

SUPREME COURT OF NIGERIA
11TH JULY, 2008. SC. 208/2007
CORAM:- N. TOBI, G. A. OGUNTADE, M. MOHAMMED,
F. F. TABAI, M. S. MUNTAKA-COOMASSIE, JJSC

CHARLES CHIWENDU

ODEDO

..... APPELLANT

AND

1. INDEPENDENT NATIONAL

ELECTORAL COMMISSION RESPONDENTS

2. PEOPLES DEMOCRATIC PARTY (PDP)

OBINNA CHIDIOKA PARTY TO BE HEARD

APPEALS - Preliminary objection - Manner of raising - Is not in subtlety but to be conspicuously titled - The objection here flowing straight from the High Court - Supreme Court lacks jurisdiction (H1)

APPEALS - Issues - Procedure - Contention that some issues did not flow from any ground of appeal - Is not well founded - Issue of application of s. 22 Supreme Court Act - Is a matter of course (H2)

APPEALS - Briefs - Relevance - Multiplicity - Allegation that there are 3 Briefs - May only justify striking out irrelevant ones - As to strike out appellant's entire Briefs will be clear injustice (H3)

ACTIONS - Academic suit - Or issue - Definition - Includes - A suit that is of no practical value to plaintiff even if he succeeds - An issue that does not relate to live issues in the litigation (H4)

ELECTIONS - Jurisdiction - Pre-election matters - Party primary election dispute - Does not fall within jurisdiction of election tribunal - Vide any provision of the Constitution, and the Electoral Act (H5)

ELECTIONS - Party primaries - Substitution of a candidate - On the ground that his name was sent "without enough information" - Does not comply with the mandatory provisions of s. 34 (1) & (2) Electoral Act 2006 (H6)

STATUTES - Interpretation & Construction - Elections - Party primaries - Substitution of a candidate - On the ground that his name was sent "without enough information" - Does not comply with the mandatory provisions of s. 34 (1) & (2) Electoral Act 2006 (H6)

ELECTIONS - Waiver - Party primaries - Guidelines that provide for winning 50% of the total votes - Is deemed waived in this case (H7)

SUPREME COURT - Powers - Rehearing a case as if court of first instance - Vide s. 22 Supreme Court Act - What to consider includes elimination of further delay in the interest of justice - Election cases need invocation of this power (H8)

FACTS

The appellant, a member of the Peoples Democratic Party (PDP), contested the primary elections along with 10 others. He sought the party's nomination as its candidate for the Idemili North and South Federal Constituency in Anambra State. Out of the eleven candidates that contested the primaries, appellant topped the list by scoring 397 votes while Mr. Chidioka scored 6 votes and was 2nd to the last on the list. The PDP submitted appellant's name to the INEC (Independent National Electoral Commission) which published his name as a person cleared to contest the Federal House of Reps election. Few weeks to that election, 2nd respondent (PDP) caused the 1st respondent (INEC) to substitute appellant's name with that of Mr. Chidioka (party to be heard). The reason given by the PDP for the substitution was that appellant's name was submitted to the INEC "without enough information."

Consequently, appellant filed an application before the Enugu Federal High Court (an unusual procedure), seeking JUDICIAL REVIEW of the act of INEC. Apart from seeking for an order of prohibition and an order of mandamus, appellant sought a declaration that the substitution of his name with that of Chidioka is unconstitutional, null and void for not complying with s. 34 of the 2006 Electoral Act. He relied on 21 grounds, and a supporting affidavit. The trial court felt that the substitution complied with the Law and dismissed the

motion. Appellants appeal to the Court of Appeal was also dismissed vide a majority decision. Still dissatisfied, Appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal in its if majority judgment was right in holding that the Appellant’s appeal in these circumstances was a mere academic exercise.

2. Whether the Appellant is not entitled to judgment on the merits of the case

3. Whether in the circumstances of this appeal, this is not a proper case in which the Supreme Court should exercise its powers under section 22 of the Supreme Court Act to hear the case on its merit in view of the failure of the Court of Appeal to do so in its majority judgment”

HELD (Unanimously allowing the appeal per **TOBI JSC**, but majority opinion refused to nullify the election and held that appellant is deemed the winner)

APPEALS - Preliminary objection - Manner of raising

1. It appears that the 2nd respondent has raised a preliminary objection on Ground 3 of the Notice of Appeal. That is not the way a preliminary objection is raised in a Brief. Learned counsel for the 2nd respondent, suddenly said in paragraph 6.25 that grounds of appeal must arise from the judgment of the court and cannot be based on just the impression of the appellant on what the court might have held. He thereafter submitted in paragraph 6.28 that since Ground 3 raised at the court below did not arise from the judgment of the trial court the issue distilled therefrom as well as the argument which ensued is incompetent and should be discontinued and struck out.

A preliminary objection cannot be raised in that subtle and uneventful way. Learned Senior Advocate for the appellant is correct when she submitted in her Reply Brief that the preliminary objection was improperly raised. The practice, and the accepted practice for that matter, is that preliminary objection in a Brief is raised in a conspicuous title in the name and style of “PRELIMINARY OBJECTION”. Thereafter the grounds and the arguments of or for the objection are stated and argued in the Brief.

This court has no jurisdiction to hear an appeal straight from the High Court. As the ground of appeal complained of is on the judgment of the High Court and not on the judgment of the Court of Appeal, this court cannot go into it. The preliminary objection therefore fails. (pp. 2912 C/2913 C)

APPEALS - Issues - Procedure

2. Learned counsel for the 1st respondent tried to fault the procedure where the learned Senior Advocate for the appellant argued Issues 2 and 3 together. To learned counsel, the two issues are not distilled from any ground of appeal. I entirely agree with learned Senior Advocate for the appellant that Issue No.2 is distilled from Ground 2.

Issue No.3 which urges this court to exercise its power under section 22 of the Supreme Court Act cannot be formulated as a ground of appeal. By the section, this court is empowered to make any order necessary for the determination of the real question in controversy in the appeal as if the matter is prosecuted in the Supreme Court as a court of first instance. By the section, this court can make or give an order that the courts below can make without sending the case back to them for a retrial or rehearing. There cannot be a ground of appeal on the section. The section can only be invoked if the proceedings in the court below justify its invocation. And relevantly in this appeal, if this court agrees with the appellant on Issues 1 and 2, then it can grant Issue 3 as a matter of course. (p. 2913 D)

APPEALS - Briefs - Relevance - Multiplicity

3. Contrary to the submission of learned Senior Advocate for the appellant, I see in the case file only one Brief filed by Mr. Arthur Okafor for the 2nd respondent; not two. Although there is some confusion in the filing of the Briefs as they relate to Mr. Emonye Adekwu and Mr. Arthur Okafor, the confusion is not enough to strike out the Brief as submitted by learned Senior Advocate. If her submission that there are three Briefs is correct the only reasonable thing to do is to strike out the irrelevant one and make use of the actual or proper Brief. The answer is not to strike out all the Briefs. That is clear injustice and this court will not be a party to it. (p. 2914 B)

Academic suit - Or issue - Definition

4. In *Plateau State v. Attorney General of the Federation* (2006) 3 NWLR (Pt.967) 346, I said at page 419:

"A suit is academic where it is merely theoretical, makes empty sound, and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situation of human nature and humanity."

An academic issue or question is one which does not require answer or adjudication by a court of law because it is not necessary to the case on hand. An academic issue or question could be a hypothetical or moot question. An academic issue or question does not relate to the live issues in the litigation because it is spent as it will not enure any right or benefit on the successful party. (p. 2914 D)

Jurisdiction - Pre-election matters

5. It is not my understanding of section 285 (1) (a) of the Constitution that the sub-paragraph can accommodate pre-election matter. It is rather my understanding that the sub-paragraph provides for the determination whether any person has been validly elected as a member of the National assembly. In my humble view, the sub-paragraph provides for election matters which give rise to post election and not pre-election proceedings. As the reliefs sought by the appellant are on pre-election matters, section 285 (1) (a) could not avail him as that sub-paragraph does not provide for litigation arising from party primaries. And that was what this court dealt with in Amaechi, what the majority decision of the Court of Appeal ignored.

I should point out that the appellant did exactly what Mr. Nzelu submitted in paragraph 4.2-5 of the Brief of the party to be heard. It is because the matter or dispute involved pre-election issues that the action was filed at the Federal High Court. And so, why the furore or storm, I ask?

Mr. Okafor, after taking section 285 (1) (a) of the Constitution referred the court to section 69 (c) of the Electoral Act, 2006 and submitted that the subsection applied to the case. With respect, the subsection which provides for the power of the Returning Officer to declare scores of candidates after election, does not apply to this case

because the appellant did not contest votes at the election but is contesting the primaries. Counsel also relied on section 146 (2) of the Electoral Act. Again the subsection does not apply as it deals with election and return conducted under the Electoral Act. I therefore do not agree with the submission of learned counsel that the Court of Appeal will be eroding the jurisdiction of and indeed be preempting the election tribunal by making an order which may have effect of making a determination within the tribunal’s jurisdiction. The reliefs sought by the appellant are clearly outside the jurisdiction of the Election Tribunals, as they are predicated on pre-election matters. I seem to be repeating myself. Mr. Okafor also relied on section 145 (1) (a) to (d) of the Electoral Act, 2006. Again, the subsection does not apply because it provides for instances or grounds when an election may be questioned. (p. 2916 E)

D

Statutes - Party primaries - Substitution of a candidate

6. Is it a cogent or verifiable reason that the appellant’s name was sent “*without enough information*”? If at the time, the name was sent, the PDP did not know the reasons for sending the name of the appellant, could the party not have given the reasons in Exhibit B. What is the meaning of “*without enough information*” in Exhibit B. In my view, the letter (Exhibit B) did not comply with the provision of section 34 (1) and (2) of the Electoral Act.

Where a law such as the Electoral Act, 2006 provides for A and a party does B, a court is entitled to hold that the party has not complied with the law, and the court has the jurisdiction to decide on the consequences of the non compliance by the party. This is clearly demonstrated in the interpretative jurisdiction of the court, and no counsel, not even Mr. Nzelu, can deprive the court of the exercise of that jurisdiction. It is not the practice of the draftsman to provide specifically a clause of sanction in every non penal legislation or statute in the way Mr. Nzelu argues.

And what is more, the submission of Mr. Nzelu underrates the time tested, time honoured and time proved principle of construction of statute by drawing the cleavage or dichotomy between the words “*shall*” and “*may*” as construing a mandate, obligation or command and permissiveness or discretion respectively. I should men-

tion that the two subsections provide for the peremptory “*shall*”. The courts will not wait for Mr. Nzelu’s provision of punishment to construe the consequence of non compliance with the section. Unfortunately for Mr. Nzelu and his client, this court will follow its earlier decision in Ugwu v Ararume, supra and hold that section 34 (1) and (2) of the Electoral Act, 2006 was not complied with and the consequence of non compliance as in Ugwu v Ararume automatically follows. (pp. 2920 H/2924 H) B

ELECTIONS - Waiver - Party primaries

7. I have taken the pains to reproduce Exhibits 3a and 4 to make a point and it is this. If the PDP Guidelines provide for 50% win of the total votes cast at the primaries, it is my view that by Exhibits 3(a) and 4, the particular guideline has been waived. This is because Exhibit 3a congratulated the appellant and Exhibit 4 named him as the candidate. Equity will not allow the respondents to hold the appellant to ransom. Waiver, a very loud principle of equity will certainly come to the rescue of the appellant. (p. 2924 B) C

SUPREME COURT - Powers - Rehearing a case

8. The Supreme court can, under the section exercise full jurisdiction over a case and deal with it in the same way a trial Judge would have done. In determining whether the conditions surrounding an appeal before the Supreme court are conducive to the exercise of its general power under section 22 of the Supreme Court Act as if the proceedings had been instituted and prosecuted before it as a court of first instance, the court will consider the followings: (a) The availability before it of all the necessary materials on which to consider the request of the party. (b) The length of time between the disposal of the action in the court below and the hearing of the appeal at the Supreme Court, (c) The interest of justice to eliminate further delay in the hearing of the matter and minimize the hardship of the party. E

By section 22, the Supreme Court has the power to determine the real issue in controversy and that in this appeal is, whether section 34 (1) and (2) of the Electoral Act, 2006 was complied with in the substitution of the appellant with Mr. Obinna Chidioka. A rehearing on the part of the Supreme Court means a rehearing on the F
G
H

Record as if the proceedings had been instituted in the court. If any set or category of case needs the application or invocation of section 22 power of the Supreme Court, it is election cases, because of the fact that they are very much liable to time in the sense that time is their very essence. (p. 2926 A/E)

B

NOTABLE POINTS OF INTEREST

TOBI JSC

1. Wrongful substitution of party candidate - Nullification of the election is ordered

C

In the light of the fact that Obinna Chidioka is enjoying a term in the House of Representatives and the appellant is languishing at home, it will meet the justice of this case by invoking its section 22 power, and that is what I want to do now, particularly when there are enough materials to do so.

D

I have come to the conclusion in this judgment that the substitution was not in compliance with section 34 (1) and (2) of the Electoral Act, 2006. And the consequence of the non compliance is a nullification of the purported election of Obinna Chidioka to the House of Representatives. The purported election based on a primary in which Obinna Chidioka scored only 6 votes is hereby nullified. In his place, the appellant who scored the highest votes of 397 is declared competent to contest the election in the constituency. And I declare the appellant to contest the election on the platform of the PDP in respect of the Idemili North and South Federal Constituency, Anambra State. This is a consequential order flowing from the reliefs sought by the appellant. (p. 2927 B)

E

F

OGUNTADE JSC

2. Nullification of the election is wrong - Appellant is deemed winner
And as to the propriety of upholding the case of Amaechi which is similar to the appellant's situation in this case, I said:

H

"In view of the above provisions, there can be no doubt that there is plenitude of power available to this Court to do (that) which the justice of the case deserves. It enables a court to grant consequential reliefs in the interest of justice even where such have not been specifically claimed. Having held as I did that the name of

Amaechi was not substituted as provided by law, the consequence is that he was the candidate of the PDP for whom the party campaigned in the April 2007 elections not Omehia and since PDP was declared to have won the elections, Amaechi must be deemed the candidate that won the election for PDP. In the eyes of the law, Omehia was never a candidate in the election much less the winner.” B

In the instant appeal, the conclusion I arrive at is the same. The 3rd respondent (or Party to be heard) was improperly substituted for the appellant. The 3rd respondent never won the primaries of the PDP for the election. The appellant and not the 3rd respondent must C be deemed the candidate of the PDP who won the election. I am certainly unable to support the conclusion of my learned brother Tobi JSC in the lead judgment that the election on 21-4-07 be nullified. The judgment of this Court in *Amaechi v. INEC & Ors.* is binding on me as it has not been overruled. (p. 2929 D) D

MOHAMMED JSC

3. Cogency of a reason not stated in substitution letter cannot be looked into

The above reasons given by the learned trial judge which he regarded E as cogent and verifiable, were based on the contents of Form CF001 filled by the appellant and submitted to INEC, the 1st respondent. Whether these reasons indeed constitute cogent and verifiable reasons, cannot be looked into in the present case because they are not F contained in the letter of application for the substitution, written to the 1st respondent earlier quoted in this judgment. The trial Court was clearly wrong in regarding the facts or the contents of Form CF001, as reasons for the substitution of the appellant, which reasons were not given by his own political party, the 2nd respondent G which was satisfied with his qualification to contest the election before sending his name as its own candidate. (p. 2933 C)

TABAI JSC

4. Court has sole right to determine rights/obligation of litigants H
Thus it is the court which has the exclusive jurisdiction for the determination of any question as to the civil rights and obligations of a person. This exclusive jurisdiction is reserved for the courts, notwith-

standing anything to the contrary in the Constitution. In this case therefore it is the court and only the court that has the authority to determine the rights and obligations of the parties. The Respondents cannot by doing what is sought to be prevented turn round to plead that the action has become merely academic. That would amount to
 B their determination of the rights and obligations of the Appellants. That cannot be. A genuinely aggrieved person who approaches the court for redress must be accorded the redress if he establishes his rights thereto at the trial. Otherwise there can be break down of public order with the possibility of the aggrieved opting for vengeance by
 C violent self-help. That can be dangerous. (p. 2938 G)

MUNTAKA-COOMASSIE JSC

5. Need for INEC to avoid lawlessness

D With respect, the question that bothers my mind my Lords, is can the 1st respondent be allowed to frustrate the appellant in his fight for the restoration of his civil right, by the conduct of the election, even though they were aware of the pending action?. Our legal system frowns at acts of self help, the only means through which the courts
 E can protect its independence and integrity is to disallow the abuse of its processes and orders. To my mind the action of the 1st respondent, (INEC) amounts to an act of lawlessness and disrespect to the rule of law. The election conducted by the 1st Respondent, when this action was pending, was of no moment and it can not deprive the
 F appellant his right to have his case determined in the court of law. (p. 2948 F)

6. Pendency of action - Holding election will not cancel court's jurisdiction

G The same approach adopted by the Respondents in Amaechi's case was also adopted in the instant case. The belief was that if elections were conducted that would put an end to the appellant's case or "kill" his case. The jurisdiction of ordinary court in pre-election matters is sacrosanct and the holding of such an election when the action was pending would not deprive the ordinary court of its jurisdiction to conclude the matter, even to the appeal court. (p. 2949 G)

REPRESENTATION

Chief (Mrs.) A. J. Offiah, SAN with her S. Larry, Ben Ogbaini, Ikechukwu Ongoma and Nnezi Offiah (Miss) for Appellant
Emonye Adekwu, for 1st Respondent

Arthur Obi Okafor with him, I. K. Ogbogu and P. Ozoilesike Miss. For
2nd Respondent B

Amobi Nzelu with him Okey Onah and E. Akutue for party to be heard (Respondent).

CASES REFERRED TO

Ibrahim v. INEC (1999) 8 NWLR (Pt.614) 334 C

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

Adebiji v Babalola (1993) 1 NWLR (Pt.267) 1

INEC V NRC (1993) 1 NWLR (Pt.267) 120

Doukpolagha v George (1992) 4 NWLR (Pt.236) 444 D

Maikori v Lere (1992) 3 NWLR (Pt.231) 525

Amaechi v INEC SC.74/2007

Akinfolarin v Akinola (1994) 3 NWLR (Pt.335) 659

Magaji v Salami (1998) 7 NWLR (Pt.557) 299

Yusuf v Eboda (1994), 3 NWLR (Pt.334) 568 E

Lawal v Ejidike (1997) 2 NWLR (Pt. 487) 319

Jegede v Citicon Nig Ltd. (2001) 4 NWLR (Pt.702) 112

Ozigbo v COP (1979) 10; NSCC. 124

The Queen v Wilcox (1961) SCNLR 296 at 298

Yusuf v Obasanjo (2003) 16 NWLR (Pt.847) 554 F

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999 ss. 6 (6) (b), 109, 111 (a) (i), 221, 240, 241 285 (1), (4) G

Electoral Act, 2006 s. 30, 32, 34 (1), (2), (3) 35, 57 (1), 69, 97 (1) (e), (f), (2) (c), 140, 144 (1) (a), (b) & 145 (1) (a) - (d)

Supreme Court Act, 2006 s. 22

LEAD JUDGMENT BY TOBI JSC

This is another political matter involving substitution; a new trend in Nigerian politics where the game is changed midstream. It affects the political party of the Peoples Democratic Party, the 2nd H

respondent. The quarrel looks more of an in-house affair; the inclusion of the 1st respondent notwithstanding. We have done a few in the past; we are asked to do this also. We must. The matter involves so much of the interpretation of the Electoral Act, 2006. What are the facts? What gave rise to the substitution?

B Charles Chiwendu Odedo, the appellant, a member of the Peoples Democratic Party bearing the acronym, PDP, contested the primary elections, along with ten others. That was on 24th November, 2006. It was for the Idemili North and South Federal Constituency in Anambra State. He won. Following the result of the election, C the PDP submitted his name to the Independent National Electoral Commission (INEC), the 1st respondent. That was on 20th December, 2006. INEC duly published the name of the appellant as a person who was cleared to contest the election. The necessary documentation was completed by INEC and the appellant thought the D coast was free or clear for him to contest the election with other political parties. But that was not to be. He had a surprise. I think he also had a shock.

E On or about 27th February, 2007, appellant got information that his name was substituted with that of Obinna Chidioka who appears in this appeal as “*party to be heard*.” I must confess that this is quite a new one to me. I have never come across such a party in our law of procedure. We learn everyday. I will not go there because the parties do not seem to have joined issue on it. And so let Obinna F Chidioka remain as “*party to be heard*” and we must hear him. We will not hear him alone; we must hear all the other parties, though they are not styled as parties to be heard. As I said, we learn everyday.

G Aggrieved, appellant went to the Federal High Court. He did not file the usual action. He filed an unusual one. It was an application for judicial review of the action of the respondents in relation to the substitution of his name with that of Obinna Chidioka. The process is at page 39 of the Record. It reads in part:

H “*TAKE NOTICE that pursuant to leave of the Federal High Court Enugu, granted on the 13th day of March 2007, the Federal High Court will be moved on Monday the 19th day of March, 2007 at the hour of 9 o'clock in the forenoon or so soon thereafter as the*

Applicant or counsel on his behalf may be heard praying the honorable court for an order for JUDICIAL REVIEW OF THE ACT OF INDEPENDENT NATIONAL ELECTORAL COMMISSION for the reliefs set out in the statement in support of the application and on the grounds set out in both the statement and the verifying affidavit in support of the application and the Exhibits therein referred to, used in the application for leave, copies of which affidavit and Exhibits are served herewith.” B

The appellant sought four reliefs. They are:

“1. A DECLARATION that the 2nd respondent having submitted a list of PDP candidates it proposes to sponsor at the 2007 elections into the House of Representatives for Anambra State Federal Constituencies to the 1st respondent pursuant to section 32 of the Electoral Act 2006, a substitution of the Applicant’s name on the said list with that of Obinna Chidioka after the 20th Feb, 2007 is D unconstitutional, null and void, the same not being in compliance with sections 34 (1), (2) and (3) of the Electoral Act, 2006.

2. AN ORDER OF PROHIBITION restraining the 1st respondent from using the substituted list of PDP candidates for elections into the Federal House of Representatives in Idemili North and South Federal Constituency. E

3. AN ORDER OF PROHIBITION restraining the first Respondent from publishing the said substituted list which was published after the 20th of Feb., 2007 or any other substituted list bearing the name of Obinna Chidioka or any other name in place of the Applicant’s name as the PDP candidate for Idemili North and South Federal Constituency pursuant to Section 35 of the Electoral Act 2006. F

4. AN ORDER OF MANDAMUS directing the 1st Respondent to publish a statement of the full names of PDP candidates standing G nominated for elections into the Federal House of Representatives for the Federal Constituencies in Anambra State as submitted to it by the 2nd Respondent on 23rd December, 2006 in accordance with section 30 of the Electoral Act, 2006.”

The grounds upon which the reliefs were sought are at pages H 42 -to 44 of the Record. They number 21. The affidavit in support of the application for leave to apply for judicial review is at pages 45 to 46 of the Record. There are five paragraphs.

3. The learned trial Judge, Faji, J, did not see his way clear in granting the reliefs sought by the appellant. He refused them. In the concluding paragraph of his judgment, the trial Judge said at page 314 of the Record:

B *“To my mind, this constitutes a cogent reason. It is also verifiable as per plaintiffs exhibit 5 which at all material times was in the custody of the 1st Defendant. I therefore find that the plaintiffs action lacks merit. The substitution was carried out in line with section 34 of the Electoral Act. The reliefs in the motion cannot therefore be granted. They are accordingly dismissed.”*

C Dissatisfied, the appellant went to the Court of Appeal. There was a split decision of the panel of Mika’ilu, Denton-West and Bada, JJ.CA. While Mika’ilu and Bada, JJ.CA struck out the appeal on the ground that it was a mere academic exercise, Denton-West, JCA parted D ways with her learned brothers. She allowed the appeal and struck out the cross appeal.

In his conclusion Mika’ilu, JCA said at page 562 of the Record:

E *“In the final conclusion, it is clear in view of the above that the appeal now pending has become an academic exercise in view of the fact that the election was already conducted and an election tribunal which is in the appropriate venue, having been set up. Consequently the appeal is struck out as a mere academic exercise”.*

F In her lone voice, Denton-West, JCA said at page 610 of the Record:

“Finally in the interest of justice, equity, fair play and upon the totality of my above reasoning and conclusions, I hereby find the appeal as not lacking in merit and it succeeds. The cross appeal is lacking in merit and is accordingly struck out”

G Still dissatisfied, the appellant has come to this court. Briefs were filed and duly exchanged. Appellant also filed a Reply Brief. The Appellant formulated the following issues for determination:

H *“1. Whether the Court of Appeal in its if majority judgment was right in holding that the Appellant’s appeal in these circumstances was a mere academic exercise.*

2. Whether the Appellant is not entitled to judgment on the merits of the case

3. Whether in the circumstances of this appeal, this is not a

proper case in which the Supreme Court should exercise its powers under section 22 of the Supreme Court Act to hear the case on its merit in view of the failure of the Court of Appeal to do so in its majority judgment”

The 1st Respondent formulated the following issues for determination: B

“1. Whether the Court of Appeal in its majority ruling was right in holding that the Appellant’s appeal in the circumstances was a mere academic exercise.

2. Whether the Court of Appeal ought to have proceeded to determine the merit of the appeal and cross appeal after holding that the appeal had become a mere academic exercise. C

3. Whether this is a proper situation for the exercise of the Supreme Court’s powers as contained in section 22 of the Supreme Court Act. D

4. Whether the trial court was correct in holding that the substitution of the appellant’s name was done in accordance with section 34(1), (2) and (3) and whether the dissenting justice was right in his assessment of the onus of proof in respect of issues which arose in the trial court.” E

The 2nd Respondent formulated the following issues for determination:

“1. Whether the Court of Appeal in its majority judgment was right in holding that the Appellant’s appeal in these circumstances was a mere academic exercise. F

2. Whether the Appellant is not entitled to judgment on the merits of the case

3. Whether the circumstances of this appeal, this is not a proper case in which the Supreme Court should exercise its powers under section 22 of the Supreme Court Act to hear this case on its merit in view of the failure of the Court of Appeal to do so in its majority judgment.” G

The Party to be heard formulated the following issues for determination. H

“1. Whether the Court of Appeal in its majority judgment was right in holding that the Appellant’s appeal in these circumstances was a mere academic exercise.

2. *Whether the Appellant is not entitled to judgment on the merits of the case.*

3. *Whether in the circumstances of this appeal, this is not a proper case in which the Supreme Court should exercise its powers under section 22 of the Supreme Court Act to hear this case on its merit in view of the failure of the Court of Appeal to do so in its majority judgment.*

4. *Has the Appellant the locus standi to institute this action in the first instance?*

C Learned Senior Advocate for the appellant, Chief (Mrs.) A. J. Offiah submitted that the issues raised in the appellant's appeal are still live and throbbing. Citing Dike v Nzeka (1986) 2 NWLR (Pt.34) 144 on what constitutes an academic exercise, learned Senior Advocate submitted that the reliefs sought are live. Relying on section 32 D of the Electoral Act, 2006, learned Senior Advocate contended that the declaration sought, if made before the holding of the election would have confirmed the right of the appellant to contest the election as the rightful candidate for the 2nd respondent; and the declaration if made after the holding of the election would still confirm his E right to challenge the election as a candidate unlawfully excluded from contesting the election by reason of the unlawful substitution. She cited section 285 (1) to (4) of the 1999 Constitution, section 144 (1) (a), (b) and 145 (d) of the 2006. Ibrahim v. INEC (1999) 8 F NWLR (Pt.614) 334; Sanyaolu v INEC (1999) 7 NWLR (Pt.612) 600; Adebisi v Babalola (1993) 1 NWLR (Pt.267) 1; INEC V NRC (1993) 1 NWLR (Pt.267) 120; Doukpolagha v George (1992) 4 NWLR (Pt.236) 444 and Maikori v Lere (1992) 3 NWLR (Pt.231) 525.

G Learned Senior Advocate submitted that when the issue is pre-electoral, as in the present case, where the appellant complains of an unlawful substitution after having been validly nominated, the proper court vested with jurisdiction is determined by a consideration of the relevant statute, the parties, the plaintiffs claim and the reliefs sought. H She cited Amaechi v INEC SC.74/2007. Akinfolarin v Akinola (1994) 3 NWLR (Pt.335) 659; NEC v NRC, supra; Doukpolagha v. George, supra. She submitted that this Court will not be groping in the dark or deciding academic issue by pronouncing on the right of the appel-

lant. This action having been commenced by way of judicial review, questions essentially the legality of the acts carried out by the 1st Respondent on the instruction (if any) of the 2nd respondent, counsel argued. Citing F. A.T.B. v Ezegbu (1993) 6 NWLR (Pt.291) 25; Daniel v. Ferguson (1891) 2 Ch.D. 27 and Jones v Security and Exchange Commission 80 (1935) L.E.D., learned Senior Advocate submitted that the processes of the court should not be treated with disdain or levity; this is essentially so when the respondents were fully aware of the pendency of the suit. B

Learned Senior Advocate submitted on Issues 2 and 3 that this is a proper case for this court to exercise its powers under section 22 of the Supreme Court Act to hear the case on its merit in view of the failure of the Court of Appeal to do so in its majority judgment. Relying on the statement in support of the grounds upon which Application was made, affidavits, counter-affidavit, the Electoral Guidelines of PDP and the cases of Mogaji v Samaila (1998) 7 NWLR (Pt.557) 299; Ehimica v National Oil and Chemical Marketing Company Ltd (1995) 5 NWLR (Pt.398) 642; Yusuf v Eboda (1994), 3 NWLR (Pt.334) 568; Lawal v Ejidike (1997) 2 NWLR (Pt.487) 319; Jegede v Citicon Nig Ltd. (2001) 4 NWLR (Pt.702) 112; Ozigbo v COP (1979) 10; NSCC. 124; The Queen v Wilcox (1961) SCNLR 296 at 298; Longjohn v Chief Iboroma (1998) 6 NWLR (Pt.555) 524; Okpalaeke v NEPA (2003) 14 NWLR (Pt.840) 583; Onwumechili v Akintemi (1985) 3 NWLR (Pt.13) 504; LPDC v Fawehinmi (1985) 2 NWLR (Pt.7) 300; Yusuf v Obasanjo (2003) 16 NWLR (Pt.847) 554; Emskip Ltd v Exquisite Ind. Ltd (2003) 4 NWLR (Pt.809) 88 and C.G.S. (Nig) Ltd v Ogu (2005) 8 NWLR (Pt.927) 336, learned Senior Advocate urged the Court to hear the merits of the matter and give judgment to the appellant. D E F G

Learned counsel for the 1st respondent Mr. Emonye Adekwu raised preliminary objection as follows:

“The Respondent prays the Honourable Court for an order that Issues 2 and 3 raised and argued together in the Appellant’s Brief of Arguments be struck out for being incompetent. H

Grounds for the preliminary objection:

(i) Only two (2) grounds of appeal are contained and disclosed in the Notice of Appeal

(ii) *Three (3) Issues were however submitted for determination.*

(iii) *Issue 1 which was obviously distilled from Ground 1 was argued alone*

(iv) *Issues 2 and 3 were argued together”.*

B Arguing the preliminary objection, learned counsel submitted that Issues 2 and 3 argued together in the appellant’s brief are incompetent and should be struck out as they were not based on competent ground or grounds of appeal. In other words, it is the argument of learned counsel that the issues are not distilled from any
C ground of appeal. He cited Labiya v Anretiola (1992) 8 NWLR (Pt.258) 139 and Ugo v Obiekwe (1989) 1 NWLR (Pt.99) 566. Counsel also contended that the joint argument of Issues 2 and 3 has entirely corrupted the issues however framed or distilled and therefore should
D be struck out.

Taking the merits of the appeal, learned counsel submitted, on Issue No. 1, that the appellant’s appeal in the circumstances was a mere academic exercise. Relying on Dike v Nzeka, supra, learned counsel said that a proceedings becomes academic or hypothetical in
E nature if it has no bearing with live issues or its determination would be an exercise in futility. As the appellant was unable to present an election petition based on the outcome of Appeal No.CA/E/97/2007, it is now an academic proceedings. He argued that the reliefs sought
F by the appellant are incapable of enforcement even if they had been granted by the Court of Appeal. He did not agree with learned Senior Advocate that the respondents by their action, intended to render the proceedings and the judgment of the court pyrrhic. Counsel did not therefore see the applicability of FATB v Ezegbu supra.

G Learned Counsel submitted on Issue No. 2 that the Court of Appeal was right in terminating the proceedings in Appeal No. CA/E/97/2007 immediately the court held that the proceedings amounted to an academic exercise. He relied on section 6(6) (b) of the 1999 Constitution.

H On Issue No.3, learned counsel submitted that this is not a proper case for the exercise of the power of the court under section 22 of the Supreme Court Act because the conditions precedent and qualification to such exercise of power are not available. He pointed

out that the provision of section 22 does not empower the Supreme Court to hear a substantive appeal for the ruling of the High Court no matter the exigencies or the formalities or vexatious nature of the appeal as the provision cannot override the exclusive jurisdiction of the Court of Appeal to hear appeals from the High Court as codified by sections 240 and 241 of the 1999 Constitution. He cited Attorney General Anambra State v Okafor (1992) 2 NWLR (Pt.396) without the page; and Harriman v Harriman (1987) 3 NWLR 244 . To learned counsel, this court cannot exceed its jurisdiction by its power under section 22, as that will violate sections 233 and 240 of the 1999 Constitution. Counsel however conceded that this court can exercise its section 22 power on the question whether or not Appeal No.CA/E/97/2007 had become academic in the circumstances. He cited Ejowhomo v Edok Eter Mandilas Ltd (1986) 1 NSCL 1184. If this court holds that the appeal is not academic, the Court of Appeal will be the only forum where the substance of the appeal would be best considered on its merits, counsel argued.

On Issue No.4, learned counsel submitted that the onus of proof is on the appellant who seeks a declaration that the substitution was not done in accordance with section 34 (1) of the Electoral Act, 2006. Citing SCC (Nig) Ltd, v Elemedu (2005) 7 NWLR (Pt.923) 28; F.B.N. v. A.C.B. (2006) 1 NWLR 438; counsel submitted that the appellant has not proved his allegation and this court must dismiss his case. He so urged the court.

Learned counsel for the 2nd respondent, Mr. Arthur Okafor submitted on Issue No.1 that the election having taken place, it is clear that the Court of Appeal cannot grant relief as to grant such relief will amount to make an order in vain or amounting to nothing other than engaging in mere academic exercise. He cited Nwobosi v A.C.B. (1995) 6 NWLR (Pt.404) 658; Oyeneye v Odugbesan (1972) 4 SC. 244 Mamman v Salaudeen (2005) 18 NWLR (Pt.958). 478. Arguing that a court of law cannot grant in vain injunctive reliefs, counsel cited Attorney General Abia State v. Attorney General of the Federation (2005) 12 NWLR (Pt.940) 452; and Obeya Memorial Hospital v Attorney General of the Federation (1987) 3 NWLR (Pt.60) 325. Citing sections 119 (a) (i), 285 (1) (a) of the 1999 Constitution and sections 69 and 140 of the Electoral Act, 2006, counsel submit-

ted that the cause of action has inured to the election tribunal and therefore the matter should not further proceed in the regular court. He did not agree with the argument that the appellant cannot approach the election tribunal. As the action of the appellant is on non-compliance, he can only go to election tribunal, counsel submitted. B He argued that the case of Amaechi v INEC supra, is not applicable. On Issue No.2, learned counsel submitted that the appellant is not entitled to judgment on the merits of the case. Learned counsel contended that the substitution letter, Exhibit B, was never produced as C the copy was in the custody of the 1st respondent, and therefore the absence of INEC receiving stamp and date on same is not an anomaly by any stretch of imagination. Counsel argued that the party to be heard was duly bound to establish not just that a letter of substitution was written, but that such letter was duly delivered in satisfaction of D the stringent requirements of section 34 (2) of the Electoral Act, 2006 and in such a situation only a certified true copy of the letter of substitution will be admissible secondary evidence in proof thereof by a combined effort of sections 109, 111 (1), 97 (1) (e) and (f) (2) (c) of the Evidence Act. He cited Nzekwu v Nzekwu (1989) 2 NWLR E (Pt.104) 373; Alataha v Asiri (1999) 5 NWLR (Pt.601) 33. To learned counsel, the party to be heard cannot be penalized by virtue of the fact that he produced a certified true copy of the letter of substitution which is clearly distinct from the copy privately delivered to him. He F pointed out that the document captioned "*Affidavit of Applicant*" was not signed by the Commissioner for Oaths according to law and therefore void as the absence of the signature is not a mere defect. He cited Agusiobo v Onyekwelu (2003) 14 NWLR (Pt.839) 34. He also dealt with the duty of the court to form an opinion as to the authority G of a question of handwriting or a signature.

Learned counsel submitted that if commission of a crime by a party to any proceeding is directly an issue, it must be established beyond reasonable doubt. He cited section 138 (1) of the Evidence Act, and Famuroti v Agbeke (1991) 5 NWLR (Pt.189); Jules v Ajani H (1980) All NLR 170. Citing Nigergate Ltd v Niger State Government (2005) 1 NWLR (Pt.907) 342, learned counsel submitted that where an allegation of commission of a crime is made in an affidavit, the mere fact that it was not denied in a counter affidavit does not negate

the requirement that such allegation be proved beyond reasonable doubt. Counsel did not agree that the learned trial Judge placed any burden of proof on the appellant in respect of the cogency of the reason for the substitution. Learned counsel thereafter suddenly attacked the grounds of appeal. I do not know whether he was raising a preliminary objection mid-stream. I will comment on this in the judgment. For now, I should continue with my summary of the Brief. B

On Issue No.3, learned counsel submitted that this is not a proper case for this court to exercise its powers under section 22 of the Supreme Court Act. He cited Obi v INEC (2007) 11 NWLR (Pt.1046) 565. Counsel urged the court to dismiss the appeal. C

Learned counsel for the party to be heard, Mr. Amobi Nzelu contended that a suit is said to be lifeless or an academic exercise where a decision reached in the matter will not enure any right or confer any benefit on the successful litigant. He cited Ogbonna v D President FRCN (1997) 5 NWLR (Pt.504) 281; Nwobishi v A.C.B. (1995) 6 NWLR (Pt.404) 658; Ndulue v Ibezim (2002) 12 NWLR (Pt.780) 139 and Tanimola v Mapping Godatta Ltd (1995) 6 NWLR (Pt.403) 617. He argued that Reliefs (2) (3) and (4) which border on prohibitive and injunctive remedies are of no moment and cannot be granted at this stage since they have been overtaken by events. He also argued that section 285 of the 1999 Constitution which donated powers to the Election Petition Tribunals never gave them the jurisdiction to determine pre-election issues. He contended that section 32, 33 and 34 of the Electoral Act 2006 made elaborate provisions on submission of list of candidates challenging nomination and substitution of candidates. Submitting that a party can only be entitled to what he claims and that parties are bound by their pleadings, counsel cited Achiakpa v Nduka (2001) 14 NWLR (Pt.734) 623; Basil v Fajebe (2001) 11 NWLR (Pt.725) 592; Onamade v Esiri (1997) 1 NWLR (Pt.480) 123 and U.B.N. PLC v Ishola (2001) 15 NWLR (Pt.735) 47. E

Learned counsel submitted that in the light of Exhibit B, the letter of substitution, the issue as to time frame within which the substitution was made was laid to rest, as the exhibit speaks for itself as the substitution was done within the time permissible by the Electoral Act 2006 which is sixty days to the election. As the substitution was F

done within the prescribed time, the appellant goes without any remedy because that is the ground upon which he sought to set aside the substitution.

Taking section 34 of the Electoral Act, counsel submitted that if the Act intended to make not giving cogent and verifiable reason a
B ground for rejection of nomination from a political party, it should have stated so. He argued that not giving cogent and verifiable reasons is not enough to refuse a candidate who has been lawfully nominated and sponsored by a political party from participating in the
C election as the breach of section 34 has no sanction. Citing Action Congress v INEC (2007) 12 NWLR (Pt.1048) 222, learned counsel reminded the courts of their primary function to interpret the law and not to prescribe sanction.

In response to the submission of learned Senior Advocate for
D the appellant in respect of the knowledge of the pendency of the matter on the part of the respondents, learned counsel submitted that there is a distinction between pendency of a suit, and the trial court refusing to grant the order sought . If processes are served on a party without any pronouncement from the court, what the party
E does upon becoming aware of the pendency of the suit is at his/her peril. But where a court has categorically refused to make an order being sought, the aggrieved party is precluded from hiding under the canopy that the other party is aware of the pending suit to service the
F court, counsel argued.

Counsel contended that the reason given for the substitution is verifiable. To counsel, the issue of reason given being cogent and verifiable is purely subjective. He argued that as the Electoral Act, 2006 did not prescribe any format as guide that will assist in determining whether any reason given is cogent and verifiable, that must
G have informed why section 34 (3) made reference to only section 34 (1) of the Act.

Taking Issues 2 and 3 together, learned counsel contended that there was no time the appellant sought any relief predicated upon
H the letter of substitution not signed by the Chairman of the 2nd respondent. He pointed out that no signature expert was called upon to look at the documents in contention. He called in aid the affidavit of the 1st respondent and that of the party to be heard. The conten-

tion that the letter of substitution was not signed raises the offence of forgery which is a crime and must be proved in accordance with section 138(1) of the Evidence Act, counsel argued. He cited Nweke v State (2001) 4 NWLR (Pt.704) 588; Odu v State (2001) 10 NWLR (Pt.722) 669; Ikoku v Oli (1962) 1 All NLR 194; Nwankwere v Adewunmi (1966) 1 All NLR 129; Vulcan Gas Ltd v G. F. Ind, A. G. (2001) 9 NWLR (Pt.719) 610. Counsel pointed out that the minority judgment of the court which is heavily relied upon by the appellant is not the judgment of the court; but the majority judgment is.

Learned counsel suddenly moved to section 108 (1) of the Evidence Act in paragraph 4.3.17 and cited Attorney General of the Federation and Attorney General of Abia State (2001) 11 NWLR (Pt.725) 689, Emokpae v University of Benin (2002) 17 NWLR (Pt.795) 139; Ohanaka v Achugwo (1998) 9 NWLR (Pt.564) 37 on the interpretation of “may” in a statute. He thereafter took Exhibits B, FAA and AMI in paragraph 4.3.19 and Exhibits 4, 10A, 11 and 14 in paragraph 4.3.20. I am thoroughly confused and the more I take the paragraphs following I get more confused. I do hope I will have my bearing straight.

I thought counsel had finished with the issue of substitution in Issue No.1 but I was wrong. The issue raised its head once again. In paragraph 4.4.4 counsel dealt with documentary evidence where they exist and referred to three cases he had earlier cited. Let me stop here on Issues 2 and 3. I will return to them later.

I go to Issue 4. It is on jurisdiction. Counsel submitted that jurisdiction is the spinal cord of every litigation and once raised must be dealt with before further steps can be taken in the matter, and jurisdiction can be raised at any stage of the proceedings including this court. He cited a large number of cases at pages 36 and 37 which I have lost count . I will save my energy not to reproduce them here as they are legion. I should however say that the submission counsel made is valid. It is a most elementary principle on jurisdiction.

Learned counsel submitted that as the appellant did not secure 50% of the total votes cast in the primary election, he has no locus standi to institute the action. He cited again, quite a number of cases. I think I can count them this time, as they are fewer than the ones on jurisdiction. They number about 8. He submitted that the

trial court had no jurisdiction to hear the matter in the first instance, as he lacked locus standi to institute the action. He urged the court to dismiss the appeal.

Learned Senior Advocate for the Appellant filed two Reply Briefs: one is in reply to respondent's and co-respondents Briefs of argument and the other is to the Brief of 2nd respondent. I will take them seriatim.

In reply to the 1st respondent's and co-respondents Brief of argument, learned Senior Advocate submitted that the preliminary objection is totally misconceived and purely diversionary as the same is novel to the law and practice regulating appeals and cannot be farther from the truth. Counsel contended that Issue No.2 was directly distilled from ground 2 of the Notice of Appeal. He reproduced the ground and relied on *Nwadike v Ibekwe* (1987) 4 NWLR (Pt.67) 718, *Fabiye v Adeniyi* (2000) 6 NWLR (Pt 662) without the page; *Dantata v Mohammed* (2000) 7 NWLR (Pt.664) 176, *Okoye v Santil* (1990) 2 NWLR (Pt.131) 172; *Rotimi v Amaechi* supra, *Ladoja v INEC* (2007) All FWLR (Pt.377) 934; *Inakaju v Adeleke* (2007) All FWLR (Pt.353) 3. *Dapianlong v Dariye* (2007) 8 NWLR (Pt.1036) 289 and *Esin v Idika* (1987) 4 NWLR (Pt.166) 503.

Taking the merits of the Brief, learned Senior Advocate submitted that this court can invoke its powers under section 22 even when the lower court has made no pronouncement on the substantive issues but is seized of all the proceedings in order to do what the lower court ought to have done in the circumstance. She cited once again *Ladoja v INEC*, supra and the minority judgment of Denton-West, JCA.

Replying to Issue No.4 of the 1st respondent's Brief learned Senior Advocate submitted that as neither a cross appeal nor an appeal nor a respondents notice was filed by the respondents/co-respondents in respect of the dissenting judgment of Denton-West, JCA, this court should discountenance the issue. She cited *Okunola v Oduola* (1987) 4 NWLR (Pt.64) 141; *Eke v Ogbonda* (2007) 1 MJSC 160, *Nzekwu v Nzekwu* (1989) 2 NWLR (Pt.104) 373 and *Kuusu v Udsu* (1990) 1 NWLR (Pt.127) 421.

In reply to the Brief of co-respondent, learned Senior Advocate pointed out that nowhere in the whole gamut of the proceed-

ings in the trial court or in the Court of Appeal did the appellant allege fraud or crime, neither did he give particulars of same. She said that the appellant simply stated that the signature was not that of the National Chairman. She argued that when fraud is alleged in any suit it must be pleaded and distinctly proved and it is not allowable to leave fraud to be inferred from the facts. She cited Usenfowokan v Idowu (1969) 1 All NLR 125 George v Dominion Flour Mills (1963) 1 All NLR 71 Oluwo v Adebawale (1964) 1 All NLR 74; Okunola v Odulo supra. I do not seem to follow the arguments in paragraphs 4.03 to 4.06. I will therefore not touch them.

In her Reply to the 2nd respondent's Brief, learned Senior Advocate urged the court to discountenance the two Briefs filed for the 2nd respondent by Mr. Arthur Okafor and strike out the same for being incompetent. Narrating the events leading to the filing of the three Briefs, learned Senior Advocate submitted that the three Briefs cannot be validly filed for the same party and by different chambers all in one appeal. She contended that the two subsequent Briefs are not regular before the court. Relying on NBN Ltd v P.B. Olatunde and Co. Ltd; Adehi v Atega (1995) 5 NWLR (Pt.396) 656 and Onifade v Olayiwola (1990) 7 NWLR (Pt.161) 130, learned Senior Advocate submitted that a party cannot (except the court so directs) file more than one Brief and that only the appellant has the right to file a second Brief in reply to issue of law arising in a Respondent's Brief.

In the unlikely event of the court not upholding the above argument, learned Senior Advocate adopted the arguments in the Reply Brief dated 2nd February, 2008. She contended that in paragraphs 4.01, 4.23, 5.10 and 6.01, the 2nd respondent assiduously engaged itself in a deliberate distortion of the true facts of the case. She submitted that counsel cannot misrepresent facts to the court. She relied on Abacha v State (2002) 11 NWLR (Pt.779) 466 and Adehi v Atega supra. She contended that the Brief contained arguments on issues, which did not arise from the appellant's grounds of appeal or from any of the issues distilled from the grounds. She referred to paragraphs 6.11, 6.12, 6.22, 6.23, 6.28, 7.00 to 7.04 and to Ibator v Barakuro (2007) 9 NWLR (Pt.1040) 475; Adeleke v Ogbonda (2007) 1 MJSC 160; Nzekwu v Nzekwu (1989) 2 NWLR (Pt.104) 373; Kuusu v Udom (1990) 1 NWLR (Pt. 127) 401; Dada v Dosumu (2006) 142 LRCN 2240.

Learned Senior Advocate argued that as the Court of Appeal agreed with the respondents in its majority judgment that the entire suit including the appeal and cross appeal had become academic it was no longer open to the respondents to urge this court to remit the case to the Court of Appeal for determination, as urged in their Brief.

B She repeated her arguments on the invocation of section 22 of the Supreme Court Act and relied on Obi v INEC (2007) 11 NWLR (Pt 1046) 565; William v Akintunde (1995) 3 NWLR (Pt.381) 101 and Ishola v Ajiboye (1994) 6 NWLR (Pt.352) 506.

C There are quite some preliminary matters to deal with in this appeal. I should take them first. ***It appears that the 2nd respondent has raised a preliminary objection on Ground 3 of the Notice of Appeal. That is not the way a preliminary objection is raised in a Brief. Learned counsel for the 2nd respondent,***
D ***suddenly said in paragraph 6.25 that grounds of appeal must arise from the judgment of the court and cannot be based on just the impression of the appellant on what the court might have held. He thereafter submitted in paragraph 6.28 that since Ground 3 raised at the court below did not arise from***
E ***the judgment of the trial court the issue distilled therefrom as well as the argument which ensued is incompetent and should be discontinued and struck out.***

A preliminary objection cannot be raised in that subtle and uneventful way. Learned Senior Advocate for the appel-
F ***lant is correct when she submitted in her Reply Brief that the preliminary objection was improperly raised. The practice, and the accepted practice for that matter, is that preliminary objection in a Brief is raised in a conspicuous title in the name***
G ***and style of "PRELIMINARY OBJECTION". Thereafter the grounds and the arguments of or for the objection are stated and argued in the Brief.***

There is yet another slight thing worth mentioning at page 18 of the Brief. It is in respect of the case of State v. Onagoruwa which
H appears in the Brief as follows: STATE v ONAGORUWA () NWLR (PART). Learned counsel did not give the full citation. He did not cite the year the case was heard; the volume of the Law Report, the part of the law report or the page. I do not think counsel expects this

court to provide the missing information. As I cannot speculate or guess the year of the law report, I decided to ignore the case. I expect counsel to be more careful in citing cases to the court.

Although counsel did not properly raise the preliminary objection, I shall not ignore it in the way I have ignored the case in view of the fact that I know the content of the objection. It is that the ground of appeal did not arise from the judgment of the High Court. B

Learned Senior Advocate for the appellant in her Reply Brief submitted that as *“there was no appeal by the 2nd respondent on the issue raised in the court below neither did he cross appeal in this court”*, the preliminary objection should fail. I do not want to go that way. It looks complicated to me. There is a more straightforward way of killing the preliminary objection and it is this. ***This court has no jurisdiction to hear an appeal straight from the High Court. As the ground of appeal complained of is on the judgment of the High Court and not on the judgment of the Court of Appeal, this court cannot go into it. The preliminary objection therefore fails.*** C

Learned counsel for the 1st respondent tried to fault the procedure where the learned Senior Advocate for the appellant argued Issues 2 and 3 together. To learned counsel, the two issues are not distilled from any ground of appeal. I entirely agree with learned Senior Advocate for the appellant that Issue No.2 is distilled from Ground 2. D

Issue No.3 which urges this court to exercise its power under section 22 of the Supreme Court Act cannot be formulated as a ground of appeal. By the section, this court is empowered to make any order necessary for the determination of the real question in controversy in the appeal as if the matter is prosecuted in the Supreme Court as a court of first instance. By the section, this court can make or give an order that the courts below can make without sending the case back to them for a retrial or rehearing. There cannot be a ground of appeal on the section. The section can only be invoked if the proceedings in the court below justify its invocation. And relevantly in this appeal, if this court agrees with the appellant on Issues 1 and 2, then it can grant Issue 3 as a matter of E

course. I realize that learned Senior Advocate dealt with only Issue No.2 as it relates to Ground 2 but did not take Issue 3 which was also a subject of the preliminary objection. As it is a matter of law, I have dealt with it.

B Now that I have finished with the preliminary objection of the respondents, I should go to those of the appellant. ***Contrary to the submission of learned Senior Advocate for the appellant, I see in the case file only one Brief filed by Mr. Arthur Okafor for the 2nd respondent; not two. Although there is some confusion in the filing of the Briefs as they relate to Mr. Emonye Adekwu and Mr. Arthur Okafor, the confusion is not enough to strike out the Brief as submitted by learned Senior Advocate. If her submission that there are three Briefs is correct the only reasonable thing to do is to strike out the irrelevant***
 C ***one and make use of the actual or proper Brief. The answer is not to strike out all the Briefs. That is clear injustice and this court will not be a party to it.***
 D

E I now go to the merits of the appeal and that takes me to what is an academic matter. ***In Plateau State v Attorney General of the Federation (2006) 3 NWLR (Pt.967) 346,1 said at page 419:***

F ***"A suit is academic where it is merely theoretical, makes empty sound, and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situation of human nature and humanity."***

G ***An academic issue or question is one which does not require answer or adjudication by a court of law because it is not necessary to the case on hand. An academic issue or question could be a hypothetical or moot question. An academic issue or question does not relate to the live issues in the litigation because it is spent as it will not enure any right or benefit on the successful party.*** See *Tanimola v Mapping Godatta Limited* (1995) 6 NWLR (Pt.403) 617; *Nwoboshi v A.C.B.* (1995) 6 NWLR (Pt.404) 658; *Ogbonna v President F.R.N.* (1997) 5 NWLR (Pt. 504) 281 and *Ndulue v Ibezim* (2002) 12 NWLR (Pt.780) 139.

Is the matter before the Federal High Court one of mere aca-

demic exercise? That is the crux of the appeal. The Court of Appeal in a majority judgment held that it is one of mere academic exercise.. Delivering the majority judgment of the Court, Mika'ilu, JCA said at page 561-562 of the Record:

"In our case all the reliefs being sought are in respect of an election which has already taken place... In short, the reliefs 2-4 are in respect of prohibition and mandamus in respect of which election had already taken place. There is no prayer asking this court or any court, to nullify the election which has already taken place. In short, the relief sought under reliefs (2) and (3) are for prohibition of acts which had already taken place. Also the mandamus sought under (4) was for an act which had ' already taken place. ...In the final conclusion it is clear in view of the above that the appeal now pending has become an academic exercise in view of the fact that the election was already conducted and an election tribunal which is the appropriate venue, having been set up. Consequently the appeal is struck out as mere academic exercise."

In her dissenting judgment Denton-West, JCA relied on the judgment of this court in Amaechi v INEC and held that the case was not one of mere academic exercise. She based her decision on the fact that the matter before the court is a pre-election matter. She said at page 569 of the Record:

"This is clearly a pre-election matter. It is about nomination of a candidate for an election by a political party. This is not a matter for Election Tribunals. The election tribunals have no jurisdiction to entertain dispute over primary elections within the political party for selection or nomination of candidates to contest election on the platform of a political party... Having considered the submission of learned counsel on the issue of whether the appeal is not academic, it is my humble view in line with recent decision of the apex court that it is not."

Who is correct: Mika'ilu, JCA or Denton-West, JCA? That is the relevant question. Mika'ilu, JCA in his judgment from pages 559 to 562, with the greatest respect, did not go into the details of the matter. Denton-West JCA in her judgment from pages 565 to 610, did exactly what Mika'ilu, JCA failed to do, which he ought to have done. Most importantly, Mika'ilu, JCA did not consider the decision

of this court in Amaechi v INEC which was obviously cited by counsel for the appellant. I expected him to consider the decision before taking a position one way or the other. It is sad that he did not do so.

In Amaechi this court dichotomized between a pre-election matter and an election matter for purposes of determining whether a suit is merely an academic exercise. Denton West, JCA took the pains to analyse the judgment of this court and in the true tradition of precedent and the principles of stare decisis followed that judgment. I was not in the panel in Amaechi but I entirely agree with my brothers' decision that a pre-election matter cannot be said to be one of mere academic exercise. On the contrary it is a live issue.

Mika'ilu JCA in his judgment at page 561 of the Record agreed with the submission of counsel for the 1st respondent that by section 285(1) (a) of the 1999 Constitution, the National Assembly Election Tribunals set up can exercise exclusive original jurisdiction in respect of issues concerning the election into the National Assembly. That same argument was made by Mr. Nzelu in his Brief. He argued that section 285 of the 1999 Constitution never gave Election Tribunals the jurisdiction to determine pre-election issues and that the appropriate court to approach on such issues is the High court, either of the States or Federal.

It is not my understanding of section 285 (1) (a) of the Constitution that the sub-paragraph can accommodate pre-election matter. It is rather my understanding that the sub-paragraph provides for the determination whether any person has been validly elected as a member of the National assembly. In my humble view, the sub-paragraph provides for election matters which give rise to post election and not pre-election proceedings. As the reliefs sought by the appellant are on pre-election matters, section 285 (1) (a) could not avail him as that sub-paragraph does not provide for litigation arising from party primaries. And that was what this court dealt with in Amaechi, what the majority decision of the Court of Appeal ignored.

I should point out that the appellant did exactly what Mr. Nzelu submitted in paragraph 4.2-5 of the Brief of the party to be heard. It is because the matter or dispute involved pre-

election issues that the action was filed at the Federal High Court. And so, why the furore or storm, I ask?

Mr. Okafor, after taking section 285 (1) (a) of the Constitution referred the court to section 69 (c) of the Electoral Act, 2006 and submitted that the subsection applied to the case. With respect, the subsection which provides for the power of the Returning Officer to declare scores of candidates after election, does not apply to this case because the appellant did not contest votes at the election but is contesting the primaries. Counsel also relied on section 146 (2) of the Electoral Act. Again the subsection does not apply as it deals with election and return conducted under the Electoral Act. I therefore do not agree with the submission of learned counsel that the Court of Appeal will be eroding the jurisdiction of and indeed be preempting the election tribunal by making an order which may have effect of making a determination within the tribunal's jurisdiction. The reliefs sought by the appellant are clearly outside the jurisdiction of the Election Tribunals, as they are predicated on pre-election matters. I seem to be repeating myself. Mr. Okafor also relied on section 145 (1) (a) to (d) of the Electoral Act, 2006. Again, the subsection does not apply because it provides for instances or grounds when an election may be questioned.

Mr. Adekwu submitted that the reliefs sought by the appellant, even if granted by the Court of Appeal, are incapable of enforcement. With respect, I do not agree with him. The reliefs are not only capable of enforcement but can be enforced. If a court of law comes to the conclusion that the substitution was not in compliance with section 34 of the Electoral Act, 2006, it will declare it a nullity as was done in the case of *Ugwu v Ararume* (2007) 12 NWLR (Pt.1048) 367.

In *Adeogun & other v Fashogbon and others*, CA/A/81/M/07 the Court of Appeal arrived at a different decision. The appellant, like as in this appeal, commenced an action at the Federal High Court Abuja against the respondents, asking for the following six reliefs:

“(i) Declaration that the 2nd Defendant has no right and/or power to recommend the substitution of the Plaintiff with the 1st

Defendant as candidate of the PDP for Ife Federal Constituency.

(ii) Declaration that the proposed substitution or replacement of the Plaintiff with the 1st Defendant as the candidate of Peoples Democratic Party for the Ife Federal Constituency by the 2nd and 3rd Defendants is unlawful, illegal, unconstitutional, null and void and of no effect whatsoever.

(iii) Declaration that the proposed selection of the 1st Defendant as the candidate of PDP for the Ife Federal Constituency is fraudulent, unlawful, illegal, unconstitutional, null and void and of no effect whatsoever.

(iv) Perpetual injunction restraining the 1st Defendant from allowing himself to be substituted, or presented to the 4th Defendant as the candidate of Peoples Democratic Party for election into Ife Federal Constituency in the 2007 general election.

(v) Perpetual injunction restraining the 2nd and 3rd Defendants from substituting, and/or presenting the 1st Defendant to the 4th Defendant as Candidate of Peoples Democratic Party for the Ife Federal Constituency in the 2007 general election.

(vi) Perpetual injunction restraining the 4th Defendant from recognizing and/or accepting the 1st Defendant as Candidate of Peoples Democratic Party for the Ife Federal Constituency in the 2007 general election.”

The learned trial Judge dismissed the suit. Hon. Fashogbon went on appeal to the Court of Appeal Abuja. On 23rd April, 2007, the applicants filed a motion urging the Court of Appeal to strike out the appeal on the grounds (a) that the Court no longer has jurisdiction to entertain or determine same (b) the appeal has become purely academic.

The Court of Appeal dismissed the motion. Relying on section 34(1) and (2) of the Electoral Act, 2006, Aboki, JCA said at page 30 of the Record:

“The provisions of section 34(1) and (2) of the Electoral Act, 2006 have enacted and placed an extra duty on INEC in its supervisory and monitoring roles over the conduct of the affairs of political parties. By the above provisions, cogent and verifiable reasons must be given by the political parties when substituting their candidates. To ensure fairness in this regard, the procedure engaged by the political

parties and INEC can be challenged in Court for the interpretation of the provisions of the section . See the unreported Supreme Court case of Engr. Charles Ugwu v Senator Ifeanyi Ararume and 2 others. SC. 74/2007. delivered on the 5th day of April, 2007. In conclusion this Court has jurisdiction to entertain this appeal on substitution of a candidate for an election which is a pre election matter. This application lacks merit and it is hereby dismissed." B

This decision given on 7th June, 2007 by the Abuja Division of the Court of Appeal was not followed by the Enugu Division of the same court on 12th July, 2007; a decision which was given some 35 days or so earlier. On appeal to the Supreme Court in SC.183/2007, this court dismissed the appeal on 30th May, 2008 by affirming the decision of the Court of Appeal that the appeal was not a mere academic exercise. Delivering the lead judgment of the Supreme court, Tabai, JSC, said in the last paragraph: D

"On the whole, I hold that the election of the 21/4/07 notwithstanding, the propriety or otherwise of the Plaintiffs substitution with the 1st Defendant remains a live issue for determination in the judicial process. In the event, I resolve the only issue in favour of the Plaintiff/Respondent. On this issue I fully endorse the ruling of the court below" E

The position of the law as stated by the Court of Appeal in Fashogbon v Chief Adeogun & others, CA/A/81/07 and the dissenting judgment of Denton-West, JCA in this appeal present the correct position of the law. With respect, the majority judgment of the court is not correct. Accordingly, Issue No.1 in the appellant's Brief succeeds. F

Let me pause here to indicate the need for the Divisions of the Court of Appeal to exchange their decisions immediately they are delivered . I do not think that is the practice. If that practice is followed, the conflicting decisions in the two cases may not have arisen. I therefore suggest that immediately a decision is given in one Division, it should be sent to the other Divisions without delay. G

And that takes me to Issue No.2. The merit of the case is the substitution of the appellant, Charles Odedo, within that of the party to be heard, Obinna Chidioka. It is the case of the appellant that the substitution was wrong as it violated section 34 (1) and (2) of the H

Electoral Act, 2006. It is the case of the respondents that the substitution was valid.

Let me quickly read section 34 (1) and (2) of the Electoral Act:

“(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.

In Ugwu v. Ararume (supra) this court examined in great detail the above two subsections. It was held that the provisions are justiciable and that cogent and verifiable reasons were not given for the substitution of the 1st respondent. I do not think I should repeat here the detailed examination of the subsections. What I should take here is whether the PDP gave cogent and verifiable reasons for the substitution of the appellant. That should take me to the facts leading to the substitution.

On 5th February, 2007, the Chairman and the National Secretary of the PDP wrote the following letter (Exhibit B) to Professor Iwu, Chairman of INEC informing him of the substitution:

*“Prof. Maurice Iwu,
Chairman,
INEC,
ABUJA*

SUBSTITUTION: PDP CANDIDATE FOR IDEMILI NORTH & SOUTH FEDERAL CONSTITUENCY, ANAMBRA STATE

This is to confirm that Obinna Chidioka is the PDP Candidate for Idemili North & South Federal Constituency, Anambra State.

Obinna Chidioka substitutes the earlier name for the aforementioned constituency which was submitted without enough information. This is for your necessary action.

(Signed)

*SEN (DR) AMADU ALI, GCON
NATIONAL CHAIRMAN*

(Signed)

*OJO MADUEKWE, CFR
NATIONAL SECRETARY”*

Is it a cogent or verifiable reason that the appellant’s name was sent “without enough information”? If at the time, the name was sent, the PDP did not know the reasons for sending the name of the appellant, could the party not have

given the reasons in Exhibit B. What is the meaning of “without enough information” in Exhibit B. In my view, the letter (Exhibit B) did not comply with the provision of section 34 (1) and (2) of the Electoral Act.

I have the temptation to stop here on the issue of section 134 (1) and (2). I should proceed to the affidavit evidence whether I can place my hands on the reason or reasons for the substitution. Paragraphs 13 and 14 of the grounds upon which the appellant sought the reliefs read:

“13 The Applicant scored 397 votes at the primaries election while Obinna Chidioka scored 6 votes. Obinna Chidioka did not attend the verification exercise conducted by the 1st Respondent on 13th Jan., 2007 or on any other date.

14. Neither Obinna Chidioka nor any of other PDP aspirants for the House of Representatives for Idemili North/South Federal Constituency participated in the verification exercise conducted by the 1st Respondent on 13th January 2007 or on any other date.”

Let me also read paragraph 4(d) of the counter affidavit of the party to be heard:

“(d) That in further answer to the said paragraph 4 of the Grounds upon which the reliefs are sought, states as follows:

(i) That for anybody in the said primary election to be declared winner/elected/nominated, the person must have secured at least 50% of the total votes cast in the said primary election;

(ii) That the total votes cast in the said primary election was 832 votes. See exhibit 3 attached to the Applicant’s affidavit in verification of the grounds relied upon.

(iii) That the Applicant polled 397 votes which is less than 50% of the total votes cast;

(iv) The Article 29(d) of the Electoral Guidelines for primary election 2006 of the 2nd respondent provided that a person stand nominated/elected if he has secured 50% of the total votes cast in the said primary election. A copy of the said guidelines is attached and marked as exhibit A;

(v) That 397 votes secured by the Applicant is 19 votes less than the 50% of the total votes cast.”

There is agreement in the affidavit evidence that the appellant

scored 397 votes. This is what paragraph 13 of the grounds upon which the reliefs are sought and paragraph 4 (d) (iii) of the counter affidavit say. While it is said in paragraph 13 of the grounds upon which the reliefs are sought that Obinna Chidioka scored a total of 6 votes, the counter affidavit is silent on this. It should be noted that paragraph 13 was not denied by Obinna Chidioka. The big question is how can a person who scored 397 votes be substituted with, a person who scored 6 votes? Election results either primary or the actual election, are announced in accordance with the person or persons who score the highest votes. What is the legal basis for Exhibit B in the light of the affidavit evidence as to the scores of Charles Odedo and Obinna Chidioka?

It is deposed in the counter affidavit that by Article 29 (d) of the Electoral Guidelines for Election 2006 of the PDP provided that *“a person stand nominated/elected if he has secured 50% of the total votes cast in the said primary election”* I do not see that provision in Article 29 (d). What Article 29(d) provides is that each accredited delegate shall be assigned an accreditation number tag by the Electoral Officer at the venue of the Special Congress. Assuming that there is such a provision (and that is possible) did Obinna Chidioka who scored 6 votes satisfy the provision of 50% of the votes cast? If not, why was he picked by the PDP? Is 6 bigger than 397 numerically?

In the counter affidavit, paragraph 4 (d) (ii) deposed to the total votes cast at the primary election as 832. Are the 6 votes cast for Obinna Chidioka 50% of the total votes of 832? Exhibit 3 shows the votes scored at the primaries by the candidates. It reads as follows:

S/No	NAME	TOTAL NO OF VOTES SCORED
1.	Charles Odedo	397
2.	Obiakor	172
3.	Sylvester Okonkwo	75
4.	Mgbemena	73
5.	Emeka Onuorah	42
6.	Dennis Okafor	25
7.	Barr. Chukwuelue	15
8.	Okwu Chukwu Obi	12

9. Obienyi	7
10. Chidioka	6
11. Helen Uzodimma	2

Exhibit 3 confirms paragraph 13 of the grounds upon which the reliefs were sought. I expected the counter affidavit to be sincere enough to admit that Obinna Chidioka scored 6 votes which qualified him to contest the election. B

In Exhibit 3 (a) the PDP sent a letter of congratulations to the appellant. The letter reads: C

“5th December, 2006

Charles Odedo,

PDP bearer for

Idemili North & South Federal Constituency

Sir, D

Congratulations on your Victory at Our Primary Elections. On behalf of the State electoral panel, I heartily congratulate you on your well deserved victory at our primary elections wherein you were elected as the Party’s Candidate for Idemili North & South Federal Constituency. E

*As our Party’s flag bearer, I strongly urge you to multiply your efforts in mobilizing people to ensure PDP’s victory at the 2007 general elections. * Once more, Congratulations.*

Yours faithfully,

Comrade Tony Nwoye, F

PDP Chairman Anambra State”

In Exhibit 4 Chief Tunde Osurinde, Chairman PDP Electoral Panel, Anambra State, named the appellant as candidate of the party in Idemili North and South Federal Constituency. Of the ten candidates, his name came first as follows: G

“IDEMILI NORTH AND SOUTH FEDERAL CONSTITUENCY

1. Charles Odedo Elected candidate

2. Obiakor

3. Sylvester Okonkwo H

4. Mgbemena

5. Emeka Onuorah ^

6. Dennis Okafor

7. Barr. Chukwuelue
8. Okwu Chukwu Obi
9. Obienyi
10. Chidioka
11. Helen Uzodimma”

B I have taken the pains to reproduce Exhibits 3a and 4 to make a point and it is this. If the PDP Guidelines provide for 50% win of the total votes cast at the primaries, it is my view that by Exhibits 3(a) and 4, the particular guideline has been waived. This is because Exhibit 3a congratulated the appellant and Exhibit 4 named him as the candidate. Equity will not allow the respondents to hold the appellant to ransom. Waiver, a very loud principle of equity will certainly come to the rescue of the appellant.

D Mr. Okafor made submission on Exhibit B in paragraph 6.04 of his Brief which I must confess I find it difficult to understand. I have the impression that he is arguing against the admissibility of Exhibit B. (the letter of substitution), on the ground that the copy was not stamped by INEC. If that is his argument, I will dismiss it right away as
E abstract and technical. Counsel did not cite any section of the Evidence Act that Exhibit B has violated. I have seen the exhibit. It is at page 123 of the Record. It is signed by Sen. (Dr.) Amadu All as National Chairman and Chief Ojo Maduekwe as National Secretary.
F The signatures are not in dispute and I do not think we should be going to the little issue of absence of INEC receiving stamp, particularly where there is no dispute as to whether INEC received the letter. If INEC did not receive Exhibit B why was it acted upon by it?

G Let me take here the submission of Mr. Nzelu that non-compliance with section 34 does not attract any punishment. The submission, in my understanding clearly stands on the head of the decision of this court in *Ugwu v Ararume*, supra. The submission of Mr. Nzelu is, with respect, strange and unknown to the tenets of legal drafting and the art of the draftsman. While the draftsman of penal legislation and the art of the draftsman. While the draftsman of penal legislation
H or statute specifically provides for sanction at the end of the provision for an offence, that is not always the practice in non penal legislation or statute.

Where a law such as the Electoral Act, 2006 provides

for A and a party does B, a court is entitled to hold that the party has not complied with the law, and the court has the jurisdiction to decide on the consequences of the non compliance by the party. This is clearly demonstrated in the interpretative jurisdiction of the court, and no counsel, not even Mr. Nzelu, can deprive the court of the exercise of that jurisdiction. It is not the practice of the draftsman to provide specifically a clause of sanction in every non penal legislation or statute in the way Mr. Nzelu argues. B

And what is more, the submission of Mr. Nzelu under- rates the time tested, time honoured and time proved principle of construction of statute by drawing the cleavage or dichotomy between the words “shall” and “may” as construing a mandate, obligation or command and permissiveness or discretion respectively. I should mention that the two subsections provide for the peremptory “shall”. The courts will not wait for Mr. Nzelu’s provision of punishment to construe the consequence of non compliance with the section. Unfortunately for Mr. Nzelu and his client, this court will follow its earlier decision in Ugwu v Ararume, supra and hold that section 34 (1) and (2) of the Electoral Act, 2006 was not complied with and the consequence of non compliance as in Ugwu v Ararume automatically follows. C D E

And that takes me to Issue No.3 where learned Senior Advocate has urged this court to exercise its section 22 powers. The section provides as follows: F

“The Supreme Court may, from time to time make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal and may direct the court below to inquire into and certify its finding on any question which the Supreme Court thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Supreme Court as a court of first instance and may rehear the G H

case in whole or in part or may remit to the court below for the purpose of such rehearing or may give such other direction as to the manner in which the court below shall deal with the case in accordance with the powers of that court."

The Supreme court can, under the section exercise full jurisdiction over a case and deal with it in the same way a trial Judge would have done. See *Ediagbonyua v. Dumex (Nig) Ltd.* (1986) 3 NWLR (Pt.31) 753. **In determining whether the conditions surrounding an appeal before the Supreme court are conducive to the exercise of its general power under section 22 of the Supreme Court Act as if the proceedings had been instituted and prosecuted before it as a court of first instance, the court will consider the followings: (a) The availability before it of all the necessary materials on which to consider the request of the party, (b) The length of time between the disposal of the action in the court below and the hearing of the appeal at the Supreme Court, (c) The interest of justice to eliminate further delay in the hearing of the matter and minimize the hardship of the party.** See *Adeyemi v Y.R.S. Ike-Oluwa and Sons Limited* (1993) 8 NWLR (Pt.309) 27.

By section 22, the Supreme Court has the power to determine the real issue in controversy and that in this appeal is, whether section 34 (1) and (2) of the Electoral Act, 2006 was complied with in the substitution of the appellant with Mr. Obinna Chidioka. A rehearing on the part of the Supreme Court means a rehearing on the Record as if the proceedings had been instituted in the court. If any set or category of case needs the application or invocation of section 22 power of the Supreme Court, it is election cases, because of the fact that they are very much liable to time in the sense that time is their very essence.

Mr. Okafor has urged us not to exercise our section 22 powers on the two grounds (a) the intended cross appeal by the 2nd respondent on jurisdiction and (b) the need to benefit from the decision of the Court of Appeal. I do not think the two grounds will change the position in favour of the 2nd respondent. The issue of jurisdiction is so clear. Section 285 of the 1999 Constitution which provides for

jurisdiction of Election Tribunal does not apply in this appeal as it deals with pre-election matter of substitution of candidates. I do not know which benefit is left that this court will derive from the decision of the Court of Appeal. The position of the Court of Appeal is clear and known.

In the light of the fact that Obinna Chidioka is enjoying a term in the House of Representatives and the appellant is languishing at home, it will meet the justice of this case by invoking its section 22 power, and that is what I want to do now, particularly when there are enough materials to do so.

I have come to the conclusion in this judgment that the substitution was not in compliance with section 34 (1) and (2) of the Electoral Act, 2006. And the consequence of the non compliance is a nullification of the purported election of Obinna Chidioka to the House of Representatives. The purported election based on a primary in which Obinna Chidioka scored only 6 votes is hereby nullified. In his place, the appellant who scored the highest votes of 397 is declared competent to contest the election in the constituency. And I declare the appellant to contest the election on the platform of the PDP in respect of the Idemili North and South Federal Constituency, Anambra State. This is a consequential order flowing from the reliefs sought by the appellant. I award N50,000.00 costs in favour of the appellant.

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Tobi JSC. The facts of this case are in some respects similar to those in *Amaechi v. INEC & 2 Ors.* [2008] 1 S. C. (Part 1) 36 where the argument was raised before us that the court would lose its jurisdiction to determine a suit in a pre-election matter where elections are held before the judgment of the court hearing the suit. This Court emphatically decided that the fact that elections are held subsequent to the commencement of the suit in a pre-election matter would not preclude the court from exercising its jurisdiction derived under the Constitution of Nigeria.

In this appeal, it is apparent that the appellant's case was pre-

misued on his improper substitution by the 2nd respondent less than 60 days to the election held on 21-04-07. It was undisputed that the appellant won the P.D.P primaries to nominate a candidate for Idemili North and South Federal constituency. It was also undisputed that the 2nd respondent sent the name of the appellant to the 1st respondent as its candidate for the said election. The 3rd respondent i.e. Obinna Chidioka who was joined to the suit by the trial court and designated as “Party to be heard” was later substituted for the appellant.

The appellant on 19-03-07 brought his application for a declaration, Prohibition and Mandamus claiming the following:

“1. A declaration that the 2nd respondent having submitted a list of PDP candidates it proposes to sponsor at the 2007 elections into the House of Representatives for Anambra State Federal Constituencies to the 1st respondent pursuant to section 32 of the Electoral Act, 2006, a substitution of the applicant’s name on the said list with that of Obinna Chidioka after the 20th February, 2007 is unconstitutional, null and void, the same not being in compliance with sections 34(1), (2) and (3) of the Electoral Act, 2006.

2. An order of Prohibition restraining the 1st respondent from using the substituted list of PDP candidates for elections into the Federal House of Representatives in Idemili North and South Federal Constituency.

3. An order of Prohibition restraining the 1st respondent from publishing the said substituted list which was published after the 20th February, 2007 or any other substituted list bearing the name of Obinna Chidioka or any other name in place of the applicant’s name as the PDP candidate for Idemili North and South Federal Constituency pursuant to Section 35 of the Electoral Act, 2006.

4. An order of Mandamus directing the 1st respondent to publish a statement of the full names of PDP candidates standing nominated for elections into the Federal house of Representatives for the Federal Constituencies in Anambra State as submitted to it by the 2nd Respondent on 23rd December, 2006 in accordance with section 35 of the Electoral Act, 2006.”

The elections were to be held on 21-04-07. Clearly therefore this was a pre-election suit. The High Court gave its judgment on 5-

4-07 dismissing the appellant's suit. The appellant was dissatisfied with the judgment and brought an appeal before the Court of Appeal, ENUGU (hereinafter referred to as the court below). In its majority judgment on 2-07-07 the court below reasoned that the appeal before it had become academic because elections had been conducted on 21-04-08. The minority judgment however allowed the appeal. B

The lead judgment by my learned brother has demonstrated why this appeal should succeed. I agree with the said judgment. The position of this Court in a situation similar to the one we have in this case was exhaustively discussed in *Amaechi v. INEC* (supra), C

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

And as to the propriety of upholding the case of *Amaechi* which is similar to the appellant's situation in this case, I said:

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

In the instant appeal, the conclusion I arrive at is the same. The 3rd respondent (or Party to be heard) was improperly substituted for the appellant. The 3rd respondent never won the primaries of the PDP for the election. The appellant and not the 3rd respondent must be deemed the candidate of the PDP who won the election. I am certainly unable to support the conclusion of my learned brother Tobi JSC in the lead judgment that the election on 21-4-07 be nulli- H

fied. The judgment of this Court in *Amaechi v. INEC & Ors.* is binding on me as it has not been overruled. I ought not to depart from it. In any case parties did not ask me to do so. Further, I ask myself the question - suppose the dispute before us in this case was not one between members of the party that was ultimately declared the winner of the election i.e. P.D.P. To make an order for a fresh election because of a dispute between members of a party that lost the election is to subject the candidate of the party that won the election to a new election. It is not only that this approach is unwise. It amounts to making an order affecting a person who was not a party to the case before the Court. This was a pre- election matter. The justice of this case lies in making an order that the person properly nominated by the PDP should step into the shoes of the person that won the election. The same thing would happen if the PDP had lost the election. The appellant would simply step into the shoes of the loser. I made this point clearly in *Amaechi v. INEC & Ors.* (supra) when at pages 111-112 of the report I said:

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

tending candidates was the validly nominated candidate for the election. It is purely an irrelevant matter whether the candidates allowed to contest wins or loses. The candidate that wins the case on the judgment of the court simply steps into the shoes of his invalidly nominated opponent whether as loser or winner.”

It is for this reason that I am unable to support the conclusion B of my learned brother Tobi JSC that the election of 21-04-07 be nullified. Rather, I would order that the appellant being the candidate validly nominated by PDP should step into the shoes of the 3rd respondent Obinna Chidioka as the winner of the election. This being C an intra-party dispute between members of the PDP, I ought not to make an order which binds or affects other political parties or candidates who were not parties to this case. I however agree with the reasoning and conclusion of my learned brother Tobi JSC that the appellant was not substituted as the candidate of the PDP in accordance with Section 34 of the Electoral Act, 2006. I would also D allow the appeal with costs as assessed in the lead judgment.

MOHAMMED JSC

I had a preview of the lead judgment of my learned brother Niki Tobi, JSC., which has just been delivered. I agree entirely with his reasoning and conclusion that this appeal deserves to succeed. I only wish to comment on the second issue for determination as identified in the appellant's brief of argument, which is whether the F appellant was not entitled to judgment on the merit of his case at the trial Court. This of course includes the question of whether or not on the facts which are largely undisputed, the substitution of the appellant's name with that of the “party to be heard” was done in compliance G with the requirements of the provisions of the Electoral Act in Section 34(2).

It is not at all in dispute between the parties that the appellant who was the winner of the 2nd Respondent's primaries to contest the seat of the member of the House of Representatives from the Idemili North and South Federal Constituency in Anambra State, his name was forwarded to INEC, the 1st respondent by his party, the H PDP, the 2nd respondent as its candidate for the election.

However, by a letter written to the 1st respondent by the 2nd Respondent on 5/2/2007, the 2nd respondent substituted the name of the appellant, earlier sent to the 1st respondent, with the name of the “*party to be heard*” as its new candidate. For the reasons given to effect the change or substitution, I quote the letter of the application for substitution which reads :-

“PROF. MAURICE IWU,
CHAIRMAN,
INEC.,
ABUJA.

SUBSTITUTION: PDP CANDIDATE FOR IDEMILI NORTH & SOUTH FEDERAL CONSTITUENCY, ANAMBRA STATE.

This is to confirm that Obinna Chidioka is the PDP Candidate for Idemili North & South Federal Constituency, Anambra State.

Obinna Chidioka substitutes the earlier name for the afore-mentioned constituency which was submitted without enough information.

This is for your necessary action.

(Signed)

(Signed)

SEN. (DR.) AMADU ALI, GCON. OJO MADUEKWE,

CFR

NATIONAL CHAIRMAN. NATIONAL SECRETARY.”

From this letter of application for substitution, it is quite clear that the only reason given by the 2nd respondent for wanting to substitute the appellant with the “*party to be heard*,” was that the name of the appellant earlier sent to the 1st respondent, was done “without enough information.” The question therefore is whether this qualifies as cogent and verifiable reasons required under the Electoral Act to effect a substitution.

Although the learned trial judge in his judgment at page 314 of the record of this appeal found that there were cogent and verifiable reasons for the substitution, his findings were not given in the 2nd respondent’s letter as the reasons for the substitution. The reasons given by the learned trial judge at page 314 include:-

“I therefore find that indeed, the plaintiff did not fully fill the Form CF001 and that explanation that 1st Respondent did not give him a true copy of Form CF001 is a mere after thought. I find that the reason in exhibit FAA that is insufficient information tallies with

the contents of the counter affidavit of Mr. Okorore to the effect that the plaintiff did not fill Form CF001 in full and did not depose to same before a commissioner for oaths. That makes whatever is contained in exhibit 5 not to be information as by section 32(2) Electoral Act to be in the Form of an affidavit. That to my mind is not information at all. Exhibit FAA was a bit charitable in using the words insufficient information indeed there was no information at all. To my mind this Constitutes a cogent reason. It is also verifiable as per plaintiffs exhibits 5 which at all material times was in the custody of the 1st Defendant.”

The above reasons given by the learned trial judge which he regarded as cogent and verifiable, were based on the contents of Form CF001 filled by the, appellant and submitted to INEC, the 1st respondent. Whether these reasons indeed constitute cogent and verifiable reasons, cannot be looked into in the present case because they are not contained in the letter of application for the substitution, written to the 1st respondent earlier quoted in this judgment. The trial Court was clearly wrong in regarding the facts or the contents of Form CF001, as reasons for the substitution of the appellant, which reasons were not given by his own political party, the 2nd respondent which was satisfied with his qualification to contest the election before sending his name as its own candidate.

In the result, I entirely agree with my learned brother Niki Tobi, JSC, in his leading judgment that no cogent and verifiable reasons were given by the 2nd respondent in its application for substitution, as required under section 34(2) of the Electoral Act, 2006 in the present case. The appellant therefore, remained the sponsored candidate of the 2nd respondent for the election and who also, in eyes of the law, must be deemed the candidate that won the election.

For the above reasons and fuller reasons contained in the lead judgment, I also allow this appeal with N50,000.00 costs to the Appellant.

TABAI JSC

This appeal is against the majority judgment of the Enugu Judicial Division of the Court of Appeal on the 12/7/2007. The action

itself was initiated by way of an application for judicial review by the Appellant on or about the 8/3/2007. He claimed against the first and 2nd Respondents the following reliefs.

B 1. A DECLARATION that the 2nd Respondent having submitted a list of PDP candidates it proposes to sponsor at the 2007 elections into the House of Representatives for Anambra State Federal Constituencies to the 1st Respondent pursuant to section 32 of the Electoral Act 2006, a substitution of the Applicant's name on the said list with that of Obinna Chidioka after the 20th February 2007 is C unconstitutional, null and void, the same not being in compliance with sections 32(1) (2) and (3) of the Electoral Act 2006.

D 2. AN ORDER OF PROHIBITION restraining the 1st Respondent from using the substituted list of PDP candidates for elections into the Federal House of Representatives in Idemili North and South Federal Constituency.

E 3. AN ORDER OF PROHIBITION restraining, the first Respondent from publishing the said substituted list which was published after the 20th of February, 2007 or any other substituted list bearing the name of Obinna Chidioka or any other name in place of the Applicant's name as the PDP candidate for Idemili North and South Federal Constituency pursuant to section 35 of the Electoral Act 2006.

F 4. AN ORDER OF MANDAMUS directing the 1st Respondent to publish a statement of the full names of PDP candidates standing nominated for elections into the Federal House of Representatives for the Federal Constituencies in Anambra State as submitted to it by the 2nd Respondent on 23rd December, 2006 in accordance with section 35 of the Electoral Act 2006.

G Sometime in the course of the proceedings Obinna Chidioka applied to be joined as a co-respondent. He was, instead, joined as a Party to be heard. The parties, through their counsel, filed and exchanged written addresses.

H In his judgment on the 5th of April 2007 the learned trial judge A.O. Faji J dismissed the claim. The Applicant/Appellant was not satisfied with the judgment and so went on appeal to the court below. While the appeal was thus pending therein, the Court suo motu raised the issue of whether the appeal was still competent since the election had since taken place and there was no restraining order

against the election. On the orders of the court written addresses were submitted. On the 12/7/2007 by a majority of 2-1 the suit was struck out for incompetence. In his judgment Ja'Afaru Mika Ilu JCA concluded thus:

"In the final conclusion it is clear in view of the above that the appeal now pending has become an academic exercise in view of the fact that the election was already concluded and an election tribunal which is the appropriate venue, having been set up. Consequently the appeal is struck out as a mere academic exercise."

In his judgment Jimi Olukayode Bada JCA agreed with the above judgment and also struck out the appeal. In part of his judgment he reacted thus:

"I agree with the reasons given therein and the conclusion reached that hearing the appeal is a mere academic exercise."

In her minority opinion, Sotonye Denton-West JCA allowed the appeal and concluded firstly in the following terms:

"I find merit in this appeal and accordingly declare that the substitution of Appellant's name, Charles Chinwendu Odedo with that of Obinna Chidioka by the 1st and 2nd Respondents is unconstitutional, null and void in respect of the 2007 elections into the House of Representatives in Idemili North and South constituency; since it is not in compliance with sections 34(1) (2) and (3) of the Electoral Act"

3. Still aggrieved, the Appellant has further come on appeal to this Court. The parties have, through their counsel, filed and exchanged their briefs of argument. And in their respective briefs the parties have formulated a number of issues for determination.

In the lead judgment prepared by my learned brother Tobi JSC, the issues formulated by counsel for the parties are clearly set out. In his typical manner, he discussed these issues in details, resolved each of them and in conclusion allowed the appeal. I agree entirely with his reasoning and conclusion. Safe and except in respect of an aspect of the consequential order which I shall make the concluding part of this judgment. I have little or nothing more to add. By way of emphasis however, I wish to comment briefly on the 1st issue. It is whether the Court of Appeal in its majority judgment was right in holding that the Appellant's appeal in the circumstances was a mere

academic exercise. This is the crucial issue in this appeal.

For a proper comprehension of this issue it is necessary to bring to the fore the salient facts which necessitated the filing of the action on the 8th of March 2007. The 2nd Respondent, PDP conducted primary election for the party's candidate for Idemili North and South Federal Constituency to the House of Representatives on the 24/11/06. The Appellant and the Party to be Heard Obinna Chidioka were among the 11 candidates who contested the said primary election of the party. The Appellant won, having scored 397 votes. The party to be heard, Obinna Chidioka, scored only 6 votes and was in the 10th position. (See page 14 of the record). Pursuant thereto, the Appellant's name was submitted by the 2nd Respondent to the 1st Respondent as its candidate for the aforesaid Federal Constituency for the then forthcoming general elections into the House of Representatives in April 2007. This submission was made on the 20/12/2006. And following this submission, the Appellant's name was published by the 1st Respondent as the 2nd Respondent's candidate for the Idemili North and South Federal Constituency in Exhibit 11. (See page 226 of the record). He completed the necessary forms which were in turn submitted by the 2nd Respondent to the first Respondent. (See Exhibit 13 at page 229-232 of the record).

However by Exhibit "B" letter dated 5/2/2007 addressed to the Chairman of the 1st Respondent, the Party to be Heard Obinna Chidioka was substituted for the Appellant. The body of the letter Exhibit B states:

"This is to confirm that Obinna Chidioka is the PDP candidate for Idemili North and South Federal Constituency Anambra State. Obinna Chidioka substitutes the earlier name for the aforementioned constituency which was submitted without enough information." (emphasis mine)

It was in reaction to this that the present action was filed, on the 8/3/07. I have earlier reproduced the four reliefs claimed. The Appellant's grievances for which he seeks redress in this action is the substitution. In the first relief he seeks a declaration that his substitution with Obinna Chidioka is unconstitutional, null and void, same being contrary to the provisions of the Electoral Act 2006. The other three reliefs seek the order of the court restraining or giving effect to

the substitution complained of for the general elections that was then forthcoming.

Despite the pendency of this action, the 1st and 2nd Respondents went ahead to use the name of Obinna Chidioka whose substitution is being challenged in this action for the April 2007 elections. The majority opinion of the Court below reasoned that the elections of April 2007 having been conducted and completed, the suit becomes spent, that there are no longer any live issues for determination by the court and therefore that the suit has become merely academic. Learned counsel for the Respondent justified this majority decision of the court below. Chief (Mrs.) A.J. Offiah, SAN for the Appellant felt, the issues were still live and throbbing the conduct of the election notwithstanding. B

In the recent case of this Court in suit No. SC. 183/2007 CHIEF ALBERT ABIODUN ADEOGUN & ORS V HON. JOHN OLAWALE DASHOGBON & ORS decided on the 30th May 2008, there was substitution in circumstances very similar to the circumstances in this case. The issue raised therein was whether by reason of the elections which had been conducted and concluded, the court no longer had the jurisdiction to hear and determine the suit. In my reaction I said: C

“A court which has jurisdiction to entertain an action would not subsequently lose that jurisdiction simply because a defendant, in some vantage position and in complete disregard for the outcome of the pending suit, goes ahead to do that which is sought to be prevented in the suit. Put in another way, a defendant in a cause has no legal authority to determine the outcome of the claim against him by purporting to complete the very act sought to be prohibited in the suit. That would amount to the court’s abdication of its constitutional and sacred duty of dispensing justice in disputes between persons or between Government or other authorities. It will send a rather dangerous signal to a genuinely aggrieved Plaintiff that he cannot obtain redress for a wrong committed by a defendant in some vantage position.” D

Still on this issue of substitution I added:- E

The Defendants/Appellants in this case cannot, by persevering on the very substitution which is being challenged, fetter the jurisdiction of the court to make its final pronouncement on the issues pre- F

sent to it for adjudication. The corollary of this is that an unlawful act which illegality is being pursued in judicial proceeding cannot metamorphose into a legitimate one by a plea of the defendant that the act has been completed. After all it is settled principle of law that a party committing on illegality, cannot be allowed by the court to benefit from the selfsame illegality, lest the court will portray itself as an instrument of injustice.....”

In my view the principles upon which I make the pronouncements above apply with equal force to this case. The issue of whether the hearing and determination of the case was a mere academic exercise never arose until the conduct of the April 2007 general elections. Despite the pendency of the suit the 1st and 2nd Respondents persisted with the substitution and presented the name of Obinna Chidioka for the election. They now plead the very fact of the election contend, as the court below did, that the suit has, by reason thereof, become merely academic. I am not persuaded by that argument and I do not, with respect, agree with the position taken by the court below.

Section 6(6) of the Constitution provides:
“The judicial powers vested in accordance with the foregoing provisions of this section

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

(b) shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.”

Thus it is the court which has the exclusive jurisdiction for the determination of any question as to the civil rights and obligations of a person. This exclusive jurisdiction is reserved for the courts, notwithstanding anything to the contrary in the Constitution. In this case therefore it is the court and only the court that has the authority to determine the rights and obligations of the parties. The Respondents cannot by doing what is sought to be prevented turn round to plead that the action has become merely academic. That would amount to their determination of the rights and obligations of the Appellants.

Than cannot be. A genuinely aggrieved person who approaches the court for redress must be accorded the redress if he establishes his rights thereto at the trial. Otherwise there can be break down of public order with the possibility of the aggrieved opting for vengeance by violent self-help. That can be dangerous.

For the foregoing reasons I also resolve the first issue in favour of the Appellant against the Respondents. B

With respect to the substitution itself there is no doubt that Exhibit “B” does not meet the requirements of section 34(2) of the Electoral act 2006. Exhibit “B” does not contain any cogent verifiable reasons for the substitution. C

In view of the above considerations and the fuller reasons very ably articulated in the lead judgment of Tobi, JSC I also allow the appeal. I declare that the substitution of Obinna Chidioka for the Appellant as the 2nd Respondent’s candidate for the Idemili North and South Federal Constituency for the election of April 2007 is null and void and of no effect whatsoever. It is as though no substitution ever took place. And on the authority of *AMAECHI v INEC & ORS* (2008) 1 SC (Part 1) 36, the Appellant is deemed to be and is the PDP candidate who contested and won the election into the House of Representatives, representing the Idemili North and South Federal Constituency of Anambra State. In other words the Appellant is by reason thereof the PDP member of the House of Representatives, representing the Idemili North and South Federal Constituency of Anambra State. I also assess the costs of this appeal at N50,000.00 in favour of the Appellant. D
E
F

MUNTAKA-COOMASSIE JSC

Having been privileged to read in draft form the judgment of my learned brother Tobi JSC, I entirely agree with his lordship that appeal be allowed. The appeal is definitely meritorious and I have no reason to hold otherwise. However in expatiation thereto I wish to add the following bit as my contribution by way of emphasis. G
H

The Appellant, in an application for judicial review, sought and obtained the leave of the Federal High Court, Enugu, hereinafter called the trial court, to apply for an Order of Prohibition and Man-

damus against the Respondents. In a motion On Notice dated 13/3/07, the Appellant sought the following reliefs:-

“B. RELIEF SOUGHT.

(1) *A DECLARATION that the 2nd respondent having submitted a list of P.D.P Candidates it approves to sponsor at the 2007 election into the House of Representative for Anambra State Federal Constituency to the 1st respondent Pursuant to section 32 of the Electoral Act, 2006, a substitution of the Applicant’s name on the said list with that of Obinna Chidioka after the 2nd February, 2007 is unconstitutional, null and void, the same not being in compliance with sections 34 (1) (2) and (3) of the Electoral 2006.*

(2) *AN ORDER OF PROHIBITION* restraining the 1st Respondent from using the substituted list of PDP candidates for election into the Federal House of Representatives in Idemili North and South Federal Constituency;

(3) *AN ORDER OF PROHIBITION* restraining the first Respondent from publishing the said substituted list which was published after the 20th February, 2007 or any other substituted list bearing the name of Obinna Chidioka, or any other name in place of the Applicant’s name as the PDP candidate for Idemili North and South Federal Constituency pursuant to section 35 of the Electoral Act, 2006.

(4) *AN ORDER OF MANDAMUS* directing the 1st Respondent to publish a statement of the full names of P.D.P candidates standing nominated for elections into the Federal House of Representatives for the Federal Constituencies in Anambra State as submitted to it by the 2nd Respondent on 23rd December 2006 in accordance with section 35 of the Electoral Act 2006.” See pages 559 - 560.

Before the motion could be heard, Mr. Obinna Chidioka brought an application dated 16/3/07 to be joined as co-respondent to the suit. However, the trial court made an Order joining him as “party to be heard.” Therefore, the “party to be heard” filed a Notice of Preliminary objection to the suit that:

“(a) *That this Honourable Court lacks jurisdiction to entertain this Suit having been predicated upon domestic affairs of political party which this Honourable Court can not inquire into.*

(b) *That this Suit as it is presently constituted discloses no jus-*

ticiable cause of action.

(c) *That the respondent/Applicant has no locus Standi to institute this action.*

(d) *That the action was wrongly commenced.*”

The preliminary objection was taken along with the substantive case. After hearing the parties, the trial court held as follows:- B

(a) On the justiciability of the claim

“In so far as the case therefore concerned the change by a political party of its candidates, then it is justiciable. I therefore find on issue that the instant matter does not fall within the domestic jurisdiction of the political party “ C

ON ISSUE II

I do not, with respect, agree that the case of ANPP v THE RETURNING OFFICER (Unreported case No. SC I78/2005 delivered on 22/2/07 by the Supreme Court applies. As I said on issue no. D 1, this matter relates to the application of section 34 of the Electoral Act, it also touches on the executive or administrative action of the Federal Government agency INEC - under section 34 of the Electoral Act and is therefore within the jurisdiction of the Federal High E Court.”

(b) On the substitution of the applicant with “the party to be heard, “ the trial court held that the substitution -was made not later than 60 days to the day of the election pursuant to section 34(2) of the Electoral Act. On the reason for the substitution the trial court F held as follows:-

”.... I therefore find that indeed, the plaintiff does not fully fill the form CF001 and that the explanation that the 1st respondent did not give him a true copy of Form CF001 is a mere after thought. I find that the reason in Exhibit FAA that is insufficient information G tallies with the contents of the counter-Affidavit of Mr. Okorore to the effect that the plaintiff did not fill Form CF001 in full and did not depose to same before a commissioner for Oath. That makes whatever is contained in Exhibit 5 not to be information, as by Section H 32(2) Electoral Act to be in the form of an affidavit. That to my mind is not information at all. Exhibit FAA was a bit charitable in term words (sic). Insufficient information indeed there was no information at all. “

In conclusion, the learned trial Judge held that:-

“The reliefs in the motion on Notice cannot therefore be granted, they are accordingly hereby dismissed. “

The appellant, being aggrieved, appealed against this decision to the Court of Appeal sitting in Enugu hereinafter called the court below. Parties duly filed and exchanged their respective briefs of argument. On the 15/5/07 when the appeal was to be heard in that court, the following happened;

“Court to parties - Is this appeal not now... (Sic) academic exercise.

Mrs. Offiah - I ask for 4 days to file a written address.

Miss Onwugbolu - I ask for 2 weeks.

Dr. Ukpeazu: I ask for one week (7 days).

Court: the appellant is given 4 days from today to file his written address on whether or not this appeal is now academic. On receipt of same the respondents shall file theirs within 7 days. The appeal is adjourned to 30/05/07 for hearing. “

Both parties filed their written address on this issue raised by the court below. In a majority of 2 to 1, the court below dismissed the appeal and held as follows:-

“It is to be noted that the appellant in his relief’s, especially the 2nd relief, prayed the trial Court to make an Order of prohibition restraining the 1st respondent from using the substituted list of P.D.P candidates for election into the Federal House of Representatives in Idemili North and South Federal Constituency. But the substituted list had already been used. In short the relief’s 2-4 are in respect of prohibition and mandamus in respect of which election had already taken place. There is no prayer asking this court, or any court to nullify the election which has already taken place.

In short, the relief sought under relief’s (2) and (3) are for prohibition of acts which had already taken place. Also the mandamus sought under (4) was for an act which had already taken place. An Order of prohibition is not a remedy for an act which had already taken place. The same to Order of Mandamus (sic) Grant of relief No. I would not serve any reasonable purpose once there is no prayer seeking for the nullification of the election which had already been conducted.

In the final analysis, it is clear in view of the above that the appeal now pending has become an academic exercise in view of the fact that the election was already conducted and an election Tribunal which is in the appropriate venue, having been set up. Consequently the appeal is struck out as a mere academic exercise. “

It is against this decision that the Appellant has further appealed to this court. In his Notice of appeal filed dated 5/10/07, the two grounds of appeal filed are reproduced hereunder without their particulars:-

“1. The learned justices of the Court of Appeal erred in law when in the majority judgment they held that the hearing of the appellant’s appeal in that court (i) had become an academic exercise in view of the fact that the election was already conducted and election Tribunal which is the appropriate venue, having been set up and therefore struck out the appellant’s appeal as a mere academic exercise.

2. That Court of Appeal erred in law in its majority judgment it failed to consider the merits of the appellant’s case on the erroneous ground that hearing of appeal had become an academic exercise “.

Parties duly filed and exchanged their respective briefs of argument. In the Appellant’s brief of argument three issues were submitted for the determination of this appeal, to wit:-

“(1) Whether the Court of Appeal in its majority judgment was right in holding that the Appellant’s appeal in these circumstances was a mere academic exercise.

(2) Whether the appellant is not entitled to judgment on the merits of the case.

(3) Whether in the circumstances of this appeal, this is not a proper case in which the Supreme Court should exercise its power under Section 22 of the Supreme Court Act to hear this case on its merit, in view of the failure of the Court of Appeal to do so in the majority judgment”.

Counsel to the 1st Respondent in his Brief of argument dated 21/1/08 formulated four issues for determination as follows:-

“1. Whether the Court of Appeal in its majority ruling was right in holding that the Appellant’s Appeal in the circumstances was a mere academic exercise.

2. *Whether the Court of Appeal ought to have proceeded to determine the merit of the appeal and cross appeal after holding that the appeal had become a mere academic exercise.*

3. *Whether this is a proper situation for the exercise of the Supreme Court's powers as contained in Section 22 of the Supreme Court Act.*

4. *Whether the trial court was correct in holding that the substitution of the appellants name was done in accordance with Section 34 (1), (2) and (3) and Whether the dissenting Justice was right in his assessment of the onus of proof in respect of issues which arose in the trial court".*

Both the 1st Respondent and the party to be heard adopted the issues as formulated by the Appellant in his brief of argument.

As earlier stated in this contribution, the issue of whether the applicant's complaints, i.e., wrongful substitution was justiciable or not was not in contest between the party. The trial court had held that the issue is justiciable and it has jurisdiction to hear the complaints. It is to be noted that neither the respondents nor the party to be heard appealed these findings of the trial court to the court of appeal. The appellant who appealed against the findings to the court below only appealed in part against the judgment of the trial court. In the notice of Appeal of the appellant to the Court of Appeal he stated as follows:-

"The whole decision other than that part thereof dealing with the matters raised in the preliminary objection. "

Hence, in view of the fact that "the issue of wrongful substitution is a justiciable issue," and the respondent and the party to be heard having not appealed against that part of the decision of the trial court, the trial court's finding is still valid and subsisting. If I may add however, that the issue of the justiciability of the Provisions of Section 34 of the Electoral Act, 2006 has long been settled by this court. In *Ugwu v Ararume (2007)12 NWLR (Part 1048) p 365 at 367 - 524.*

I have no reason to disagree with their Lordships. Section 34 of the Electoral Act, 2006 is design to check the excesses of the political party arbitrarily substituting candidates who have fought for and worked hard to emerge as the party candidate in the primary elec-

tions. The section seeks to put sanity in our political system. The days were gone when godfatherism was used to determine candidates who emerged as the party candidates instead of those who succeeded at the primary conducted to elect candidates from the grass root. It puts confidence in a successful candidate from the primaries that once they were elected, his party cannot on its own whims and caprices substitute them for less popular and credible candidates without adducing cogent and verifiable reasons for such substitution. B

The 1st Respondent in its Brief of argument raised preliminary objection to the 2nd and 3rd issues framed by the appellant on the ground that the appellant who filed only two grounds of appeal could not raise three issues out of the said grounds. The attack in my view was particularly centred on the third issue, which deals with the power of this court under Section 22 of the Supreme Court Act to hear the case on the merit, if the circumstances of the case deserve it. Though this court frowns at formulation of issues for determination in excess of the number of grounds of appeal filed as it leads to proliferation, however this cannot be said to apply to this case. C

Issue III as formulated by the appellant is a product of issue II which was distilled from the second ground of appeal. Issue II raised the question whether the appellant is entitled to judgment, if for a moment, this court resolves in favour of the appellant, is this court going to refer the case back to the lower court to enter judgment for the appellant or to exercise our power under the provisions of Section 22 of the Supreme Court Act?. It is my view that this is not a proper case where it can be said that the proliferation of issues for determination ordinarily the appellant could have argued the issue as a sub-issue under issue no II, it is therefore not surprising that the appellant argued the two issues together. I therefore find no merit in the objection of the 1st respondent. F

Surprisingly, the 1st respondent who complained against, the issues formulated by the appellant being in excess of the number of the grounds of appeal contained in the Notice of Appeal, turned round to formulate four (4) issues out of the two grounds of appeal. The fourth issue formulated by the 1st respondent earlier set out in this judgment did not flow from the two grounds of appeal before this court. I will therefore discountenance it in this judgment. H

In the determination of this appeal I will follow the footsteps of the 2nd respondent and the ‘party to be heard in adopting the issues formulated by the appellant in this case. These issues have earlier been set out I will take them one after the other.

ISSUE 1

B *“Whether the court of appeal in its majority judgment was right in holding that the appellant’s appeal in these circumstances was a mere academic exercise “*

The appellant in his Brief of argument submitted that his claim is essentially for a declaration that his political party (P.D.P) rightfully submitted his name under Section 32 of the Electoral Act - as its rightful candidate for election and that the alleged substitution of his name with that of “Party to be heard” was not done in accordance with the requirements of Section 34 of the Electoral Act. The Senior D Counsel for the appellant therefore submitted that this declaration if made before the holding of the elections would have confirmed his rightful candidate for the 2nd respondent, and the said declaration if made after the holding of the election, the election would still confirm his right to challenge the election as a candidate unlawfully excluded from contesting the election by reason of unlawful exclusion. E It was submitted that issues of nomination and substitution are pre-election matters which could only be heard by regular courts and not the Election Petition Tribunals.

F The following cases were cited: -

- (1) IBRAHIM Vs INEC (1999) 8 NWLR (PART 614) 334 at 351;
- (2) SANYA OLU Vs INEC (1999) NWLR (PART 612) 600 at 608;
- G (3) NEC Vs NRC (1993) 1 NWLR (PART 267) 1 SC. 120; and
- (4) DONKPO LAGHA Vs GEORGE (1992) 4 NWLR (Part 236) at 444.

H It was the submission of the learned counsel that the holding of an election would not constitute a bar to the appellant’s case, as the 1st respondent was duly aware of the pending suit and the claims against it and in disregarding these court processes it proceeded with the conduct of the election. He therefore contended that the court will not lend helping hand to a respondent who intends to render the

proceedings and the judgment of the court pyrrhic by its adverse acts. The following cases were cited: -

- (i) FATB Vs EZEGBU (1993) 6 NWLR (Pt 291) at 25
- (ii) DANIEL Vs FERGUSON (1891) 2 CH. D 97.

It was submitted that the holding of the election has not rendered this case to a mere academic issue. B

The 1st respondent contended in it's Brief of argument that the holding of the general election and the setting up of Election Tribunals have rendered the proceedings to mere academic or hypothetical issues. The case of DIKE Vs NZEKA (1986) 2 NWLR (Part 34) 144 was cited. Learned Counsel contended that this action as constituted is a pre-election and that it is not challenging the said elections. Therefore if the appellant's prayers were granted, it would be in futility as only the Election petition Tribunal that can up-turn the declaration of the Returning Officer who declared the party to be heard as the winner of the election. C D

The 2nd respondent submitted that election having taken place it is clear that the Court of Appeal cannot grant reliefs at this stage, as granting the reliefs at this stage will amount to making an order in vain which amounts to a mere academic exercise. He cited the following cases; - E

- (a) Nwobodo Vs A C B (1995) 6 NWLR (pt 404) 658;
- (b) Mamman Vs Salaudeen (2005) 18 NWLR (Part 958) 478;
- (c) Oyeneye Vs Dugbesan (1972) 4 SC. 244;
- (d) A-G Abia State Vs A-G. FED (2005) 12 NWLR (Pt 940) 452 at 514; and F
- (e) Obeya Memorial Hospital Vs A-G. FED. (1987) 3 NWLR (Part 60) 326.

Learned counsel to the 2nd respondent further submitted that the combined effect of section 119(a) (i) 285 (1) (a) of the 1999 Constitution and Section 140 and 69 of the Electoral Act, and the cause of action has inured to the election Tribunal. The learned counsel disagreed with the appellant and submitted that the proper venue is the Election Tribunal by virtue of the provisions of Section 145 (1) (b) of the Electoral Act, 2006 and concluded that ROTIMI Vs AMECHI supra is not helpful in this case. G H

Learned counsel to "The party to be heard" contended in his

Brief of argument that a suit is said to be lifeless or an academic exercise where a decision reached in the matter will not enure any right or confer any benefit on the successful litigant, he cited the case of *Ogbonna Vs President F.R.N* (1997) 5 NWLR ((Part 504) 281 at 283; *Nwoboshi Vs ACB* (1995) 6 NWLR (part 404) 658 at 665.

B In the instant case, reliefs 2, 3 and 4 which border on prohibitive and injunctive remedies are of no moment and cannot be granted at this stage by the Honourable Court, since they have been over taken by event. The learned counsel concluded, rightly in my view, C that the Federal High Court was the appropriate court to canvass issues of this nature and that the appeal to the Court of Appeal are steps in the right direction. However, the counsel referred to relief No 1 and submitted that the complaint of the appellant in relief No 1 is substitution. Learned counsel referred this court to section 32, 34 of D the Electoral Act, 2006 and submitted that since the complaint of the appellant was that he was substituted after 20/2/07 which was the last day for the exercise, but by Exhibits B, FAA, and ANN dated 5th February, 2007 which was received on the 19/2/07, it is clear that the substitution was done within time. By virtue of the said letter of sub- E stitution which is an Exhibit before the court, this issue as to time frame within which the substitution was made, was laid to rest. As such there is no more any life issue to decide.

The lower court, fortunately or unfortunately agreed with the respondents in its majority judgment when it concluded thus: - F

“Grant of relief No 1 would not serve any useful purpose once there is no prayer seeking for the nullification of the election which had already been concluded”.

With respect, the question that bothers my mind my Lords, is G can the 1st respondent be allowed to frustrate the appellant in his fight for the restoration of his civil right, by the conduct of the election, even though they were aware of the pending action?. Our legal system frowns at acts of self help, the only means through which the courts can protect its independence and integrity is to disallow the H abuse of its processes and orders. To my mind the action of the 1st respondent, (INEC) amounts to an act of lawlessness and disrespect to the rule of law. The election conducted by the 1st Respondent, when this action was pending, was of no moment and it can not

deprive the appellant his right to have his case determined in the court of law. To me the minority decision is un-assailable and I agree with it when it held thus: -

“Having duly studied the various submissions of the parties and indeed the recent pronouncement of the apex court, I am of the humble view that it is essential first to determine the conduct of the pre-election. See Ibrahim Vs INEC (1998) 8 NWLR (pt 614) 334 at 354, Adebisi Vs Babalola (1993) 1 NWLR (pt 267) 1. Amaechi Vs INEC supra, is nearly on all fours with this appeal and it is not even treated by the Apex court as an academic issue as it is very live within the court of Appeal Abuja and the Apex Court as an academic issue”. See pp 565 - 610 of the Record.

In AMAECHI Vs INEC (2008) 5 NWLR (Part 1080) 227 at 314, Oguntade JSC stated the position of the law as follows: -

Section 178 above is a provision of the 1999 Constitution to ensure a smooth transition from one administration to another. It is not a provision to destroy the right of access to the court granted to a citizen under Section 36 of the same Constitution. In the same way section 285 (2) relied upon by senior counsel cannot be construed to destroy the jurisdiction which the ordinary court in Nigeria have in pre-election matters. Were the court to construct Section 285 (1) as having the effect of ousting the jurisdiction of the ordinary court in pre-election matters, all that a defendant would do to frustrate a plaintiff's is to stall? For time and obtain adjournment to ensure that a plaintiff's case is killed, once election is held”.

At page 315, His Lordship stated as follows:-

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

The same approach adopted by the Respondents in Amaechi's case was also adopted in the instant case. The belief was that if elections were conducted that would put an end to the appellant's case or “kill” his case. The jurisdiction of ordinary court in pre-election matters is sacrosanct and the holding of such an election when the

action was pending would not deprive the ordinary court of its jurisdiction to conclude the matter, even to the appeal court.

It is to be noted that the appellant in this case took steps immediately he was aware of this substitution. He instituted this action before the conduct of the election and had been steadfast, believing in the judicial process that justice would be done. He did not stand by and allowed the party to be heard' to fight for the election and therefore seek to take the benefit of the result of the election by proceeding to seek for the enforcement of his right after the election.

All what I have been labouring to state is that he did not sleep over his right. If this action had been instituted after the conduct and declaration of the election I would have held that the jurisdiction of the trial court to hear the pre-election matters has been over taken by event. In the circumstances I resolve issue one in favour of the appellant.

ISSUES II AND III

Both parties agree and argue issues 2 and 3 together. The 1st respondent in his brief of argument formulated four (4) sub - issues to wit:-

(1) *Whether the alleged letter of substitution dated 5th February, 2007 (Exhibit B, FAA and AN1) was made by the political party (PDP) as required by section 34 (1) of the Electoral Act, 2006 and whether the learned trial judge was right in failing to resolve the issue in his judgment.*

(2) *Whether the learned trial judge was right in his assessment of the standard of proof and on whom the onus of proof lay in respect of specific issues which arose in the case.*

(3) *Whether in view of the evidence before the court, the learned trial judge was right when he held that the substitution of the Appellant's name was carried out in line with section 34 of the Electoral Act, 2006.*

(4) *Whether the Appellant was given fair hearing in the matter of the substitution of his name with that of OBINNA CHIDIOKA as the PDP candidate for House of Representative Election in Idemili North and South Federal Constituency".*

These sub - issues, no doubt, go to the merit of the substantive issue, it is thus pertinent to determine whether this case falls within

those cases in which the court can invoke the power conferred on it by Section 22 of the Supreme Court Rules to rehear an appeal and make such order as the trial court may make.

In this respect the appellant submitted that in considering whether the court should exercise its power under Section 22 of the Supreme Court Act, Counsel referred to the case of Yusuf v. Obasanjo (2003) 16 NWLR (part 847) at 554, and C.GG (NIG) LTD V. OGU (2005) 8 NWLR (part 927) at 366, and submitted that all the necessary facts to be considered in determining the merit of the case are before the court. The learned senior counsel therefore submitted that this is a proper case on which this court should invoke its powers under Section 22 of the Supreme Court Act. The party to be heard Obinna Chidioka, seems to agree with the appellant on this point, in paragraph 4, 5, 11 of this brief of argument, he submitted as follows: *“Having said the above, this Honourable court has the power under Section 22 of the Supreme Court Act to deal with issue so formulated but not answered by the Court of Appeal and can as well remit the case back to the Court of Appeal to make pronouncements on the issues so formulated but not answered or addressed in her majority judgment. The same is like any order (sic) case coming before the court. It attaches some importance as any other case “.*

The learned counsel to the 1st respondent in his brief cited the case of OBI Vs INEC (2007) 11 NWLR (part 1046) 565 at 646; and submitted that this case does not meet the conditions laid down in that case, hence the provisions of Section 22 of the Supreme Court Act could not be invoked. He referred to the application pending before the court below to cross appeal over a matter bordering on the jurisdiction of the trial court. I have carefully and meticulously looked at the motion for leave the 1st respondent was complaining of, in fact the motion has been moved and granted on the 15/05/07. It therefore forms part of the issue which the lower court did not decide.

In the case of OBI Vs INEC (Supra) at p. 646, the case laid down the principles to be followed before the provisions of Section 22 of the Supreme Court Act can be invoked as follows: -

“It follows from what I have been saying above that certain conditionalities must be present before the provisions of this section

can be invoked and they are:

(1) *The lower court or trial court must have the legal power to adjudicate in the matter before the appellate court entertains it.*

(2) *The real issue raised up by the claim of the appellant at the lower court or trial court must be seen to be capable of being distilled*
B *from the grounds of appeal.*

(3) *All necessary materials must be available to the court for consideration.*

(4) *The need for expeditious disposal of the case or suit to*
C *meet the ends of justice must be apparent; and*

(5) *The injustice or hardship that will follow if the case is remitted to the court below must clearly manifest itself."*

By virtue of the provisions of Section 74 of the Evidence Act, I take judicial notice of the fact that the Election to the House of Representatives took place on 21//4/07 and the winners have since been sworn in.

Now it is one year after the said election, while the terms of the present occupant of the election being contested will expire 2011. If this case is remitted back to the lower court it will definitely take some
E measure of time before it is decided, perhaps an appeal may also be brought to this court. At the end of the day, whoever emerges as a winner in this case would have little or no time to effectively represent his constituency in the National Assembly. It is my view that it will
F be in the interest of justice for this court to hear this case on its merit. All the necessary materials, as stated earlier, to determine the case on the merit are before this court, and all the issues have been extensively argued by the learned counsel to all the parties. I will now proceed to determine this case on its own merit.

G Turning to the main appeal before this court, i.e. the submissions raised under issue II of the appellant's brief of argument in the first sub-issue, the appellant's counsel submitted that by the Provisions of Section 34 (1) of the Electoral Act 2006, it is only the political party which can initiate the process of changing any of its candidate
H for election and not a member or an officer of the court. Hence for a substitution to be valid the process for such substitution must be initiated by the political party. The learned senior counsel for the Appellant contended that throughout proceedings in this case there was no

where the Respondents or the party to be heard averred that PDP wrote and submitted a letter of substitution. It was the contention of the appellant that Exhibit B was not signed by the National Chairman of the PDP. The appellant produced Exhibit 10A which is another letter of substitution said to have been signed by Alhaji Ahmadu Ali Exhibit 2, and 11 which show the normal signatures of Alhaji Ahmadu Ali were produced. Comparing the signature on Exhibit B with that in Exhibits 10A, 2 and 11, it would be apparent that Exhibit B was signed by the said National Chairman of PDP, learned counsel submitted. Hence Exhibit B having not been signed by the National Chairman it could not be said that it was made by the political party i.e. PDP, the 2nd Respondent herein. B
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On the 2nd sub-issue the appellant submitted that the onus of proving that the appellant was duly and properly substituted in accordance with the provisions of the electoral Act, 2006 is on the Respondents in Order to justify their actions. Section 139 of the Evidence Act and the case of Yusuf V. Eboda (1994) 3 NWLR (pt. 334) 568 at 582 were cited.

The receipt of same was shown other than bare averment that the substitution was done before the 20/2/07, learned counsel pointed out that Exhibit B was bereft of any date of receipt or stamp of INEC reappeared in the counter-Affidavit of "the party to be heard as Exhibits F A A and A N 1, this shows that these Exhibits were made and tutored to meet the exigencies of this case. Exhibits F A A and A N 1 show an INEC's stamp showing It was received on 19/2/07. The learned counsel queried - what happened to the said letter between 26/3/07 when it was filed in court as Exhibit B. without any receipt stamp and 25/3/07 when it re-appeared in court as Exhibit FAA and ANI bearing a receipt stamp for 19/2/07. E
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On the 3rd sub-issue the learned senior counsel submitted that the letter of substitution does not disclose any cogent and verifiable reason why the appellant was allegedly substituted. It was submitted that cogent and verifiable reason can be described and understood as a reason(s) which is/are compelling and convincing and the truth or truthfulness of which can be confirmed, established, or substantiated. In the instant case, the 2nd respondent who did the substitution did not contest this case which shows that it has no defence to H

the action. The onus is on the 2nd respondent who did the substitution to prove that cogent and verifiable reason was given for the substitution, which was not done in this case. The appellant's counsel submitted that the appellant duly completed form CF001 by supplying all the requirement therein and same was sworn before a Commissioner for Oath of the High Court of the Federal Capital Territory Abuja on 21/12/06; this was neither challenged nor denied by the respondents, he therefore urged the court to resolve this issue in favour of the appellant.

On the fourth issue the appellant submitted that no notice of substitution was given, and as a person to be directly affected by the act of substitution he is entitled to formal notice and the reasons for such substitution. It was therefore submitted that the right of the appellant to fair hearing has been breached, and the court ought to have set aside the purported substitution. See the case of *ONWUMECHILI Vs AKINYEMI* (1985)3 NWLR (part 13) at 504.

The 2nd Respondent, in response to the above submissions in his brief, submitted that the appellant has the onus to prove that his substitution was not done in accordance with the provision of Section 34(1) of the Electoral Act the case of *SCC (Nig) Ltd. Vs Elemadu* (2001)9 NWLR (pt 923)28/63 was cited. He submitted that the appellant has the duty to such information i.e. that the signature on Exhibit B, ANI and FAA was not that of the National chairman. The mere procurement of Exhibit 10A without more is not sufficient to prove that Exhibit B was not signed by the national chairman of PDP. He therefore submitted that the appellant was alleging that the signature in Exhibit B was forged and the duty is on him to prove this beyond reasonable doubt, this, the appellant has failed to do. He pointed out that no evidence was produced by the respondents to show that Exhibit B was signed by the National Chairman of PDP and the National Secretary. He referred to section 108(1) of the Evidence Act, and submitted that what the court would have simply done was to compare the signature in Exhibit B, and compared it with Exhibits 10A, 2 and 11. He relied on the cases of:-

Lawal Vs EJIDIKE (1997) 2 NWLR (part 481) 319 at 330;
Jegede Vs Citicon (Nig) Ltd (2001) 4 NWLR (part 702) 112 at 134.

On the 3rd sub - issue the Appellant submitted that Section 34

(1) (2) and (3) of the Electoral Act 2006 provide for the following mandatory requirements for a valid substitution of a candidate: -

(a) The application for change, substitution or replacement of a candidate shall be made by his political party.

(b) Such political party shall inform INEC of the intended change, substitution or replacement of its candidate in writing not later than 60 days to the date of election. B

(c) The political party in its written application for change, substitution or replacement of its candidate shall give cogent and verifiable reasons for such substitution. “ C

It was therefore the submission of the learned senior counsel that the substitution of the appellant in the instant case did not comply with any of these requirements. Firstly, the letter of substitution Exhibit B was not signed by the PDP National Chairman, secondly, the substitution was not done later than 60 days to the date of election. The counsel queried the validity of Exhibit B. He pointed out that no date of substitution.

The 2nd respondent on the first sub issue referred to paragraph 4 (b) of “the party to be heard and contended that Exhibit B was given to the party to be heard” as a copy while Exhibits FAA and ANI were the copies submitted to the 1st respondent. It was submitted that the party to be heard can not be penalized by virtue of the fact that he produced a certified true copy of the letter of substitution. He therefore submitted that Exhibits FAA and ANI were submitted to the 1st respondent in excess of 60 days preceding the date of the election. On this score Section 34 of the Electoral Act which mandated that any such substitution should be effected in writing not later than 60 days to the election is amply satisfied. F

On the signature on Exhibit B the learned counsel submitted G that it is for the court to form an opinion as to the authenticity of a question of hand writing or a signature. However, informing that opinion, the opinions upon that point of person specially skilled on question as to identity of a hand writing are relevant. Section 57 (1) of the Evidence Act and SEISMOGRAPH SERVICE, LTD Vs H ONOKPASA (1972) ANLR 347; R Vs ONITIRI (1946) 12 WACA 58 were cited.

The learned counsel contended that the allegation being made

in this case is criminal in nature and the Appellant has the onus to strictly prove same. *FAMURTI Vs AGBEKE* (1991) 5 NWLR (part 189) 1 at 13; *JUEES Vs AJANI* (1980) ALE NLR 170 at 180 and Section 138(2) of the Evidence Act were cited in support.

B Learned counsel to the 2nd respondent further submitted that it is the case of the Appellant which ordinarily ought to be accompanied by an affidavit as prescribed by Section 32 (2) of the Electoral Act, 2006 to the 2nd respondent who then will forward same to INEC.

C The affidavit under the said section of the Electoral Act, 2006 is a pre - requisite to the 2nd respondent who then will forward same to INEC. The affidavit under the said section of the electoral Act, 2006 is a pre-requisite to the validity of the nomination papers by a true and correct interpretation of the section.

D For this reason therefore it can not be subjected to any serious disputation there were accompanying affidavit is not duly documented and sworn to verify the facts in the nomination paper, such vital facts or information in the nomination paper will amount to no information at all.

E He referred to Exhibit 5 and contended that it was not sworn to before any court. He also referred to Section 34 (2) of the Electoral Act and submitted that the section only requires the reason to be cogent and verifiable before a substitution could be effected by the 1st respondent. Verification can be gathered from an examination of all the circumstances of the case. In this regard, the affidavit of Mr.

F Okurore is quite instructive on the position adopted by the 1st respondent or the reasons that the anomaly which pre-empted the substitution was pointed out to the appellant who failed to do anything about it. The defect was therefore patent on the document.

G On sub - issue 4, learned counsel submitted that section 34 of the Electoral Act 2006 does not contemplate any hearing before substitution not signed by the chairman of the 2nd respondent. No signature or handwriting expert was called to look at document in contention. He further submitted that the allegation that the letter of substitution was not signed by the National Chairman of the 2nd respondent savours criminality and the burden of proof is beyond reasonable doubt, he referred to Section 138 (1) of the Evidence

Act, and the case of Nweke Vs State (2001) 4 NWLR (part 704) 588 at 592 wherein this court held that: -

“If commission of a crime by a party to any proceeding, civil or criminal, is directly in issue, it must be proved beyond reasonable doubt” See pages 21-22 of the party to be heard brief. Learned counsel continued to submit that the burden of proof placed on the party to be heard was discharged immediately it was deposed in the affidavit that the officers of the 2nd respondent whose responsibility it was to sign the letter of substitution actually signed the letter. The letters of comparison exhibited by the appellant for comparison are of no moment since the allegation is of criminal nature. It was further submitted that it was not the duty of the trial court/judge who is not a handwriting expert to descend into the arena and begin to compare signatures. Section 108 of the Evidence Act does not grant the trial judge such powers. Learned counsel further submits that what makes a substitution valid is a compliance with the Electoral Act, 2006 and once the substitution is done within the prescribed period it becomes valid. The issue of cogent and verifiable reason is mere collateral.

However, he submitted that the reason adduced for the said substitution of the name of the appellant is “Submitted without enough information” can be verified in the sense that the form CF001 submitted by the appellant was incomplete because the affidavit of compliance was not sworn to as mandatorily required by the Electoral Act, 2006. He submitted that the reason given for the substitution was cogent and verifiable and it could mean that the appellant did not complete form CF001 properly or that the affidavit of compliance mandatorily required by Section 32 (5) of the Electoral Act was not sworn to and signed by the appellant or that the appellant did not score 50% of total votes cast in the primary election of the 2nd respondent. The learned counsel to “the party to be heard” then proceeded to formulate an issue to wit: -

“Has the appellant the locus standi to institute this action in the first instance”

Now, I have carefully gone through the record of proceedings I could not see any appeal filed by “the party to be heard”, neither did he file any application before this court to raise any fresh issue on appeal. This issue therefore has no relevance to the two grounds of

appeal in this case. I will therefore discountenance this issue in the resolution of this appeal.

I must state that this matter centered on the interpretation of the provisions of Section 34 of the Electoral Act, 2006, herein referred as “The Act”. It 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.

C (2) Any application made pursuant to subsection (1) of the 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 sub section (1) of this section”.

D It is clear that any political party wishing to change or substitute its candidate in election must fulfill these conditions: -

(i) The application for change or substitution of a candidate must be made by a political party in this case, P.D.P and no other.

E (ii) Such political party shall inform INEC of this intending change, substitution or replacement of its candidate in writing not later than 60 days to the date of election.

F (iii) The political party in its written application for change, substitution or replacement of its candidate shall give cogent, persuasive, convincing and above all strong and verifiable reason for such substitution “.

G It is under these three requirements or conditions that I shall endeavour to examine whether the substitution of the appellant herein by the 2nd respondent was done in accordance with the provisions of Section 34 of “the Act”. It is necessary to point out at this juncture, that these requirements are not disjunctive but conjunctive. That is to say a political party wishing to change, substitute, or replace its candidate in an election must satisfy the three conditions enunciated above.

H However, I wish to, with respect, resolve one important issue which has been subject of controversy among the parties in his case, before I proceed to the examination of the said conditions. The issue is, who has the burden or onus of proving that the substitution of a candidate was done in accordance with the provisions of Section 34 of the electoral Act, 2006.

The appellant in this appeal strenuously and persistently argued that the onus of proving that a substitution of a candidate in an election was validly carried out rests squarely on the political party which carried out the substitution. The respondents, in turn, i.e. the 1st respondent and the party to be heard contended with equal force that it was the appellant who was seeking reliefs from the court that has the burden of proving that his substitution was not validly done. They referred to Section 138 (1) of the Evidence Act and submitted that the appellant has the onus to prove his case. B

In my view, the provision of Section 34 is very clear and unambiguous. The duty to change, substitute and or replacement of a candidate in an election is that of the political party which, it goes without saying, must initiate same. The act of substitution out of necessity is that of the political party in which appellant has no role to play. A party, who wins a primary election, would not take the issue of substituting him/her with another candidate lightly and as such a political party who intends to change him or her must ensure that it complies with the statutory provisions of Section 34 of the Act. This was the position taken by my learned brother in this court Mohammed JSC in the popular case of AMAECHI VS INEC AND OTHERS (2008) 5 NWLR (pt. 1080) 227 at 365. C
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“the obligation of giving or providing cogent and verifiable reasons in its application to substitute or replace any candidate for any election under the Electoral Act, 2006 lies squarely on the shoulders of a political party wishing to effect the change. There is no obligation whatsoever on INEC or the court to which any complaint on the compliance or otherwise with Section 34 of the electoral Act 2006, may be brought, to look outside the application for the relevant facts, had reasons for wanting to effect the change or substitution of candidates”. F
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What I can deduce from this principle of law as enunciated by my learned brother are two fold:-

1. The obligation of proving that the provision of Section 34 of the Electoral Act, 2006, is complied with by a political party who changes or intends to change its candidate in any election is that of the political party who effected the change or seeking the change; and H

2. It is neither the duty of INEC nor the court to provide any extraneous evidence to explain the reason or reasons for the substitution, except the reason stated in the application for change.

B It is in this context that I will proceed to the determination of this case. In the instant appeal, the 2nd respondent who substituted the appellant with the party to be heard was duly served with the processes of the trial court but failed to attend to the court no counter-Affidavit was filed by the 2nd respondent to challenge the averments contained in the appellant's affidavit. Whatever facts that were de-
C posed to by the 1st respondent in explaining the reason for the substitution of the appellant are mere surplusage and not reliable. The acts of the person been challenged are that of the 2nd respondent who did not find it fit to defend its actions. The 1st respondent who has no obligation or duty to explain the actions of the 2nd respon-
D dent can therefore not stand for him. INEC is not an appendage of PDP. It is my view, with all sense of responsibility, therefore that the 2nd respondent having failed to present any fact before the court to explain its action or justify the substitution of the appellant with "the party to be heard", has failed to discharge the obligation imposed on it by Section 34 of "the Act".
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Be that as it may, can it be said that Exhibit B discloses cogent and verifiable reason for the substitution of the appellant with "the party to be heard" in the election, the subject matter of this case? The
F appellant's counsel submitted that no such cogent and verifiable reason was given for the said substitution. It was his submission that substitution "was submitted without enough information", is vague and conveys no cogent reason. The 2nd respondent submitted that when the accompanying affidavit is not duly documented and sworn
G to verify the facts or information in the nomination paper such vital facts or information in the nomination paper will amount to no information at all, and this constitutes cogent and verifiable reason, is subjective in terms and it depends on the circumstances of each case. With tremendous respect, the term cogent and verifiable reason has
H been judicially defined in the case of AMAECHI VS. INEC (supra) at pages 296 - 297 where in the earlier decision of this court in UGWU VS. ARARUME (2007) 12 NWLR (pt. 1048) 367 it was stated as follows:-

“At pages 155 - 156 of the judgment of this court in Ugwu and Anor Vs. Ararume, I concluded as follows: it is manifest that the requirement under Section 34 (2) of the 2006 Act that cogent and verifiable reason be given in order to effect a change of candidates was a deliberate and poignant attempt to reverse the 2002 Act which led to a situation where disputes arose even after elections had been concluded as to which particular candidates had been put up by parties to stand election. The meaning of the word ‘cogent as given in the shorter Oxford English Dictionary is stated to be “constraining, powerful, forcible, having power to compel, assent, convincing”. The same dictionary defines “verifiable “ as “that can be settled or proved to be true, authentic, accurate or real, capable of verification “.

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

(Italics mine for emphasis)

Now, can the reason given in Exhibit B to be ‘self demonstrating of its truth so as not to admit any shred of uncertainty’. Coincidentally, the party to be heard in his brief has provided an answer to this question, in his words, he said as follows:-

“It is also our submission that the reason given for the substitution by the 2nd respondent that is to say “was submitted without enough information” constitute cogent and verifiable reason. It would mean that the appellant did not complete his form CFOO1 properly or that the affidavit of compliance as mandatorily required by Section 32 (2) of the Electoral Act 2006 was not sworn to and signed by the appellant or that the appellant did not score 50% of the total votes cast in the primary election of the 2nd respondent”

(Italics mine).

From the above it is apparent that what the sentence “was submitted without enough information” was not self-demonstrating, evidence has to be lead to prove or explain what the sentence means or suggests.

In view of the above, I have no hesitation in holding that the

appellant was substituted by the 2nd respondent without any cogent and verifiable reasons. This has effectually disposed of this appeal, and it is on this basis that I hold the view that the minority judgment of the lower court, as per Denton-West JCA, was correct. Consequently I hold that the appellant is the 2nd respondent's candidate
 B into the election for the Federal House of Representatives for the Idemili North and South Federal Constituency in Anambra State.

Again it is not in dispute that election into the House of Representatives had been concluded and the party to be heard, Mr. Obinna
 C Chidioka, had been sworn in as the winner of the election. It is the above facts that made the respondents to believe that this action has been overtaken by event i.e. the conduct of the election in dispute. This belief to my mind, is erroneous and misconceived. Candidates in an election are sponsored by political parties. It is the political party
 D that participated in the conduct of an election that is the winner or the loser and not the candidates sponsored by the political parties sometimes, the goodwill of a candidate being sponsored in an election may contribute to the victory of the political party in an election Section 221 of the 1999 Constitution of Nigeria does not recognize
 E an Independent candidate contesting in our elections. Section 221 says:

*“S. 221, No association, other than a political party shall canvass for votes for any candidate at any election or contribute to the
 F funds of any political party or to the election expenses of any candidate at any election “.*

In interpreting the above provisions, this court in Amaechi V. INEC (supra) at p. 317 held as follows:-

*“The above provisions effectually remove the possibility of in-
 G dependent candidacy in our elections, and places emphasis and responsibility on elections on political parties. Without a political party a candidate cannot contest. The primary method of contest for elective offices is therefore between parties. If as provided in Section 221 above, it is only a party that canvasses for votes. It follows that it is a
 H party that wins election. A good or bad candidate may enhance or diminish the prospect of his party in winning but at the end of the day, it is the party that wins or loses an election. I think that the failure of respondents' counsel to appreciate the overriding importance of the*

political party rather than the candidate that has made lose sight of the fact that where as candidates may change in an election but the parties do not. In mundane and colloquial terms we say a candidate has won an election on a particular constituency but in reality and in consonance with section 221 of the constitution, it is his party that has won the election “.

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(Italics mine for clarity)

Applying these principles adumbrated above in the instant case and having held that he appellant was not validly substituted, I hold that the 2nd respondent won the House of Representative election conducted 21/4/07 in Idemili North and South Federal Constituency with the Appellant, Charles Chinwendu Odedo, as in this case in AMAECHI VS. INEC, (supra) at 318, this court held per Oguntade JSC thus:-

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“In his argument in the brief filed for PDP, J. K. Gadzama SAN, Senior Counsel argued that Amaechi, who had not contested the election could not be declared the winner. He stated that such a declaration would amount to a negation of democratic process. With respect to counsel, I think he missed the central issue which is that it was in fact Amaechi and not Omehia who contested the election. Omehia remained no more than a pretender to the office. The one unchanging feature is that PDP was the sponsoring party”.

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As I mention earlier that PDP did not provide a cogent and verifiable reason for the attempt to substitute the appellant with “the party to be heard”. Not having done so the appellant who has acquired vested right by his victory at the primaries and the submission of his name to INEC was never removed as the PDP candidate. He was the candidate of PDP for whom the campaigned in the April, 2007, election not “the party to be heard”. And since the PDP was declared to have won the election, it follows therefore that the appellant must be deemed to have won the election. Hence Charles Chiwendu Odedo, the appellant must be deemed to be the PDP candidate who won the election for the PDP. In the eyes of the law, and in the eagle eyes of this court, Obinna Chidioka, the party to be heard was never a candidate in the election much less the winner. Consequently, I accordingly declared Charles Odedo the person entitled to be the member of the Federal House of Representatives,

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representing Idemili North and South Federal Constituency of Anambra State. I did not nullify the election held on 21/4/07 as I never had cause to do so for the reasons I had earlier stated in this contribution.

It is for the little but humble contribution above and the more
B detailed and painstaking judgment of my learned Lord, NIKI TOBI
JSC, that I agree with the conclusion that the appeal is pregnant with
a lot of merit and ought to be allowed. I hereby allow the appeal. I
endorse the orders as to costs.

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