Section 34 of the Electoral Act, 2006, it does not and cannot protect the unlawful act of the appellant in supplanting the name of the 1st respondent; that it was not the 2nd respondent that nominated the appellant but the appellant who unlawfully supplanted the name of the 1st respondent. E F G H

Learned counsel submitted that the appellant was not nominated by the 2nd respondent as its candidate for the election as the appellant scored 13% of the votes cast at the primaries contrary to the requirement of Article 30(d) of the Constitution of the 2nd respondent which required him to obtain at least 50% of the votes; B that it was rather the 1st respondent who scored 75% of the votes and was duly nominated; that Exhibit Senator 2 by which the appellant claims to have been nominated is vitiated by the absence of endorsement of the National Secretary of the 2nd respondent as C required by Article 49 of the guidelines for the primary election 2006; that the appellant had not complied with the mandatory requirements of Section 32 of the Electoral Act, 2006, so he cannot be recognized as a validly nominated candidate to be afforded the requisite protection. Learned counsel urged the court to resolve the D issue against the appellant and I dismiss the appeal.

On his part, learned counsel for the 3rd respondent submitted that the appellant's issue no. 1 is different from the case he presented at the lower courts; that the case of Onuoha v. Okafor and Dalhatu v. Turaki, "remain good law only in the absence of Section 34(2) of the E Electoral Act, 2006; that *'whenever the winner of the primary election challenges the action of a political party nominating another person in his stead, whether such other person participated in the primaries or not (which issue has also been laid to rest by this court) it will no longer be the domestic affair of the political party. INEC and indeed the courts, will be entitled... inquire into the propriety of the* F *action as it involves the trampling of the constitutional rights of a citizen of the country.....'*" that Section 34(2) becomes operative the moment a political party concludes its primaries and a winner G emerges even before the candidate is formally forwarded to INEC by the party.

On the question as to whether or not the 2nd respondent in fact and in law nominated the appellant, learned counsel submitted that "it is not in dispute, the name of the appellant did find its way H into the list submitted to the 3rd respondent." that even if the appellant was initially nominated, such nomination was illegal as it did not originate from the constituency through primaries; that the 2nd respondent does not have "an unalloyed right to nominate a candidate

*other than the winner of the primaries and that the appellant was not nominated by the 2nd respondent.*" Finally, learned counsel urged the court to resolve the issue against the appellant.

**The parties agree that the law still remains that the courts do not interfere in the affairs of political parties and that matters raising political questions as to how a political party should be run or who should be its candidate at an election is strictly a matter within the exclusive jurisdiction of the political parties which the courts lack the jurisdiction to interfere.** The position was stated clearly by this court in *Onuoha v. Okafor* supra thus:-

*"Sponsorship, although it is not of the aims and objectives of the party is not a right guaranteed to the members of NPP alone under the party's Constitution or the 1979 Constitution of the Federal Republic of Nigeria or under any statute or Common Law.*

*The rights and obligations of members are set out in Article 8 of the party's Constitution (See Exhibit 3) and the right to be sponsored is not one of them. Nowhere in the 1979 Constitution is a right to sponsorship by the NPP guaranteed to the members of the party. It is only the right to contest nomination that is guaranteed by the party's Constitution...."*

**It is therefore clearly the law that a political party such as the 2nd respondent, has the unfettered right to nominate or sponsor a candidate it likes for any election and the courts have no jurisdiction to inquire into that issue except in circumstances as decided in the case of *Ugwu v. Araraume* supra and the provisions of Section 34(2) of the Electoral Act, 2006. The above exception has to do with substitution of a candidate already nominated and submitted to INEC, 120 days to the election in which case the substitution must be done 60 days to the election and the political party intending the change or substitution of the nominated candidate must give cogent and verifiable reasons before the change or substitution can be effected - See Section 34(2) of the Electoral Act, 2006, *Ugwu v. Araraume* supra. Where no cogent and verifiable reason(s) is/are given by the political party concerned, the substitution or change of candidate cannot be effected and the original candidate presented to INEC**

by the political party in accordance with the law remains the candidate for the party for the particular election - See Ugwu v. Araraume supra, Amaechi v. INEC supra.

In the instant case, the question that follows is, whether the appellant was in fact and law the original candidate of the 2nd respondent presented to the 3rd respondent as its candidate for the National Election into the Ondo South Senatorial Seat. While the appellant claims that he is, the 1st respondent claims that the appellant is not. It should be noted that the 1st respondent did not counter-claim at the trial.

I am of the view that the question as to who was the original candidate sponsored by the 2nd respondent for the election in issue, is no longer in issue at this stage of the proceedings. For instance, at page 245 of the record, the learned trial Judge found as follows:-

*"Having found and held that the plaintiff was duly nominated by Exhibits Senator 2 and 3 nomination form is stamped received by party on 19/2/07, it is from INEC, it is signed as collected."*

At page 722 to 723 of the record, the lower court held as follows:-

*"From the documents presented by the appellant and the 1st respondent, I agree with the learned senior counsel for the 1st respondent that the name of the 1st respondent was initially nominated and his name sent to INEC but the Governor and the State Chairman of the 2nd respondent (PDP) effected a change in the 1st respondent's candidacy as per Exhibit A dated 19/2/07....."*

I had earlier in this judgment reproduced the reliefs claimed by the appellant in this action which are based on the purported substitution of the appellant with the 1st respondent, in this court. There is no doubt that the instant action was sparked off by the letter of application for substitution of the appellant with the 1st respondent which letter, Exhibit Senator 4, dated 5/2/07, was written by the 2nd respondent, PDP. The letter is reproduced hereunder:-

*"February 5th, 2007.*

*Prof. Maurice Iwu,*

*Chairman,*

*INEC, Abuja.*

*SUBSTITUTION: PDP CANDIDATE FOR ONDO SOUTH*

SENATORIAL DISTRICT, ONDO STATE.

*This is to confirm that Chief (Hon.) Olusola Oke is the PDP candidate for Ondo South Senatorial District, Ondo State.*

*Chief (Hon.) Olusola Oke substitutes the earlier name for the aforementioned constituency which was submitted without enough information.* B

*This is for your necessary action.*

*Sgd.*

*Sen. (Dr.) Amadu Ali, GCON*

*National Chairman*

*Sgd.*

*Ojo Madueke, CFR*

*National Secretary.”* C

It is really a matter of common sense that you cannot substitute something for nothing. There must exist something or somebody who can be substituted. In the instant case, that somebody who existed as candidate of the 2nd respondent, irrespective of how he was nominated is the appellant as concurrently found by the lower courts which finding is clearly supported particularly by Exhibit Senator 4 supra. D E

It is my considered view that the lower court having found as earlier stated, the issue of the nomination of the appellant as candidate for the election on the platform of the 2nd respondent became a non-issue particularly as there is no appeal before this court on the said concurrent finding. The above being the position, I hold the view that all arguments of counsel touching and concerning the issue as to whether the appellant was the nominated candidate of the 2nd respondent is of no moment as the same ground to no issue. F

There is no doubt, and in fact, parties are unanimous, that the 2nd respondent's primaries for the nomination of a candidate for the election in question was won overwhelmingly by the 1st respondent having pooled 75% of the total votes cast at the primaries as against the 13% in favour of the appellant. G

However, the fact remains as concurrently found by the lower courts that despite the 1st respondent winning the said primaries it was the appellant who was nominated by the 2nd respondent to be its candidate at the said election. I hold the view that since it is within H

the province of a political party, such as the 2nd respondent, to nominate a candidate to sponsor for an election, and having nominated the appellant as found by the lower courts, the courts are without jurisdiction, on the authority of *Onuoha v. Okafor*, *Dalhatu v. Turaki* etc., to inquire into the reasons or otherwise of the nomination except where the party seeks to substitute the candidate so nominated with another candidate in which case it has to give cogent and verifiable reasons for the change. If it fails or the reason(s) is/are found not to be cogent and verifiable, the courts would have jurisdiction to interfere so as to protect the right conferred on the original candidate by virtue of the nomination. ***The nomination by the party may be by way of primary election, selection, appointment etc, or a combination of the above. Whatever the method adopted the law is that, nomination of a candidate to be sponsored by a political party remains within the absolute jurisdiction of the political parties. It is therefore my view that issue 1 be and is hereby resolved in favour of the appellant.***

On issue 2, learned senior counsel for the appellant submitted that the appellant having been properly nominated in accordance with the provisions of the Electoral Act, 2006, deserves the protection provided under Section 34(2) of the Electoral Act, 2006 and that it is the duty of the political party seeking the substitution to provide cogent and verifiable reason for the substitution; that the provisions of Section 34(2) *supra* are mandatory; that the 2nd respondent has not satisfied the requirements of the said Section 34(2); that the reason of “*without enough information*” stated in Exhibit Senator 4 amounts to no reason at all as it amounts to saying that the submission of the name of the appellant was done in “*error*” which this court has held in *Ugwu v. Araraume* and *Amaechi v. INEC*, to amount to no reasons; that the reason for the substitution must be stated on the face of the letter of application and it is nowhere stated in Exhibit Senator 4 that the reason was because the 1st respondent won the primaries; that the lower court had no business fishing for reasons for the substitution when none was stated on the application and urged the court to resolve the issue in favour of the appellant.

It is the submission of learned senior counsel for the 1st respondent while arguing his issue 1 that the appellant never submitted

for consideration of the court, nor invited the court to determine whether there were cogent and verifiable reasons to warrant the substitution of his name. In his argument of his issue 2, learned senior counsel submitted that the appellant was never nominated nor sponsored by the 2nd respondent and that the court will not allow itself to be used as an engine of fraud; that it was the 1st respondent as held by the lower court that was nominated by the 2nd respondent and that the appellant has not appealed against that finding; that the appellant has not stated that the reason given for his substitution is not cogent and verifiable; that an election is not just an event but a process and for a person to be a candidate of a party, he must have by a process emerged as the candidate of his party at the primaries and that the result of the primary is binding on the party; that the appellant manipulated the list of candidates sent to the 3rd respondent by changing the name of the 1st respondent who won the primaries, as such the appellant's name can in the circumstance be changed with that of the 1st respondent and urged the court to resolve the issue in favour of the respondents. It is the submission of the learned counsel for the 2nd respondent on issue 2 that the appellant was never validly and legally nominated by the 2nd respondent and therefore not a candidate within the meaning of Section 34(2) of the Electoral Act, 2006 and as such he is not entitled to the protection of candidates under the sections because:-

*“(a) he did not fulfill the condition precedent for nomination by the 2nd respondent in its Constitution and electoral guideline;*

*(b) he did not fulfill the condition for nomination under Section 32(1) and (2) of the Electoral Act, 2006,*

*(c) that appellant did not establish compliance with Section 33 of the Electoral Act, 2006, as he failed to establish that he was screened and cleared by the 3rd respondent; that the appellant did not seek interpretation of Section 34(2) of the Electoral Act, 2006, as no violation of the section was alleged by the appellant. Finally, learned counsel urged the court to resolve the issue against the appellant.”*

On his part, learned counsel for the 3rd respondent submitted that the appellant was never validly nominated for the election as there is no evidence of the alleged nomination as appellant did not win the primaries. Like the other respondents, learned counsel sub-

mitted that the appellant never raised the issue of whether or not a cogent and verifiable reason was given for his substitution. Learned counsel however stated in paragraph 7.17 of the 3rd respondent's Brief as follows:-

B *"We agreed with the appellant as submitted at P45 Paragraph 2.12 of his Brief of Argument "that Section 34 applied by operation of law once the condition necessary for invoking it have been satisfied and confers and vested right on a nominated candidate" but disagrees with the second arm of the submission in the said paragraph in that it is for the appellant to allege non-compliance with*  
 C *Section 34 so as to invoke its application by pleading same. Finally, learned counsel urged the court to resolve the issue against the appellant."*

D Section 34 of the Electoral Act, 2006, deals with change/ substitution of candidates for an election while Section 32 of the same Act makes provision for submission of list of candidates by political parties. For ease of reference, I will reproduce certain subsections of the two sections of the said Act.

Section 32(1) provides thus:-

E *"1. Every political party shall not later than 120 days before the date appointed for a general election under the provisions of this Act, submit to the commission in the prescribed forms the list of the candidates the party proposes to sponsor at the elections.*

F *2. The list shall be accompanied by an affidavit sworn to by each candidate at the High Court of a State, indicating that he has fulfilled all the constitutional requirements for election into that office.*

G *3. The Commission shall within 7 days of the receipt of the personal particulars of the candidate, published, same in the constituency where the candidate intends to contest the election....."*

While Section 34 provides as follows:-

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

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

*(3) Except in the case of death, there shall be no substitution*

*or replacement of any candidate whatsoever after the date referred to in subsection (1) of this section .”*

From the provisions of Section 32 of the Act supra, it is very clear that it is the duty of a political party to submit to INEC a list of candidates it intends to sponsor in any election. It is also a mandatory requirement of the Act that the list of candidates must be submitted to the Commission (INEC) not later than 120 days to the date appointed for a general election. It follows that a list of candidate submitted to INEC less than 120 days before the election is invalid in which case the party concerned would be deemed to have fielded no candidate(s) for the election(s).

In the instant case, the 2nd respondent, in accordance with the provisions of Section 32(1) submitted Exhibit Senator 2 in which the name of the appellant was included as candidate for the election. This fact has been concurrently found by the lower court(s). There is no appeal against the concurrent finding. The respondents are therefore deemed to have conceded the fact.

Unfortunately, the respondents continue to argue that the appellant was not a nominated candidate for the election but the 1st respondent whose name was never in Exhibit Senator 2. The question is, if the appellant was initially not the candidate for the election, why apply to the 3rd respondent for substitution? Secondly, if it is conceded that the appellant who was sought to be substituted as candidate for the election was never a candidate presented by the 2nd respondent to the 3rd respondent within the required 120 days for the election yet the party sought substitution of him, would that make any sense? It has also been argued that the appellant did not fulfill the necessary conditions for nomination such as swearing to an affidavit etc, as a result of which it is submitted that he was not the party's candidate. I think that the argument does not hold water at all because if the appellant was never a candidate, there would have been no need for the 2nd respondent to apply to substitute him and for the 3rd respondent to oblige. The application for substitution to my mind is a loud admission of the fact that the appellant was in fact and law, the candidate of the 2nd respondent for that election. It is settled law that what is admitted need no proof. I have had to revisit this point due to the way counsel for the respondents presented their

arguments on issues 1 & 2.

Turning to the provisions of Section 34 supra, it is clear that the section recognizes the right of a political party to change or substitute one candidate for another but under certain conditions; the conditions being:-

B *"(a) applying for the change/substitution not later than 60 days to the election;*

*(b) giving cogent and verifiable reasons for the intended change/substitution."*

C *It is very clear that the action of the appellant is directed against his substitution as a candidate for the election in question. In relief (b), the appellant specifically sought a declaration that "the substitution of the appellant's name with that of Chief Olusola Oke having been cleared by INEC was wrongful."*

D ***It has been held by this court in Ugwu v. Araraume supra, that Section 34(8) is mandatory and that it protects the right of the candidate originally presented by the political party for the election from arbitrary change by the party. It follows that for a candidate to be deprived of the sponsorship of the party there must be cogent and verifiable reason for the change or substitution. It has been argued strenuously by the respondents' counsel that the appellant did not complain against the reason for substitution given by the 2nd respondent neither did he ask for the interpretation of the said Section 34(3).***

F ***With respect, I hold the considered view that the submission is very much erroneous particularly as the appellant's case is a challenge of the substitution and by the provisions of Section 34(2), it is the duty of the party seeking the substitution***

G ***that must not only provide reasons for the change or substitution but must make sure that the reasons are cogent and verifiable otherwise, the change or substitution must fail. In the instant case, the appellant challenged his substitution on the ground that it was wrongful as claimed in relief (b) supra, so***

H ***he thereby put the burden of proving that the substitution was valid or satisfied the statutory requirements on the 2nd respondent who applied for same. The appellant need not go further to specifically challenge the reasons for the substitu-***

**tion before the court would examine same once the substitution is challenged as being wrongful.** In this case, it should be borne in mind that the fact of substitution is not in dispute. What is in dispute is whether there was a valid substitution according to law.

**Coming now to the reason given for the substitution** <sup>B</sup>  
**which is stated to be “without enough information,” I agree**  
**with the trial court and the learned senior counsel for the ap-**  
**pellant that the said reason, if it may be so considered/re-**  
**garded, amounts to no reason at all neither is it cogent and**  
**verifiable, as statutorily required. I have to emphasis the point** <sup>C</sup>  
**that Section 34(2) seeks to protect the right of sponsorship**  
**of a candidate whose name had been submitted to the 3rd re-**  
**spondent by the 2nd respondent as its candidate for any elec-**  
**tion irrespective of how he emerged as the candidate as the**  
**means by which a candidate of a political party emerges is** <sup>D</sup>  
**within the domestic affairs of the political parties in respect**  
**of which the courts lack the jurisdiction to interfere. In the**  
**instant case, it cannot be said that the 2nd respondent who**  
**conducted the primaries according to its Constitution and**  
**guidelines in which the 1st respondent emerged an overwhelm-** <sup>E</sup>  
**ing winner and even decided the appeal of the appellant against**  
**the declaration of the 1st respondent as the winner of that**  
**primaries, was “without enough information” as to the actual**  
**winner of the primaries when it sent its list of candidates with-** <sup>F</sup>  
**out the name of the 1st respondent but included the name of**  
**the appellant instead. It really does not matter how the name**  
**of the appellant got onto the list of candidates- the fact re-**  
**mains that it is there and he was duly screened for the election**  
**before the application to substitute him. In any event, the 2nd** <sup>G</sup>  
**respondent never said that the reason it was seeking the sub-**  
**stitution was because the 1st respondent, rather than the ap-**  
**pellant, won the primaries.**

The name of the appellant might have gotten into that list by dubious means but that is not the issue before the court- it is there that is why the 2nd respondent sought substitution. You cannot say that it really was not the intention of the 2nd respondent to sponsor the appellant who did not win the primaries in place of the 1st re- <sup>H</sup>

spendent who did as it is within the powers of the 2nd respondent to determine the candidate for an election and to submit his name to the 3rd respondent for necessary documentation. Once the 2nd respondent submitted the name of the appellant, that is the end of the matter as the court is without jurisdiction to inquire as to how the appellant made the list. The jurisdiction of the court is only activated when the party seeks to change or substitute the candidate.

It is however unfortunate that a winner of the primaries conducted by the 2nd respondent in accordance with its Constitution and guidelines was prevented from being submitted as candidate for the election in a democracy while the man who lost became the sponsored candidate. There is nothing to be done about that having regards to the state of the law on substitution and the facts of this case. This case presents the stark realities of the Nigerian situation particularly as it relates to the attitude of the political class which sees election into any position as a matter of life and death and is consequently ready to do anything possible to attain the ambition. The appellant in this case, a distinguished Senator, simply exploited the state of the relevant law to his advantage irrespective of the fact that he lost the primary election and his appeal against same was refused by the Peoples Democratic Party (PDP).

It should also be noted that the 1st respondent filed no action in respect of his winning of the primary election neither did he counterclaim in the instant case; though I wonder if such an action is maintainable in view of the state of the law on nomination of candidates by political parties.

In conclusion, I resolve issue 2 in favour of the appellant.

In view of the resolution of issues 1 & 2 in favour of the appellant, I am of the view that in the circumstance there is no need going further to consider issue 3 as the substance of that issue has been dealt with in the consideration of issues 1&2.

I therefore, conclude by saying that the appeal has merit and is accordingly allowed by me. The judgment of the lower court delivered on the 2nd day of October, 2007, in appeal No. CA/A/112/2007 is hereby set aside while the judgment of the trial court in Suit. No. FHC/ABJ/CS/159/2007, delivered on the 18th day of April, 2007, is hereby restored.

In the circumstance of the case, I make no order as to costs.

### **MUSDAPHER JSC**

I have read before now the judgment of my Lord, Onnoghen, JSC., just delivered with which I entirely agree. In the aforesaid judgment his Lordship has meticulously and exhaustively discussed all the issues submitted for the determination of the appeal. I respectively adopt his reasonings as mine and consequently, I too, find the appeal meritorious and I allow it. The judgment of the lower court delivered on the 2nd of October, 2007, is hereby set aside and the judgment of the trial court delivered on the 18th of April, 2007, is hereby restored. I make no order as to costs.

### **AKINTAN JSC**

This appeal arose over a dispute in respect of nomination of candidates by a political party for the contest of senatorial seat in the last general election. The appellant was the plaintiff in this case which he commenced by Originating Summons at the Federal High Court, Abuja against the respondents as defendants. His request from the court was for the court to determine: (1) whether his political party (the PDP) can substitute him with another candidate for the Ondo South Senatorial Zone in the Senatorial election? and (2) whether he could be substituted after he had been cleared by Independent National Election Commission to contest the election (INEC)? The plaintiff then sought for the following reliefs from the court:-

*“(a) A declaration that the PDP has no power to remove the name of the applicant as the candidate on the platform of PDP for the Ondo South Senatorial Seat having been cleared by INEC.*

*(b) A declaration that the substitution of the applicant’s name with that of Chief Olusola Oke having been cleared by INEC was wrongful.*

*(c) A declaration that the applicant is the party’s rightful candidate to contest for the office of senator in the Ondo South Senatorial Zone in the forth coming election.*

*(d) An order that the name of the applicant be restored as the sole candidate on the platform of the PDP for the Ondo South Sena-*

torial seat.

(e) *An order restraining the 1st respondent from further presenting or recognizing Chief Olusola Oke or any other candidate than the applicant to contest for the office of the Senatorial seat in the Ondo South Senatorial Zone in the forth coming election on the platform of the PDP.”*

An affidavit and a further affidavit were deposed to and filed in support of the Originating Summons. The facts relied on were set out therein and a number of documents were also attached to the affidavits.

The crux of the appellant’s case was that he contested for the party primaries by which the candidate to represent his political party, the PDP along with the 1st respondent and other candidates. The result of the polls was that the 1st respondent scored the highest votes. But the appellant’s name was the one that was included on the list of contestants sent by the party to the INEC. INEC, on the other hand, went ahead by screening the appellant along with the others sent to it. The appellant was eventually cleared for the contest by INEC. Then the party, probably realized that there was a mistake, wrote to INEC a letter dated February 5th, 2007. The letter reads, inter alia, as follows:-

“*Prof. Maurice Iwu*  
*Chairman,*  
*Independent National Electoral Commission,*  
*Abuja.*  
*February 5th, 2007*  
*Substitution: PDP Candidate for Ondo South Senatorial District. Ondo State.*

*This is to confirm that Chief (Hon.) Olusola Oke is the PDP candidate for Ondo South Senatorial District, Ondo State,*  
*Chief (Hon.) Olusola Oke substitutes the earlier name for the afore-mentioned constituency which was submitted without enough information.*

*This is for your necessary action.*  
*Sgd:*  
*Sen. (Dr) Amadu Ali, GCON.*  
*National Chairman.*

*Sgd.*  
*Ojo Maduekwe, CFR.*  
*National Secretary."*

The trial took place before Abimbola Ogie, J. In his reserved judgment delivered on 18/4/2007, the learned trial Judge granted all the plaintiff's five reliefs. An appeal was filed against the decision of the court to the Court of Appeal (hereinafter referred to as the court below). The court below allowed the appeal in its decision delivered on 2/10/2007. The judgment of the trial court was accordingly set aside. The present appeal is from that judgment.

The parties filed their respective Briefs of Argument in this court. Issues were formulated therein and canvassed extensively. The full facts and discussions of all the issues raised are fully set out and discussed in the leading judgment written by my learned brother, Onnoghen, JSC. I therefore need not repeat them. I have to say that I entirely agree with his reasoning and conclusions reached in the leading judgment. All I have to say, therefore, are merely by way of emphasis on some of the core issues raised in the appeal. The first point I will like to mention is the role of the court in interfering with the process of nominating candidates that would contest for office on the platform of a political party. The position of the law on that point is that the court will not normally interfere with how a political party arrives at its list of candidates forwarded to INEC as the chosen candidates for a particular contest. This stand can be justified on the ground that a political party could still take a number of factors into consideration in arriving at the final list of its candidates to be sent to INEC. Such factors may include ensuring geographical spread and other factors. Failure to act on the result of primaries, therefore may not *per se* be enforceable in the court.

The courts will, however, come in only when the provisions of specific statutes have to be interpreted. Thus, in the instant case, the provisions of Sections 32 and 34 of the Electoral Act, 2006, came up for interpretation. Section 32 of that Act makes provisions for submission of candidates to the electoral body, INEC while Section 34 sets out the procedure to be followed by a political party intending to make changes in the names of candidates submitted to INEC. Section 32(1) provides that:-

*“32 (1) Every political party shall not later than 120 days before the date appointed for general election under the provisions of this Act, submit to the Commission in the prescribed forms the list of the candidates the party proposes to sponsor at the elections.”*

Section 34 of the Act, on the other hand, provides thus:-

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

The undisputed facts of this case clearly show that the 1st respondent was the winner at the primaries election conducted by the political party to determine who should be its candidate. But it was the name of the appellant who lost at the primaries that was forwarded to INEC. There was a move to make a change. This was through the letter already reproduced earlier above in this judgment.

E The main question, therefore is whether the provisions of Sections 32 and 34 of the Electoral Act, 2006, were complied with. While the courts may ignore the activities of the political party in arriving at the name or names of its candidates sent to INEC, the courts are however bound to ensure that the relevant specific provisions of the Electoral Act are complied with. Thus, in the instant case, the court is bound to ensure, for example, that the list was sent to INEC not later than 120 days before the date appointed for the general election as prescribed in Section 32 (1) of the Electoral Act. Similarly, the court F is bound to ensure that any request for substitution of any name already sent complies with the provisions of Section 34 of the same Act. G

In exercising that function in this case, there is no doubt that while the provisions of Section 34(1) of the Act, requiring the change H or substitution of a candidate had to be made not later than 60 days to the election might have been complied with, such can not be said in respect of Section 34(2) which prescribes that any application for such substitution *“shall give cogent and verifiable reasons.”* In the

letter by which the request for the substitution was made (already reproduced above in this judgment) no reason was given for making the request. The provisions of the subsection is mandatory and the conditions prescribed are two-folds, namely: (a) to give cogent reasons; and (b) the said cogent reasons must be verifiable. There was a total failure to give cogent reason in this case. It follows also that there was nothing to verify since no reason was given. The mandatory provisions of the Act was therefore not complied with and as such the attempt to make the change is null and void. B

In the result and for the reasons I have given above and the fuller reasons given in the afore-mentioned leading judgment written by my learned brother, Onnoghen, JSC., which I also adopt, I allow the appeal and make similar consequential orders as are made in the leading judgment, including that on costs. C

D

### MOHAMMED JSC

The judgment just delivered by my learned brother, Onnoghen, JSC., was read by me before today. I am in complete agreement with him that there is merit in this appeal which consequently ought to be allowed. I only want to add one or two words on some of the issues raised for the sake of emphasis. E

The appellant who was the plaintiff was at the Abuja Federal High Court by Originating Summons seeking the following reliefs- F

*"(a) A declaration that the Peoples Democratic Party (PDP) has no power to remove the name of the applicant as the candidate on the platform of PDP for the Ondo South Senatorial seat, having been cleared by INEC.*

*(b) A declaration that the substitution of the applicant's name with that of Chief Olusola Oke having been cleared by INEC was wrongful.*

*(c) A declaration that the applicant is the party rightful candidate to contest for the office of Senator in the Ondo South Senatorial Zone in the forthcoming election.* H

*(d) An order that the name of the applicant be restored as the sole candidate on the platform of the PDP for the Ondo South Senatorial seat.*

*(e) An order restraining the 1st respondent from further presenting or recognizing Chief Olusola Oke or any other candidate than the applicant to contest for the office of the Senatorial seat in the Ondo South Senatorial Zone in the forthcoming election on the platform of the PDP.”*

B After considering the affidavit, a number of further affidavits in support of the plaintiff's Originating Summons, a number of counter-affidavits filed by the defendants/respondents in their defence to the claims in the Originating Summons and several documents exhibited  
C by the parties in their affidavit, further affidavits and counter-affidavits, the learned trial Judge came to the conclusion that the appellant as plaintiff was successful in establishing his case against the respondents/ defendants and granted all the reliefs sought in its judgment  
D 2007. In that judgment, the learned trial Judge declared the appellant as the candidate for the senatorial seat in Ondo South Senatorial Zone in the election scheduled on 21st April, 2007, on the platform of the PDP , the 2nd respondent. The 1st and 2nd respondents who were the 1st and 3rd defendants at the trial court were not happy  
E with that judgment and therefore appealed against it to the Court of Appeal, Abuja Division where the appeal was allowed on 2nd October, 2007, the judgment/orders of the trial court in favour of the appellant were set aside resulting in a victory for the 1st respondent who was declared the candidate for the 2nd respondent in the Senatorial election held on 21st April, 2007, for the Ondo South Senatorial Zone in Ondo State. Dissatisfied with that judgment against him,  
F the appellant has now appealed to this court. The appellant's Amended Notice of Appeal filed on 14th November, 2007, contains 10 grounds  
G of appeal against the judgment of the court below. The relief sought by the appellant is for an order setting aside the judgment of the lower court in its entirety and restoring and affirming the judgment of the trial Federal High Court, Abuja, delivered on 18th April, 2007. In the Brief of Argument filed by the learned senior counsel for the  
H appellant, the following three issues for determination were formulated from the 10 grounds of appeal :-

*“(a) Having regard to the decision of this Honourable Court in Onuoha v. Okafor, Dalhatu v. Turaki, Ugwu v. Araraume. Amaechi*

*v. INEC, the PDP Constitution and Electoral Guidelines and Act, 2006, whether the 2nd respondent (The Peoples Democratic Party) has a right to nominate the appellant and did infact nominate the appellant despite the fact that the 1st respondent won the primaries?*

(b) Having forwarded the name of the appellant, whether the 2nd respondent (PDP) has provided any cogent and verifiable reason(s) to warrant the purported substitution in compliance with Section 34(2) of the Electoral Act, 2006?

(c) Whether having regard to the legal requirements of the provisions of Section 32 of the Electoral Act, 2006, the 1st respondent has proved the existence of a nomination that is capable of being illegally supplanted?"

In the respondent's Brief filed for 1st respondent by his learned senior counsel, three issues were also identified for the determination of the appeal if the Preliminary Objection to 9 out of the 10 grounds of appeal filed by the appellant is not successful to throw out the appeal. The three issues are:-

"(i) Whether the plaintiff's claim is one formulated, within the province of Section 34 of the Electoral Act, 2006 and if not, whether the court below was wrong in its reasoning that trial court changed the nature of the plaintiff's claim by determining same within the intendment of Section 34 of the Electoral Act, 2006?"

(ii) Whether in the particular circumstances of this case, plaintiff's name was lawfully removed? and

(iii) Whether the Court of Appeal was wrong in the eventual order it made?"

In their respective respondent's Briefs of Argument, learned counsel to the 2nd and 3rd respondents also seemed to have agreed with the learned senior counsel to the appellant that there are indeed three issues for determination in this appeal. Although a number of preliminary matters were raised by the respondents in the form of respondent's notice by the 2nd respondent and Preliminary Objections to the appellant's grounds of appeal filed by the 1st and 3rd respondents, I entirely agree with the way and manner these preliminary matters were tackled and resolved in the leading judgment of my learned brother, Onnoghen, JSC.

The complaint of the appellant in his first issue is whether the

2nd respondent, the Peoples Democratic Party had a right to nominate the appellant and did infact nominate him inspite of the fact that the 1st respondent was the winner of the primaries. Learned senior counsel for the appellant has answered the question raised in this issue in the affirmative, stressing that the decisions of this court in the recent cases of Ugwu v. Araraume (2007) 12 NWLR (Pt.1048) 367 and Amaechi v. INEC (2007) 7-10 S.C. 172, did not overrule the decisions in Onuoha v. Okafor and Dalhatu v. Turaki, that the right of a political party to nominate its own candidate for any election, is a domestic right of the party which cannot be questioned by a court of law. To that extent, learned counsel observed that the court below was in error to have held that the decision of this court in Ugwu v. Araraume was only to protect the right of a candidate who emerged a winner of primaries of a political party and not the right of a candidate who has not been lawfully substituted. In his reaction on the right of a political party to nominate a candidate to contest election on the platform of a political party under the Electoral Act, 2006, learned senior counsel for the 1st respondent is in full agreement with the learned senior counsel for the appellant that the cases of Onuoha v. Okafor (1983) 2 SCNLR 244 at 262 - 263 and Dalhatu v. Turaki (2003) 7 S.C. 1; (2003) 15 NWLR (Pt.843) 310, still remain good law on the subject.

Learned senior counsel to the 2nd respondent, the political party whose right to nominate a candidate for election under the Electoral Act is being examined in this issue, surprisingly too, has a different view on the question. It is the view of the learned counsel to the 2nd respondent that the 2nd respondent, as a political party, does not have an unalloyed right to nominate a candidate other than the winner of the primaries.

The stand of the 3rd respondent in its Brief of Argument on this issue, however, is that the issue was not canvassed in the two courts below but is being raised for the 1st time in this court. All the same, its learned counsel is of the view that the implication of the decision of this court in Amaechi's case is that Onuoha v. Okafor and Dalhatu v. Turaki, remain good law only in the absence of Section 34(2) of the Electoral Act, 2006, and the PDP Constitution and Electoral Guidelines.

It is quite clear from the stand taken by the learned senior counsel to the appellant and the 1st respondent and learned counsel to the 3rd respondent on this issue that they are in agreement that inspite of the recent decisions of this court in Ugwu v. Araraume and Amaechi v. INEC, the decisions of this court in Onuoha v. Okafor and Dalhatu v. Turaki, still remain good law on the right of a political party to nominate a suitable candidate to contest any election under its platform. Furthermore, that right as contained in the previous or repealed Electoral Acts, is still being preserved by Section 32 of the Electoral Act, 2006, which states-

*“32 (1) Every political party shall not later than 120 days before the date appointed for a general election under the provisions of this Act, submit to the Commission the prescribed forms the list of candidates the party proposes to sponsor at the election.*

*(2) The list shall be accompanied by an affidavit sworn to by each candidate at the High Court of a State, indicating that he has fulfilled all the constitutional requirements for election into that office.*

*(3) The Commission shall, within 7 days of the receipt of the personal particulars of the candidate, publish same in the constituency where the candidate intends to contest the election.*

*(4) Any person who has reasonable grounds to believe that any information given by a candidate in the affidavit is false may file a suit at the High Court of a State or Federal High Court against such person seeking a declaration that the information contained in the affidavit is false.*

*(5) If the court determines that any of the information contained in the affidavit is false the court shall issue an order disqualifying the candidate from contesting the election.*

*(6) A political party which presents to the Commission the name of a candidate who does not meet the qualifications stipulated in this section, commits an offence and is liable on conviction to a maximum fine of N500,000.00.*

*(7) Every political party shall not later than 14 days before the date appointed for a bye-election by the Commission submit the list of candidates from the party for the bye-election.”*

The provisions of subsection (1) of this Section 38 of the Elec-

toral Act, 2006, is quite plain and unambiguous. In short, the section has given any registered political party in Nigeria eligible to contest any election under the Act, the right to determine the candidate that party wishes to sponsor to contest the election. That right is exercised by submission of the list of candidates the political party wishes to  
 B contest the election under its platform, to the Independent National Electoral Commission, the body charged with the responsibility of conducting the election under the Constitution and the Electoral Act. Therefore, how a political party arrives at the list of candidates to be  
 C submitted to INEC, is entirely its internal affairs, particularly taking into consideration the heavy responsibility heaped on it by the law in subsection (6) of Section 38 of the Act, of ensuring that all the candidates contained in the list submitted by a political party meet the requirements of the law at the expense of sanction to any political  
 D party which submits names of candidates who do not meet the requirements. It is certainly not the law, nor was it the decision of this court in *Ugwu v. Araraume* and *Amaechi v. INEC*, as argued by the learned counsel to the 2nd respondent, that a political party does not have an unalloyed right to nominate a candidate other than the win-  
 E ner of the primaries conducted by such a political party. In my view, a political party is not bound to submit the name of a candidate who emerges the winner of the primaries conducted by it in its list of candidates who does not meet the qualifications stipulated under the  
 F law. The 2nd respondent is therefore not prohibited by the provisions of the Electoral Act, 2006 or any decision of this court, from including the name of the appellant who was not the winner of the primaries conducted by it, on the list of its candidates to contest the election conducted on 21st April, 2007.

G On the question of whether or not infact the name of the appellant was on the initial list of candidates submitted to INEC to contest the election under the platform of the 2nd respondent, both courts below answered this question in the affirmative. The finding of the trial Federal High Court in its judgment on the question is at  
 H pages 355-356 where the learned trial Judge said-

*"Be that as it may from the affidavit and documents certified, attached it stands clear that plaintiff was originally nominated and sponsored by PDP wrongly or rightly, it is what the 1st defendant*

*party sent to INEC from beginning in compliance with Section 32(1) of Electoral Act, and INEC has not -discharged the burden by documents nor the party by a second corrected letter which it claims was corrected as contained in its counter-affidavit. Even if the above did not exist, the issue of signature and nomination is in compliance with Section 32 of Electoral Act."* B

As for the court below, its finding on the original submission of the name of the appellant as candidate of the 2nd respondent to INEC, can be seen at pages 722-723 of the record where that court found from the same record of appeal before it thus -

*"With the exhibits and documents put forward by the 1st respondent, Exhibit A the letter dated 19th February, 2007, shows that the appellant was the candidate put forward by the 2nd respondent to the 3rd respondent, having substituted the 1st respondent."* C

The appellant in this court was the 1st respondent at the court D below who was found to have been substituted as the candidate for the 2nd respondent by the appellant in that court who is now the 1st respondent. This finding no doubt confirms that the name of the appellant was the original name submitted to the 3rd respondent as the candidate to contest the Senatorial seat of Ondo South Senatorial Zone in the election, before the alleged substitution of his name. E This position was further re-emphasised by the court below on the same pages 722-723 when it said:-

*"From the documents presented by the appellant and the 1st F respondent, I agree with the learned senior counsel for the 1st respondent that the name of the 1st respondent was initially nominated and his name sent to INEC but the Governor and the State Chairman of the 2nd respondent (PDP) effected a change in the 1st respondent's candidacy per Exhibit A dated 19th February, 2007, to G the National Secretary of the 2nd respondent (PDP) after Exhibit Senator 4 had been written on 5th February, 2007, to the National Chairman of 3rd respondent INEC by the National Party Executives Chairman and Secretary. The said Exhibit Senator 4 confirm that H the appellant was the PDP candidate for Ondo South Senatorial District Ondo State. It is clear in the letter that the appellant substitutes the earlier name for the constituency which was clearly stated to have been 'submitted without enough information' see letter of 5th Feb-*

*ruary, 2007, as reproduced.*”

The picture is quite plain from the concurrent findings of the two courts below from the affidavits and counter-affidavits evidence adduced by the parties at the trial court that for whatever reasons which were not disclosed, inspite of the fact that the appellant was not the winner of the primaries conducted by the 3rd respondent, and his appeal to contest his loss at the primaries was dismissed, the 2nd respondent all the same in exercise of its right under Section 32(1) of the Electoral Act, 2006, decided to forward the name of the appellant to INEC, the 3rd respondent as its candidate to contest the election from Ondo South Senatorial District leaving behind or ignoring the name of the 1st respondent who actually won the primaries. This action of the 2nd respondent, in my view, is quite in line with and in compliance with the provisions of Section 32 of the Electoral Act earlier quoted in full in this judgment. This is because the circumstances surrounding the dropping of the name of the 1st respondent as the candidate of the 2nd respondent, is entirely the internal affairs of the party which has the sole responsibility under the law to field a suitable and qualified candidate who met the requirements of the law, in order to avoid sanctions under Section 32(6) of the Electoral Act.

However, where the snag arises as happened in the present case, is where for some reasons the 2nd respondent as a political party decides to effect a change in the list of candidates already submitted to INEC in compliance with Section 32 of the Electoral Act as candidates being sponsored by the 2nd respondent to contest the election. It is then and only then, that the provisions of Section 34 of the Electoral Act, 2006, would come into play. This section states-

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

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

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

The question is whether the 2nd respondent in effecting its’

change or substitution of the appellant with the 1st respondent as its candidate for the 21st April, 2007, election, complied with the provisions of the above Section 34 of the Electoral Act. While the learned trial Judge, Ogie, J., was of the view that the substitution was not done in compliance with the section of the law, the court below per Uwa, JCA., was of the contrary view holding that the substitution was in order. My task therefore in this judgment, is to determine which of the two courts below is right. B

In carrying out this task, it is necessary to examine the letter of application for the substitution written to the 2nd respondent to the 3rd respondent. The letter dated 5th February, 2007, which was in evidence at the trial court marked or referred to as Exhibit A reads- C

*“February 5, 2007,*

*Prof. Maurice Iwu,*

*Chairman,*

*INEC.*

*Abuja.*

*SUBSTITUTION: PDP CANDIDATE FOR ONDO SENATORIAL DISTRICT, ONDO STATE.*

*This is to confirm that Chief (Hon) Olusola Oke is the P.D.P candidate for Ondo South Senatorial District, Ondo State.* E

*Chief (Hon.) Olusola Oke substitutes the earlier name for the aforementioned constituency which was submitted without enough information.*

*This is for your necessary action.*

*Sgn.*

*Sen. (Dr.) Ahmadu Ali, GCON*

*National Chairman.*

*Sgn.*

*Ojo Maduekwe, CFR.*

*National Secretary.”*

The only reason given by the 2nd respondent to the 3rd respondent for wanting to effect the change or substitution of the appellant, though not specifically named in the letter, with the 1st respondent as the PDP candidate for Ondo South Senatorial District, Ondo State for the election, was that the name of the appellant earlier submitted was done “*without enough information.*” I am of the view that the reason that the appellant’s name was submitted without enough information, cannot meet the requirements of Section 34(2) of the Electoral Act, that cogent and verifiable reasons must be H

given in line with the decisions of this court in ugwu v. Araraume (2007) 6 S.C. (Pt.I) 88; (2007) 12 NWLR (Pt.1048) 367 and Amaechi v. INEC & Ors. (2007) 7-10 S.C. 179; (2007) 5 NWLR (Pt.1080) 999, in which this court refused to accept reasons that the names of the candidates earlier submitted to INEC, was done in error, as cogent and verifiable reasons. The learned trial Judge in the present case was therefore right in refusing to accept the reason for the substitution that the appellant's name was submitted without enough information, as cogent and verifiable reasons within the requirements of Section 34(9) of the Electoral Act.

Although the court below regarded the letter written to the Secretary of the PDP, the 2nd respondent by the Governor of Ondo State and the State Chairman of the PDP 2nd respondent, requesting for the substitution of the appellant with the 1st respondent giving reasons for their request, that letter, did not accompany the 2nd respondent's letter of 5th February, 2007, to the 3rd respondent to supplement the reasons for the substitution. The court below did not realise that in as much the Governor's letter to the 2nd respondent could be regarded as containing cogent and verifiable reasons for wanting to effect the substitution, that letter which was written on 19th February, 2007, was not in existence to be taken into account by the 2nd respondent when it forwarded the name of 1st respondent to the 3rd respondent to substitute the appellant as candidate on 5th February, 2007, the date application for the substitution was written.

In the result, I am fully with my learned brother, Onnoghen, JSC., in his leading judgment that this appeal has merit. Accordingly, the appeal is hereby allowed, the judgment of the court below of 2nd October, 2007, is hereby set aside and replaced with the judgment of the trial court of 18th April, 2007, which is hereby affirmed. With this judgment, the appellant, Senator Hosea Ehinlanwo remains the candidate of the 2nd respondent for the Ondo South Senatorial District of Ondo State in the election conducted on 21st April, 2007, and is entitled to be accorded the benefit of the result of that election. I also make no order on costs.

**MUNTAKA-COOMASSIE JSC**

I have had a preview of the judgment just delivered by my learned brother, Onnoghen, JSC. My Lord has made an in-depth research in this appeal. Consequently, his Lordship has adequately covered all the points and competently thrashed out all the issues presented to us. It would serve no meaningful purpose for me to merely repeat what his Lordship has said. It appears I have nothing more useful, to add. That is the more reason why I should just agree. It is clear to me that the stance taken by my Lord is unassailable and correct in law with tremendous respect. Appeal, I agree, has merit and is consequently allowed by me. There shall be no order as to costs.

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