

SUPREME COURT OF NIGERIA
12TH DECEMBER, 2008. SC. 72/2008
CORAM:- I. L. KUTIGI CJN, A. I. KATSINA-ALU,
N. TOBI, D. MUSDAPHER, G. A. OGUNTADE,
A. M. MUKHTAR, W. S. N. ONNOGHEN, JJSC

1. ALHAJI ATIKU ABUBAKAR, GCON PETITIONERS/
2. SENATOR BEN OBI APPELLANTS
3. ACTION CONGRESS (AC)

AND

1. ALHAJI UMARU MUSA YAR'ADUA
2. DR. JONATHAN GOODLUCK
3. PEOPLES DEMOCRATIC PARTY (PDP)
4. INDEPENDENT NATIONAL RESPONDENTS
ELECTORAL COMMISSION (INEC)
5. PROFESSOR MAURICE MADUAKOLAM
IWU (CHAIRMAN, INEC)
6. CHIEF ELECTORAL COMMISSIONER
& 808 OTHERS

ELECTION PETITIONS - Validity of elections - Grounds of challenge - Electoral Act 2006, s. 145 (1) - Ground of unlawful exclusion is mutually exclusive - With the rest of the grounds provided in the section - As it presupposes non-participation in the elections while the rest presuppose actual participation (H1)

ELECTIONS - Unlawful exclusion - Electoral Act 2006, s. 145 (1) (d) - Import - The phrase contemplates the literal exclusion of a validly nominated candidate - It does not admit of constructive or implied exclusion (H2)

ELECTION PETITIONS - Unlawful exclusion - Proof of - A petitioner alleging unlawful exclusion - Must plead and prove facts showing inter alia - That his name was not included in the list of candidates - The instant petitioner failed to do so (H3)

ELECTION PETITIONS - Validity of elections - Grounds of challenge - Reliance on mutually exclusive grounds - Effect - It amounts

to a petitioner approbating and reprobating - And has the effect of destroying his alternative case by his alternative evidence (H4)

FACTS

Following the 21st April, 2007, presidential elections which returned the 1st respondent as the elected president of the Federal Republic of Nigeria, the petitioners/appellants filed a petition challenging the election before the Court of Appeal, sitting as the presidential election tribunal. The case of the appellants as shown by their evidence was that the 4th respondent impeded their smooth participation in the elections and did not afford them equal opportunities with other contesting parties in the election.

However, the appellants by their petition relied both on the ground of unlawful exclusion and on other grounds showing that they participated in the elections. After hearing, the Court of Appeal held that by their pleading of unlawful exclusion they lacked the *locus standi* to rely on the other grounds. The court also held that by their evidence of actual participation in the elections, they failed to prove unlawful exclusion. Accordingly the petition was dismissed. Aggrieved, appellants have brought this appeal against the decision of the Court of Appeal.

ISSUES FOR DETERMINATION

"1. WHETHER AFTER ITS RULING ON 20TH SEPTEMBER, 2007, THE LOWER COURT IN ITS JUDGMENT DELIVERED ON 26TH FEBRUARY, 2008, WAS NOT IN ERROR TO HAVE RE-OPENED CONSIDERATION OF THE ISSUE THAT THE PETITION IN ITS ENTIRETY WAS INCOMPETENT AND THAT 5TH RESPONDENT WAS WRONGLY JOINED IN THE PETITION.

2. WHETHER THE LOWER COURT IS RIGHT IN HOLDING, FIRSTLY, THAT THE 1ST PETITIONER WAS NOT UNLAWFULLY EXCLUDED FROM THE ELECTION AND SECONDLY, THAT HAVING PLEADED UNLAWFUL EXCLUSION, HE CANNOT QUESTION THE ELECTION ON ANY OTHER GROUND.

3. WHETHER THE JUDGMENT ON APPEAL TO THIS COURT IS NOT VITIATED BY THE COURT'S USE OF SECTION 146 OF THE ELECTORAL ACT 2006 TO SHIELD FROM INVALIDITY. VARIOUS INFRACTIONS OF THE ACT, INCLUDING CASES

OF NON-COMPLIANCE AMOUNTING TO CORRUPT PRACTICE, NON-COMPLIANCE WITH THE PROVISIONS RELATING TO BALLOT PAPERS AND TO THE VOTERS' REGISTER.

4. WHETHER THE DECISION OF THE COURT' OF APPEAL STRIKING OUT THE NAME OF THE 5TH RESPONDENT ON THE GROUND THAT HE IS NOT A JURISTIC PERSONALITY IS CORRECT HAVING REGARD TO THE PLEADINGS, EVIDENCE AND ENTIRE CIRCUMSTANCES OF THE PETITION. (etc. see p. 3176)

HELD (Dismissing the appeal per **KATSINA-ALU JSC**, Oguntade JSC dissenting)

Validity of elections - Grounds of challenge

1. Without doubt the word "or" in section 145(1) of the Electoral Act has compartmentalized the grounds in (a), (b) and (c) together and ground (d) on its own. There is good reason for this. A careful reading of section 145(1) would reveal that a petition under subsection (1)(a)(b) & (c) does presuppose that the petitioner did in fact participate in the election as a contestant. Whereas a petition under subsection (1)(d) does presuppose that the petitioner was excluded from participating in the election as a contestant. I should imagine, that a petitioner who did not contest the election would not be heard to complain that the election was invalid by reason of corrupt practices or non-compliance with the provisions of the Electoral Act or that the respondent was not duly elected by majority of lawful votes cast at the election. I think it is plain that the ground provided under section 145(1)(d) of the Electoral Act relating to exclusion of a candidate from contesting the election and the three other grounds provided under the same section 145(1)(a), (b) and (c) relating to disqualification of a candidate who was returned, corrupt practices and non-compliance with the provisions of the Act and failure to secure majority of lawful votes cast at the election are mutually exclusive. Therefore a candidate who did not contest an election cannot legally and logically complain that the election was marred by rigging, corrupt practices, non-compliance with the provisions of the Electoral Act. (p. 3183 H)

ELECTIONS - Unlawful exclusion - Electoral Act 2006, s. 145

2. It was contended for the 1st Petitioner that the acts of the INEC and its Chairman in initially disqualifying him from contesting the election and placing several hurdles on his path amounted to his exclusion from the Presidential election. The point was stretched further that the petitioner was constructively excluded from contesting the election in breach of section 145(1)(d) of the Act.

I am not impressed with this argument. There is nothing in section 145(1)(d) that talks of constructive or qualified exclusion. The section provides as follows:

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

It is trite law that the court has a duty to interpret a statute or provision thereof by giving them their plain, ordinary and literal meaning except where such an interpretation will lead to manifest absurdity. The provision in section 145(1)(d) of the Electoral Act is clear and unambiguous and does not ‘admit of any meaning resembling constructive or qualified exclusion. The word “*exclusion*” stands on its own and has been defined to mean “*keeping out, barring, prohibited, eliminated, ruled out.*” The only plain, ordinary and literal meaning that the said section can be given must be that a petitioner who was validly nominated by his party was excluded from participating in the said election as a candidate of his party. (p. 3193 C)

ELECTION PETITIONS - Unlawful exclusion - Proof of

3. The law is settled that in order to prove unlawful exclusion after valid nomination by his party, a petitioner must show the following:

- (i) that he was validly nominated by his political party.
- (ii) that an election was conducted
- (iii) that a winner was declared and
- (iv) that his name was not included in the list of the contestants.

More fatal to the petition was the fact that no attempt was made to plead facts to show that the 1st Petitioner’s name was not included in the list of candidates and logically too, none of the petitioner’s witnesses led evidence to prove this vital ingredient at the hearing.

Reliance on mutually exclusive grounds - Effect

4. I think the position would have been different if the petitioners had pulled out of the contest in protest against the hurdles placed on their path. They did not do so and the evidence placed before the Court of Appeal showed that, the candidate and his party took part in the election as contestants for the office of the President. The 1st petitioner approbated and reproated by his decision to also challenge the election on the mutually exclusive grounds under section 145(l)(a)(b) & (c) of the Act (hereby impliedly acknowledging his participation in the election where he came a distant 3rd with 2,637,848 votes.

In my judgment, therefore, the appellants were not excluded in participating in the Election held on 21st April, 2007. This issue disposes of the appeal., That being so, I do not deem it necessary to consider the other issues raised in the appeal that the result the appeal fails and I dismiss it. I affirm the judgment of the Court of Appeal delivered on the 26th day of February, 2008. (p. 3195 C)

NOTABLE POINTS OF INTEREST

KUTIGI CJN

1. Election petitions - Reliefs may be sought in alternatives but grounds cannot be relied on in alternatives

The first pertinent issue for the Court of Appeal to resolve was whether or not the Petition itself was incompetent for the reason that the ground of unlawful exclusion was raised along with other grounds as alternatives contrary to the provisions of section 145(1) of the Electoral Act, 2006. This incidentally has, also become a very important issue before this Court now. The trial court after thoroughly analysing submissions of counsel concluded thus-

“Learned Senior Counsel for the Petitioners confused reliefs sought in an election Petition and grounds therein, which in our humble view are distinct while reliefs or prayers can be made in the alternative, in an election petition, a ground of exclusion cannot be made in the alternative with other grounds. A ground of exclusion in an election petition stands clearly on its own. It is mutually exclusive

of other grounds. It is crystal clear that from the foregoing that the Petitioners are approbating and reprobating at the same time. This should not be allowed since it is frowned at by the law.

I agree. (p. 3197 D)

B TOBI JSC

2. Briefs - A reply brief is unnecessary where respondent's brief does not raise new issues or points

A Reply Brief is filed when an issue of law or argument raised in the Respondent's Brief calls for a reply. A Reply Brief is not necessary when the respondent's Brief does not raise new or fresh issue or point. Where a Reply Brief is necessary, it should be confined to answering any new or fresh issue or point raised in the respondents Brief.

D Reply Brief is not where the appellant re-awakens forgotten knowledge in the case, it is not a repair kit of the engineer to repair the appellant's Brief. (p. 3230 E)

3. Estoppel per rem judicatam can only apply when the issue is resolved on its merits and disposed of finally

It is trite law that the principle of estoppel per rem judicatam can only apply when the issue is resolved on its merits and disposed of finally. Is the ruling complained of final?

F A cursory look at the ruling shows very clearly that it was not on the merits and therefore not final on the issue; a more sustained and permanent look more so. As the ruling was not final, issue estoppel does not apply. The issue therefore fails. (p. 3241 F)

G 4. Evidence - Reasonable doubt is an honest misgiving generated by insufficiency of proof

Reasonable doubt which will justify acquittal is doubt based on reason and arising from evidence or lack of evidence, and it is doubt which a reasonable man or woman might entertain and it is not fanciful doubt, is not imagined doubt, and is not doubt that the court might conjure up to avoid performing unpleasant task or duty. See Black's Law Dictionary, 6th Edition, page 1265. A reasonable doubt is an honest misgiving generated by the insufficiency of the proof,

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which reason sanctions as a substantial doubt. It is a doubt which make the court hesitate as to the correctness of the conclusion which it arrives at. The principle of proof beyond reasonable doubt is necessary because of the constitutional presumption of the innocence of the accused, provided in section 36 (5) of the Constitution. (p. 3242 H) B

5. Evidence - Admission by a set of respondents cannot affect another set of respondents

Learned Senior Advocate for the appellants contended in paragraph 6.39 of the Brief that both parties admitted that the ballot papers were not serialized. If “both parties” in the paragraph mean the appellants and all the respondents, I will not agree with him because the conclusion is not borne out from the Record. It is clear from the Replies that there is no admission on the part of some of the respondents that the ballot papers were not serialized. As the issue of non serialization was denied by some respondents, the burden of proof was on the appellants. This is because admission by a set of respondents cannot in law affect another set of respondents. The petitioner has a duty to prove the non-serialization of ballot papers as it affects the respondents who did not admit. (p. 3245 G) C
D
E

6. When a natural person cannot be sued in the natural name

In other words, juristic or legal personality is a creation of statute and a party which seeks relief must comply strictly with the enabling statute. The position of the law is as stringent and as strict as that. F

Learned Senior Advocate for the appellants submitted that as the 5th respondent is a natural person, he could be sued in that name. While I entirely agree that a natural person could sue or be sued in the natural name, I do not agree that he can be sued in the natural name when the alleged wrong involves or relates to his office. And the office here is Chairman of INEC. (p. 3250 D) G

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7. Evidence - If a party makes a case bearing two opposing positions affecting the substance of the issue, his case crumbles

Paradoxically, learned Senior Advocate in making a case of conflict,

involved himself in a conflict in the number of results oscillating between the figures “2 and 3”. Which one should this court take? A party must be sure of his case and he must present it in one lung breath; not in two-lung breath. If a party makes a case bearing two opposing positions, which positions affect the substance or merits of the issue, it crumbles. A court of law is not competent to make a choice or repair the case and give the party in default judgment. (p. 3253 G)

8. Evidence - Handwriting - Proof thereof requires the testimony of experts

Section 51(1) of the Evidence Act provides that when the court has to form an opinion upon a point of foreign law, native law or custom, or of science or art or in questions as to identity of handwriting or finger impressions, the opinions upon which that point of persons specially skilled in such law, native law or custom, or science or art, or in question as identity of handwriting or finger impressions are relevant facts. In *Jagede v. Citicon Nig Ltd* (2001) 2 NWLR (Pt.702) 112, Oguntade, JCA (as he then was) said at page 134:

“It seems to me that the purpose of section 108(1) & (2) above is not to turn over to the court the duty of a handwriting expert. Before the court could undertake the duty of comparing handwriting or signatures in a civil case, the parties to the dispute themselves ought first to have called evidence to show that a person signed or did not sign the signature in dispute. The court cannot without such evidence volunteer to find evidence for one of the parties as to who had signed the disputed signature. That would be akin to taking the side of one of them”

In the light of the above, section 51(1) of the Evidence Act and the case, I cannot fault the Court of Appeal in holding that evidence of handwriting expert is necessary. This is because the Court of Appeal or any other court for that matter cannot determine “apparent similar writing”. The issue fails. (p. 3256 C)

9. Interrogatories - Duty of an interrogator

I agree with the submission of learned Senior Advocate for the 1st and 2nd respondents, when in his address at the Court of Appeal he

said, in paragraph 5.0 page 4508 of the Record:

“Petitioners counsel have not been able to situate properly the usage which they want the court to make of the answers to the interrogatories in their petition. This is the thrust of NIKI TOBI JSC’s judgment where his Lordship posited that it is this court alone who can decide whether or not the answers will assist the petitioners case.” B

That is what I said and I am right in saying that. (p. 3260 H)

10. Court has a duty to react to all relevant issues before it

Let me take the issue of the Court of Appeal not dealing with it. I am C firmly with learned Senior Advocate for the appellants. The Court of Appeal was wrong in not taking the issue. It is the law that a court should react to all the relevant issues before it and come to a decision one way or the other. A court has no right to ignore relevant issues. I do not think silence on the issue on the part of the Court of Appeal is D deliberate. It is likely to be an oversight, particularly, in a case of this dimension and magnitude. I cannot say for sure that I have taken all the issues raised by the parties in this appeal. What I am sure is that I have taken all the important issues. (p. 3262 C)

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11. Petitioner has the burden of proving that malpractice substantially affected the election results

The operative words in section 146 (1) are *“if it appears to the Election Tribunal or Court that the election was conducted substantially F in accordance with the principles of the Act”* In view of the fact that the tribunal or court can only come to that conclusion in the light of evidence before it, one of the parties must give that evidence to the contrary and the party is the one who will fail, if that evidence is not given. That party, in my humble view, is the petitioner. He is the G party who alleges that the election was not conducted substantially in accordance with the principles of the Electoral Act; the opposite situation in section 146 (1). And this allegation is made by the appellants as petitioners in paragraph 3 of their reliefs. (p. 3263 H)

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12. Election petition - Legality of votes cast - Proof thereof

A petitioner who contests the legality or lawfulness of votes cast in an election and the subsequent result must tender in evidence all the

necessary documents by way of forms and other documents used at the election. He should not stop there. He must call witnesses to testify that the illegality or unlawfulness substantially affected the result of the election. The documents are amongst those in which the results of the votes are recorded. The witnesses are those who saw it all on the day of the election not those who picked the evidence from an eye witness. No. They must be eye witnesses too.

Both forms and witnesses are vital for contesting the legality or lawfulness of the votes cast and the subsequent result of the election. One cannot be a substitute for the other. It is not enough for the petitioner to tender only the documents. It is incumbent on him to lead evidence in respect of the wrong doings or irregularities both in the conduct of the election and the recording of the votes; wrong doings and irregularities which affected substantially the result of the election. (p. 3272 G)

13. Judgments are based on evidence not public opinion or sentiment

The pulse of Nigeria's public opinion, if I can feel it, in this case, is to allow the appeal on the speculation or should I say, belief that the election was irregularly conducted in violation of the Electoral Act. The concern of the court is whether the appellants proved their case. Even if the Justices of the Court of Appeal were in the field of the election and saw irregularities and inwardly expressed some anger at the way the election was held, the adversary nature of our jurisprudence will not allow them to use what they saw to give judgment in favour of the appellants. They will insist on proof by the appellants because the Evidence Act does not allow them to take judicial notice of what they saw. This is what the Court of Appeal insisted and rightly too for that matter. The appellants failed because they did not satisfy the burden of proof placed on them by the Evidence Act and section 146 (1) of the Electoral Act. I cannot help or assist the appellants as I am bound by the law. (p. 3274 A)

MUSDAPHER JSC

14. Election petition - Pleading therein does not admit of inconsistent alternative allegations

An Election petition is statutory and is unlike any other civil claim where there is so much latitude. Thus pleading in the alternative is an expedient which like most expedients, can be carried too far. An example where it was carried too far existed in the history of legal literature, it concerned an action brought against a neighbour for damaging a borrowed cart, the solicitor advised the defendant to plead “*That he had never borrowed the cart; and that the cart was damaged and useless when he borrowed it; and that he used the cart with care and returned it undamaged, and that he had borrowed the cart from some person other than the plaintiff; and that the cart, was owned by the defendant himself; and that the plaintiff never owned any cart.*” This clearly was obviously framed to take the benefit of anything that may turn up, without any clear idea of the case which the plaintiff is alleging.

It has to be stressed that election petition is not the same as any civil claim where in a pleading a party can include alternative and inconsistent allegations from material facts as shown above. (pp. 3279 H/3280 F)

OGUNTADE JSC (Dissenting)

15. A plaintiff may plead inconsistent claims in the alternative

The well-established principle of procedure is that a plaintiff or petitioner may in his pleadings raise inconsistent claims. But the court will not give such plaintiff or petitioner a judgment upholding such inconsistent claims. The necessity to bring in the same suit claims which are inconsistent is based on common-sense, expediency and the necessity to save time. It is settled law that a plaintiff is not allowed to nibble at his claims or reliefs by bringing in successive suits the claims which could be considered in one and the same suit. This approach prevents the resort to a multiplicity of suits on a dispute where all the issues in the dispute could be resolved in one suit. (p. 3288 D)

16. Court has a duty to consider alternative claims in succession

The petitioners/appellants in this case had approached the court below praying for some reliefs. They were not to be the judges. They could not determine in advance which of the reliefs they claimed would be granted. That was a matter to be decided by the court.

They needed however to present all their claims to the court in one petition in order to obviate the need to bring another petition on grounds (a), (b), (c) of Section 145(1) should the court dismiss the claim under ground (d). It was incumbent on the court below to consider in succession each of the claims made by the petitioners/
 B appellants. That the principal claim fails is all the more a reason to consider the alternative claims. There is no justification for a court to refuse to consider the claims in a suit on the ground that the claims were brought in the alternative. To do so would lead to a multiplicity
 C of suits arising from the same transaction. (p. 3288 F)

17. Inclusion of election candidate presupposes equal treatment and opportunities

An election is like a bazaar where political candidates advertise their
 D party programmes to electors and that is as it should be in a democracy. In the interpretation of a provision in the Electoral Act, 2006, a court must be conscious of its duty to jealously guard the underlying principles of democratic governance as enshrined in our Constitution.

E In the interpretation of the words “that the petitioners or its candidate was validly nominated but was unlawfully excluded from the election”, a court must bear in mind that the ‘exclusion’ postulated under Section 145(1)(d) is the refusal to accord to a candidate
 F the equality of treatment as would enable him contest against the other candidates on level terms. You cannot prevent a political candidate from advertising his programmes to the electors and turn round to say he was not excluded. (pp. 3296 A/3297 A)

G **MUKHTAR JSC**

18. Electoral Act 2006 - Is the applicable law to elections

Basically, the argument under this issue should revolve around the interpretation of Section 145 of the Electoral Act supra only, and not other extraneous, or unrelated matters that have no bearing on the
 H complaint in the corresponding ground of appeal that is tied to this issue. The Independent Electoral Commission is a creation of the constitution vide Section 153 of the Constitution of the Federal Republic of Nigeria 1999, and so the Electoral Act from which it was

made is the applicable law. That being the position, the provisions of the Act are binding, and in as far as proceedings in election matters are concerned, the said provisions govern them, irrespective of other constitutional provisions. An Electoral Tribunal is bound by them and must apply them accordingly. That is in fact why I think the gravamen of this issue rests on the interpretation of this pertinent provision. (p. 3306 G) B

REPRESENTATION

Prof. Ben Nwabueze SAN, for the petitioners/appellants with him are C
 Prof. A. B Kasunmu SAN, Alh. Abdullahi Ibrahim SAN, Rickey Tarla SAN, Chief Adeniyi Akintola SAN, Chief Emeka Ngige SAN, Adetunji Oyeypio SAN, Chief Titus Ashaolu SAN, Omar Shitten Esq, Dr. M. Ladan Esq, H. A Nganjiwa Esq, Wole Iyamu Esq, A. 1 Owonikoko Esq, J. O ODubela Esq, J. O Babayemi (Mrs), Gabriel Tsenyen Esq, D
 Rotimi Oguneso Esq, Bamidele Aturu Esq, Festus Keyamo Esq, Sulaiman Usman Esq, Abiodun Dada Esq, R. Okotie-Eboh (Miss), Gbohahan Gbadamosi Esq, p. Bassi (Mrs) O. Amptian (Mrs), T. Osadare, O. A Itedjere, Y. Pitan Esq, E. Okodaso (Mrs), 1. Zuofa (Miss), T. J Aondo Esq, W. Afiah Esq, C. Nwiyi (Miss) E
 Chief Wole Olanipekun, SAN for the 1st and 2nd respondents with him are Yusuf Ali, SAN, Dr, Alex A. Izinyon, Maureen Onyuike (Miss), K. K Eleja, S. A Oke, Alex Akoja, S. A Babakebe, Precilla O. Oditah, Kabir Akingbolu, Waheed Gbadmosi, Eubena Amedu, Abimbola F
 Kayode, Abdulaziz Ibrahim, Adamu Abbas, F. O Izinyon, E. Oghojiafor, Oluwasiji Alabi (Miss), Kauna Penzin, Kalat Bagaiya, Aikhunegbe Malik, Olugbenga Adeyemi, Oluwasijibomi Alabi, Chinedu Umeh, Chief N. U Akpan, Martin Opara Esq, N. I Echeanyanwu (Miss), Mrs V. O Awomolo, N. Bonwakama (Miss). G
 Chief Joe Kyari Gadzama SAN, for the 3rd respondent with him are Chief Bolaji Ayorinde SAN, Chief Duro Adeleye SAN, Paul Erokoro SAN, Prof. Bolaji Owasanoye, Chief Olusola Oke, R.A Lawal Rabana, Alh. R. O Yusuf, A. C Ozioko, Chief Obi Nbakwe, Z. E Abdulahi, Akuyibo Owukori, C. P Oli, S. I Bamgbose (Mrs) C. O Egbase (Miss) H
 D. H Bwala,, Y. A Yamta, Maryam Kyari (Miss), A. U Ringim, Dayo Babalola, Pauline Saleh (Miss)
 Kanu G. Agabi (CON), SAN for the 4th - 808th respondents with

him are A. B Mahmoud, SAN, Amechi Nwaiwu, SAN, O. O Uzzi, Esq, Wole Adebayo Esq, O. S Obande Esq, Musa Elayo Esq, C. U Ekomaru, Esq, Okon Efut, Esq, O. O Obono-Obla Esq, Irene Ideva (Mrs), P. O Ofikwu Esq, R. A Umiom Esq, Ayo Akam Esq, Chuka Ugwu Esq, Patience Osagiede (Miss), Rita N Ogar (Mrs), Darracott Osawe Esq, Adam Abdullahi Esq, Egang Agabi Esq, Ifunanya O. Obumselu (Mrs), John Ochogwu Esq, O. M Enebeli (Mrs), A. Ugar (Miss), A. Sadawja.

N. O Ibom for the 809th respondent with him ate Pamela Olubor, Erhebor C, Gazali Tukur, O. O Nwachukwu .

Dr. Bello Fadile for the 810th respondent with him is Ikechukwu Maledo Esq.

CASES REFERRED TO

- D ANPP v. Haruna (2003) 14 NWLR (Pt.841) 546 at 570
 Cardoso v Daniel (1986) 2 NWLR (Pt.20)
 Ukpong v Udoson (2007) 2 NWLR (Pt. 1017) 184
 Onyenaobi v President, OCC (1995) 3 NWLR (Pt.301) 50
 Ukachukwu v Uba (2005) 18 NWLR (Pt.956) 1
- E Mohammed v Hussein (1998) 14 NWLR (Pt.534) 108
 Lawal v Dawodu (1972) 1 ALL NLR 707
 Ebba v Ogodo (2000) 10 NWLR (Pt.675) 357 at 406
 Yusuf v Obasanjo (2005) 18 NWLR (Pt.956) 96 at 187
- F Akpokiniovo v Agas (2004) 10 NWLR (Pt.881) 394 at 421
 Nwole v Iwuagwu (2004) 15 NWLR (Pt.895) 61
 PPA v Saraki (2007) 17 NWLR (Pt.1064) 453
 Ojukwu v Obasanjo (2004) 12 NWLR (Pt.886) 169 at page 227

G STATUTES REFERRED TO

Electoral Act, 2006, ss. 141 & 146
 Evidence Act, ss. 51, 74, 135, 136, 137, 138 & 150

LEAD JUDGMENT BY KATSINA-ALU JSC

- H Following the 21st April, 2007 presidential election which returned the 1st Respondent as the elected President of the Federal Republic of Nigeria, the Appellants filed their petition challenging the said election on the 21st May, 2007 vide a 51 paragraph petition

asking the Court of Appeal to invalidate the said election. The Court of Appeal on 26th February, 2008 dismissed the petition. This appeal is against a dismissal.

The presidential election was held on the 21st day of April 2007 to fill the offices of the President and Vice-President of the Federal Republic of Nigeria. The election, was held nation-wide by the 4th respondent, was contested by candidates from 25 political parties. The 1st and 2nd appellants contested as candidates of the Action Congress (AC), The 1st and 2nd respondents contested the election as candidates of the 3rd Respondent Peoples Democratic Party (PDP). The Chief Returning Officer of the 4th Respondent returned the 1st and 2nd respondents as duly elected President, and Vice-President respectively of the Federal Republic of Nigeria. As I have already decided, the appellants filed a petition at the Court of Appeal on the 21st day of May, 2007 challenging the return. The petition was dismissed.

To their joint brief of argument, the appellants raised ten issues for determination in this appeal. They read thus:

1. *WHETHER AFTER ITS RULING ON THE 20TH SEPTEMBER, 2007, THE LOWER COURT IN ITS JUDGMENT DELIVERED ON 26TH FEBRUARY, 2008, WAS NOT IN ERROR TO HAVE RE-OPENED CONSIDERATION OF THE ISSUE THAT THE PETITION IN ITS ENTIRETY WAS INCOMPETENT AND THAT 5TH RESPONDENT WAS WRONGLY JOINED IN THE PETITION (GROUNDS 2, 3 AND 4).*

2. *WHETHER THE LOWER COURT IS RIGHT IN HOLDING, FIRSTLY, THAT THE 1ST PETITIONER WAS NOT UNLAWFULLY EXCLUDED FROM THE ELECTION AND SECONDLY, THAT HAVING PLEADED UNLAWFUL EXCLUSION, HE CANNOT QUESTION THE ELECTION ON ANY OTHER GROUND. (GROUNDS 5, 7, 8, 9, 10, 14 & 15).*

3. *WHETHER THE JUDGMENT ON APPEAL TO THIS COURT IS NOT VITIATED BY THE COURT'S USE OF SECTION 146 OF THE ELECTORAL ACT 2006 TO SHIELD FROM INVALIDITY. VARIOUS INFRACTIONS OF THE ACT, INCLUDING CASES OF NON-COMPLIANCE AMOUNTING TO CORRUPT PRACTICE, NON-COMPLIANCE WITH THE PROVISIONS RELATING TO BAL-*

LOT PAPERS AND TO THE VOTERS' REGISTER. (GROUNDS 11, 18, 20, 21, 34 AND 36).

4. *WHETHER THE DECISION OF THE COURT' OF APPEAL STRIKING OUT THE NAME OF THE 5TH RESPONDENT ON THE GROUND THAT HE IS NOT A JURISTIC PERSONALITY IS CORRECT HAVING REGARD TO THE PLEADINGS, EVIDENCE AND ENTIRE CIRCUMSTANCES OF THE PETITION (GROUND 6)*

5. *WHETHER THE COURT OF APPEAL RIGHTLY DEEMED THE 1ST RESPONDENT AS HAVING BEEN DULY ELECTED PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA BY MAJORITY OF VALID LAWFUL VOTES OF 24, 638, 063 IN THE FACE OF THE THREE CONFLICTING "FINAL" RESULTS OF THE ELECTION WHICH THE 4TH AND 6TH RESPONDENTS WERE UNABLE TO EXPLAIN OR RECONCILE BY THEIR PLEADINGS OR BY EVIDENCE AT THE TRIAL. (GROUNDS: 1, 23, 24, 25 and 38)*

6. *WHETHER THE ALLEGATIONS OF APPARENT SIMILAR HANDWRITING ON DOCUMENTS TENDERED BY CONSENT CAN ONLY BE ESTABLISHED BY CALLING EXPERT HAND-WRITING ANALYST, WHEN RESPONDENTS OFFERED NO EXPLANATION BEYOND BARE DENIAL THROUGH UNNAMED, UN-SWORN WITNESSES, WHO WERE NOT THE AUTHORS OF THE SAID DOCUMENTS. (GROUND 19)*

7. *WHETHER THE DECISION OF THE COURT OF APPEAL TO THE EFFECT THAT THE PETITIONERS DID NOT SPECIFICALLY IDENTIFY ANY POLICE OFFICER OR SOLDIER WHO PARTICIPATED IN THE CONDUCT OF THE, ELECTION WAS CORRECT HAVING REGARD TO THE ADMISSIONS ON RECORD, PLEADINGS AND EVIDENCE (GROUND 22).*

8. *WHETHER OR NOT THE FAILURE OF THE COURT OF APPEAL TO CONSIDER THE VALIDITY AND ADMISSIBILITY OF ALL THE WITNESS STATEMENTS OF THE 1ST & 2ND RESPONDENTS AND SOME OF THOSE OF THE 4TH - 808TH RESPONDENTS OCCASSIONED A MISCARRIAGE OF JUSTICE (GROUND 31).*

9. *WHETHER OR NOT THE TOTAL FAILURE OF THE COURT OF APPEAL TO EVALUATE AND PRONOUNCE UPON THE EVIDENCE ELICITED FROM THE 5TH RESPONDENT BY WAY*

OF ANSWERS TO THE ADMINISTERED INTERROGATORIES OCCASIONED A MISCARRIAGE OF JUSTICE (GROUND 27, 28, 29, 30, 32).

10. WHETHER THIS IS NOT A PROPER CASE FOR THE SUPREME COURT TO INVOKE SECTION 22 OF THE SUPREME COURT ACT TO INVALIDATE THE ELECTIONS IN VIEW OF: B

i) FAILURE OF THE COURT OF APPEAL, TO EVALUATE EVIDENCE ON VITAL ISSUES RELATING TO DELIVERY AND SUPPLY OF BALLOT PAPERS

ii) DISREGARDING PETITIONERS SUBMISSIONS ON THOUSANDS OF EXHIBITS THAT SUPPORTED PETITIONERS' AS HIGHLIGHTED IN SCHEDULES 1 - 25 INCORPORATED INTO THEIR FINAL ADDRESS C

iii) FAILURE OF THE COURT OF APPEAL TO PROPERLY EVALUATE AND PRONOUNCE ON EVIDENCE LED BY THE PETITIONERS IN THEIR WITNESSES PREJUDICIAL CONCLUSIONS NOT BORNE BY THE RECORDS,

iv) ALLOWING EXTRANEOUS POLITICAL CONSIDERATIONS TO AFFECT THEIR JUDGMENT TO THE PREJUDICE OF THE PETITIONERS. (GROUNDS 17, 18, 26, 33, 37 & 391. E

v) DISALLOWING THE PETITIONERS' INDEPENDENT WITNESSES ON SUBPOENA FROM TESTIFYING ON GROUND THAT THEIR DEPOSITIONS WERE NOT FRONT-LOADED AT THE TIME OF FILING OF THE PETITION. (GROUND 1, 2 AND 4 OF INTERLOCUTORY APPEAL) F

The 1st and 2nd Respondents also identified ten (10) issues for determination. These are as follows:

i. UPON A DISPASSIONATE INTERPRETATION OF SECTION 145(1)(d) OF THE ELECTORAL ACT, 2006, WHETHER THE APPELLANTS WHO COMPLAINED OF TOTAL EXCLUSION FROM PARTICIPATION IN THE ELECTION COULD STILL RIGHTLY CHALLENGE THE OUTCOME OF THE ELECTION UNDER ANY OF THE GROUNDS STATED IN SECTION 145(i)(a)(b) AND (c) OF THE SAME ELECTORAL ACT - GROUNDS 5, 7, 8, 9 AND 10. H

ii. CONSIDERING THE FACT THAT THE OBJECTION RAISED TO THE COMPETENCE OF THE APPEAL WAS/IS JURISDICTIONAL, COUPLED WITH THE FACT THAT THE LOWER COURT

DID NOT DISPOSE OF THE MERITS OF THE SAID OBJECTION IN ITS RULING OF 20TH SEPTEMBER, 2007, WHETHER IT CAN RIGHTLY BE SAID THAT THE SAID OBJECTION HAS BEEN CAUGHT, BY ISSUE ESTOPPEL TO EXCLUDE THE VALID PRO-
B NAL JUDGMENT - GROUNDS 2, 3, 4 AND 6.

iii. HAVING REGARD TO THE STATE OF THE PLEADINGS READ TOGETHER WITH THE MANDATORY PROVISIONS OF PARAGRAPH 4(i)(C) OF THE FIRST SCHEDULE TO THE ELEC-
C TOR AL ACT, 2006 IN CONJUNCTION WITH SECTION 141 OF THE SAME ELECTORAL ACT, WHETHER THE LOWER COURT WAS NOT PERFECTLY RIGHT TO HAVE ADOPTED THE SCORES PLEADED FOR BOTH 1ST APPELLANT AND THE 1ST RESPON-
D DENTS' REPLY-GROUND 1.

iv. BEARING IN MIND THE STATE OF THE VARIOUS CRIMI-
NAL ALLEGATIONS CONTAINED IN THE PETITION VIS-A-VIS SECTIONS 135,136,137 AND 138 OF THE EVIDENCE ACT AND DECIDED AND BINDING AUTHORITIES OF THIS COURT ON
E ELECTORAL, MATTERS, COUPLED WITH THE TERSE EVIDENCE PLACED BEFORE THE COURT BY THE PETITIONERS/APPEL-
LANTS, WHETHER THE APPELLANTS EVER DISCHARGED THE ONUS OR BURDEN OF PROOF PLACED ON THEM TO WAR-
F RANT THE GRANT OF THEIR PETITION/RELIEFS - GROUNDS 11, 22, 23, 24 AND 39.

v. JUXTAPOSING THE MYRIADS AND AVALANCHE OF CRIMINAL OR QUASI-CRIMINAL ALLEGATIONS OF NON-COM-
PLIANCE WITH THE PROVISIONS OF THE ELECTORAL ACT, G 2006, WITH THE LACK OF EVIDENCE TO ESTABLISH THE SAID ALLEGATION, WHETHER THE LOWER COURT WAS NOT PERFECTLY RIGHT BY HOLDING THAT THE SAID ALLEGATIONS WERE UNPROVEN AND/ OR THAT IF THEY WERE PERIPHER-
H AFFECTED THE OUTCOME OF THE ELECTION - GROUNDS 12, 13, 14, 15,16, 20, 21, 34, 36 AND 38

vi. DO SCHEDULES 1 - 25 PROCURED BY APPELLANTS' COUNSEL AND ATTACHED APPELLANTS' WRITTEN ADDRESS

HAVE ANY PROBATIVE VALUE TO WARRANT ANY COURT USING THEM TO NULLIFY THE 1ST RESPONDENT'S ELECTION? - GROUNDS 17,18 AND 33.

vii. CONSIDERING THE PLEADINGS OF PARTIES, THE DEARTH OF EVIDENCE ON SEEMINGLY SIMILAR WRITINGS/SIGNATURES AND THE WRITTEN ADDRESSES OF THEIR RESPECTIVE COUNSEL WHEREIN NO INVITATION WAS MADE TO THE LOWER COURT TO COMPARE OR CONTRAST PERCEIVED SIMILAR WRITINGS/SIGNATURES, WHETHER. THE LOWER COURT WAS UNDER ANY DUTY OR OBLIGATION TO START COMPARING SUCH PERCEIVED SIMILAR WRITINGS/SIGNATURES - GROUND 19. B
C

viii. WAS THE LOWER COURT NOT RIGHT BY AFFIRMING THE RETURN OF THE RESPONDENTS AS MADE BY THE CHIEF ELECTORAL COMMISSIONER FOR THE PRESIDENTIAL ELECTION AFTER PAINSTAKINGLY CONSIDERING THE EVIDENCE BEFORE IT? - GROUNDS 25 AND 26. D

ix. CONSIDERING THE ANSWERS ELICITED BY WAY OF DEPOSITIONS THROUGH AFFIDAVITS FROM THE INTERROGATORIES, COUPLED WITH THE FACT THAT UNDER AND BY VIRTUE OF ORDER 33 RULE 8 (1) AND (2) OF THE FEDERAL HIGH COURT CIVIL PROCEDURE RULES, APPELLANTS DID NOT COMPLAIN THAT THE ANSWERS ELICITED BY THEM WERE INSUFFICIENT TO WARRANT AN ORDER FOR FURTHER ANSWERS, WHETHER THERE WAS ANY NEED FOR THE CONSIDERATION OF THE SAID ANSWERS AND/OR WHETHER THE ANSWERS HAVE ANY PROBATIVE VALUE TO THE APPELLANTS - GROUNDS 27, 28, 29, 30 AND 32. E
F

x. UPON A HOLISTIC CONSTRUCTION OF THE ELECTION TRIBUNAL AND COURT PRACTICE DIRECTIONS 2007 (PRACTICE DIRECTIONS) WHETHER RESPONDENTS' COPIOUSLY MADE USE OF THE LOWER COURT AND IN THEIR BRIEF BEFORE THIS COURT WERE/ARE NOT PROPERLY PLACED BEFORE THE LOWER COURT - GROUNDS 30 AND 31. G
H

The 3rd respondent and the 4th - 808th respondents also raised similar issues for determination. I think the starting point is the appellants' issue No. 2, the 1st and 2nd Respondents' Issue No. 1

Both issues question whether a petitioner who complained of exclusion from participating in the election can question the outcome of the election under any of the grounds stated in section 145(1)(a)(b) and (c) of the Electoral Act.

The grounds on which this petition is based are:

- B “(a) *The 1st Petitioner was validly nominated by the 3rd Petitioner but was unlawfully excluded from the election.*
 (b) *The election was invalid by reason of corrupt practices;*
 (c) *the election was invalid for reason of non-compliance with*
 C *the provisions of the Electoral Act, 2006 as amended; and*
 (d) *the 1st Respondent was not duly elected by the majority of lawful votes cast at the April 21, 2007 Presidential Election.”*

The petitioners in the petition prayed for eight reliefs which read as follows:

- D “1. *It may be determined that the presidential Election of 21st April, 2007 is invalid for unlawful exclusion of the 1st and 2nd petitioners who were validly nominated by the 3rd petitioner as its candidate of the Presidential election, and the said election be nullified.*

ALTERNATIVELY THAT:

- E 2. *It may be determined that Alhaji Umaru Musa Yar’dua who was returned by the 4th -6th Respondents as the President elect based on the Presidential Election held on 21st April, 2007 was not duly elected (or returned) and his election be nullified.*

- F 3. *It may be determined that the said Presidential Election held on 21st April, 2007 is invalid for non-compliance with the provisions of electoral Act, 2006, which non-compliance had substantially affected the result of the election, and that the election be nullified.*

- G 4. *It may be determined that the said election be invalidated or annulled by reason of widespread corrupt practices, and that the election be nullified.*

- H 5. *It may be determined that a fresh election be conducted into the office of the President of the Federal Republic of Nigeria, in accordance with section 147 of the Electoral Act, 2006 at which the 1st and 2nd Petitioners shall be accorded full and unimpeded right to contest as validly nominated candidates.*

6. *It maybe determined that the 5th, 7th - 42nd Respondents as officials of the 4th Respondent, who directly and negligently mis-*

conducted the April 21, 2007 Presidential Election 'in contravention of the provision of the Electoral Act, 2006 be recommended for criminal prosecution by the Attorney-General pursuant to section 157 of the Electoral Act, 2006.

7. *It may be recommended that the 5th, 7th - 42nd Respondents who supervised and/or misconducted the April 21, 2007 Presidential Election be prohibited from participating in the conduct of the fresh election which may be ordered in consequence of this Petition.*

8. *And for such order or further orders as the Honourable Court may deem fit to make in the circumstance.*”

The first issue the court below took up was whether or not the petition was incompetent for the reason that the ground of unlawful exclusion was raised along with other grounds. The law under consideration is the provision of section 145(1) of the Electoral Act, 2006 which provides as follows:-

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

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

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

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

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

It was the contention of the 1st and 2nd Respondents that the ground under section 145(1)(d) of the Electoral Act relating to the exclusion of a candidate from contesting the election and the three earlier grounds provided under the same section 145(1)(a),(b) and (c) relating to disqualification of a candidate who was returned, corrupt practices and non-compliance with the provision of the Act and failure of the respondents to secure majority of the lawful votes cast at the said election are mutually exclusive. They cannot be lumped together as was done in the instant case. It was further said that a candidate who is complaining of exclusion at an election does not have the locus standi to challenge the result of the election based on

other alternative grounds. It was submitted for the 1st and 2nd Respondents that the wordings of the section are very clear, simple and unambiguous and should therefore be given their ordinary literal meaning.

B Learned counsel for the petitioners/appellants disagreed. He submitted that a petitioner is not precluded from relying on alternative grounds under section 145 of the Electoral Act, 2006.

In its judgment the Court of Appeal struck, out the alternative grounds. That court held that:

C *"We find that having relied on the ground of valid nomination and unlawful exclusion, the Petitioners are ordinarily, precluded from relying on any other ground under section 145(1) of the Electoral Act, 2006 and the alternative grounds ought to be struck out, after all, it has been variously held that where a statute provides a particular mode of performing a duty regulated by statute, that method, and no other, must have to be adopted. Refer to Nuhu Sani Ibrahim & Ors. (1999) 8 NWLR (Pt.614) 334 at 352; Muhammadu Buhari v. Alhaji Mohammed Dikko Yusuf (2003) 4 NWLR (Pt.841) 446 at 498-499."*

E The court below then proceeded to examine the issue of exclusion - whether petitioners were excluded from participating in the presidential election of 21st April, 2007 or not..

F After exhaustive consideration of the submissions and arguments on behalf of the parties, the court below found as follows:

G *"The petitioners, from their own showing in their pleadings, evidence of their salient witnesses as depicted earlier on in this judgment, as well as their conduct after the judgment of the Supreme Court on 16th April, 2007, cannot be heard to say that they have been excluded from the presidential election. They were not excluded, they were included and actively participated in the election. This issue is accordingly resolved against the petitioners and in favour of the Respondents."*

H An election petition is sui generis. That is to say it is in a class by itself. Surely, this is no longer a moot point. It is different from a common law civil action. This must be borne in mind throughout these proceedings.

The applicable law under consideration is the provision of sec-

tion 145(1) of the Electoral Act, 2006 which I have read earlier on in this judgment but for ease of reference I hereby read it again:

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

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

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

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

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

It will be seen clearly that grounds (a), (b) and (c) above are separated from ground (d) by the word "or". The word "or" is defined in Black's Law Dictionary, Sixth Edition in the following terms: D

"A disjunctive participle used to express an alternative or to give a choice of one among two or more things."

In the case of *Arubo v. Aiyeleru* (1993) 3 NWLR (Pt.208) 126 at 141-142 this court in construing the word "or" thus:

"..... The power given to the court under the rule is to either strike out or amend, the word "or" having a disjunctive connotation. It does not give the court the power to strike out and amend....." E

Also in the case of *Abia State University v. Anyaibe* (1996) 3 NWLR (Pt.439) 646 at 661 the Court of Appeal per Katsina-Alu JCA F (as he then was) held:

"..... It is to be noted that twelve month's period is separated from the next period following by the word "or". This word always bears the disjunctive meaning in an enactment that is to say it separates the provision preceding it from the provision coming after G it. Its role is to show that the provisions in which it is appearing are distinct and separate one from the other. In Black's Law Dictionary Sixth Edition the word "or" is defined inter alia: A disjunctive participle used to express an alternative or to give a choice of one among H two or more things."

Without doubt the word "or" in section 145(1) of the Electoral Act has compartmentalized the grounds in (a), (b) and (c) together and ground (d) on its own. There is good rea-

son for this. A careful reading of section 145(1) would reveal that a petition under subsection (1)(a)(b) & (c) does presuppose that the petitioner did in fact participate in the election as a contestant. Whereas a petition under subsection (1)(d) does presuppose that the petitioner was excluded from participating in the election as a contestant. I should imagine, that a petitioner who did not contest the election would not be heard to complain that the election was invalid by reason of corrupt practices or non-compliance with the provisions of the Electoral Act or that the respondent was not duly elected by majority of lawful votes cast at the election. See also the case of ANPP v. Haruna (2003) 14 NWLR (Pt.841) 546 at 570. **I think it is plain that the ground provided under section 145(1)(d) of the Electoral Act relating to exclusion of a candidate from contesting the election and the three other grounds provided under the same section 145(1)(a), (b) and (c) relating to disqualification of a candidate who was returned, corrupt practices and non-compliance with the provisions of the Act and failure to secure majority of lawful votes cast at the election are mutually exclusive. Therefore a candidate who did not contest an election cannot legally and logically complain that the election was marred by rigging, corrupt practices, non-compliance with the provisions of the Electoral Act.**

The effect in law of a petitioner claiming exclusion under section 145(1)(d) of the Act, is that he has shut himself out from presenting his petition under any of the grounds stipulated in section 145(1)(a), (b) and (c), as none of the grounds can still avail him. This is so because the effect of the exclusion ground, if successful, would render the election void and a fresh election would be ordered pursuant to section 147(1) of the Electoral Act, 2006. Clearly, it will be seen that the ground of unlawful exclusion cannot stand with any other ground as presented in the instant petition. This would be tantamount to approbating and reprobating which the law frowns at.

The petition as it stands is akin to a plaintiff who sues for trespass to a particular piece of land and recovery of possession of the same parcel of land. Both claims are contradictory. See *Aromire v.*

Awoyemi (1972) ANLR 105 at 106, Ibeziako v. Nwagbogu (1972) ANLR 693, Ezekwesili v. Agbapuonwu (2003) 9 NWLR (Pt.825) 363. In my judgment, the court below rightly struck out the alternative grounds brought under section 145(1) (a), (b) and (c)

I move now to consider the question whether or not the appellants were excluded from contesting the election. As I have earlier shown in this judgment, the petitioners based this ground on paragraph 15(a) of their petition which reads thus:

"15(a) The 1st petitioner was validly nominated by the 3rd petitioner but was unlawfully excluded from the election;"

The facts of unlawful exclusion were provided in paragraph 16 of the petition. I think it is pertinent to set out this paragraph. Paragraph 16 states as follows.

"16. FACTS OF UNLAWFUL EXCLUSION

(a) The 1st Petitioner was duly nominated by the 3rd Petitioner as its candidate for the 21st April, 2007 Presidential Election;

(b) Upon the nomination of the 1st Petitioner, the nomination form was duly completed and submitted to the 4th Respondent;

(c) After submission, the 4th Respondent, on 28th Day of December, 2006 invited all the candidates including the 1st Petitioner to its screening and verification exercise;

(d) Subsequent to the screening and verification exercise, the 4th Respondent published a statement of the full list of the names of candidates standing nominated pursuant to the Electoral Act;

(e) In the statement of the full names of candidates standing nominated published by the 4th Respondent, the name of the 1st Petitioner was unlawfully excluded;

(f) In addition to sub paragraphs (a) - (e) above, the 4th and 5th Respondents, at different public fora and after nomination had closed, repeatedly declared and stated that the 1st Petitioner was disqualified from contesting the April 21, 2007 Presidential Election and implacably maintained this position until the day of the election.

(g) The Petitioners will contend further that the 4th and 5th Respondents were biased and deliberately failed to give the Petitioners equal opportunity as was given to other candidates to participate in the April 21, 2007 Presidential Election.

(h) The Petitioners will contend that the action of the 4th and

5th Respondents as enumerated in paragraphs (a) - (f) above, was deliberate and effectively excluded the 1st and 2nd Petitioners from engaging in a meaningful and effective contest as a candidate at the election for which he had been validly nominated by the 3rd Petitioner.

B "PARTICULARS OF UNLAWFUL EXCLUSION"

i The 3rd Respondent by a letter dated 18th January, 2007 actually instigated the events that led to the unlawful exclusion of the 1st Petitioner.

C *ii. Upon becoming aware of the letter by the 3rd Respondent during the screening, the 1st Petitioner, in his capacity as a nominated candidate, replied, through his Counsel, to the 4th Respondent, informing the 4th Respondent that the allegations made by the 3rd Respondent were unfounded.*

D *iii. The 4th Respondent at no time thereafter reverted to the Petitioners about their response.*

iv. On the 7th day of March, 2007, the Federal High Court in Suit No.: FHC/ABJ/CS/03/2007 between Action Congress vs. INEC & Anor. Judgment was delivered by Kuewumi J. in which it was adjudged, amongst others, that the 4th Respondent lacked power to disqualify a candidate at an election and that such power lies with the Court of Law,

The said Judgment shall be relied upon.

F *v. Thereafter, in defiance of the said Judgment, the 4th Respondent proceeded to publish its official list of candidates excluding the name of the 1st Petitioner. In addition, the said list was posted on INEC website.*

G *vi. A letter was written by the 3rd Petitioner to the 4th and 5th Respondents on the 9th day of February, 2007 complaining about the unlawful exclusion of its candidate.*

vii. The 4th Respondent replied the Petitioner's letter on 17th February, 2007 declining to revisit the unlawful exclusion.

H *viii. Following the insistence of 4th Respondent on the 1st Petitioner's unlawful exclusion, an action was instituted at the Federal High Court, Abuja in Suit No.: FHC/ABJ/CS/152/2007 (Alhaji Atiku Abubakar & Anor vs. INEC & Anor.) before Tijani Abubakar J., Judgment was delivered on the 3rd day of April, 2007 whereupon it was*

declared as follows:

"(1) That an order is made directing the Defendants not to exclude the 1st Plaintiff from contesting the election to the office of the President of the Federal Republic of Nigeria.

(2) That if excluded it is hereby ordered that Defendants include the Name of the 1st Plaintiff as the Presidential Flag bearer of the 2nd Plaintiff.

(3) That the Defendants are hereby restrained from excluding the name of the 1st Plaintiff as the Presidential candidate of the 2nd Plaintiff except upon pronouncement by a Court of Law."

The judgment which is still subsisting shall be relied upon at the trial.

ix. Your Petitioners shall lead evidence that in defiance of the Order/Judgment of the Court, the 4th and 5th Respondents persisted in their decision to unlawfully exclude the Petitioners and stated that it would only obey Orders made by the Supreme Court.

x. Your Petitioners shall lead evidence that apart from the final list of presidential candidates published by the 4th Respondent on 15th March, 2007, no further amended, supplementary or modified list of Presidential candidates was published by the 4th Respondent in which the name of the Petitioners were included.

xi. Notwithstanding the fact that the 1st Petitioner was unlawfully excluded, the 4th Respondent proceeded to allocate 2,637,848 votes to the 1st Petitioner as a candidate in the election.

xii. By reason of the unlawful exclusion, it became practically impossible for the 1st Petitioner to present himself effectively as a candidate at the election and for his supporters to canvass for votes on his behalf.

xiii. The 1st Petitioner was, prior to the election a two-term Vice President, who had won two (2) previous Presidential Elections, on a joint ticket with the incumbent President, General Olusegun Obasanjo.

xiv. Upon joining the 3rd Petitioner, the 1st Petitioner pulled a substantial followership which stood him in good stead to have won the election but for the 4th Respondent's acts of unlawful exclusion.

xv. In the course of seeking reversal of his unlawful exclusion, a Judgment of the Supreme Court was delivered on Monday. 16th

April, 2007 where it was adjudged that the 4th Respondent had no power to disqualify a candidate in an election without a lawful Court Order.

xvi. Notwithstanding the judgment of the Federal High Court of 3rd April, 2007 and the Judgment of the Supreme Court of 16th April, 2007, the 4th Respondent still refused to restore and/or publish the name of the 1st Petitioner on the list of candidates standing nominated as at Tuesday, 17th April, 2007.

xvii. Tuesday, 17th April, 2007 the 809th Respondent in contravention of the Electoral Act, 2006, and the Constitution of the Federal Republic of Nigeria, 1999 issued an Order prohibiting campaign and public meetings until after the date of the Presidential Election, which Order was brazenly enforced by the law enforcement agencies.

xviii. By the prohibition order issued by the 809th Respondent, the Petitioners were effectively deprived of the opportunity to undertake their electioneering campaign up to the 20th of April, 2007, when by law campaigns were to cease.

xix. That the party symbol of the 3rd Petitioner as approved by the 4th Respondent was not reflected on the ballot paper used for the April 21, 2007 Presidential Election the object and effect of which was to exclude the Petitioners from a meaningful and effective participation in the election.

At the trial, your Petitioners shall rely on Newspaper publications, video recordings, mobile phone visual recording, photographs, correspondences, and other forms of communications and other relevant documents exchanged between the parties."

It must be pointed out that some court judgments were tendered by the petitioners/appellants in an attempt to establish this ground and respectively, there are Exhibits EPT/03/P/4, EPT/03/P/6, that is:

"(i) Certified true copy of judgment and enrolled Order in Suit No. FHC/ABJ/CS/03/2007.

(ii) Certified copy of judgment and enrolled order in Suit No. FHC/ABJ/CS/152/2007.

(iii) Certified true copy of the judgment of the Supreme Court delivered on Monday 6th April, 2007 on the lack of powers of INEC

to disqualify candidates."

These judgments, it will be seen clearly, were delivered before the election which took place on 21st April, 2007. Exhibit EPT/03/P/6 clearly states that the 1st Petitioner/Appellant was not a disqualified candidate. It was a judgment of this court delivered on 16th April, 2007 paving way for the Appellants to participate in the election. B

Now, notwithstanding the facts of unlawful exclusion set out in paragraph 16 of the petition, the petitioners in paragraphs 18 and 20 of their petition pleaded facts showing that they participated in the election. The said paragraphs read as follows: C

"OYO STATE

18(a)(xxii) Voters were intimidated by security officials particularly in Ogbomosho Local Government Area; also, agents of the 3rd petitioner were driven away from the filing units by security agents.

RIVERS STATE D

18(a)(XXIII). Agents of 3rd petitioner were, prevented from observing the conduct of the elections.

ZAMFARA STATE

18(a)(XXIV) As a result majority of eligible Party Agents, particularly those of the 3rd petitioner were deprived the opportunity to observe the conduct of the election. E

20. Before and during the election, the 5th Respondent exhibited acts of gross bias with impunity against the person and candidature of the 1st Petitioner "

It is pertinent at this point to read material parts of the evidence of some of the witnesses called by the petitioners which shows that the petitioners participated in the election: F

Alhaji Oumar Shittien:

"I am the legal Adviser to Atiku Campaign Office, the campaign outfit of the 1st and 2nd Petitioners I voted in the Presidential and National Assembly election of 21st April, 2007. The name of my polling station is Kallum Central School in Kallum Ward in Shendam Local Government Area of Plateau State. When I was given the Presidential ballot Paper, I observed that the symbol reflected thereon is not the symbol as approved by INEC. It does not have two out of the three colours that are associated with the symbol i.e. Green and Black. Many of the voters did not recognize the symbol of H

Action Congress in the few places where election took place in Plateau State.”

Chief Tom Ikimi:

“I know the 1st Petitioner, Alhaji Atiku Abubakar. He is the leader of our Party and its flag bearer in the just concluded Presidential Election held on the 21st/ of April, 2007. I know the 2nd Petitioner, Senator Ben Obi. He was the running mate of the 1st Petitioner I remember the 21st day of April, 2007. On that day was the Presidential and National Assembly Election in Nigeria I was appointed collation Agent of the Action Congress to represent the Party at the Final collation of results of the Presidential Elections of April 21, 2007 and to be assisted by Dr. Okwesilieze Nwodo. This was in response to an invitation by INEC to all Political Parties who fielded Presidential candidates in the Elections to send such representatives for the collation of results on Saturday 21 April evening At around 11 a.m. on Sunday April 22, Senator Ben Obi, Vice Presidential candidate of the Action Congress telephoned me conveying to me information he had just received, that collation of results was about to commence at INEC Headquarters but that our Party Agents were not there. I immediately rushed to the venue. Nothing had yet started.”

Senator Ben Obi

“I am a Senator of the Federal Republic of Nigeria, Representing Anambra Central Senatorial District. I am the 2nd Petitioner in these proceedings and the Vice Presidential Candidate of Action Congress. The First Petitioner was the validly nominated candidate of the Action Congress; the Political Party that nominated us for the Presidential Election held on the 21st of April, 2007. The Party is the 2nd Respondent in these proceedings. The 4th Respondent excluded us in the said election I remember vividly the events that took place on the day of the election in Anambra State. On the said day, I was in my hometown, Awka, the Capital of Anambra State to cast my vote. It was there that I registered as a voter On April 21, 2007, when the Presidential and the National Assembly Election held, I was in Awka to cast my vote. I made several visits to the polling station where I was supposed to vote but did not see any electoral official or voting materials It is noteworthy that when AD

replaced its deceased Presidential candidate, Chief Adefarati with Chief Pere Ajuwa on or about the 5th of April, 2007, the latter's name was promptly reflected on the INEC list of Presidential candidates and posted in the website. It is therefore not in doubt that we were unlawfully excluded in the questioned election."

Alhaji Lai Mohammed:

"..... They are the duly nominated candidates of the 3rd petitioner who were unlawfully excluded by the 4th respondent (INEC) from contesting the Presidential Election of 21st April, 2007 That I followed the materials to my Polling Unit (Bolki Unit 1) in Bolki Ward so as to cast my vote."

Pithon P. Digoli:

"Was the Chairman of the 3rd Petitioner in Numan Local Government and was charged with the responsibility for monitoring the Presidential Election in the Local Government."

Alhaji Hayalu Magdari"

"That I am the LGA collation Agent of the Action Congress representing the Petitioner in this Petition. That I was the one charged with the responsibility of overseeing the distribution of election materials meant for the Presidential Election in. Fufure LGA."

Alhaji Jauro Audu.

"That I am the Party Chairman of the Action Congress in Maiha Local Government representing the 1st petitioner in this Petition. That I was the one charged with the responsibility of monitoring the conduct of Presidential Election in the Local Government. I moved around the whole Ward in the Local government Area."

Mr. Wilson Japhet Fofana

That I am the LGA collation Agent of Action Congress representing the 1st Petitioner in this Petition. That I was the one charged with the responsibility of overseeing the distribution of electoral materials fixed for the Presidential Election in Numan LGA."

Alhaji Audu Suleiman:

"That, I am the Local Government Collation Agent of the Action Congress representing the Petitioner in this petition That I was the one charged, with the responsibility of monitoring and collation of Presidential Election in Shelleng Local Government."

Dr. Chiebonam Orji:

"That I remember the 21st day of April, 2007. On that day there was a Presidential and National Assembly elections in Nigeria. I was the Action Congress Party Agent of Enugu North Local Government,"

Mr. Emeka Udeh:

B *"That I remember the 21st day of April, 2007. On that day there was a Presidential and National Assembly Elections in Nigeria. I was the Action Congress Party Agent of Ezeagu Local Government."*

Mr. Hakeem Okedara.

C *"My names are Mr. Hakeem Okedara. I live at No. 45 Olowu Road, Owu, Abeokuta; I am a Contractor by profession. I am also a Politician. I am a registered member of Action Congress (AC), the 3rd Petitioner in these proceedings. I hail from Abeokuta North Local Government of Ogun State. I know the 1st Petitioner, Alhaji Atiku*
D *Abubakar. He is the leader of our Party and its flag bearer in, the just concluded Presidential election held on the 21st of April, 2007. I know the 2nd Petitioner, Senator Ben Obi. He was the running mate of the 1st Petitioner. He is also a serving Senator of the Federal Republic of Nigeria. I remember the 21st day of April, 2007. On that*
E *day there was a Presidential and National Assembly elections in Nigeria. I was the AC co-ordinator for Abeokuta North Local Government Area of Ogun State. In my capacity as a co-ordinator, I moved freely around all the polling booths in Abeokuta North on the 21st*
F *day of April, 2007 during the Presidential/ National Assembly Elections."*

In addition Exhibit EP3/28, a letter by the 3rd Petitioner to the Chairman of INEC, the 4th Respondent dated 19/4/07 reads thus:

"19th April, 2007

G *The Chairman
Independent National Electoral Commission (INEC)
INEC Headquarters
Plot 436, Zambezi Crescent
Maitama, Abuja*

H *INTRODUCING FIVE MAN DELEGATION TO THE NATIONAL ELECTION RESULT COLLATION CENTER*

This is to introduce to you five man delegation that will represent our Party Action Congress (AC) at the National Election Result

Collation Center (INEC). They are:

1. Chief Tom Ikimi - Leader of the Delegation
2. Bashkir Dalhatu , . •
3. Chief Yomi Edu
4. Dr. Okwesilieze Nwodo
5. Alh. Lai Mohammed

B

Please accept the assurances of our highest esteem.

Alhaji Abubakar Sulaiman .

National Admin. Secretary

For: National Secretary."

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It was contended for the 1st Petitioner that the acts of the INEC and its Chairman in initially disqualifying him from contesting the election and placing several hurdles on his path amounted to his exclusion from the Presidential election. The point was stretched further that the petitioner was constructively excluded from contesting the election in breach of section 145(1)(d) of the Act.

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I am not impressed with this argument. There is nothing in section 145(1)(d) that talks of constructive or qualified exclusion. The section provides as follows:

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

It is trite law that the court has a duty to interpret a statute or provision thereof by giving them their plain, ordinary and literal meaning except where such an interpretation will lead to manifest absurdity. See National Assembly v. President Federal Republic of Nigeria (2003) 9 NWLR (Pt.824) 104; Ray v. FWLR (Pt.310) 1637. The provision in section 145(1)(d) of the Electoral Act is clear and unambiguous and does not 'admit of any meaning resembling constructive or qualified exclusion. The word "exclusion" stands on its own and has been defined to mean "keeping out, barring, prohibited, eliminated, ruled out." - Buhari v. INEC (2008) 4 NWLR (Pt. 1078) 546 at 646. The only plain, ordinary and literal meaning that the said section can be given must be that a petitioner who was validly nominated by his party was excluded from participating in the said election as a candidate of his party. A petitioner can only

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plead facts to prove that he was excluded after due nomination and did not in fact take part in the election. ***The law is settled that in order to prove unlawful exclusion after valid nomination by his party, a petitioner must show the following:***

- (i) ***that he was validly nominated by his political party.***
- B (ii) ***that an election was conducted***
- (iii) ***that a winner was declared and***
- (iv) ***that his name was not included in the list of the contestants.***

C See Effiong v. Ikpeeme (1999)6 NWLR (Pt.606) 206 cited with approval in the case of Idris. v. ANPP (2008)8 NWLR (pt1088) 1

I shall now apply the above principles, to the petitioners' case:-

(i) **VALID NOMINATION BY ACTION CONGRESS:** This issue is not in dispute. The 1st Petitioner was validly nominated by D Action Congress as its presidential flagbearer sometime in December, 2005 and he campaigned in that capacity until his initial disqualification by INEC and eventual clearance to contest by the Judgment of this court on the 16th April, 2007.

(ii) **THAT AN ELECTION WAS CONDUCTED:** All the parties E agreed that an election into the office of President took place on the 21st April, 2007.

(iii) **THAT A WINNER WAS DECLARED:** In the petition challenging the 1st Respondent's return as winner the 1st Petitioner admitted that 1st Respondent was declared winner with 24, 678,063 F votes as against 2,637,848 votes scored by him.

(iv) **THAT PETITIONER'S NAME WAS NOT INCLUDED IN THE LIST OF CONTESTANTS:** This issue is the most important fact to be established by a petitioner alleging valid nomination but unlawful exclusion. The 1st Petitioner however failed to establish same because: G

(a) In paragraphs 16, 18(a)(xxii), 18(a)(xxiii) 18(a)(xxiv) and (20) of the petition facts clearly showing acts of participation in the election were clearly pleaded.

H (b) facts in these paragraphs clearly showed that Alhaji Atiku Abubakar was a candidate in the said election held on 21st April, 2007. See paragraph 8 of the petition where this fact was admitted.
(c) his nomination was processed as a candidate of the Action Con-

gress by INEC and he went ahead to participate in the said election. (c) despite alleged hurdles placed on his path prior to the election, the 1st Petitioner took part in the election and came a distant 3rd with 2,637,648 votes.

Further to the above and **more fatal to the petition was the fact that no attempt was made to plead facts to show that the 1st Petitioner's name was not included in the list of candidates and logically too, none of the petitioner's witnesses led evidence to prove this vital ingredient at the hearing.** The onus of proof of valid nomination and unlawful exclusion from an election is squarely on the petitioner: See Effion v. Ikpeeme (supra). B

I think the position would have been different if the petitioners had pulled out of the contest in protest against the hurdles placed on their path. They did not do so and the evidence placed before the Court of Appeal showed that, the candidate and his party took part in the election as contestants for the office of the President. The 1st petitioner approved and reprobated by his decision to also challenge the election on the mutually exclusive grounds under section 145(l)(a)(b) & (c) of the Act (hereby impliedly acknowledging his participation in the election where he came a distant 3rd with 2,637,848 votes. C

In my judgment, therefore, the appellants were not excluded in participating in the Election held on 21st April, 2007. This issue disposes of the appeal., That being so, I do not deem it necessary to consider the other issues raised in the appeal that the result the appeal fails and I dismiss it. I affirm the judgment of the Court of Appeal delivered on the 26th day of February, 2008. I make no order as to costs. D

KUTIGI CJN

The Independent National Electoral Commission (4th Respondent) organized and conducted an election into the office of the President of the Federal Republic of Nigeria on 21st April, 2007. At the end of the election the 1st Respondent was declared winner. The 1st Respondent scored 24, 638,063 votes while the 1st Petitioner scored E

only 2,637,848 votes.

The Petitioners were dissatisfied with the result of the election and challenged it by filing their Petition on the following grounds as contained in paragraph 15 of the said Petition

"15. The grounds on which the Petition is based are-

B *(a) The 1st Petitioner was validly nominated by the 3rd Petitioner but was unlawfully excluded from the election;*

ALTERNATIVELY THAT:

(b) The election was invalid by reason of corrupt practices;

C *(c) The election was invalid for reasons of non-compliance with the provisions of the Electoral Act, 2006 as amended; and*

(d) The 1st Respondent was not duly elected by majority of lawful Votes cast at the April 21, 2007 Presidential election".

At the trial both sides, Petitioners and Respondents, relied on D sworn testimonies of their witnesses and several documents tendered by consent from the Bar. They also submitted and relied on their written addresses in compliance with the order of court.

The Petitioners in their written address submitted the following five issues for determination, namely -

E *"1. Whether or not a case of unlawful exclusion from the participating in the Presidential Election of 21st April, 2007 has been made out by the Petitioners.*

F *2. If the answer to the above is in the affirmative, whether or not the election should not be set aside having regards to the provisions of section 147(1) of the Electoral Act, 2006.*

G *3. If the answer to issue 1 is resolved against the petitioners and the Court finds that the petitioners were not unlawfully excluded at the said election, whether or not the election should be set aside for non-compliance with the provisions of the Electoral Act 2006 and also for corrupt practices as set out in paragraphs 17 and 18 of the Petition.*

H *4. Whether or not section 146(1) of the Electoral Act 2005 can be applied to validate the said election in spite of the various acts of non-compliances and corrupt practices discussed in issue No. 3 above.*

5. Whether or not a case has been made out by the petitioners for the prosecution of the 5th Respondent and other erring officials

of the 4th Respondent and the prohibition of the 5th Respondent from participating in the conduct of future elections in the country.”

The trial Court of Appeal, considered all the issues and came to the conclusion that the issues had not been established. It accordingly dismissed the Petition.

The Petitioners, aggrieved by the decision of the trial court have now appealed to this Court. In their brief of argument they have submitted nine issues for resolution. I do not need to set them out here. It is sufficient to observe that it is very clear to me that after the Court of Appeal struck out the ALTERNATIVE grounds (b) (c) and (d) of the Petition above, the only and single issue left for that Court to resolve is the surviving substantive ground (a) which is “*whether the Petitioner was validly nominated by the 3rd Petitioner but was unlawfully excluded from the election.*” Embedded in the issue is the question of whether or not the Court of Appeal was right to have struck out ALTERNATIVE grounds in the Petition as having offended section 145(1) of the Electoral Act, 2006.

The first pertinent issue for the Court of Appeal to resolve was whether or not the Petition itself was incompetent for the reason that the ground of unlawful exclusion was raised along with other grounds as alternatives contrary to the provisions of section 145(1) of the Electoral Act, 2006. This incidentally has, also become a very important issue before this Court now. The trial court after thoroughly analysing submissions of counsel concluded thus-

“Learned Senior Counsel for the Petitioners confused reliefs sought in an election Petition and grounds therein, which in our humble view are distinct while reliefs or prayers can be made in the alternative, in an election petition, a ground of exclusion cannot be made in the alternative with other grounds. A ground of exclusion in an election petition stands clearly on its own. It is mutually exclusive of other grounds. It is crystal clear that from the foregoing that the Petitioners are approbating and reprobating at the same time. This should not be allowed since it is frowned at by the law.

Accordingly this issue is resolved in favour of the Respondents against the Petitioners. We find that having relied on the ground of valid nomination and lawful exclusion, the Petitioners are, ordinarily, precluded from relying on any other ground under section 145(1) of

the Electoral Act, 2006 and the alternative grounds ought to be struck out”.

I agree. The Court of Appeal rightly in my view struck out the alternative grounds in the Petition.

The Court thereafter proceeded to consider the next salient issue before it having struck out ALTERNATIVE ground. The issue was whether the Petitioners were excluded from participating in the Presidential election. This is the only ground left for challenging the Presidential election as I have shown above. Again after going through the submissions of Counsel, the Court of Appeal in its judgment said as follows -

“Exclusion means keeping out, barring, prohibited, eliminated, ruled out. The Petitioners, from their own showing in their pleadings, evidence of their salient witnesses as depict earlier on in this judgment, as well as their conduct after the judgment of the Supreme Court on 16th April, 2007, cannot be heard to say that they have been excluded from the Presidential Election. They were not excluded; they were included and actively participated in the election. This issue is accordingly resolved against the Petitioners and in favour of the Respondents.”

Once more I agree with the decision of the Court of Appeal. The Court is right. The Petitioners were never excluded from participating in the election. They actively took part.

Having resolved the above two issues against the appellants, there is clearly no more live issue to be considered in the appeal. It is for the above reasons and those ably stated in the lead judgment of my learned brother Katsina-Alu, JSC. that I agree to dismiss the appeal. The appeal is unmeritorious. It woefully failed, It is accordingly dismissed with no order as to costs. The judgment of the Court of Appeal is affirmed.

TOBI JSC

I have read in draft the judgment of my learned brother, Katsina-Alu, JSC and I agree with him that the appeal should be dismissed. Let me add this to the judgment of my learned brother. 21st April, 2007 will be remembered by most Nigerians, particularly the electorate. The Presidential Election was held on that day. 21st

April came and went. Nigerians expected the results. They were announced on 23rd April, by the 5th respondent, Professor Maurice Iwu. As usual, he made them public. It was at a World Press Conference. The entire world was almost in Nigeria, literally. It was a memorable and eventful day for politicians and the electorate. Professor Iwu declared Alhaji Umaru Musa Yar'Adua and Dr. Goodluck Jonathan, 1st and 2nd respondents respectively, as winners. Their families and their supporters were happy. They went into big and great jubilation. Both Alhaji Umaru Musa Yar'Adua and Dr. Goodluck Jonathan must have been happy too. After all, they contested the election and they were declared the winners. Who will not be happy in such a matter?

The 5th respondent announced the result of the 1st appellant and the 1st respondent as follows:

1. Alhaji Abubakar Atiku	AC	2,637,848
2. Alhaji Musa Yar'Adua	PDP	24,638,063

While 1st and 2nd respondents were happy, the appellants were unhappy. They are Alhaji Atiku Abubakar, Senator Ben Obi and the Action Congress. They sued, as petitioners contesting the result of the election. They asked for the following relief:

"1. It may be determined that the Presidential election of 21st April, 2007 is invalid for unlawful exclusion of the 1st and 2nd Petitioners who were validly nominated by the 3rd Petitioner as its candidate at the Presidential election, and that the said election be nullified."

They also asked for the following six reliefs in the alternative:

"2. It may be determined that Alhaji Umaru Musa Yar'Adua who was returned by the 4th-6th respondents as the President-elect G based on the Presidential Election held on 21st April, 2007 was not duly elected (or returned) and his election be nullified."

3. It may be determined that the said Presidential election held on 21st April, 2007 is invalid for non-compliance with the provisions of Electoral Act 2006, which non-compliance had substantially affected the result of the election, and that the election be nullified."

4. It may be determined that the said Election be invalidated or annulled by reason of widespread corrupt practices, and that the

election be nullified.

5. *It may be determined that a fresh election be conducted into the office of the President of the Federal Republic of Nigeria in accordance with section 147 of the Electoral Act, 2006 at which the 1st and 2nd petitioners shall be accorded full and unimpeded right to contest as validly nominated candidates.*

6. *It may be determined that the 5th, 7th-42nd respondents as officials of the 4th respondent, who directly and negligently mis-conducted the April 21st, 2007 Presidential Election in contravention of the provision of the Electoral Act, 2006 be recommended for criminal prosecution by the Attorney General pursuant to Section 157 of the Electoral Act, 2006.*

7. *It may be recommended that the 5th, 7th-42nd respondents who supervised and/or misconducted the April 21, 2007 Presidential Election be prohibited from participating in the conduct of the fresh election which may be ordered in consequence of this petition."*

The petitioners stated their case in their petition of 24 paragraphs and written statements of witnesses. After a number of interlocutory matters, the petition was heard. The Court of Appeal dismissed the petition of the petitioners and held that the 1st and 2nd respondents are the winners of the election, and therefore the President and Vice President respectively of the Federal Republic of Nigeria. Fabiyi, JCA in his lead judgment said at page 4780 of the Record:

"Since the two consolidated petitions have failed, it follows that Alhaji Musa Yar'Adua and Dr. Goodluck Jonathan remain the elected President and Vice President respectively of the Federal Republic of Nigeria."

Aggrieved by the judgment, the appellants have come to this court. Briefs were filed and duly exchanged. The appellants formulated the following ten issues for determination:

1. *Whether after its ruling on 20th September, 2007, the lower court, in its judgment delivered on 26th February, 2008, was not in error to have reopened consideration of the issue that the petition in its entirety was incompetent and that 5th respondent was wrongly joined in the petition.*

2. *Whether the lower court is right in holding, firstly, that the*

1st petitioner was not unlawfully excluded from the election and, secondly, that, having pleaded unlawful exclusion, he cannot question the election on any other ground.

3. Whether the judgment on appeal to this court is not vitiated by the lower court's use of section 146 of the Electoral Act 2006 to shield from invalidity, various infractions of the Act, including cases of non-compliance amounting to corrupt practice, non-compliance with the provisions relating to ballot papers and to the voters' register.

4. Whether the decision of the Court of Appeal striking out the name of the 5th respondent on the ground that he is not a juristic personality is correct having regard to the pleadings, evidence and entire circumstances of the petition.

5. Whether Court of Appeal rightly deemed the 1st respondent as having been duly elected President of the Federal Republic of Nigeria by majority of valid lawful votes of 24,638,063 in the face of the three conflicting "final" results of the election which the 4th and 6th respondents were unable to explain or reconcile by their pleadings or by evidence at the trial.

6. Whether the allegations of apparent similar handwriting on documents tendered by consent can only be established by calling expert handwriting analyst, when respondents offered no explanation beyond bare denial through unnamed, un-sworn witnesses, who were not the authors of the said documents.

7. Whether the decision of the Court of Appeal to the effect that the petitioners did not specifically identify any police officer or soldier who participated in the conduct of the election was correct having regard to the admissions on record, pleadings and evidence.

8. Whether or not the failure of the Court of Appeal to consider the validity and admissibility of all the witness statements of the 1st and 2nd respondents and some of those of the 4th - 808 respondents occasioned a miscarriage of justice.

9. Whether or not the total failure of the Court of Appeal to evaluate and pronounce upon the evidence elicited from the 5th respondent by way of answers to the administered interrogatories occasioned a miscarriage of justice.

10. Whether or not a proper case for the Supreme Court to invoke section 22 of the Supreme Court Act to invalidate the elec-

tions in view of:

i) Failure of the Court of Appeal to evaluate evidence on vital issues relating to delivery and supply of ballot papers.

ii) Disregarding petitioners submissions on thousands of exhibits that supported petitioners' as highlighted in schedules 1-25 incorporated into their final addresses;

iii) Failure of the Court of Appeal to properly evaluate and pronounce on evidence led by the petitioners in their witness statements and ascribing to such witnesses prejudicial conclusions not borne by the records;

iv) Allowing extraneous political considerations to affect their judgment to the prejudice of the petitioners. (Grounds 17, 18, 26, 33, 37 & 39).

v) Disallowing the petitioners' independent witnesses on sub-D poena from testifying on ground that their depositions were not front-loaded at the time of filing of the petition. (Ground 1, 2 and 4 of interlocutory appeal)."

The 1st and 2nd respondents formulated the following ten issues for determination:

E "(i) Upon a dispassionate interpretation of section 145(d) of the Electoral Act, 2006 whether the appellants who complained of total exclusion from participation in the election could still rightly challenge the outcome of the election under any of the grounds stated in section 145 (1) (a) (b) and (c) of the same Electoral Act.

F (ii) Considering the fact that the objection raised to the competence of the appeal was/is jurisdictional, coupled with the fact that the lower court did not dispose of the merits of the said objection in its ruling of 20th September, 2007, whether it can rightly be said that G the said objection has been caught by issue estoppel to exclude the valid pronouncement made on it by the lower court in its final judgment.

H (iii) Having regard to the state of the pleadings read together with the mandatory provisions of paragraph 4(1) (c) of the First Schedule to the Electoral Act, 2006 in conjunction with section 141 of the same Electoral Act, whether the lower court was not perfectly right to have adopted the scores pleaded for both 1st appellant and the 1st respondent in the petition and as admitted in the respondents' reply.

(iv) *Bearing in mind the state of the various criminal allegations contained in the petition vis-a-vis sections 135, 136, 137 and 138 of the Evidence Act and decided and binding authorities of this court on electoral matters, coupled with the terse evidence placed before the court by the petitioners/appellants, whether the appellants ever discharged the onus or burden of proof placed on them to warrant the grant of their petition/reliefs.* B

(v) *Juxtaposing the myriads and avalanche of criminal or quasi-criminal allegations of non compliance with the provisions of the Electoral Act, 2006, with the lack of evidence to establish the said allegations, whether the lower court was not perfectly right by holding that the said allegations were unproven and/or that if they were peripherally proved, same was not sufficient to have affected the outcome of the election.* C

(vi) *Do Schedules 1-25 procured by appellants' counsel and attached to appellants' written address have any probative value to warrant any court using them to nullify the 1st respondent's election?* D

(vii) *Considering the pleadings of parties, the dearth of evidence on seemingly similar writings/ signatures and the written addresses of their respective counsel wherein no invitation was made to the lower court to compare or contrast perceived similar writings/ signatures, whether the lower court was under any duty or obligation to start comparing such perceived similar writings/signatures* E

(viii) *Was the lower court not right by affirming the return of the respondents as made by the Chief Electoral Commissioner for the Presidential election after painstakingly considering the evidence before it?* F

(ix) *Considering the answers elicited by way of depositions G through affidavits from the interrogatories, coupled with the fact that under and by virtue of Order 33 Rule 8 (1) and (2) of the Federal High Court Civil Procedure Rules, appellants did not complain that the answers elicited by them were insufficient to warrant an order for further answers, whether there was any need for the consideration of the said answers and/or whether the answers have any probative value to the appellants.* H

(x) *Upon a holistic construction of the Election Tribunal and*

Court Practice Directions 2007 (Practice Directions) whether respondents' witness statements which appellants copiously made use of at the lower court and in their brief before this court were/are not properly placed before the lower court."

B The 1st and 2nd respondents have filed a notice of preliminary objection in the following terms:

C *"TAKE NOTICE that at or before the hearing of this appeal, the respondents shall pray the Supreme court to strike out grounds 1 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 18, 19, 20 through to 38 of the Appellants Notice of Appeal dated 18th March, 2008 and further strike out the issues for determination distilled in the Appellants' Brief of Argument from the said incompetent grounds of appeal"*

D The respondents have relied on five grounds of objection. I will return to the preliminary objection later in this judgment. For now, let me take the Briefs.

The 3rd respondent formulated the following eleven issues for determination:

E *(i) Whether the appellants who founded their petition on ground of valid nomination and unlawful exclusion are precluded from relying on any other ground in challenging the election of the 1st respondent having regard to the provisions of section 145 (1) of the Electoral Act, 2006.*

F *(ii) Whether the appellants proved by credible, legal and admissible evidence that the method adopted by the 4th-809th and 810th Respondents were contrary to the provisions of the Electoral Act 2006 and if answered in the affirmative, whether they were substantial enough to affect the result of the election.*

G *(iii) Whether the joinder of the 5th respondent (Prof. Maurice Iwu) in the petition is proper in law.*

H *(iv) In determining the objection raised by the 1st and 2nd Respondents as to the competence of the petition, was the lower court estopped from deciding same having regard to its ruling of 20th September, 2007, in the early part of the proceedings.*

(v) Whether it could be rightly said in the surrounding circumstances that the 1st Appellant did not participate in the April 21, 2007 presidential elections.

(vi) *Did the lower court correctly apply the presumption of regularity of the result of the election?*

(vii) *Did the lower court correctly evaluate the evidence of Lai Mohammed who is one of the witnesses for the petitioners and if answered in the negative, whether that would be enough to set aside the judgment.* B

(viii) *Whether the witness statements in oath of the 1st and 2nd respondents and 4th-808th respondents' witnesses complied with the Practice Directions and the Evidence Act.*

(ix) *Whether the pronouncement of the Trial Court underscor- C
ing the importance of election to welfare and safety of the entire nation was the 11 basis in which it refused to nullify the election.*

(x) *Whether or not the lower court was right in rejecting the petitioners' request to tender the report of 2007 general election in evidence at the stage of proceedings when counsel sought to tender D
same in evidence and if answered in the negative, whether the same did not amount to evidence.*

(xi) *Whether the lower court properly evaluated the evidence before it and made the correct findings of fact before reaching its conclusion."* E

The 4th to 808th respondents also formulated the following eleven issues for determination:

"1. *Whether the court below having struck out the preliminary objection of the respondents on the ground that it was premature F
and ought to be taken at the substantive hearing of the petition was precluded from deciding the issues raised in the preliminary objection on the merit at the substantive hearing of the petition.*

2. *Whether the court below was right in holding that the petitioners, having pleaded unlawful exclusion and non-participation in G
the election could not at the same time and on the same facts question the election on any other grounds available only to a participant in the election?*

3. *Whether in view of the petitioners' own copious pleadings and depositions of inclusion and participation in the election the court H
below was right in holding that the petitioners were not excluded?*

4. *Whether at the court below the petitioners proved that the Presidential Election was not conducted substantially in accordance*

with the principles and provisions of the Electoral Act, 2006 having regard to the provisions of section 146(1) of the said Act and whether the alleged acts of non-compliance, if proved, substantially affected the outcome of the election.

B 5. *Whether the court below was right in striking out the name of the 5th respondent sued in his personal capacity who had also been sued in his official capacity as the 6th respondent in the same petition when the petition only challenged his official acts.*

C 6. *Whether the court below was right in holding that the 1st respondent was duly elected as President of the Federal Republic of Nigeria by a majority of lawful votes of 24, 638,068 as declared in the declaration of result sheet and certificate of return made by the 4th and 5th respondents when the presumption of regularity of the result sheet and certificate of return was not rebutted by evidence at*
D *the end of trial?*

7. *Whether the court below was right in holding that the onus of proving the allegations of similarity of handwritings on documents was on the appellants who alleged same but failed to discharge the onus by calling any expert handwriting analyst?*

E 8. *Whether the court below was right in dismissing the petitioners' allegations of crime against police officers and soldiers when the petitioners did not identify any police officer or soldier in their petition or depositions?*

F 9. *Whether the witness depositions of 1st and 2nd respondents and those of 4th to 808th respondents were valid and admissible in view of the extant Practice Directions?*

G 10. *Whether the court below was right in not pronouncing on the evidence elicited in the interrogatories when the petitioners who issued the interrogatories abandoned same by not urging anything upon the court in respect of same?*

H 11. *Whether the powers of the Supreme Court under section 22 of the Supreme Court Act have been appropriately invoked and whether the Supreme Court ought to disturb the findings of the lower court when:*

(i) The court below properly evaluated the relevant and admissible evidence on all issues competently before it including those relating to ballot papers;

(ii) *The court below considered all the submissions of petitioners on depositions and exhibits;*

(iii) *The court below did not base its judgment on factors extraneous to the issues placed before it by the parties;*

(iv) *The findings of the court below are not perverse; and*

(v) *The judgment of the court below did not occasion any miscarriage of justice.”* B

The 810th respondent formulated one issue for determination:

“Whether the ‘soldiers’ who were alleged to have committed electoral malpractices could be said to have participated in the conduct of the election, especially when the said ‘soldiers’ were not identified.” C

Learned Senior Advocate for the appellants, Professor A. B. Kasunmu, submitted on Issue No.1 that after its ruling on 20th September, 2007 the Court of Appeal was in error to have re-opened consideration of the issue that the petition in its entirety was incompetent; as the Court of Appeal became functus officio. He cited Cardoso v Daniel (1986) 2 NWLR (Pt.20); Ukpong v Udoson (2007) 2 NWLR (Pt. 1017) 184; Anyaegebunam v Attorney General Anambra State (2001) 6 NWLR (Pt.710) 532; Onyenaobi v President, OCC (1995) 3 NWLR (Pt.301) 50; Ukachukwu v Uba (2005) 18 NWLR (Pt.956) 1; Mohammed v Hussein (1998) 14 NWLR (Pt.534) 108; Lawal v Dawodu (1972) 1 ALL NLR 707; Adigun v Attorney General Oyo state (No.2) (1987) 2 NWLR (Pt.56) 197; Ebba v Ogo (2000) 10 NWLR (Pt.675) 357 at 406 Yusuf v Obasanjo (2005) 18 NWLR (Pt.956) 96 at 187; and Akpokiniovo v Agas (2004) 10 NWLR (Pt.881) 394 at 421. D

Learned Senior Advocate submitted that the recent decision of Inakoju v Adeleke (2007) 4 NWLR (Pt.1025) 423 at 631 relied upon by the Court of Appeal on the issue of issue estoppel was in conflict with the previous decisions of this court in Cardoso v Daniel, Lawal v Dawodu, and the authorities in that regard. That apart, counsel submitted that if the interpretation given to the decision by the Court of Appeal is correct, he urged the court to regard the position taken by me (Tobi, JSC) as obiter dictum and therefore not binding on the lower courts. He cited AIC Ltd v NNPC (2005) 1 NWLR (Pt.937) E

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3208 Abubakar v. Yar'adua (2008) 12 KLR Tobi JSC
563 at 589-590; Otun v Otun (2004) 14 NWLR (Pt.893) 381 at 398.

On Issue No, 2, learned Senior Advocate submitted that this court should not be beclouded by the technical or dictionary meaning of the word, 'exclusion' which the Court of Appeal defined as
B "*keeping out, barring, prohibited, eliminated, ruled out*". He urged the court to examine the totality of the electoral process and the conduct of the election. He submitted that the election conducted did not accord with fundamental principles of free, fair and credible
C election and so the 1st and 2nd respondents were not validly elected as provided for in section 239 (1) of the 1999 Constitution.

Referring to the equal protection principle of the United States Constitution and section 42(1) of the 1999 Constitution, learned Senior Advocate submitted that the appellants were not given equal
D protection, the hallmark of fairness in an election. He enumerated eight requirements of fairness in an election in paragraph 5.04, pages 20 and 21 of the Brief. An election, learned Senior Advocate argued, is invalidated by lack or absence of any of the eight elements of fairness, if established, as by the admission of the Court of Appeal at
E page 4763, Vol. 11 of the Record. Relying on what the Court of Appeal said as hurdles, learned Senior Advocate cited Baker v Carr 369 US. 186 and Wesboy v Sanders 376 US 1 at page 7.

Learned Senior Advocate submitted that the Court of Appeal
F was certainly in error to have focused solely on the 1st appellant's so-called participation on polling day, as election is not a one day affair but a process spanning a period of time and comprising a series of actions from the registration of voters to polling on polling day. At all the stages the candidate must have a full, unimpeded and free participation. He referred to Nwole v Iwuagwu (2004) 15 NWLR (Pt.895) 61; PPA v Saraki (2007) 17 NWLR (Pt.1064) 453 and Ojukwu v Obasanjo (2004) 12 NWLR (Pt.886) 169 at page 227. Arguing that the participation of the 3rd appellant in the electoral process is largely irrelevant, learned counsel referred the court to the hurdles placed
H on the way of the 1st appellant in paragraphs 5.11 and 5.12, and pages 23 and 24 of the Brief.

Taking the issue of whether having pleaded unlawful exclusion, the 1st appellant cannot question the election in any other

ground, learned Senior Advocate contended that the judgment of the court is more or less ambiguous. He argued that the Court of Appeal contradicted itself in the decision by its failure to take into account the meaning and effect of the words “*any of the following grounds*” which appear in the first line of section 145 (1) of the Electoral Act. Relying on the definition of “*any*” in decided cases, learned Senior Advocate urged the court to adopt the same definition of the word in section 145 (1) of the Electoral Act. By this purposive approach, counsel argued, a petitioner will have the liberty to challenge an election on more than one of the grounds specified in section 145 (1) of the Act. Counsel also examined the meaning of “or” in paragraph 5.32 of the Brief and submitted that the words “any of the following grounds” in section 145 (1) mean that an election may be questioned on one or more or all the grounds specified in the subsection either together or in the alternative. It is a mis-reading and a distortion of section 145 (1) to say that “a petitioner can only complain in one of the grounds that is, “the ground of valid nomination but unlawful exclusion cannot be made in the alternative with other grounds (and that) it is mutually exclusive of other grounds” learned Senior Advocate contended.

Learned Senior Advocate called the attention of the court to the fact that in the sister case of Buhari v INEC and others, the Court of Appeal invoked the provisions of the Federal High Court (Civil Procedure) Rules 2000 to expunge some aspects of the petitioner’s petition for being violative of the rules of pleadings, but refused to invoke the same provisions that permit parties to plead facts and claim reliefs in the alternative. Counsel urged the court to set aside the decision of the Court of Appeal on the issue, being clearly wrong not to hold that a claim of unlawful exclusion does not preclude it being pleaded in the alternative to other grounds under section 145 (1) of the Act.

On the issue of Logo/Party symbol of the 3rd appellant, learned Senior Advocate relied on section 83 of the Electoral Act and submitted that the 4th respondent is obliged to allot to a candidate at an election only the symbol of the party sponsoring him as registered with INEC. Disagreeing with the decision of the Court of Appeal that there was no evidence that any prospective voter was misled, coun-

sel referred to the evidence of Alhaji Ourmar Shitten in paragraph 5.41 of the Brief. He pointed out that as the witness was not cross-examined the truth of the evidence is not in dispute. He cited Abadom v State (1997) 1 NWLR (Pt.479) 1 at 20. Counsel also referred the court to the evidence of Cletus Obun and Olusesi Babatunde on the logo of 3rd appellant. On Issue No.3, learned Senior Advocate submitted that the Court of Appeal was wrong for using section 146 of the Electoral Act to shield from invalidity, various infractions of the Act, including cases of non-compliance amounting to corrupt practice, and non-compliance with the provisions relating to ballot papers and to the voters register. Tracing the decision of the Court of Appeal to the case of Buhari v Obasanjo (2005) 13 NWLR (Pt.941-943) 1, learned-Senior Advocate urged the court as the apex court and in line with the spirit of judicial activism and innovativeness to re-visit the decision, on the ground that it was given per-incuriam. Learned Senior Advocate took time and pains to examine the wordings of section 146 from pages 41 to 76 of the Brief. Counsel urged the court to depart from the decision based on the grounds stated in paragraph 6.114 page 75 of the Brief.

On Issue No. 4, learned Senior Advocate submitted that the Court of Appeal erred when it upheld the contention of the 4th to 808th respondents that the 5th respondent is not a juristic person and accordingly struck out his name from the petition. He submitted that the 5th respondent, a natural person, can sue and be sued in his personal name and as such his joinder was not in breach of the Electoral Act. He cited Ataguba and Co. v G. U. Nig Ltd (2005) 8 NWLR (Pt.927) 426 at 445; Green v Green (1987) 3 NWLR (Pt.60) 480; Ude v Nwara (1993) 2 NWLR (Pt.278) 278; Kalu v Uzor (2004) 12 NWLR (Pt.886) 1; Uzodinma v Udenwa (2004) 1 NWLR (Pt.954) 303; Nnachi v Ibom (2004) 16 NWLR (Pt.900) 614 at 633; Egolum v Obasanjo (1999) 7 NWLR (Pt.611) 355 at 397; Ella v Agbo (1999) 7 NWLR (Pt.613) 139 at 151. Ibrahim v Shagari (1983) ALL NLR 507 and section 144 (2) of the Electoral Act, 2006.

On Issue No.5, learned Senior Advocate submitted that the Court of Appeal was wrong in deciding the 1st respondent as having been duly elected President of the Federal Republic of Nigeria by majority of valid lawful votes of 24, 638,063 in the face of the three

conflicting “final” results of the election which the 4th and 6th respondents were unable to explain or reconcile by their pleadings or by evidence at the trial. Learned counsel referred to the pleadings, the evidence and the documents tendered before the court from pages 86 to 95 of the Brief. He cited the case of *Ngwu v Mba* (1999) 3 NWLR (Pt.595) 400 at 408. B

Taking Issue No.6, Learned Senior Advocate submitted that the allegation of apparent similar handwriting on documents tendered by counsel cannot only be established by calling expert handwriting analyst, when respondents offered no explanation beyond bare denial through unnamed, un-sworn witnesses, who were not the authors of the documents. He submitted that the petitioners, contrary to the position taken by the Court of Appeal, adequately and succinctly pleaded facts that made unavoidable the analysis contained in the final Address of the petitioners to the effect that same persons signed different election result sheets in different polling units generally across the country and in particular in those States referred to in Schedules 1-25. Counsel referred to what he called the relevant facts justifying the analyses contained in the schedules and the pleadings as well as evidence of witnesses from pages 96 to 108 of the Brief. He also cited *Ezemba v Ibenema* (2004) 14 NWLR (Pt.894) 617 at 649 - 650; *Okagbue v Romaine* (1982) 5 SC 133 at 163. *Ifeadi v Atedze* (1998) 13 NWLR (Pt.581) 205 at 227. *Agbanelo v U.B.N. (Nig) Ltd* (2000) 7 NWLR (Pt.666) 534 at 556 557; *Musa v Christ lied PLC* (2000) 12 NWLR (Pt.680) 145 at 154-155; *Adenle v Olude* (2002) 18 NWLR (Pt.799) 413; *Queen v Wileox* (1961) All NLR 631; *Ozigbo v COP* (1976) 2 SC 67; *UTB v Awanzigana* (1994) 6 NWLR (Pt.348) 56; *Chukwuma v Anyakora* (2006) ALL FWLR (Pt.302) 121; *Ishola v UBN Ltd* (2005) 6 NWLR (Pt.922) 422 and sections 64 and 146 of the Electoral Act. D E F G

Taking Issue No. 7, learned Senior Advocate submitted that the decision of the Court of Appeal to the effect that the petitioners did not specifically identify any police officer or soldier who participated in the conduct of the election was not correct, having regard to the admissions on record, pleadings and evidence. Counsel referred the court to the pleadings, admissions and other evidence from pages 109 to 123 of the Brief. He also dealt with proof of electoral offence H

and cited the following authorities on the issue: Obasanjo v Yusuf (2004) 9 NWLR (Pt.877) 144 at 126; Buhari v Obasanjo (2005) 13 NWLR (Pt.941) 1; Yusuf v Obasanjo (2005) 18 NWLR (Pt.956) 96 at 174 and Ransome Kuti v Attorney General of the Federation (1985) 2 NWLR (Pt.6) 211.

B On Issue No. 8 learned Senior Advocate submitted that the failure of the Court of Appeal to consider the validity and admissibility of all the witness statements of the 1st and 2nd respondents and some of those of the 4th to 808th respondents occasioned a miscarriage of justice. He referred to the Practice Directions, sections 1(4) and 90 of the Evidence Act and the following cases: Haruna v Modibbo (2004) 16 NWLR (Pt.900) 487 at 535-536; Afribank (Nig) PLC v Akwara (2006) 5 NWLR (Pt.974) 619 at 654-655; UBA v Lawal-Osule (2003) FWLR (Pt.178) 1080 at 1087; Onochie v Odogwu (2006) 6 NWLR (Pt.975) 65 at 86; Dagaci of Dere v Dagaci of Ebwa (2006) 7 NWLR (Pt.979) 382 at 429 and Larmie v DPMS Ltd (2005) 18 NWLR (Pt.958) 438 at 463. He urged the court to hold that a miscarriage of justice to the prejudice of the petitioners had occurred arising from the facts and circumstances of the wrongly admitted statements.

Dealing with Issue No. 9, learned Senior Advocate submitted that the total failure of the Court of Appeal to evaluate and pronounce upon the evidence elicited from the 5th respondent by way of answers to the administered interrogatories occasioned a miscarriage of justice. Counsel examined some of the points which the interrogatories sought to establish from page 129 to page 136 of the Brief. He cited Obodo v Olomu (1987) 3 NWLR (Pt.5) 111; Omozeghian v Adjarho (2006) 4 NWLR (Pt.969) 33 at 60-61 and Intermerciosa (Nig) Ltd v Anammaco (2005) 1 NWLR (Pt.907) 371 at 382-383.

Learned Senior Advocate submitted that the rejection of INEC Post Election Report which vital admissions were made by the 5th respondent as facts pleaded by the petitioners is wrong. Counsel also submitted that the Court of Appeal was in grave error when it allowed the 5th respondent to file affidavit evidence in answer to the interrogatories, after close of trial, but refused petitioners the opportunity to rebut the answers on oath.

On Issue No. 10 learned Senior Advocate submitted that this is a proper case for this court to invoke section 22 of the Supreme Court Act to invalidate the action in view of:

“(i) Failure of the Court of Appeal to evaluate the evidence on vital issues relating to delivery and supply of ballot papers.

(ii) Disregarding Petitioners submissions on thousands of exhibits that supported Petitioners’ case as highlighted in schedules 1-25 incorporated into their final addresses.

(iii) Failure of the Court of Appeal to properly evaluate and pronounce on evidence led by the Petitioners in their witness statements and ascribing to such witnesses prejudicial conclusions not borne by the records.

(iv) Allowing extraneous political considerations to affect their judgment to the prejudice of the petitioners.

(v) Disallowing the petitioners’ independent witnesses on subpoena from testifying on ground that their depositions were not front-loaded at the time of filing of the petition.”

Learned counsel examined in great detail the above reasons from pages 140 to 225 of the Brief. He urged the court to allow the appeal.

Learned Senior Advocate for the 1st and 2nd respondents, Chief Wole Olanipekun, in his preliminary objection submitted that Grounds 1, 6, 10, 25, 26 and 35 do not arise from any ratio of the judgment of the Court of Appeal appealed against. He contended that an appeal only lies against the ratio decidendi of a case and so a ground of appeal must be an attack against the judgment. He cited Egbe v Alhaji (1996) 1 NWLR (Pt.128) 546 at 590 and Kolawole v Alberto (1989) NWLR (Pt.98) 382.

Learned Senior Advocate contended that Ground 10 makes a new case entirely as it was not an issue submitted for determination in the Court of Appeal. Put in another way, it was not one of the grounds on which the appellants’ petition was based in the Court of Appeal. He argued that election petition can only be grounded on four statutory grounds and no more, although the question of qualification of a candidate might be a constitutional one in some circumstances. He referred to section 131 of the Constitution, section 145 (1) of the Electoral Act and the cases of Okeru v Egbuoh (2006) 15

NWLR (Pt.1001) 1 at 23 and Ajide v Kelani (1985) 3 NWLR (Pt.12) 248.

On Grounds 25 and 26, learned Senior Advocate submitted that the grounds do not desire or flow from any ratio of the judgment of the Court of Appeal. At no point in time did the Court of
B Appeal say that it was relying on the case of Bush v Gore to deem the 1st respondent as returned in the way and manner stated in Ground 25. If anything, the Court of Appeal made a passing reference to the case. In a similar vein, the purported misdirection of the Court of
C Appeal as quoted in Ground 26 does not emanate from any ratio of the judgment of the Court of Appeal, learned Senior Advocate argued.

Learned Senior Advocate also attacked other grounds of appeal as follows: (i) Grounds 25, 32, 34 and 38 are vague and incom-
D prehensible, (ii) The particulars of Grounds 3, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 26, 27, 28, 29, 30, 33, 36, 37, and 38 are attacked for different reasons, (iii) Ground 8 is not only vague but contains legal argument which can only be canvassed in a Brief to support an issue, (iv) Ground 39 is not omnibus
E ground cognizable under the law. Citing Korede v Adedokun (2001) 15 NWLR (Pt.736) 483 and 498-499 and Amude v Adelodun (1994) 8 NWLR (Pt. 360) 1 at 23, learned Senior Advocate urged the Court to uphold the preliminary objection, strike out the grounds of ap-
F peal; thereafter strike out the incompetent issues formulated on the grounds and strike out the entire Brief and dispose of the appeal which to all purpose is unwarranted.

Arguing the merits of the appeal, apparently in the alternative, learned Senior Advocate submitted on Issue No. 1 that upon a dis-
G passionate interpretation of section 145 (1)(d) of the Electoral Act, 2006, the appellants who complained of total exclusion from participation in the election could not still rightly challenge the outcome of the election under any of the grounds stated in section 145 (1) (a) (b) and (c) of the Act.

H Learned Senior Advocate submitted that having participated in the election, the appellants can no longer use the facts pleaded in paragraph 15 of their petition to challenge the result of the election on ground of unlawful exclusion because the wordings of section

145 (1) (d) are very clear, simple and free from any ambiguity, and therefore should be given their ordinary literal meaning. He cited Awolowo v Shagari (1979) 6-9 SC. 73.

A candidate who did not contest an election cannot logically, reasonably and legally complain that the election was marred by rigging, corrupt practices, non compliance with the provisions of the Electoral Act because he was not a candidate and would not have known what happened at the election. Furthermore, a candidate who is complaining of exclusion at an election does not have the locus standi to challenge the result of the election on the grounds stipulated under section 145 (1) (a)(b) and (c) of the Electoral Act because by virtue of section 144 (1) of the Act, it is only a candidate in an election or a political party which participated in the election that can present election petition, learned Senior Advocate argued. He cited Adesanya v President of Federal Republic of Nigeria (1981) 2, NCLR 358, Thomas v Olufosoye (1985) 1 NWLR (Pt.18) 669. Attorney General Adamawa State v Attorney General of the Federation (2005) 18 NWLR (Pt.958), 581 at 623. Counsel took time and pains to interpret or construe section 145 (1) of the Electoral Act. Counsel submitted that the appellants posture in the matter constitutes a gross and crave abuse of the process of court. Citing Kotoye v Saraki (1992) 9 NWLR (Pt.264) 156, counsel urged the court not to indulge the appellants.

On Issue No. 2, learned Senior Advocate submitted that considering the fact that the objection raised on the competence of the appeal is jurisdictional, coupled with the fact that the Court of Appeal did not dispose of the merits of the objection in its ruling of 20th September, 2007, the objection was not caught by issue estoppel to exclude the valid pronouncement made on it by the Court of Appeal. He contended that estoppel to apply in any proceedings the issue raised must be distinctly and finally determined between the parties; thus where the issue raised is not considered at all at the stage it was raised, just like in the proceedings before the Court of Appeal, culminating in this appeal, estoppel cannot apply. He relied on Inakoju v Adeleke supra, Coker v Sanyaolu (1976) 9-10 SC 203; Fidelitas Shipping Co. Ltd, v V/O Egent Cheld (1966) 1 QB 630 at 640; and Akapo v Habeeb-Hakeem (1992) 6 NWLR (Pt. 247) 266 at 287

Counsel argued that as the Court of Appeal never decided the issue at all and/or on the merit, issue estoppel cannot apply. Relying on FRN v Ifegwu (2003) 15 NWLR (Pt.842) 113 at 212, counsel submitted that as the issue involved was jurisdiction, estoppel cannot be raised against it. Counsel did not agree that the case of Cardoso v Daniel applies and that Tobi, JSC stated the correct position of the law in Inakoju v Adeleke, which the Court of Appeal rightly relied on

On whether the 5th respondent can be sued personally, learned Senior Advocate submitted that he cannot be so sued. He called in aid sections 28, 153 and 154 of the Electoral Act, 2006 and the following cases: Esenawo v Ukpong (1999) 6 NWLR (Pt.608) 611 at 617; Fagbola v Titilayo Plastic Ltd (2005) 2 NWLR (Pt.909) 1 at 19; Umar v W.G.G. Nig Ltd (2007) 7 NWLR (Pt.1032) 117 at 150. J.K. Randle v Kwara Breweries Ltd (1986) 6 SC. 1 and Ehidimehon v Musa (2000) 8 NWLR (Pt.669) 540 at 569. Counsel urged the court to strike out paragraphs 5, 6, 8, 13, 16(f), (g) (h), (ix), 17 (xxv), (xxvi), 19, 20, 23 and prayers 2, 6 and 7 of the petition as they are in respect of the 5th respondent.

Taking Issue No. 3 learned Senior Advocate submitted that having regard to the state of the pleadings read together with the mandatory provision of paragraph 4 (1) (c) of the First Schedule to the Electoral Act, 2006 in conjunction with section 141 of the Act, the Court of Appeal was perfectly right to have accepted the scores pleaded for both the 1st appellant and the 1st respondent in the petition and as admitted in the respondents' reply. Relying on paragraphs 9 and 10 of the petition, learned counsel contended that no issue was joined by the parties on the votes scored by the 1st respondent and the 1st appellant as the figures pleaded by the appellants were admitted by the respondents. He relied on section 75 of the Evidence Act and the following cases: Chief Ndiakaere v Egbuonu (1941) 6 WACA 216; Udofia v Afia (1940) 6 WACA 216; Saude v Abdullahi (1989) 4 NWLR (Pt.116) 387 at 431; Buhari v Obasanjo (2005) 13 NWLR (Pt.941) 1 at 193; Ibrahim v Barde (1996) 9 NWLR (Pt.474) 513; Kimdey v Military Governor of Gongola State (1988) 1 NWLR (Pt.77) 445; Kenrow (Nig) Ltd v Moss (1987) 4 NWLR (Pt.65) 373; Yinya v Okudi (No.2) (1990) 4 NWLR (Pt. 146) 551 at 576.

If appellants rightly argued that the Court of Appeal believed

the figures inserted in their pleadings being made the figures returned by the Chief Electoral Commissioner on 23rd April, 2007, it then means that they have willingly or unwillingly shot themselves at both legs and, in the process crippled their petition, in the sense that without the figures and without an announcement or declaration of result by the Chief Electoral Commissioner of a winner on 23rd April, 2007, there would have been no properly constituted petition for the Court of Appeal to adjudicate on, counsel argued. Stretched further, there would be no appeal to be entertained by the Supreme Court. But bluntly, if this court agrees with the submission under this issue the inescapable consequence is for the petition to be dismissed for being incompetent, learned Senior Advocate further argued. Taking Issues 4 and 5 together, learned Senior Advocate submitted that bearing in mind the state of the various criminal allegations contained in the petition vis-a-vis sections 135, 136, 137 and 138 of the Evidence Act and decided cases, the appellants did not discharge the onus or burden of proof placed on them to warrant the grant of their reliefs. He also submitted that juxtaposing the myriad and avalanche of criminal or quasi-criminal allegations of non compliance with the provisions of the Electoral Act. 2006 and the lack of evidence to establish the allegations, the Court of Appeal was perfectly right by holding that the allegations were not proved or they were peripherally proved and the same was not sufficient to have affected the outcome of the election. He relied on the various election results from the States and the cases of Edokpolo & Co. Ltd v Ohenhen (1994) 7 NWLR (Pt.458) 529; Highgrade Maritime Services Ltd v First Bank (Nig) Ltd (1991) 1 NWLR (Pt.167) 290; Kimdey v Military Governor. Gongola State ((1988) 12 NWLR (Pt.77) 445; Fashanu v Adekoya (1974) 6 SC. 83; Bunge v Govenor of Rivers State (2006) 12 NWLR (Pt.995) 573 at 630 and Obieka v Obi (2005) 10 NWLR (Pt.932) 60 at 79. Relying on Buhari v Obasanjo (2005) 13 NWLR (Pt.941) 255 and Akinfosile v Ijose (1960) SCNLR 447, counsel submitted in the alternative that by section 150 of the Evidence Act, the court would presume the regularity of the INEC forms tendered.

Although the appellants pleaded that no elections were held, that votes were arbitrarily allocated, that ballot papers were hijacked, ballot boxes were stuffed with ballot papers, that there was corrup-

tion galore that marred the election, and that generally, there was non-compliance with the provisions of the Electoral Act, curiously and or more surprisingly, not a single used ballot paper was tendered by the appellants; neither did they tender any ballot box stuffed with any ballot paper, the allegation of corruption remains bare, just as it has been pleaded; no evidence of declaration of the result before final result was announced or collated was produced and even if produced, it was not established how it affected the very wide gap in the score between the 1st respondent and the 1st appellant. This court cannot invalidate an election on these grounds without the production of the vital exhibits, learned Senior Advocate submitted. He relied on section 149 (d) of the Evidence Act and the case of *Onah v. State* (1985) 3 NWLR (Pt.237) without the page.

Calling in aid section 138 of the Evidence Act, *Orji v Ndu* (1993) 1 NWLR (Pt.268) without page; *Nwobodo v Onoh* (1984) 1 SCNLR 4 at 14 and a number of other cases, learned Senior Advocate submitted that the appellants had the burden to prove the crimes beyond reasonable doubt.

On allegation of non-compliance with the Electoral Act, learned Senior Advocate submitted that a petitioner that makes non compliance with the Electoral Act the basis of his petition must not only plead same with particulars, he must go ahead by credible evidence to show how the non compliance affected the election. He must bring credible, convincing and unassailable evidence of the non compliance and the decisive effect it would have on the outcome of the election. He cited *Buhari v Obasanjo* (2005) 10 NWLR (Pt.941) 1; *A.D v Fayose* (2005) 10 NWLR (Pt.932) 151; *Imam v Sheriff* (2005) 4 NWLR (Pt.914) 80; *Anazodo v Audu* (1999) 4 NWLR (Pt.600) 530 at 546; *Balami v Bwala* (1993) 1 NWLR (Pt.267) 51 at 68; *Ebebe v Ezenduka* (1998) 7 NWLR (Pt. 556) 74; *Izuogu v Udenwa* (1999) 6 NWLR (Pt.608) 582 at 589; *Alhaji Elias v Chief Omobare* (1982) ALL NLR (Pt.I) 70 at 81; *Onyenge v Ebere* (1004 13 NWLR (Pt.889) 39; and *Modupe v State* (1988) 4 NWLR (Pt.87) 130 at H 137.

Taking Issue No.6, learned Senior Advocate submitted that schedules 1-25 procured by counsel for the appellants and attached to the written address of the appellants have no probative value to

warrant any court using them to nullify the election of the 1st respondent. Tracing the short history behind the schedules in paragraph 10.1, pages 104 to 105 of the Brief, learned Senior Advocate explained that the permutations contained in the schedules are based on counsel's imagination and conclusion and not on any piece of evidence before the Court of Appeal. He relied on paragraphs 1 (1) (2) and 4(1) (2) (3) of the Practice Directions. Counsel examined the witness statements and evidence of 146 witnesses from pages 106 to 187 of the Brief and evaluated same together with evidence of 1st and 2nd respondents at page 187 relative to some of the statements from pages 187 to 233 of the Brief and submitted that the appellants did not prove their case. B C

On Issue No. 7 learned counsel submitted that considering the pleadings of the parties, the dearth of evidence on seemingly similar writings/signatures and the written addresses of their respective counsel wherein no invitation was made to the Court of Appeal to compare or contrast perceived similar writings/signatures, the Court of Appeal was not under any duty or obligation to start comparing such perceived similar writings/signatures. He cited Yongo v COP (1992) 8 NWLR (Pt.257) 36 at 63 to 64; Jagede v Citicon Nig. Ltd. (2001) 4 NWLR (Pt.702) 112 at 134 Seismograph Nig Ltd, v. Ogbeni (1976) 4 SC 85. He submitted that the case of Chukwuma v Anyakora (2006) ALL FWLR (Pt.302) 121 cited by counsel for the appellants is not helpful to their case at all. D E

On Issue No. 8 learned Senior Advocate submitted that the Court of Appeal was right in affirming the return of the respondents as made by the Chief Electoral Commissioner for the Presidential Election after painstakingly considering the evidence before it. Counsel cited section 239 of the Constitution, Adun v Osunde (2003) 16 NWLR (Pt.847) 643 at 666-667 and Abdullahi v Alewa (1999) 5 NWLR (Pt. 602) 196 at 204. . F G

Dealing with Issue No. 9, learned Senior Advocate submitted that considering the answers elicited by way of deposition through affidavits from interrogatories, coupled with the fact that under and by virtue of Order 33 Rule 8 (1) and (2) of the Federal High Court (Civil Procedure) Rules, appellants did not complain that the answers elicited were insufficient to warrant an order for further answers, there H

was no need for the consideration of the answers or whether they had any probative value to the case of the appellants. He relied on Order 33 Rule 8 of the Federal High Court (Civil Procedure) Rules and dealt with the questions in the interrogatories from pages 249 to 251 and urged the Court to hold that the answers elicited from the
 B interrogatories which form part of the petitioners/appellants case do not in any manner whatsoever and however assist their case. He cited Odeyeye v Ajiboye (1987) 3 NWLR (Pt.61) 432 Bamigbose v Oshoko (1983) 2 NWLR (Pt.78) 509; Ojukwu v Onwudigwe (1984) 1 SCNLR 347; Alhaji Abubakar v Alhaji Yar'Adua supra; Macsoy v UAC Ltd (1962) AC 152 at 160; Famuyide v R.C Irving & Co. Ltd (1992) 7 NWLR (Pt.256) 639; Owie v Ighiwi (2005) 5 NWLR (Pt.917) 184 at 219-260 and Azuokwu v Nwakanma (2005) 11 NWLR (Pt.937) 537.

D On Issue No. 10, learned Senior Advocate submitted that upon a holistic construction of the Election Tribunal and Court Practice Direction 2007, the respondents witness statements which the appellants copiously made use of at the Court of Appeal and in their Brief before this court were properly placed before the Court of Appeal.
 E Citing Attorney General Bayelsa State vs Attorney General, Rivers State (2006) 18 NWLR (Pt.1012) 596 at 643, learned counsel argued that the question of the competence or otherwise of the respondents' witnesses statements will only come to light when appellants have succeeded in establishing their case; only then will this
 F court consider the competence or otherwise of the respondents witness statements and then go further to discover whether any defence is disclosed. He addressed the court on the competence of the respondents witness statements on oath ex-abundante cautela from
 G page 262 to 275 of the Brief.

Learned Senior Advocate specifically responded to Issue No. 10 of the Appellants Brief from pages 275 to page 310. He contended from pages 310 to 315 that the appellants reliefs are ungrantable. Counsel urged the Court to dismiss the appeal.

H Learned Senior Advocate for the 3rd respondent, Chief J. K. Gadzama submitted on Issue No.1 that the submission of counsel in paragraphs 5.18 to 5.34 of the Appellants Brief contending that the use of the phrase "any of the following grounds" in section 145 (1) of

the Electoral Act means that an election may be questioned on one or more or all the grounds specified in the subsection either together or in the alternative, does not hold water. If a person did not participate in an election, he is only bound to complain on the propriety or otherwise of his non participation and not contend that he scored majority of lawful votes in an election he did not participate in. If he complained of both, it would amount to either being speculative about his claim or blowing hot and cold at the same time. The simple rule of logic is that a thing cannot be and also not be. The two sets of grounds are in fact contradictory and incompatible, learned Senior Advocate submitted. He cited *Abia State University v Anyaibe* (1996) 3 NWLR (Pt.439) 546 at 661. He urged the court to determine whether the 1st appellant was unlawfully excluded or not from the election. B C

On Issue No. 2, learned Senior Advocate submitted that the petitioners did not prove by credible evidence that the method adopted by the 4th to 808th respondents in conducting the election and the acts alleged against the 1st, 2nd, 3rd and 809th respondents were contrary to the provision of the Electoral Act, 2006; and if the answer is in the affirmative, the acts were not substantial to affect the result of the election. He pointed out that paragraph 16(h) (xix) of the petition on the party's symbol is contrary to the evidence of Lai Mohammed and Oumar Shittien. Counsel submitted that there was no evidence on record of a prospective voter who wanted to vote for the petitioners but could not recognize their symbol. Relying on *Amaechi v INEC*, and a number of cases on the burden of proof, learned Senior Advocate submitted that the petitioners did not discharge the burden of proof placed on them. D E F

On Issue No. 3, learned Senior Advocate submitted that the joinder of the 5th respondent, Professor Maurice Iwu, in the petition was not proper in law. He cited sections 144 (2) and 162 of the Electoral Act, *Ataguba v G. U. Nig, Ltd* (2005) 8 NWLR (Pt.927) 426 at 445, *Obasanjo v Yusuf* (2004) 9 NWLR (Pt.877) 210; *Okonkwo v INEC* (2004) 1 NWLR (Pt.854) 242 at 272 and other cases. G

On Issue No. 4, learned Senior Advocate submitted that in determining the objection raised by the 1st and 2nd respondents as to the competence of the petition, the Court of Appeal was not estopped from deciding same having regard to its ruling on 20th Sep- H

tember, 2007. Citing Mills v Copper (1967) 2 NWLR 1343; Standard Bank (Nig) Ltd, v Ikomi (1972) NSCC 28; Ezewani v Onwordi (1986) 2 NSCC 914; Aro v Fabolude (1983) All NLR 67; Olomu of Okwodiete v Ivbighre of Ughwaba (1960) WNLR, 28; Chiekwe v Obiara (1960) SCNLR 566; Yaya v Olubode (1974) 10 SC 209; B Fidelitas Shipping Co. Ltd. v V/o Expert child (1978) 3 SC 219 ; and Mohammed v Olawunmi (1993) 4 NWLR (Pt. 287) at 254, counsel submitted that the reliefs sought by the respondents were not refused because the Court of Appeal did not embark on an exercise to decide the matter on the merit but stalled it on ground of procedural C irregularities and that the respondents are not foreclosed from re-visiting the issue raised by their application in their final address or is the Court of Appeal without jurisdiction when it proceeded to consider the issues raised in the final address of the parties.

D Taking Issue No.5, learned Senior Advocate submitted that in the surrounding circumstances, the 1st appellant participated in the 21st April, 2007 presidential election. Relying on the evidence of Chief Tom Ikimi, learned Senior Advocate submitted that the Court of Appeal correctly found that the appellants were not excluded from E the election.

Learned Senior Advocate submitted on Issue No.6 that the Court of Appeal correctly applied the presumption of regularity of the result of the election. He cited sections 116, 149 (c) and 150 (1) of the Evidence Act; Omoboriowo v Ajasin (1984) NSCC Vol. 15, F page 81 at page 82 and Yusuf v Obasanjo .

On Issue No.7 learned Senior Advocate submitted that the Court of Appeal correctly evaluated the evidence of Lai Mohammed who was one of the witnesses for the petitioners; and in the event G that the court did not correctly evaluate the evidence, that is not enough to set aside the judgment of the Court of Appeal. Citing Woluchem v Gudi (1981) 5 SC 291 at 313, Ogunnaike v Ojayemi (1987) 1 NWLR (Pt.53) 760 at 770, Mogaji v Odofin (1978) 4 SC 91 at 94; and Ajayi v Fisher (1956) SCNLR 279 counsel submitted H that the procedure adopted by the Court of Appeal did not in any-way occasion miscarriage of justice or justify that the decision of the court be overturned.

On Issue No. 8, learned Senior Advocate submitted that the

witness statements on oath of the 1st and 2nd respondents and the 4th to 808th respondents witnesses complied with the Practice Directions and the Evidence Act. He relied on the Election Tribunal and Court Practice (Amendment) Directions, 2007 and section 180 of the Evidence Act.

Dealing with Issue No.9 learned Senior Advocate submitted that the pronouncement of the Court of Appeal underscoring the importance of election to welfare and safety of the entire nation was not the basis in which the court refused to nullify the election. Citing UBA Ltd v Stahlban GMBH and Co KG (1989) 3 NWLR (Pt. 110) 374; UTC v Pamotei (1989) 2 NWLR (Pt.103) 244 at 293; Adegoke Motors Ltd v Odesanya (1988) 2 NWLR (Pt.74) 108 at 123; Clement v Iwuanyanwu (1959) 3 NWLR (Pt. 107) 39; Aeroflot v UBALtd (1986) 3 NWLR (Pt.27) 188 at 191; Egbo v Laguma (1988) 3 NWLR (Pt.80) 109 at 122 and Babalola v Babalola (1956) SCNLR 146 at 148 to 149, learned counsel submitted that the remark or observation of the Court of Appeal attacked in Ground 26 of the Grounds of Appeal is nothing but an obiter dictum which cannot give rise to an issue for determination.

On Issue No. 10, learned Senior Advocate submitted that the Court of Appeal was right in rejecting the petitioners request to tender the Report of 2007 General Election in evidence at the stage of proceedings when counsel sought to tender same in evidence. He cited paragraphs 1(1), 6(1) of the Practice Directions and Williams v Hope Rising Voluntary Society (1982) 1 ALL NLR 1 at 6-7. He contended that the petitioners cannot be permitted to put up a different case at the address stage from what they put up in their petition up to the stage of the hearing of the petition. He relied on a number of decisions from page 61 to page 65 of the Brief.

Learned Senior Advocate submitted that the Court of Appeal properly evaluated the evidence before it and made correct findings of fact before reaching its conclusion. He cited section 239 of the 1999 Constitution, Mogaji v Odojin (1978) 4 SC 91; Ezeoke v Nwagbo (1988) 1 NWLR (Pt.72) 616; Olujinle v Adeagbo (1988) 2 NWLR (Pt.75) 238; Fashanu v Adekoya (1974) 1 ALL NLR (Pt.1) 35 at 41-42; Buhari v Obasanjo (2005) 13 NWLR (Pt.941) 1 at 137 and Oyegun v Igbiniedion (1992) 2 NWLR (Pt.226) 747 at 761. He

urged the court to dismiss the appeal.

Learned Senior Advocate for the 4th to 808th respondents, Mr. Kami Agabi, submitted on Issue No. 1 that the Court of Appeal was not precluded from deciding the issues raised in the preliminary objection on the merits at the substantive hearing of the petition having struck out the preliminary objection of the respondents on the ground that it was premature and ought to be taken at the substantive hearing of the petition. He also submitted that the plea of issue estoppel does not avail the petitioners as the plea avails a party only when the issues have been determined. He relied on Ikem v Efamo (2001) 10 NWLR (Pt.720) 1 at 15 and Yusuf v Obasanjo (2004) 18 NSCQR 477 at 534.

Taking Issues 2 and 3 together, learned Senior Advocate submitted that the Court of Appeal was right in holding that the petitioners, having pleaded unlawful exclusion and non participation in the election, could not at the same time, and on the same facts, question the election on any other grounds available only to a participant in the election. He also submitted that in view of the petitioners own copious pleadings and depositions of inclusion and participation in the election, the Court of Appeal was right in holding that they were not excluded in the election. He cited paragraphs 7, 15 and 16 of the petition. Counsel called the attention of the court to instances of participation by the appellants. He specifically called the attention of the court to the evidence of Alhaji Oumar Shitten, Chief Tom Ikimi, Senator Ben Obi, Alhaji Lai Mohammed, and a number of others from pages 34 to 36. He cited section 139 of the Constitution, sections 144 and 145 of the Electoral Act, 2006 and a number of cases.

Learned Senior Advocate submitted that the petitioners did not prove at the Court of Appeal that the Presidential Election was not conducted substantially in accordance with the principles and provision of the Electoral Act, 2006 having regard to the provision of section 146 (1) of the Act and in the alternative that the alleged acts of non compliance if proved at all did not substantially affect the outcome of the election. He cited a number of cases at pages 60 to 64 and called the attention of the court to results in some States from pages 66 to 144 of the Brief.

Taking Issue No. 4, learned Senior Advocate submitted that

the Court of Appeal was right in striking out the name of the 5th respondent sued in his personal capacity who had also been sued in his official capacity as the 6th respondent in the same petition when the petition only challenged his official acts. He called the attention of the court to section 148(2) of the Electoral Act, paragraphs 5 and 6 of the petition and the following cases: Agbomade Bank Ltd v General Manager G.B. Ollivat Ltd (1961) All NLR 116.; Green v Green (1987) 3 NWLR (Pt.61) 480; Hope Democratic Party v INEC Suit No. CA/A/EP/5/2007 delivered on 20th August, 2007 (unreported); Kalu v Uzor (2004) 12 NWLR (Pt.886) 9; and Yusuf v Akindipe (2000) 8 NWLR (Pt.669) 376. B C

On Issue No. 5, learned Senior Advocate submitted that the Court of Appeal was right in holding that the 1st respondent was duly elected as President of the Federal Republic of Nigeria by a majority of lawful votes of 24,638,068 as declared in the Declaration of Result Sheet and Certificate of Return made by the 4th and 5th respondents when the presumption of return was not rebutted by evidence at the end of trial. Citing section 150 of the Evidence Act, learned Senior Advocate submitted that the legal presumption in favour of the 1st respondent is that he was validly elected by a majority of lawful votes cast at the election and that the onus was upon the petitioners to rebut the presumption. He submitted that the petitioners did not rebut the presumption. He cited Wali v Bafarawa (2004) 16 NWLR (Pt.898) 34; sections 69 (1) (c), 130 and 146 (1) of the Electoral Act. E F

Taking Issue No.6, learned Senior Advocate submitted that the Court of Appeal was right in holding that the onus of proving the allegations of similarity of handwritings on documents was on the petitioners who alleged same but failed to discharge the onus by calling any expert handwriting analyst. He cited Buhari v Obasanjo (2003) 23 NSCCR 442 at 574; George v Dominion Flour Mills Ltd (1963) 1 All NLR 71 at 77. Counsel contended that the 24 instances of apparent similar writings involving a few units in just 7 out of the 36 States and the Federal Capital Territory, which the petitioners pointed out at page 107 of their Brief, are not enough to substantially affect the outcome of the election. He cited once again Buhari v. Obasanjo. G H

Dealing with Issue No. 7 learned Senior Advocate submitted

that the Court of Appeal was right in dismissing the petitioners allegation of crime against the Police Officers and Soldiers when the petitioners did not identify any of them. He cited Buhari v Obasanjo (2004) 1 EPR 112 at 132-133; Agbi v Ogbe (2004) 5, MJSC 41 at 74; Nwobodo v Onoh (1984) 1 SCNLR 1 at 27-28; Wali v Bafarawa.

B Buhari v Yusuf . He dealt with the issue of corrupt practices in some detail at pages 185 to 190 of the Brief.

C Learned Senior Advocate submitted on Issue No.8 that the witness depositions of 1st and 2nd respondents and those of the 4th to 808th respondents were valid and admissible in view of the extant Practice Direction. He cited section 90 of the Evidence Act, paragraph 1(1) (b) of the Practice Directions, 2007, Okereke v Yar'adua; Awuse v Odili (2005) 16 NWLR (Pt.952) 416 at 480 and Larmie v DPMS Ltd (2005) 18 NWLR (Pt.958) 438 at 463.

D Learned Senior Advocate submitted on Issue No.9 that the Court of Appeal was right in not pronouncing on the evidence elicited in the interrogatories when the petitioners who issued the interrogatories abandoned them by not urging anything on them. Learned counsel examined the interrogatories from pages 211 to 214 of the
E Brief and argued that as the petitioners did not urge upon the Court of Appeal whatever inferences could reasonably be drawn from the answers to the interrogatories, there was nothing the Court could do. He relied on Order 33 Rules (1) and (2) of the Federal High Court (Civil Procedure Rules) 2004; Okulate v Awosanye (2000) 1 SC 107
F at 123; Plateau State v Attorney General of the Federation (2006) 3 NWLR (Pt.967) 346 at 361; Momah v Vab Petroleum (2000) 2 SC 142 at 143 and Okonji v Njokanma (1999) 12 SC (Pt.3) 150 at 177.

G On Issue No. 10, learned Senior Advocate submitted that the facts and circumstances of the case, having regard to the evidence called by the parties and the conclusion reached by the Court of Appeal, the case did not warrant the exercise by this court of its powers under section 22 of the Supreme Court Act. Learned Senior Advocate submitted as follows: (1) The Court of Appeal properly evaluated the relevant and admissible evidence on all issues competently
H before it including those relating to ballot papers. (2) The Court of Appeal considered all the submissions of the petitioners on depositions and exhibits particularly as reflected in schedules 1 to 25 at-

tached to the address of the appellant's counsel (3) The Court of Appeal did not base its judgment on factors extraneous to the issues before it by the parties. (4) The findings of the Court of Appeal were not perverse and (5) The judgment of the Court of Appeal did not occasion any miscarriage of justice. In the circumstances, this court cannot invoke its powers under section 22, learned Senior Advocate B contended. He cited a number of cases. Counsel finally urged the court to dismiss the appeal.

Learned counsel for the 810th respondent, Dr. Bello Fadile, relying on section 144 (2) of the Electoral Act, submitted that the appellants having conceded that the 810th respondent cannot be C described as an Electoral Officer, the appellants have failed to establish that the 810th respondent qualified as any other person who took part in the conduct of an Election" within the contemplation of the Act. For the appellants to insinuate that the 810th respondent is D an agent of the Independent National Electoral Commission in order to be accommodated and to succeed under section 144 (2) of the Electoral Act will amount to a gross misconduct, learned counsel argued. He called the attention of the court to sections 217 and 218 of E the Constitution and submitted that for the appellants to refer to the 810th respondent as agent of INEC amounts to misleading the court. He also relied on the findings of the Court of Appeal that all the witnesses called by the petitioners did not specifically identify any F police officer or soldier. He cited Ransome Kuti v Attorney General of the Federation (1985) 2 NWLR (Pt.6) 211 and Ndidi v State (2007) 5 SC 175. Citing Eboh v Oguiyifor (1999) 3 NWLR (Pt.595) at 419; Deba v Zagi (1999) 5 NWLR (Pt.601) 114 and Adeola v Owoade (1999) 9 NWLR (Pt.614) at 30, counsel argued that as the allegations made by the appellants are criminal in nature, the onus squarely G lies on them to prove them beyond reasonable doubt. He urged the court to dismiss the appeal.

Learned Senior Advocate for the appellants in his Reply Brief to the Brief of the 1st and 2nd respondents on the preliminary objection, submitted that all the grounds of appeal filed in this appeal complied with the parameters of good and proper grounds of appeal. H The particulars and the nature of the error of each ground clearly related to the specific reasons, observations and findings of facts in

the judgment appealed against, counsel submitted. Counsel took time and pains to deal with all the grounds of appeal attacked by the 1st and 2nd respondents and submitted that an appeal can be argued on a single valid ground.

B The Reply Brief is on the Issues in the 1st and 2nd respondents' Brief. On Issue No.1 learned Senior Advocate submitted that as the 1st and 2nd respondents did not cross appeal on the issue of exclusion of the 1st petitioner, they cannot be heard to argue that the facts of unlawful exclusion pleaded in paragraphs 15 and 16 of the
C petition are pre-election matters and that the Court of Appeal had no jurisdiction to entertain same. Counsel submitted that as election is a process and not an event the argument of 1st and 2nd respondents has no basis in law.

On Issue No.2 learned Senior Advocate substantially repeated
D the arguments in the Appellants Briefs. I realize that he added the case of *Shanu v Afribank Nig Plc* (2002) 6 SC (Pt.II) 135 to buttress the point that the position I took in *Inakoju v Adeleke*, is not correct. On whether Professor Maurice Iwu could be sued personally, learned Senior Advocate referred to *Falae v Obasanjo* (No.2) (1999) 4 NWLR
E (Pt.599) 476; *Alhaji M. D. Yusuf v Chief Obasanjo* (2005) 18 NWLR (Pt. 956) 96; *Awolowo v. Shagari* (1979) All NLR 120. *Kurfi v The Chief Electoral Officer and Mr. Filo Menkiti, The Returning Officer and the sister petition in this Appeal*, CA/A/EA/2/07; *Buhari v INEC*
F (1008) 4 NWLR (Pt.1078) 541 and submitted that the question as to the juristic personality of the Returning Officers was not raised because it amounted to chasing shadows or hair splitting.

On Issue No.3, learned Senior Advocate submitted that it is not the law that failure in all cases to state the scores of the candidates
G in an election in a petition would render the petition void. On Issues 4 and 5, learned Senior Advocate repeated the arguments in the Appellants Brief in respect of absence of serial numbering of the ballot papers. He contended that appellants cannot be expected to produce ballot papers and ballot boxes that are in law the exclusive custody of INEC.
H

On proof of allegation of error, learned Senior Advocate submitted that by a community reading of sections 144(2) and 157 of the Electoral Act, commission of crime, if disclosed in a petition, need

not be proved beyond reasonable doubt.

On failure to appeal against specific findings of fact, learned Senior Advocate submitted that it is not a mandatory requirement of the Supreme Court Rules that a complaint against a finding of a court in the notice of appeal must set out the entire findings when the ground has encapsulated the material part of it as to give reasonable indication of appellants grievance to the respondent. B

On issue 6 learned Senior Advocate submitted that the Court of Appeal was wrong in refusing to accord probative value to schedules 1 to 25 attached to the appellants written address. Counsel provided tables and also relied on the evidence of twelve witnesses at pages 69 to 80 of the Reply Brief. C

On the petitioners witnesses and 1st and 2nd respondents witness statements and evaluation of evidence, learned Senior Advocate submitted that the exercise is like comparing human beings with ghosts or comparing day with night. He said that while the petitioner's witnesses are known through their names, addresses and signatures, the respondents witness statements were said to have been disposed by anonymous persons bearing letters of the alphabet such as ABC, XX and 77K. E

On the reply of the petitioners/appellants before the Court of Appeal and the witness statement, learned Senior Advocate submitted that the reply in question did not in any way contravene paragraph 16 of the 1st Schedule to the Electoral Act, 2006 and paragraphs 1 and 2 of the Practice Directions. F

On Issue 7, learned Senior Advocate submitted that the Judge and not the handwriting expert has the final word on evaluating evidence in coming to the conclusion as to handwriting. On Issue 8, learned Senior Advocate submitted that the Court of Appeal was wrong in affirming the return of the respondents. He also submitted on Issue 9 that the Court of Appeal was bound to consider the answers to the interrogatories and assign probative value to them. He finally submitted on Issue 10 that the respondents witness statements which the appellants copiously made use of at the Court of Appeal were properly placed before the court. Learned Senior Advocate complained seriously of the language used by learned Senior Advocate for the 1st and 2nd respondents. H

Learned Senior Advocate for the appellants in his Reply Brief to the 3rd respondent's Brief submitted that as the introduction of the definition of semi-colon in paragraph 15 of the Brief was not canvassed in the Court of Appeal, it cannot be raised as a new point here without a cross appeal. He said in the alternative that it is very
 B doubtful whether courts can have resort to punctuation .

Learned Senior Advocate submitted on the issue of non serialization that in the light of the nature of the non compliance, the appellants need not prove it; in his words, it does not require "such
 C catholic proof" On the issue of legal personality of the 5th respondent, learned Senior Advocate submitted that only natural persons can be prosecuted for many of the offences in Part VIII of the Electoral Act, 2006 as corporate soles cannot be impersonal.

As the Reply Briefs to the Brief of the 4th to 808th respondents and the Brief to the 809th to 810th respondents are essentially
 D repetitive of either the appellants Brief or the Reply Briefs I have summarized above, I will not take the trouble to repeat them here. I am tired of the summary.

I will like to make a comment on the Reply Briefs. The Reply
 E Briefs are mostly a repetition of the Appellants Brief. Most of the principles of law are repeated in the Reply Briefs. New cases that did not occur to counsel are mentioned and articulated. A Reply Brief is filed when an issue of law or argument raised in the Respondent's
 F Brief calls for a reply. A Reply Brief is not necessary when the respondent's Brief does not raise new or fresh issue or point. Where a Reply Brief is necessary, it should be confined to answering any new or fresh issue or point raised in the respondents Brief. In the recent case of Ochemaje v State (2008) 15 NWLR (Pt.1109) at page
 G 85,1 said:

*"In her reply brief, learned counsel for the appellant merely repeated her arguments in the appellant's brief... A reply brief is not one for the repetition of the arguments in the appellants brief. It is not a forum for emphasizing the arguments in the appellant's brief.
 H On the contrary, a reply brief, as the name implies, replies to the respondent's brief. In the exercise, the appellant need not repeat an argument in the appellant's brief. If the respondent's brief has joined issue with the appellant's brief as expected, the appellant need not*

repeat the issue joined either by emphasis or by expatiation. This is what I see in this reply brief. I shall therefore not summarise it here as the contents are already comprehensively treated in the appellant's brief"

Reply Brief is not where the appellant re-awakens forgotten knowledge in the case, it is not a repair kit of the engineer to repair the appellant's Brief. Like in the case of Ochemaje v State, I see that situation here. In view of the important nature of the case, I made some effort to summarise them. For the same reason, I will not discountenance them; although they are not the best Reply Briefs because of their repetitive nature and content.

Let me take the preliminary objection on the grounds of appeal. In the light of the Reply Brief, I am of the view that a number of the grounds of appeal are valid. I shall therefore not strike out the appeal. Even on the showing of the Brief of the 1st and 2nd respondents at page 23 of the Brief, Grounds 2, 4, 25, 31, 34, 35 and 38 are competent. It is the law that one valid ground of appeal can sustain an appeal. The grounds not complained against by the 1st and 2nd respondents are seven. They are more than enough to sustain this appeal. I shall therefore take the appeal.

It is convenient to take first Issue 2 of the appellants Brief on exclusion. The relevant provision is section 145 (1) of the Electoral Act. It reads:

"An election may be questioned on any of the following grounds;

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

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

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

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

Section 145 (1) provides four grounds for questioning an election. There is no dispute about that. The only dispute, and a very vibrant and deep one is, whether a petitioner who seeks the relief in section 145 (1) (d), can in the alternative, also seek relief in section

145 (1) (a) (b) and (c). The main object of interpretation of statute is to discover the intention of the lawmaker, which is deducible from the language used. And so where the language of a statute is plain, clear and unambiguous, the duty of the court is to interpret the language in its strict grammatical meaning to convey the intention of the lawmaker. See generally *Chief Awolowo v Alhaji Shagari* (1979) 6-9 SC 51; *Ojokolobo v Alamu* (1987) 5 NWLR (Pt. 61) 377; *PDP v INEC* (1999) 11 NWLR (Pt.626) 200; *Adewunmi v A.G. Ekiti State* (2002) 2 NWLR (Pt.751) 474. The court has no jurisdiction or competence to go outside the statute in search of interpretation convenient to it. Similarly, the court cannot interpret a statute to suit its purpose because the statute does not belong to it. If at all, anybody or institution can or should claim ownership of a statute, that body or institution is the Legislature which by virtue of its constitutional right to make and amend, can claim ownership of it.

As the provision of section 145 (1) is clear and unambiguous, I shall give it a literal interpretation. A petitioner can question an election on any of the four grounds in section 145 (1). He has a choice in the first place. The choice is however not open-ended. It is restricted. The restriction is commanded or ordered by the disjunctive participle “or” immediately after the semi colon in section 145 (1) (e). It is a conjunction mostly used to express or convey an alternative or a choice on the part of a person or an individual. The person or individual has the freedom of the air to choose either between two things or among more than two things. It is a function word and courts of law interpret it functionally. Once a person or an individual makes his choice, he is glued to it. In the interpretation of statute, the courts construe the word mainly as disjunctive and not conjunctive. This is where the word is different from “and” wearing a conjunctive appellation. See generally *Anie v Uzorka* (1993) 8 NWLR (Pt.309) 1; *Arubo v Aiyeleru* (1993) 3 NWLR (Pt.280) 126; *Savannah Bank Nigeria Ltd v Starite Industries Overseas Corporation* (2001) 1 NWLR (Pt. 693)194.

Accordingly, where a petitioner questions an election on section 145 (1) (d), he cannot at the same time, even in the alternative, question the election on any of the other three grounds separately or together. This is the legal purport of the disjunctive “or” in section

145 (c).

(c) Learned Senior Advocate for the appellants in his Reply Brief to the Brief of the 3rd respondent submitted that courts should not have resort to punctuation marks in the interpretation of statutes. He cited the English case of Inland Revenue Commissioners v Hinchy (1960) 1 ALL ER 505 where Lord Reid said at page 510: B

“So even if punctuation in more modern Acts can be looked at (which is very doubtful) I do not think that one can have any regard to punctuation in older Acts. And omitting the comma, I would hold that the whole of the penalty was subject to modification under the Act of 1842.” C

I do not see the case applicable in this appeal. In the first place it is the law that taxation statutes, by their very nature, are very strictly constructed or interpreted because taxation is an exact financial legislation demanding frugal economic interpretation. And what is more, in the context of Lord Reid’s statement, the Electoral Act of 2006 is modern Act not an old Act. D

I will not agree with Lord Reid if his intention is to completely erase or wipe out punctuation marks in the interpretation of statute. That may be good law in the United Kingdom but is not certainly good law in Nigeria. I do not even think that is good law in the United Kingdom. As punctuation marks play a most important role in the English language, they are of vital importance in the literary rule of interpretation. Why jettison punctuation marks? E

Learned Senior Advocate for the appellants urged this court not to accept the submission of counsel for the 3rd respondent on the semi colon between section 145 (i) (c) and (d) because the argument was not canvassed in the Court of Appeal and therefore a new point in this court, without a cross appeal. I do not think that is correct. A party need not cross appeal to interpret a statute. No. Not at all. F

It is the tradition of the common law and our procedure rules for a plaintiff to seek relief in the alternative. There is no argument about this. But where a statute directly or by implication prohibits, forbids or legislates against relief in the alternative, a court of law would bow to the particular statute. A court of law will be wrong to fall back on the common law tradition or rules of court because that H

is not available to the court in the face of the statutory provision. Section 145 (1) of the Electoral Act is one such provision and the Judge that I am, I bow to it with reverence and trepidation and I have no choice in the matter than to so bow.

B I now proceed to the contention of the appellants that they were unlawfully excluded from the election. Exclusion, an act of excluding or the fact of being excluded, connotes an element of ban, debarment, total denial, ostracism, preclusion, prohibition, refusal, rejection, removal, riddance, and seclusion.

C Learned Senior Advocate for the appellants submitted that the important constitutional issue raised in the case should not be beclouded by the technical or dictionary meaning of the word “exclusion”. Why? I do not see anything technical in the approach of the Court of Appeal. I also do not see anything wrong in the Court of
D Appeal resorting to the dictionary meaning of the word “exclusion” I have done the same thing.

If a word is used in a statute in a clear and unambiguous way the duty of the court is to give that word a literal interpretation to convey its dictionary and dictional meaning. I must say also that most
E words are used in statutes to convey their usual and ordinary meaning and courts of law are bound to conform to such meanings. Why not the word, “exclusion”? The clear and unambiguous word in the statute cannot be interpreted or construed beyond its onerous meaning to achieve the purpose of one of the parties. That is the effort of
F learned Senior Advocate for the appellants. I will not yield to that because it is not the correct position of the law.

The Court of Appeal found that “some hurdles were placed on his (the 1st petitioner’s) way which ordinarily should not be so.
G Learned Senior Advocate took the opportunity in the Brief to submit in effect that the hurdles constituted exclusion in the sense that the appellants were not given reasonable and fair opportunity to contest the election. A hurdle is a frame for jumping over in a race. That is not the meaning in the context of the word here. In the context, the
H word means a difficulty which must be dealt with as one can say; “Ebikeme overcame many hurdles to become a lawyer” It is clear from the above that the word “hurdle” does not mean that the person gets finally to a point or a mirage where no return journey is

possible. It does not mean that the person moves to a brick wall. It does not mean that the person moves to a close. I do not see such a construction in the word. On the contrary, the word conveys element of being surmountable or ability to overcome. In the context, the position of the Court of Appeal is that though hurdles were placed on the way of the 1st appellant, he finally participated in the election and so was not unlawfully excluded. In terms of stagnation or total and complete stoppage, exclusion is more appropriate than hurdle, because in the latter, the person can move out of the stagnation or stoppage. In the light of the above, I do not, with respect, agree with the picture learned Senior Advocate of the appellants paints in the Brief that the Court of Appeal was in some contradiction. After all exclusion and hurdle are not synonymous or synonyms. B

Learned Senior Advocate for the appellants urged us to adopt a purposive interpretation of section 145(1) of the Electoral Act. The purposive rule of interpretation would appear to have been originated by Lord Denning in the case of *Seaford Court Estates Ltd v Asher* (1949) 2 KB 481. In developing the rule, which evolved from the mischief rule, Lord Denning said: C

"It would ordinarily save the judges trouble-if Acts of Parliament were drafted with divine presence and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy and then he must supplement the written word so as to give 'force of life' to the intention of the legislature." E

In *Magor and St. Mellons Rural District Council v Newport Corporation* (1951) 2 All ER 839, Lord Denning, though expatiating the same rule, sounded more cordial when he said: F

"We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and make sense of the G

enactment than by opening it up to destructive analysis.”

In both cases, Lord Denning emphasized the intention of Parliament which is our National Assembly. This means that whatever rule of interpretation, including the purposive rule, the intention of the lawmaker is paramount and central. Lord Denning correctly pointed out that courts of law cannot pull the language of Parliament to pieces and make nonsense of it. I will not go along with learned Senior Advocate for the appellants in his construction of section 145 (1) of the Electoral Act as I will be pulling the language of the National Assembly and make nonsense of it by such construction. Can I do that? No. That will not be a judicial act but a legislative act in the guise and pretence of judicialism. Such an act will be in violation of section 4 of the Constitution. I should say that the purposive rule of interpretation will not avail a Judge where the intention of the lawmaker is clear, precise and unequivocal, so much so that, a person can say “Yes this is what the lawmaker has in his mind” The purposive rule does not allow the Judge to destroy the intention of the lawmaker, in the language of Lord Denning, *“the Judge must not alter the material at which it is woven, but he can and should iron out the creases.”* The rule does not apply, and I so hold.

Learned Senior Advocate left section 145 (1) of the Electoral Act, 2006 and took sections 42 (1) and 17 (1) and (2) of the Constitution. He moved into American jurisprudence of equal treatment of candidates, particularly the equal protection principle of the United States Constitution. He cited a number of cases.

With respect, I am not with him. I do not see the applicability of section 42 (1) and 17(1) and (2) of the Constitution of the Federal Republic of Nigeria. I also do not see the applicability of equal protection principle in the United States Constitution, or in any Constitution. I say this because this court is concerned with the interpretation of section 145 (1) of the Electoral Act and not the 1999 Constitution, or American jurisprudence on equal protection. I will recall the very brilliant submission of Mr. Agabi, counsel for 4 to 808 respondents, that unequal treatment is not a ground for challenging an election in the Electoral Act, 2006. The ground is “exclusion”. Learned Senior Advocate for the appellants had no reply to this submission. Of course, he will not have. This court should have examined the 1999 Consti-

tution, if counsel had raised any issue of conflict. He did not. He is correct in not so raising because there is no case of conflict. And so, all the labour in the Brief, scholarly though, does not help the appellants. And when I say this, I am not oblivious of the provision of sections 102 and 103 of the Electoral Act 2006 particularly section 102 which provides inter alia that a government owned print or electronic media shall give equal access on daily basis to all registered political parties or candidates of such political parties. While the sections provide against limitation on political broadcast and freedom to campaign for the election, I am of the view that the sections are not the grounds for questioning an election. Section 145 is that section and sections 102 and 103 do not in anyway pretend to struggle for hegemony with section 145. On the American jurisprudence cited by counsel, I have said several times that my hire is to interpret and invoke the Nigerian Constitution and Nigerian statutes. I cannot invoke foreign Constitutions or statutes unless similar to ours. In other words, I cannot invoke foreign laws which are contrary to ours.

Now I come to the mother of the issue and it is whether the appellants were excluded from the election. Respondents relied on the evidence of some witnesses for the appellants. I will take the evidence of three of the witnesses. Chief Tom Ikimi, a member of the 3rd appellant party (Action Congress) said in his witness deposition:

"I was appointed Collation Agent of the Action Congress to represent the party at the final collation of results of the Presidential Election of April 21, 2007 and to be assisted by Dr. Okwi Nwodo. This was in response to an invitation by Independent National Electoral Commission (INEC) to all political parties who fielded Presidential candidate in the election to send such representatives for the collation of results on Saturday 21st April...."

Alhaji Oumar Shitten, the Legal Adviser to the Atiku campaign Office, said in his witness deposition:

"I am the Legal Adviser to Atiku Campaign Office... I voted in the Presidential and National Assembly Election of 21st April, 2007. The name of my polling station is Kallum Central School in Kallum Ward in Shendam Local Government Area of Plateau State.

Mr. Hakeem Okedara, said in his witness deposition:

"I am also a politician. I am a registered member of Action

Congress (AC), the 3rd petitioner. I know the 1st Petitioner Alhaji Atiku Abubakar. He is the leader of our party and its flag bearer in the just concluded Presidential Election held on the 21st of April, 2007 I know the 2nd Petitioner, Senator Ben Obi. He was the running mate of the 1st Petitioner. I remember the 21st day of April, 2007. On that day there was a Presidential and National Assembly elections in Nigeria. I was the AC Co-ordinator for Abeokuta North Local Government Area of Ogun State. In my capacity as a Co-ordinator, I moved freely around all the polling booths in Abeokuta on the 21st day of April, 2007 during the Presidential/National Assembly Election."

The above apart, by Exhibit EP3/28, the 3rd appellant, (Action Congress) wrote a letter to the 5th respondent in which members of the party were appointed delegates at the National Collation Centre. The letter reads in full:

"INTRODUCING FIVE MAN DELEGATION TO THE NATIONAL ELECTION RESULT COLLATION CENTER

This is to introduce to you five man delegation that will represent our Party Action Congress (AC) at the National Election Result Collation Center (INEC). They are:

- 1. Chief Tom Ikimi- Leader of the Delegation*
 - 2. Bashir Dalhatu*
 - 3. Chief Yomi Edu*
 - 4. Dr. Okwesilieze Nwodo*
 - 5. Alh. Lai Mohammed*
- Please accept the assurances of our highest esteem*
Alhaji Abubakar Suleiman
National Admin Secretary
For: National Secretary"

Did the appellants respond to the above specific evidence of participation in the election in their Reply Briefs? They did not. All they did was to repeat their earlier position in their Brief that they could still challenge the outcome of the election under the grounds in section 145 (1) (a) (b) and (c) in the alternative. I expected them to take the specific evidence above. In my view, they could not because they have no answer to them. I cannot blame them. There is no answer and they cannot manufacture one.

Let me permit myself to ask a few questions: (1) Did the 1st appellant, Alhaji Atiku Abubakar, vote at the election? (2) Did the 2nd appellant, Senator Ben Obi, vote at the election? Although he managed to avoid the issue in his witness statement, I still ask the question whether he voted or not? (3) Can the appellants seriously contend that they were excluded from the election on the face of Exhibit EP3/28 and the evidence of the three witnesses produced above? (4) What is the meaning of flag bearer and running mate in the evidence of Hakeem Akodare? Do the words not convey participation in the election in the Nigerian context of the meaning of the words? (5) Did the appellants successfully make a case of exclusion at pages 33 to 38 in respect of wrong logo/party symbol in the light of the plethora of evidence of participation above? I still have questions galore but I can stop here, hoping that I have made the point. B C

Considering the above, the Court of Appeal, per Fabiyi JCA D said at page 4763 Volume 11 of the Records:

"In our considered opinion, the above scenario points to the inescapable fact that the 1st Petitioner's name was published by INEC after the judgment of the Supreme Court of April 16, 2007 to contest the Presidential election of 21st April, 2007." E

At this point we appreciate the submissions of the learned Senior Counsel to the petitioners in respect of his stance over acts which he contended as amounting to acts that constitute exclusion. It appears that from the date of nomination until 16th of April, 2007, the 4th Respondent attempted to exclude the 1st Petitioner from participating in the election. Certainly, some hurdles were placed on his way which ordinarily should not be so. But by the judgment of the Supreme Court of 16th April, 2007, the coast was cleared for him to contest the election. It needs no further gainsaying the fact that he participated in the election." F G

I entirely agree with the Court of Appeal. I fully endorse the last sentence. The court is very correct. The position cannot be otherwise. In my view, the argument that the appellants were excluded from the election is a clear exaggeration and exaggeration has no place in law; it being the act of saying or believing more than the truth about something or the verb, "exaggerate" as meaning larger, better or even worse than it really is. Law is based on exact conduct H

of the human being and humanity, founded or mellowed on truth and finesee; not on exaggeration.

In sum, I entirely agree with the Court of Appeal that the appellants, in law, participated in the election. In the light of the provision of section 145 (1) of the Electoral Act, 2006 in the way I have interpreted it, I come to the conclusion that the entire appeal stands dismissed and I dismiss it.

I would like to take the other issues raised by the appellants in the alternative. This is not to say that I am wrong. I only want to take them in the interest of the development of our jurisprudence of elections in the way the Court of Appeal did.. Normally, as the final Court of Appeal, I need not go that far but I should in the circumstances of this case. I will therefore now examine the issues.

I begin with the 1st Issue on the ruling of 20th September, 2007 . The ruling that is the subject of the issue was delivered by Ogebe, JCA (as he then was) As the ruling is taken in SC. 274/2007, I will not deal with the merits of it. I will however take briefly the criticism of the judgment I gave in Inakeju v Adeleke (supra) which was relied upon by the Court of Appeal in the ruling. I will also take whether the principles of estoppel can apply in the case. The criticism is the following statement I made in the case:

“Issue estoppel cannot be invoked in the same case”

In the appellant’s Brief, learned Senior Advocate, consciously modest, managed to justify the above position I took when he said:

“A close reading of the judgment would reveal that his Lordship made the point that issue estoppel cannot apply in the same case on appeal. In other words, a party who is exercising his constitutional right of appeal cannot be met with the shield of issue estoppel in the same case on appeal. This position taken by his Lordship is undoubtedly sound, otherwise any appeal can be defended on the ground of issue estoppel. Put in other words, no appeal will ever succeed since the defence of issue estoppel would always be available to a Respondent on appeal. This is the content in which the statement of the learned Justice of the Supreme Court can and should be understood in that the court did not overrule its previous decision in Cardoso v. Daniel supra and Lawal v. Dawodu supra for if the court had been minded to do so it would have stated so expressly.”

Learned Senior Advocate took up the issue in his Reply Brief to the Brief of the 1st and 2nd respondents. He added the decisions in Shanu v Afribank Nig Plc (2002) 6 SC (Pt.11) 135 and Ikeni v Efarmo (2001) 10 NWLR (Pt.720) 1 to his list of authorities to make the point that I was wrong. In the Reply Brief, counsel took a stronger position by urging this court to strengthen the law by deciding the question of issue estoppel applying in the same case or not and whether the previous decisions of the court to the effect that estoppel can apply in the same case were reached per incuriam or otherwise. I must confess that none of the cases cited by learned Senior Advocate in the Briefs was known by me when I decided Inakoju. I do not know all the law. Let me look at two of the cases cited in the appellants brief briefly. In Lawal v Dawodu the ruling of the learned trial Judge was final as it dealt with Exhibit E, the judgment in respect of the same land. In this case the ruling was not final and that is the distinguishing factor. In Cardoso v Daniel, the issue of estoppel was in the second suit, No. IK/9/1966 which is different from this case where it was raised in the same case.

It is possible that I am wrong. It is possible that I opened it too wide. I leave that to my learned brothers. They are the best umpires, here. Whatever is the situation, I do not think it is helpful to the case of the appellants; and that is the important aspect. Whether I am wrong or right is pursuing the shadow and neglecting the substance. I will prefer to pursue the substance. And the substance is to examine the wording of the ruling of Ogebe, JCA (as he then was) and see whether the equitable principle of estoppel can apply.

It is trite law that the principle of estoppel per rem judicatam can only apply when the issue is resolved on its merits and disposed of finally. Is the ruling complained of final? As the answer to the question can only be found in the ruling, I should allow myself to quote it here :

"I have listened to the arguments of Counsel on all sides in these two applications to strike out the Petition for incompetence and lack of jurisdiction or in the alternative to strike out some paragraphs and reliefs in the Petition. Both applications must be refused for the following two reasons.

(1) Paragraph 49(2) of the 1st Schedule to the Electoral Act

2006 provides that an application of this nature shall not be allowed unless made within a reasonable time and when a party making it has not taken any fresh steps in the proceedings.

In this case the applicants have joined issues with the Petitioners/Respondents on all complaints made in the petition. They are therefore caught by this provision.

(2) It is trite law that in interlocutory stage, issues that call for determination in the main case should be avoided. The issue of joinder and inconsistent claims are not jurisdictional matters but mere irregularities which can be sorted out at the hearing of the petition. I see no proper challenge of jurisdiction in the two applications. This Court has full jurisdiction to entertain the Petition to enable all parties to ventilate their cases on merit. Accordingly, I dismiss both applications."

A cursory look at the ruling shows very clearly that it was not on the merits and therefore not final on the issue; a more sustained and permanent look more so. Most counsel for the respondents made submissions on the issue in or along that line. Unfortunately, counsel for the appellants in their Reply Briefs avoided this most important aspect. He rather concentrated on my decision in Inakeju v Adeleke, as if the fortunes of the appeal rested on this court declaring the judgment wrong. He put all his strength to discredit the case and left the substance of the matter. As the ruling was not final, issue estoppel does not apply. The issue therefore fails. And that is the substance of the matter

I go to Issue 3 on non compliance with the Electoral Act. I will take the issue of non compliance in respect of corrupt practices, ballot papers, voters register, postponement or shifting of voting. I will take the above seriatim.

Corruption is a criminal offence which must be proved beyond reasonable doubt. That is the requirement of section 138 (1) of the Evidence Act, which provides that if the commission of a crime by a party to any proceedings is directly in issue in any proceedings civil or criminal, it must be proved beyond reasonable doubt. The subsection uses the words "any proceedings" twice. It is my view that the words apply to proceedings in election petitions. Reasonable doubt which will justify acquittal is doubt based on reason and arising from

evidence or lack of evidence, and it is doubt which a reasonable man or woman might entertain and it is not fanciful doubt, is not imagined doubt, and is not doubt that the court might conjure up to avoid performing unpleasant task or duty. See Black's Law Dictionary, 6th Edition, page 1265. A reasonable doubt is an honest mis-
 giving generated by the insufficiency of the proof, which reason sanc-
 tions as a substantial doubt. It is a doubt which make the court hesi-
 tate as to the correctness of the conclusion which it arrives at. The
 principle of proof beyond reasonable doubt is necessary because of
 the constitutional presumption of the innocence of the accused, pro-
 vided in section 36 (5) of the Constitution. B
C

By section 138 (2) of the Evidence Act, the burden of proving that any person has been guilty of a crime or wrongful act is, subject to the provision of section 141 of the Act, on the person who asserts it, whether the commission of such act is or is not directly in
 issue in the action. By section 138 (3) if the prosecution prove the
 commission of a crime beyond reasonable doubt the burden of proving
 reasonable doubt is shifted to the accused. See generally *Alonge v Inspector General of Police* (1959) 4 FSC 203; *Inspector General of Police v Oguntade* (1971) 2 ALL NLR 11, *Lori v The State* (1980) 8-11 SC 81, *Karimu v The State* (1989) 1 NWLR (Pt. 96) 124. D
E

It has been held in a plethora of cases that the burden of proving criminal offence in an election petition is on the petitioner and the proof should be beyond reasonable doubt. See *Chief Nwobodo v Chief Onah* (1984) 1 SCNLR 1; *Omoboriowo v Ajasin* (1984) 1
 SCNLR 108; *Buhari v Obasanjo*. F

Learned Senior Advocate for the appellants submitted in the Reply Brief that on a community reading of sections 144 (2) and 157 of the Electoral Act, commission of crime, if disclosed in a petition, G
 need not be proved beyond reasonable doubt. He also relied on the decision of this court in *Buhari v Obasanjo*. Let me examine the authorities relied upon by counsel.

The first is section 144 (2) of the Electoral Act, it reads:

"The person whose election is complained of is, in this Act referred to as the Respondent, but if the petitioner complains of the conduct of an Electoral Officer, a Presiding Officer, a Returning Officer or any other person who took part in the conduct of an election, H

such officer or person who took part in the conduct of an election, such officer or person shall for the purpose of this Act be deemed to be a Respondent and shall be joined in the election as a necessary party *PROVIDED* that where such officer or person is shown to have acted as an agent of the commission, his non joinder as aforesaid will not on its own operate to void the petition if the commission is made a party”

Section 157 of the Act provides as follows:

“The commission shall consider only recommendation made to it by a tribunal with respect to the prosecution by it of any person for any offence disclosed in any election petition.”

I do not see the point made by learned Senior Advocate for the appellants. While section 144 (2) provides for parties to an election petition, section 157 provides for prosecution of offence disclosed in election petition. How can a community reading of the two sections result in the conclusion reached by learned counsel? How can a provision on joinder result in the conclusion reached by learned Senior Advocate, I ask again? I do not see and counsel did not go further to substantiate his submission. And what is more, it will be unthinkable for a statute to do away or dispense with, by the mere waive of the hand, the age long common law principle of proof of crime beyond reasonable doubt by the prosecution. Happily, there is no such section in the Electoral Act.

In Buhari v Obasanjo, Uwais, CJN said:

“Now it is clear to me that section 129 of the Electoral Act creates a criminal offence which it terms ‘undue influence’ and prescribes punishment for the offence. I do not therefore see how such an offence can be the subject of an election petition or civil proceeding. If the petitioner means to prosecute the 1st and 2nd Respondent/Cross Appellant of the offence under section 129, then there must be a charge to which they must plead in a normal criminal proceedings.”

Learned Senior Advocate submitted that on the above authority of Buhari v Obasanjo, allegation of acts of non compliance with the Act in the conduct of the election, which also constitute a criminal offence under the Electoral Act, may, in given circumstance, not have to be proved beyond reasonable doubt. With respect, I do

not see that decision in Buhari. Uwais, CJN did not say that. He was specific on the offence of undue influence and this court cannot read the decision to cover proof of offence in election petition .

Let me take the issue of non serialization of ballot papers. Narrating what appellants regarded as facts of non compliance, they deposited in paragraph 17(b) (xiii) of the petition as follows: B

"Forms EC8As and EC8Bs were produced in two parallel copies in duplicates bearing the same serial number to generate results one of which invariably is authenticated and relied upon simply because majority votes were allocated to the 3 Respondent therein: C Typical examples of the duplicitous result forms are those from Benue South Senatorial district in Benue State, and numerous other States."

The 1st and 2nd respondents denied the above in paragraph 19 (vi) of their Reply to the petition:

"Paragraphs 17(b) (xiii) and (xiv) are denied. Without prejudice D to the generality of this denial, it is averred that there were no parallel copies of forms ECSAs or ECSBs in duplicates bearing the same serial numbers."

The 3rd respondent also denied the averment in paragraph 13 (b) of its Reply to the petition: E

"Sub-paragraph ... (xiii) ..., of paragraph 17 of the Petition are (is) hereby denied and the Petitioners are put to the strict proof thereof"

The 4th to 808th respondents did not specifically aver that paragraph 17(b) (xiii) was not true but denied the content of the sub-paragraph as it affects or relates to the duplicitous nature of the result forms. In paragraph 8(b) (viii) the respondents averred: F

"Form ECSAs and ECSBs are for the collation of the different results and not a duplication of each other."

Learned Senior Advocate for the appellants contended in paragraph 6.39 of the Brief that both parties admitted that the ballot papers were not serialized. If "both parties" in the paragraph mean the appellants and all the respondents, I will not agree with him because the conclusion is not borne out from the Record. It is clear from the Replies that there is no admission on the part of some of the respondents that the ballot papers were not serialized. As the issue of non serialization was denied by some respondents, the burden of proof was on the appellants. This is because admission by a set of H

respondents cannot in law affect another set of respondents. The petitioner has a duty to prove the non-serialization of ballot papers as it affects the respondents who did not admit. Did they discharge the burden? And the only way to discharge the burden is by tendering the ballot papers which were not serialized. Did they do that? If so, where and which are the exhibits?

Reacting to the submission of 1st and 2nd respondents on the non tendering of ballot papers, learned Senior Advocate for the appellants submitted that appellants cannot be expected to produce what is by law consigned to the exclusive authority of INEC. It was INEC which denied that such ballot boxes were not snatched that should have produced them, counsel argued. If copies of the not serialized ballot papers were not tendered, how can the Court of Appeal decide in favour of the appellants? Where is the evidence to decide in favour of the appellants when they did not produce even a copy of the non-serialised ballot papers? This looks to me like undertaking a wild goose chase. Courts of law lack jurisdiction to undertake such a chase.

One aspect that bothers me is the wording of paragraph 17 (b) (xiii) of the petition. I regard it as pleadings in civil proceedings and I see nothing wrong in applying principles of pleadings in such proceedings in relation to paragraph 17 (b) (xiii) of the petition. The aspect which bothers me is contained in the last paragraph of the averment which reads:

“Typical examples of these duplicitous result forms are those from Benue South Senatorial District in Benue State and numerous other States.”

One basic principle of pleadings is that the facts pleaded must be exact, precise and should not give rise or room for speculation or conjecture. The facts pleaded must be concise and not rigmarole. Applying this basic principle to paragraph 17 (b) (xiii) of the petition, the words “and numerous other states” do not satisfy the principle of good pleadings. The word “numerous” means many thus relating to a great number. Subtracting part of Benue State from the other States, including the Federal Capital Territory, will leave us with thirty five States, probably two-thirds of Benue State as the paragraph deposed to only one Senatorial district, which is one third (see section

48 of the Constitution) and the whole of the Federal Capital Territory, which for this purpose qualifies as a State. How will a court of law determine the number to satisfy the averment in paragraph 17(b) (xiii) of the petition.

The petition in other areas, is specific in terms of the States complained of in respect of non compliance. Why not paragraph 17(b) (xiii), I ask? In my humble view, paragraph 17(b) (xiii) is a very lazy pleading bothering on smartness and artifice. It is my feeling that if there was any such evidence in other States, the appellants should have mentioned them rather than the vague, nebulous and unfathomable averment of “and numerous other States” Did the appellants expect the respondents to produce evidence on the numerous other States? That will be day dreaming and the respondents are not likely to be part of that dream. Can this court come to the conclusion that non-serialization affecting Benue State only substantially affected the result of the election?

In paragraph 6.32 page 50 of the Brief, learned Senior Advocate said:

“Printing ballot papers without serial numbers as in the case of the ballot papers used in the April, 2007 Presidential election is not just a matter of non-compliance with the provision of section 45 of the Act, it is a corrupt practice of a serious subversive type because it could allow ballots to be mass-produced and pre-marketed by party activities or corrupt election officials, which we submit in fact happened in the said Presidential election”

I will not go into the speculation contained in the paragraph. I leave that to the appellants, the owners of the speculation. I will take briefly the submission that printing ballot papers without serial numbers is a corrupt practice, which I entirely agree with counsel. As a corrupt practice, the burden is on the appellants to prove the offence beyond reasonable doubt. I do not see where the appellants proved the offence of corruption deposed to in their petition. I also do not see where they claimed proving it in their Brief. All I see is submission of a magisterial nature in paragraphs 6.03, 6.10, 6.11 and 6.13. Can a court of law substitute such magisterial submission for section 138 of the Evidence Act.? No. The law cannot replace the burden of proof in section 138 of the Evidence Act with such submission.

Let me address the submission of learned Senior Advocate for the appellants in response to the Brief of the 3rd respondent. He made serious efforts to dichotomize between acts of non-compliance which need to be proved by a petition and those which need not be proved. He submitted that by the very nature of the acts of non-compliance in respect of non serialization of the ballot papers, they do not “*require such catholic proof.*” This is quite a new one to me; new because I do not see such dichotomy or cleavage in the law of proof in our Evidence Act; certainly not in sections 135, 136, 137 and 138 of the Evidence Act. I do not also see it in the Electoral Act, 2006. And so I ask, where is that law? In our Law of Evidence, proof is not necessary if a fact is admitted. Proof may not also be necessary in a matter that the court can take judicial notice under section 74 of the Evidence Act. I do not know of the one learned Senior Advocate gave in paragraph 3.02 of the Reply Brief. I must say that the paragraph has brought clearly to the fore that the appellants did not lead evidence in proof of the non serialization, affecting substantially the result of the election. And to me that is the crux of the matter In the words of learned Senior Advocate, the issue of non serialization, “by its very nature does not require such catholic proof?” The word “catholic” in the context does not mean the Roman Catholic Church but it is likely to mean general, including many things, and broad. If that is the meaning attached to the word by the appellants, I then ask; what is the specific proof by the appellants that the non serialization substantially affected the result of the election. I ask this question because of the impression I have that a matter that does not require a catholic proof may require specific proof. The judge that I am, I cannot speculate; I cannot conjecture.

There is another aspect to the issue of non-serialization. If it affected all the ballot papers, it is difficult for appellants to prove that they suffered a disadvantage or that they were disfavoured. In such a situation both parties may derive some benefits or suffer some disadvantages. For instance, in Lagos State, the appellants won the election. I have the impression that the same non serialized ballot papers gave them victory. A million naira question then comes very handy: Could the appellants have raised the issue if they won the election in all other States in the way they won in Lagos State?

The importance of ballot papers in the conduct of an election cannot be overemphasised. As a matter of fact, nothing makes an election without ballot papers. Election is election because of ballot papers. Section 45 provides for the format of ballot papers. There is no proof before this court that the ballot papers did not conform with the format provided in the section. Until there is such a proof, I cannot base the judgment on the fact that ballot papers are a desideratum in an election and therefore nullify an election without the petitioner proving section 45 of the Electoral Act. Where did the appellants tender the ballot papers which were in violation of section 45 of the Act ?

I take the issues of voters register and postponement or shifting of voting. On the issue of voters register, the Court of Appeal said at page 4769, Volume 11 of the Record:

"The contention of the learned Senior Counsel for the petitioners that millions of persons who were qualified to be registered as voters were not duly registered was not substantiated by evidence. It appears that the contention is speculative. There is no evidence from persons who complained that they were not registered and therefore barred from exercising their right to vote. None of them has been shown to have filed any objection or even gone to court to challenge their non registration. It is therefore highly untenable for the court to be invited to invalidate the election on this ground. Even if there was a surmised non compliance, by the provisions of section 146 (1) of the Electoral Act, 2006 same has not been shown to have substantially affected the result of the election."

On shifting the polls, the Court of Appeal said at page 4773, Volume 11 of the Record:

"We must express it here that it is immaterial that the poll was shifted by two hours on 21st April, 2006. The period of 7 hours stated for the election was still maintained. The shifting of poll affected all contestants. It was not shown that the exercise of discretion to shift the poll was wrongly done. And there is no evidence that any prospective voter was denied the right to cast his vote. Candidly speaking, I cannot, with adequate precision surmise the rationale behind this complaint. The decision in the case of Bassey v Young (supra) is in point here."

I cannot improve on the above. The Court of appeal is correct. Shifting of time for election affects all the parties. None of the parties had advantage over the other. As the time lost was recovered later, the period of seven hours scheduled or slated for the election was intact.

B I should take Issue 4 on whether the 5th respondent is a juristic personality. The law recognizes two categories of persons who can sue and be sued. They are natural persons and other bodies having juristic personality. They are referred to as artificial persons. It is the C law that a body not vested with juristic or legal personality cannot sue or be sued.

Juristic or legal personality can only be denoted by the enabling law. This can either be the Constitution or a statute. If the enabling law provides for a particular name by way of juristic or legal D personality, a party must sue or be sued in that name. He has no choice to sue or be sued in any other name. In other words, juristic or legal personality is a creation of statute and a party which seeks relief must comply strictly with the enabling statute. The position of E the law is as stringent and as strict as that.

Learned Senior Advocate for the appellants submitted that as the 5th respondent is a natural person, he could be sued in that name. While I entirely agree that a natural person could sue or be sued in the natural name, I do not agree that he can be sued in the F natural name when the alleged wrong involves or relates to his office. And the office here is Chairman of INEC.

The 5th respondent was sued as “Professor Maurice Maduakolam Iwu (Chairman INEC).” The relevant question is whether such a name is in the Constitution or in the Electoral Act, G 2006? The answer is, no. And that leads to a second question: where did the appellants get that name? I have no answer to that question. Probably the appellants have an answer. That is the crux of the matter. As juristic or legal personality is a strict matter of law, parties cannot beg the court to accept a person who does not answer the correct H name in the enabling law. And here paragraph F 14 (1) (a) of Part 1, Third Schedule to the Constitution provides some answer. It reads:

“The Independent National Electoral Commission shall com-

prise the following members:

(a) A Chairman, who shall be the Chief Electoral Commissioner;”

As the 5th respondent sued in the name and style of “Professor Maurice Maduakolam Iwu (Chairman INEC) which is neither in the Constitution nor in the Electoral Act 2006, counsel for the appellants joined the wrong person. This is not a technicality but the substantive position of the law. A plaintiff who sues a wrong person in law cannot be heard to say that the court should give judgment in his favour against the wrong person. After all, a court of law cannot give judgment against a person not known to law.

Learned Senior Advocate for the appellants in his Reply Brief cited cases in paragraph 6.24 and submitted that “*the court did not find anything wrong with that*” While I do not want to go into the merits of the cases counsel cited, I must say that a court does not go out of its way to decide a matter which is not objected to by a party. That is the very essence of the umpiring role of a Judge. I expected counsel to cite authorities which decided similar issue after objection, in favour of the position he has taken. There is no such authority. I do not know of any, myself.

Learned Senior Advocate made reference to what he called the sister petition to this appeal i.e. CA/A/EP/2/07 Buhari v INEC reported in (2008) 4 NWLR (Pt.1078) 546, where the second respondent therein was sued as “Chief Electoral Commissioner (Professor Maurice Iwu)”. With respect, he drew the wrong analogy. He got the wrong example. The counsel in Buhari v INEC did the right thing. The counsel in this appeal, with the greatest respect, did the wrong thing. There is a world of difference between “Professor Maurice Maduakolam Iwu (Chairman INEC)” and Chief Electoral Commissioner (Professor Maurice Iwu)”

Learned Senior Advocate for the 3rd respondent has provided an adequate answer to the submission of learned Senior Advocate for the appellants; when he submitted as follows in paragraphs 101 and 103, page 25 of the Brief:

“The Petitioner, it is submitted sued the 5th Respondent, Prof. Maurice Iwu in his personal capacity. The appendage to his name, which is (Chairman, INEC) is not enough to qualify him as a statu-

tory Respondent under the Act. It may have been different if he was sued as Chairman INEC, with his name as appendage.

In any case, our further submission, My Lords, is that the subsection in stipulating or defining who shall qualify as statutory respondent did not include the Chairman of INEC as one of them, so the defect cannot really be cured either by suing him as Prof. Maurice Iwu, with Chairman INEC as an appendage, or as Chairman INEC with Prof. Maurice Iwu as an appendage.”

This is a very good one. Counsel has provided an answer to the point raised by learned Senior Advocate for the appellants. In Buhari v INEC, counsel first used the juristic person of “Chief Electoral Commissioner” followed by the name of the holder of the office. Although the absence of the name of the holder of the office should not have made any difference, counsel in his own wisdom, and for avoidance of doubt, decided to add the name. I do not see anything wrong with that. In this appeal, the position is the reverse. The name of Professor Maurice Maduakolam Iwu a non-juristic person in the case, came first and followed by the official name of Chairman of INEC. This means that the person sued is Professor Maurice Maduakolam Iwu, followed by the descriptive name of Chairman of INEC” the office Professor Iwu holds. It is sad that a non-juristic person was sued resulting in the name struck out. The appellants have my sympathy but there is nothing I can do about it. Sympathy built on sentiment cannot take a party anywhere in the law. It ends there. That takes me to Issue 5 on what counsel call conflicting final results. He relied on paragraphs 17 and 18 of the petition. I have gone through the two paragraphs and I do not see where the appellants averred that the 5th respondent announced two or three conflicting results. Paragraph 17 (xxiv), with respect, is not such a paragraph. Normally, this should be the end of the consideration of the issue based on the law that parties cannot given evidence on what is not pleaded. In other words, parties are bound by their pleadings and what is not pleaded go to no issue. See Yusuf v Adegoke (2007) 5 NWLR (Pt.1027) 415; UBN PLC v Ayodara and Sons Ltd (2007) 11 NWLR (Pt.1045) 332, Adetoun Oladeji (Nig) Ltd v N.B. PLC. U Ayodare and Son Ltd (2007) 13 NWLR (Pt.1052) 567. In the event that I am wrong in holding that the issue of two or three conflicting

results was not pleaded, I will go to the merit of the issue in the alternative.

Learned Senior Advocate submitted in paragraph 8.07 of the appellants Brief, that the appellants tendered three different versions of the results prepared by the 4th and 5th respondents. He referred to them as Exhibits EPT/03/12 (2-3) and EPT/03/13. I have checked the list of exhibits prepared by the appellants to be used at the hearing of the appeal. I could not place my hands on the two exhibits. I however placed my hands on Exhibits EP/12 (3) and EP/P.13. I do not know whether these are the exhibits learned Senior Advocate is referring to. In Exhibit EP/12(3) a score of 24,638,063 is recorded for the 1st respondent. In Exhibit EP/P.13, a score of 24,784,227 is recorded for 1st respondent. The case made in Issue 5 of the appellants Brief is that there are three conflicting results which the 4 and 6th respondents were unable to explain or reconcile by their pleadings or by evidence at the trial. This he repeated in paragraph 7.02 of the Reply Brief when he submitted that the 1st respondent was returned as winner on the basis of three conflicting results. He relied on paragraph 10 of the petition. The paragraph averred:

"... At the end of the presidential election referred to in paragraphs 8 and 9 above, Alhaji Umaru Musa Yar'adua of the Peoples Democratic Party (PDP) was returned elected as announced by the 6th Respondent on the 23rd April, 2007 with a total score of 24,638,063 and the INEC website, with a total of 24,784,222"

In one breath, the appellants make a case of three conflicting results and in another breath they make a case of two conflicting results. Which version should this court take or believe. Is it the version of three conflicting results or the version of two conflicting results? I see here a confusing and confused case made by the appellants. Paradoxically, learned Senior Advocate in making a case of conflict, involved himself in a conflict in the number of results oscillating between the figures "2 and 3". Which one should this court take? A party must be sure of his case and he must present it in one lung breath; not in two-lung breath. If a party makes a case bearing two opposing positions, which positions affect the substance or merits of the issue, it crumbles. A court of law is not competent to make a choice or repair the case and give the party in default judgment.

Let me also go further on the issue. The difference between the two versions arithmetically is 784,227 votes. Will this court be going out of its way by taking the smaller score of 24,638,006 and subtract it from the total score of 2,637,848 of the 1st appellant. By the exercise, the 1st respondent has an excess of more than twenty million votes over and above the 1st appellant. The position I have taken is the essence of section 146 (1) of the Electoral Act. I have not made a case for the respondents. The law allows the court to make use of the evidence before it and draw conclusion. That is what I have done. The above exercise of taking the smaller score of the 1st respondent is the most favourable position to the 1st appellant

Learned Senior Advocate for the appellants submitted in the appellants' Brief that the results announced by the 5th respondent were done in breach of the provision of the Electoral Act, 2006. He made reference to paragraph 17 (b) (xxiii) of the petition :
Your Petitioners aver that while election results from 25 States of the Federation were still being awaited on the 23rd day of April, 2007, the 5th Respondent excused himself and went out of the Collation Centre at the Headquarters of the 4th Respondent leaving behind the party agents, to announce the result of the Presidential election, declaring the Respondent the winner and making pronouncements of victory for the 1st-3rd Respondents as the Returning Officer allegedly on the bars of "scores TRANSMITTED ELECTRONICALLY" from various polling units and wards throughout the country."

I do not see where the appellants proved the above averment. In the absence of proof, the averment has no probative value and I so hold.

Learned Senior Advocate for the 4th to 808th respondents relied on section 150 of the Evidence Act. Section 150 (1) is relevant. It provides:

"When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with"

Chief Solomon Awomolo, SAN, defined presumption of law as follows:

"A presumption of law is merely an invocation of a rule of law compelling a fact-finder to reach a particular conclusion in the ab-

sence of evidence to the contrary. It otherwise means a mandatory deduction which law directs to be made, having regard to rules of law and practice laid down for courts use. It is a procedural device, which takes place of evidence in certain cases until the facts in lieu of which the presumption operates are shown. Presumption of law is in fact a preliminary rule of law which may disappear in the face of rebutted evidence. However, in the absence of evidence to the contrary, the presumption stands.” B

See Chief Afe Babalola (ed) : Law and Practice of Evidence page 361. C

This is a very adequate definition of presumption. I cannot put it better. A presumption of law is law and the court can make use of it. A presumption of law will however fossilize into thin air if it is rebutted. Of course, a party can rebut the evidence if it is a rebuttable presumption. Where presumption is irrebuttable it stands for all time, like the rock of Gibraltar. D

As the presumption here is rebuttable, I will so restrict myself. The acts of announcing the result are official acts within the meaning of section 150(1) of the Evidence Act. The burden is on the appellants to prove that the acts were not official. The burden is also on the appellants to prove that the acts were not done in a manner substantially regular. I do not see any such proof. All I see are conflicting allegations in respect of the number of results, moving from two to three. Issue 5 fails. E

I take Issue 6 on handwriting. On this, the Court of Appeal said at page 4775, Volume 11 of the Record : F

“Allegation of apparent similar writing can only be sustained after evidence by a handwriting expert which is not available”

Learned Senior Advocate for the appellants did not agree with the above. He submitted that expert evidence of handwriting expert is not necessary. He submitted that the appellants adequately and succinctly pleaded facts that made unavoidable the analysis contained in the final address of the appellants to the effect that same persons signed different election result sheets in different polling units generally across the country. He relied on paragraph 17 (xii) of the petition. The sub-paragraph reads. H

“In the few places where voting took place at all, there was

multiple voting, scores and candidates were not entered by the Presiding Officers at the polling units in Form EC 8As; the forms were not signed by the Presiding Officers at the Polling units nor counter-signed by party agents except for those of the 3rd Respondent”.

B The sub-paragraph alleges crime which must be proved beyond reasonable doubt. I said earlier, I do not see any evidence in proof of the allegation. Learned Senior Advocate submitted that the existence of forms illegally signed by the same persons is consistent with the allegation that voting did not take place in many of the polling centres and that the paragraphs contain allegation to the effect that the forms were not signed by the presiding officers.

How will the Court of Appeal know that the allegations are correct? That is the basis of the conclusion of the court that evidence of handwriting experts was necessary. Section 51(1) of the Evidence Act provides that when the court has to form an opinion upon a point of foreign law, native law or custom, or of science or art or in questions as to identity of handwriting or finger impressions, the opinions upon which that point of persons specially skilled in such law, native law or custom, or science or art, or in question as identity of handwriting or finger impressions are relevant facts. In Jagede v Citicon Nig Ltd (2001) 2 NWLR (Pt.702) 112, Oguntade, JCA (as he then was) said at page 134:

“It seems to me that the purpose of section 108(1) & (2) above is not to turn over to the court the duty of a handwriting expert. Before the court could undertake the duty of comparing handwriting or signatures in a civil case, the parties to the dispute themselves ought first to have called evidence to show that a person signed or did not sign the signature in dispute. The court cannot without such evidence volunteer to find evidence for one of the parties as to who had signed the disputed signature. That would be akin to taking the side of one of them”

H In the light of the above, section 51(1) of the Evidence Act and the case, I cannot fault the Court of Appeal in holding that evidence of handwriting expert is necessary. This is because the Court of Appeal or any other court for that matter cannot determine “apparent similar writing”. The issue fails

Issue 7 is on the identity of any police officer or soldier who

participated in the conduct of the election. On the issue, the Court of Appeal held inter alia at page 4777, Volume 11.

"It cannot be disputed that the allegations made against unidentified policeman and soldiers are criminal in nature... It is instructive to note that of all the witnesses called by the Petitioners, none of them specifically identified any police officer or soldier; the case of Kuti v A.G Federation (1985) 2 NWLR (Pt.6) 211 is here relevant. Accordingly no allegation of crime can be established with the scenario painted by the Petitions."

A number of counsel cited what I said in *Obasanjo v Yusuf* as follows:

"A person unknown is a person not known. In other words by their averments, the petitioners did not have any knowledge by way of names or identifiable person or persons who compiled the election results in the local government areas. How will the respondents expect the petitioners to join persons the petitioners do not know? It is both a factual and legal impossibility."

I made the above statement in the context of paragraph 16(b) of the Amended Petition:

"In majority of local government areas in those states election results were compiled by persons unknown other than officials of the 40th respondent and transmitted by the State Resident Electoral Commissioners to the 41st respondent."

Obasanjo v Yusuf is different from this case in two aspects. First, *Obasanjo* dealt with joinder of parties. This case does not involve joinder. Second, the statement was made in relation to paragraph 16(b) of the petition. There is no such paragraph in this case. Learned Senior Advocate for the appellants also cited section 141 (2) of the Electoral Act. It reads:

"The person whose election is complained of, is in this act, referred to as the Respondent, but if the Petitioner complains of the conduct of an Electoral Officer, a Presiding Officer, a Returning Officer or any other person who took part in the conduct of an election, such Officer or person shall for the purpose of this Act be deemed to be a Respondent and shall be joined in the election petition on his or her official status as a necessary party PROVIDED that where such officer or person is shown to have acted as an agent of the counsel

his non joinder will not on its own operate to void the petition if the commission is made a party”

I do not know the intended change in the law by the above authorities, as contended by learned Senior Advocate for the appellants. Obasanjo v Yusuf was decided on the facts of the case and cannot be generalized to cover all situations. Section 144 (2) deals with joinder of respondents. Assuming that the Court of Appeal was wrong in what it said in respect of the specific identification of police officers or soldiers, the position does not in any way help or assist the appellants. I say this because outside what the Court of Appeal said, the appellants did not prove the criminal content of the case beyond reasonable doubt.

I think I can pause here to make a comment on section 141 (2) of the Electoral Act. My comment is in respect of the number or plethora of respondents in election petitions in this country. In this case there are 810 respondents. This is a record to have a place in the guiness book of record. Considering what obtains in other world jurisprudences, I regard this as near primitive if not a primitive situation. How can a case involve 810 respondents? There is need for the amendment of the Electoral Act and it is section 141(2). It is my view that section 141(2) should be reconstructed to reduce the large number of respondents. I do not see any difficulty in that.

Issue 8 is next in the order of consideration. It is on the validity and admissibility of all the witness statements of the 1st and 2nd respondents and some of the 4th to 808th respondents. The parties are *ad idem* that the Practice Directions 2007, as amended, provided for the procedure adopted by some of the respondents. The relevant amendment reads:

1. Sub paragraph (a) and (b) (1) of paragraph 1 of the Election Tribunal and Court Practice Directions 2007 is hereby amended as follows :-

(i) In sub-paragraph (a) (1) delete the words “list of all the witnesses” and substitute therefore the words — “statement indicating the number of witnesses the petitioner intends”

(ii) In sub-paragraph (b) (1), delete comma and immediately thereafter insert the words “whose identity may be represented by an alphabet or a combination thereof.”

It is the submission of learned Senior Advocate for the appellants that the Practice Direction is in conflict with the Evidence Act and therefore null and void. He cited three cases. With respect, none of the three cases directly so decided.

Learned Senior Advocate submitted in the alternative that the Practice Direction envisages a situation where the identity of a witness is disclosed at the time of trial more so as in the petition where their physical presence was dispensed with. The least that counsel for the respondents could have done to bring their witness statements within the intendment of the Practice Direction was to have supplied the names and other particulars of the deponent to these witness statements to the court and also to counsel for the petitioners when the witness statements were being tendered from the bar, learned counsel contended. Assuming that the issue is valid, how does it assist or help the case of the appellants? I ask this question on the basic principle of law that a plaintiff cannot rely on the weakness of the case of a defendant. The important point is whether the appellants did prove their case.

What is the intendment of the amendment? The intendment of the President of the Court of Appeal in the amendment, in my humble view, is to protect witnesses from possible attack by the opposite party. That is a valid reason and I commend the amendment, which for all intents and purposes did not defeat the administration of justice. Considering the volatile nature of Nigerians in matters of party politics propelled by their do or die attitude, there is real need to protect the witnesses. All the parties know, including the appellants, that behind the letters of the English alphabet are the deponents. All the parties know, including the appellants, that the letters of the English alphabet had not the brain and human mind and automation to swear to affidavit and so it was more of a caricature than anything real. Why the furore? I regard the issue as arid legalism and mere technicality in relation to the alleged conflict between the Practice Directions and the Evidence Act. The issue fails Issue 9 is on evaluation and procurement on the evidence elicited from the 5th respondent. Most of the counsel for the respondents submitted that counsel for the appellants did not urge the Court of Appeal to apply the answers to the interrogatories. Counsel for the appellants did not

provide an adequate answer. I should recall here the reaction of the appellants to the supplementary address of the 1st and 2nd respondents in the Court of Appeal in respect of the answers given by the 5th respondent to the interrogatories. In paragraph 1.23 at page 4366, Volume 10 of the Record, the appellants sounded apparently pessimistic:

“Finally, we submit that the case of the petitioners have neither been flattened nor weakened by the answers given by the 5th Respondent to the interrogatories. We could have gone the whole hog with him on his evasive and unsatisfactory answers but we do not wish Your Lordships to be distracted by the clear perjury committed by the 5th Respondent. We leave that issue for another day.”

Learned Senior Advocate for the 1st and 2nd respondents, in his reply on points of law to the petitioners address on answers to interrogatories submitted that the petitioners came to a very faulty conclusion by labeling 5th respondent a liar who should be committed for perjury simply because his answers to their interrogatories are not satisfactory to them. He argued that petitioners have not been able to counter or fault the submission that the evidence extracted from the interrogatories form part of their case.

What did I say on the interrogatories? Did I commit myself one way or the other on the interrogatories? I think not. I towed a neutral line when I said in Alhaji Abubakar v Alhaji Yar'adua (2008) 4 NWLR (Pt.1078) 465 at page 502:

“Learned Senior Advocate for the 2nd and 3rd respondents described the question as pertaining to commercial transaction and therefore not relevant to the petition of the appellants. With respect, I disagree. I think most of the questions are relevant. They may help the case of the petitioners. They may not. That is left for the Court of Appeal to decide. We are not there and we cannot jump the gun.”

It is clear from the above that I did not take a position because I cannot in law take a position at that interlocutory stage. I am rather surprised that what I said became a controversy in the Court of Appeal. I agree with the submission of learned Senior Advocate for the 1st and 2nd respondents, when in his address at the Court of Appeal he said, in paragraph 5.0 page 4508 of the Record:

“Petitioners counsel have not been able to situate properly the

usage which they want the court to make of the answers to the interrogatories in their petition. This is the thrust of NIKI TOBI JSC's judgment where his Lordship posited that it is this court alone who can decide whether or not the answers will assist the petitioners case."

That is what I said and I am right in saying that.

I return to the apparent pessimism of the appellants. Their counsel described the answers of the 5th respondents as evasive and unsatisfactory. In so far as the answers did not come within the expectation of the appellants, they will remain, in the minds of the appellants, evasive and unsatisfactory. This, in my humble view, is an admission that the answers given by the 5th respondent were not useful to the appellants.

Counsel for the appellants in the state of despair, if I may so describe the situation, submitted in the Court of Appeal that he will leave the issue of perjury committed by the 5th respondent "for another day." Which other day, I ask? What law allows or entitles the appellants to raise the issue of perjury of the 5th respondent "another day"? I know of no such law and there is no such law.

Learned Senior Advocate for the appellants had all the time to raise the issue there. He did not. Accordingly, he has no other day in the world to raise the issue, as this judgment ends this matter for forever. It is clear from the submission of counsel for the appellants in the Court of Appeal that he abandoned the issue of interrogatories and he cannot raise it here without leave. Unfortunately counsel did not seek leave to raise it.

I think I can now say something on the answers to the interrogatories in the alternative. Let me allow myself to quote what I said in Alhaji Abubakar v Alhaji Yar'Adua at pages 499 and 500:

"The main arm of interrogatories is to uphold the case of the party interrogating and destroy that of his opponent. Interrogatories elicit admissions from the opponent and admissions are most valuable for determining liability... Although interrogatories which meet with positive answers save the burden of proof placed on the plaintiff, a plaintiff cannot by sheer craftiness or artifice in administering the process of Interrogatories, shift the burden of proof on defendant. That will be reversing the trend in our adjectival law in sections 136, 137 and 139 of the Evidence Act. In other words, a court will

not allow a plaintiff to lure a defendant to admit a fact which is unequivocally or categorically denied in the statement of defence. A court will invoke its equitable jurisdiction to stop such smartness on the part of the plaintiff."

B A party in interrogation has no legal duty to help by his answers, to prove the case of the interrogator. The answers to the interrogatories did not in anyway assist the appellants in the proof of their case. Counsel for the appellants seems to share this view when he said that the answers are evasive and unsatisfactory. Above all, the
C appellants did not prove the content of the interrogatories.

Let me take the issue of the Court of Appeal not dealing with it. I am firmly with learned Senior Advocate for the appellants. The Court of Appeal was wrong in not taking the issue. It is the law that a court should react to all the relevant issues before it and come to a
D decision one way or the other. A court has no right to ignore relevant issues. I do not think silence on the issue on the part of the Court of Appeal is deliberate. It is likely to be an oversight, particularly, in a case of this dimension and magnitude. I cannot say for sure that I
E have taken all the issues raised by the parties in this appeal. What I am sure is that I have taken all the important issues.

Let me now take section 146(1) of the Electoral Act 2006 and our decision in Buhari v Obasanjo. Section 146(1) provides as follows:

F *"An election shall not be liable to be invalidated by reason of non compliance with the provisions of the Act if it appears to the Election Tribunal or Court that the election was conducted substantially in accordance with the principles of the Act and that the non compliance did not affect substantially the result of the election"*

G The quarrel on the subsection is on the party the burden of proof lies. It is the contention of the appellants that the burden of proof lies on the respondents. It is the retention of the respondents that the burden of proof is on the appellants. Who is correct? In
H Buhari v Obasanjo, Belgore JSC (as his then was) said:

"The burden is on petitioners to prove that non compliance has not only taken place but also has substantially affected, the result (must be) fulfilled. There must be clear evidence of non compliance, then that non compliance has substantially affected the election"

Ejiwunmi, JSC also said:

"I have no doubt that the learned Justice of the Tribunal rightly interpreted the provisions of section 135(1) of the (2002) Electoral Act. This in effect means that the onus lies on the Appellants to establish first substantial non compliance and secondly that it did or could have affected the result of the election." B

Ejiwunmi, JSC in the above referred to the decision of Tabai JCA (as he then was) on the issue. Tabai JCA (as he then was) said:

"On the principle of the decision, it is common ground that the petitioner must first establish the non compliance. The controversy is only as to the point at which the onus shifts to the respondents to prove that the non compliance, though established, did not substantially affect the election and the result. In my considered opinion whether or not at the end of the case of the petitioner the onus shifts to the respondents to prove that the non compliance did not substantially affect the election and results depends on the court's own perception of the effect of the non compliance. Where the court is of the opinion that the non compliance did not and could not have had any impact whatsoever on the election, then the petitioner has failed to shift the onus of proof and the petition thus fails. But where, in the opinion of the court, the effect of the non compliance is fundamental and has created in the court's mind a doubt on the regularity of the election and authenticity of the ensuing result, then the onus shifts on the respondents. In such a situation, unless the respondents lead evidence to establish that the non compliance did not affect the election and the result, the petition succeeds. It is my respectful view that in such a situation, proof is not beyond reasonable doubt but on the preponderance of evidence" C D E F

Tabai, JCA (as he then was) has said it all. He got it properly and very well when he said and I quote him at the expense of prolixity:" G

"the controversy is only as to the point on which the onus shifts to the respondents to prove the non compliance though established, did not substantially affect the election and the result" H

After correctly identifying the controversy, the learned Justice provided the correct answer as stated above.

The operative words in section 146 (1) are *"if it appears to the*

Election Tribunal or Court that the election was conducted substantially in accordance with the principles of the Act” In view of the fact that the tribunal or court can only come to that conclusion in the light of evidence before it, one of the parties must give that evidence to the contrary and the party is the one who will fail, if that evidence is not given. That party, in my humble view, is the petitioner. He is the party who alleges that the election was not conducted substantially in accordance with the principles of the Electoral Act; the opposite situation in section 146 (1). And this allegation is made by the appellants as petitioners in paragraph 3 of their reliefs.

Learned Senior Advocate for the appellants has urged this court to depart from our decision in Buhari v Obasanjo. He has asked us to follow our decision in Swem v Dzungwe and the English decision of Morgan v Simpson. I will take the two cases. In Swem this court held that once a petitioner establishes non compliance, and the court or other tribunal cannot say whether or not the result of the election could have been affected by such non compliance, the election will be avoided on the ground that civil cases are proved by a preponderance of accepted evidence. At that stage, the onus shifts to the respondent to show that the non compliance did not affect the result of the election.

The position in this case is different. In this case the Court of Appeal held that the non compliance did not substantially affect the result of the election. As the Court of Appeal categorically so held, the onus cannot shift to the respondents to show that the non compliance did not affect the result of the election. In other words, the Court of Appeal was not in doubt on whether the result of the election could have been affected by the non compliance. I do not see any conflict or contradiction between Swem and the decision of the Court of Appeal.

I now take the English case of Morgan v Simpson. In the light of the fact that counsel for the appellants took the case in considerable detail, and regarded it as locus classicus. I will examine it in great detail and thoroughly.

First the facts. At a local government election at which a total of 23,691 votes were cast, 82 ballot papers were properly rejected by the returning officer, 44 of those papers were rejected because

they had not been stamped with the official mark as required by the local election rules. The 44 unstamped ballot papers had been issued at 18 different polling stations, despite notice displayed at the polling stations directing voters to see that ballot papers were stamped, the voters to whom the 44 papers had been issued had not noticed that the polling clerks had failed to stamp them. The returning officer himself had not been at fault. If the 44 ballot papers had not been rejected, but had been counted, the petitioner, a candidate at the election would have won the election by a majority of 7 over the respondent. In consequence of the rejection of the 44 papers the respondent had a majority of 11 and so was declared to be the successful candidate. The petitioner sought an order that the election should be declared invalid under section 37 (1) of the Representation of the People Act 1949, on the ground that it had not been conducted substantially in accordance with the law as to elections; alternatively that even if it had been so conducted, the omissions of the polling clerks had affected the result. B C D

It was held as follows: (1) Under section 37 (1) an election court was required to declare an election invalid (a) If irregularities in the conduct of the election had been such that it could not be said that the election had been “so conducted” as to be substantially in accordance with the law as to elections, or (b) if the irregularities had affected the result. Accordingly, where breaches of the election rules, “*although trivial, had affected the result, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections*” Conversely, if the election had been conducted so badly that it was not substantially in accordance with the election law it was vitiated irrespective of whether or not the result of the election had been affected (2) Although the election had been conducted substantially in accordance with the law as to local elections, the omission to stamp the 44 ballot papers had affected the result of the election which would therefore be declared invalid. E F G H

Section 37(1) of the Representation of the Peoples Act, 1949 came up for interpretation in the case. The subsection reads:

“No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other per-

son in breach of his official duty in connection with the election or otherwise of the local elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to election and that the act or omission did not affect its result.”

B Interpreting the subsection positively, Lord Denning said at page 726:

“That section is expressed in the negative... The question of law in this case is whether it should be transformed into the positive so as to show when an election is to be declared invalid. So that it would run: ‘A local government election shall be declared invalid (by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules) if it appears to the tribunal having cognizance of the question that the election was not so conducted as to be substantially in accordance with the law as to elections or that the act or omission did affect the result’

D I think that the section should be transformed so as to read positively in the way I have stated. I have come to this conclusion from the history of the law as to election and the cases under the statutes to which I now turn, underlining the important points.”

E Section 37(1) of the Representation of the People Act 1949 is generally similar to section 146(1) of the Electoral Act, 2006. In that general context, reference to Morgan is proper and I underline in that general context. I agree with the positive interpretation of the subsection by Lord Denning. I am however wondering whether that positive interpretation does not throw the burden of proof in this case on the appellants as petitioners. And here, I rely on the following sentence:

G “If it appears to the tribunal having cognizance of the question that the election was not so conducted as to be substantially in accordance with the law as to election and that the act or omission did affect the result.”

H As it is, both section 37(1) of the Representation of People the Act 1949 and section 146 (1) of the Electoral Act, 2006 share the words “if it appears” as common denominators. As I have construed the words above in relation to proof, I will not repeat myself.

Recapitulating the law, Lord Denning said at page 728 as follows:

“Collating all these cases together, I suggest that, the law can be stated in these propositions. (1) if the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. That is shown by the Hackney case, where two out of 19 polling stations were closed all day, and 5,000 voters were unable to vote. (2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules of mistake at the polls provided that it did not affect the result of the election. That is shown by the Islington case where 14 ballot papers were issued after 8p.m. (3) But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls and it did affect the result then the election is vitiated. That is shown by Gunn Sharp, where the mistake in not stamping 102 ballot papers did affect the result. Applying these propositions, it is clear that in this case, although the election was conducted substantially in accordance with the law, nevertheless the mistake in not stamping 44 papers did affect the result. So the election is vitiated. The election of Mr. Simpson must be declared invalid.”

What does Morgan say? In (1) and (3) the election is vitiated. In (2) the election is not vitiated. In (1) Lord Denning said that if the election was conducted badly that it was not substantially in accordance with the law as to election, the election will be vitiated. Is there any proof by the appellants that the election was conducted so badly that it was not substantially in accordance with the Electoral Act? I see tons and torrents of allegations but I do not see proof of them. I do not see proof that the election was conducted badly, not to talk of proof that the election was conducted “so badly” And what is more. I do not see any evidence proving the Heckney type of closure of polling stations and disenfranchisement of voters. I only see allegations upon allegations. Why then Morgan?

I say on (2) that it is in some agreement with section 146 (1) of the Electoral Act, as it relates to the second leg in respect of not affecting the result of the election. In (3), the election will be vitiated

even though it was conducted substantially in accordance with the law as to election if breach of the rules of election or mistake at the polls, did affect the result of the election.

Considering the above three basic principles and applying them to the facts of the case, Lord Denning concluded his judgment at page 728:

“Applying these propositions, it is clear that in this case, although the election was conducted substantially in accordance with the law, nevertheless the mistake in not stamping 44 papers did affect the result. So the election is vitiated. The election of Mr. Simpson must be declared invalid.”

Learned Senior Advocate for the appellants quoted the following dictum of Stephenson LJ at page 31:

“If substantial breaches of the law are, as I think enough to invalidate an election though they did not affect its result, it follows that contrary to the opinion of the Divisional Court, trivial breaches which affect the result must also be enough.”

With respect, the first leg of the statement in respect of breaches not affecting the result, is not our law as it is contrary to section 146 (1) of the Electoral Act. It could be English law; certainly not Nigerian law, and so it is out.

Learned Senior Advocate also cited the following dictum later on the same page:

“Any breach of the local election rules which affects the result of an election is by itself enough to compel the tribunal to declare the election void.”

That is the position in our law as it speaks the language of section 146 (1) of the Electoral Act, not what Stephenson, LJ said earlier. And so it keeps the company of section 146(1).

In Morgan v Simpson, Morgan, the conservative party candidate, was declared by the returning officer as having scored 10,329 votes, while Simpson, a candidate of the Labour Party, was declared by the returning officer as having scored 10,340 votes. Simpson was declared winner of the election. The scrutineers found that 44 ballot papers were rejected for want of official marks. Of the 44 rejected Morgan had 31 and Simpson had 13. So if those 44 ballot papers had been counted and not rejected, Morgan would have won. She

would have received 10,329 plus 31, that is 10,360 votes. Mr. Simpson would have received 10,340 plus 13, that is 10,353. So Morgan would have been elected by a majority of 7 over Simpson. That is the basis of the decision in Morgan v Simpson and the ratio decidendi should be construed in the light of the above facts. I expected learned Senior Advocate to state or reveal the facts of the case. He did not. I am surprised that he did not, particularly where he submitted very strongly that this court should depart from the decision in Buhari v Obasanjo and follow the English case of Morgan v Simpson. Why should Morgan be the King and Buhari the subject or better, the servant? Why should the court move to the United Kingdom to use a case which does not apply and drop our decision which applies? This is one thing that will make the Hausa man, exclaim haba I am sorry that I have to disobey him. I cannot see my way clear in departing from Buhari v Obasanjo and follow Morgan v Simpson. This is more so when in this case, the appellants did not lead evidence as to the specific votes which are invalid and a 'fortiori that such votes substantially affected the result of the election, as required by section 146(1) of the Electoral Act. There was such evidence in Morgan but none in this case. Departing from a previous or earlier decision of a court is a very serious judicial exercise which this court can only undertake if it comes to the conclusion that the decision is wrong. The matter is not as easy as the Englishman finding coffee on his breakfast table and seeping it with ease. No. As I do not see anything wrong with the decision in Buhari v Obasanjo I will not depart from it and follow Morgan. This is because Morgan does not apply. So be it.

The crux of this appeal boils down to proof. The petition is full or replete with allegations of non compliance with the Electoral Act but the issue is whether the appellants proved them. By way of recapitulation, I will take in summary in numbered paragraphs the main issues involved in the appeal as they relate to proof.

1. Appellants pleaded in paragraph 7 of the petition that they were excluded from participating in the election. Was this averment proved? How did the 1st appellant get 2,617,848? If the appellants say as in paragraph 11 of the petition that the scores are the "*product of deliberate wrong entries and allocation of figures made by the 4th*"

respondent's agents or officers at the polling units," did the 1st appellant not cast his vote at the election? Did the 2nd appellant not cast his vote at the election? Although the 2nd appellant did not come out clearly on this, did he not in reality cast his vote? What will be their answer to Exhibit EP3/28 in which the 3rd appellant, (the Action Congress) delegated members of the party to participate in the election. What of the evidence of Chief Tom Ikimi and the others I mentioned earlier in this judgment who gave evidence of participation in the election? A community reading of Exhibit EP3/28 and the evidence of the witnesses clearly show that the appellants were not excluded at the election but participated in it. The evidence is regarded in law as evidence against interest. The interest of the appellants as averred in the petition is that they were excluded. Therefore evidence to the contrary, as indicated above, is evidence against interest. Courts of law do not play with evidence against interest. They grab such evidence and use it against the party. The Court of Appeal was not wrong therefore in using the evidence against the appellants. I too use the evidence against them.

Learned Senior Advocate for the appellants submitted on the issue of exclusion that election is a process spanning a period of time and comprise a series of actions from registration of voters to polling on polling day. This submission anticipates two major events: registration and voting. Did the 1st and 2nd appellants not register? If they did not register, how did they cast their votes? Learned Senior Advocate, with the greatest respect, is not correct in contending that the Court of Appeal focused, solely on the 1st appellant's so-called participation on polling day. Registration, by his own admission, is not an activity on election day. Can the learned Senior Advocate be really heard to say that the participation of the 3rd appellant in the electoral process is largely irrelevant. Why? That is quite a new one and I am not prepared to accept it. The participation of the 3rd appellant is inseparable from the participation of the 1st and 2nd appellants. After all, both the Constitution and the Electoral Act recognize political parties and that justifies Exhibit EP3/28.

2. In the light of the correct decision of the Court of Appeal that the appellants were excluded from pursuing the grounds in section 145(1) (a) (b) (c), after invoking the ground of exclusion in

section 145 1(d), can the appellants really contend that they proved their case? In what way, I ask? I must say that wording the reliefs in the way they are, is an unfortunate legal advice. The victims of that advice are the appellants. I will not say more.

3. There are tons and torrents of allegations galore on corrupt practice. Were the allegations proved? As I said earlier, all I see are magisterial submissions in the Brief of the appellants without proof. Appellants seem to submit that a petitioner need not prove crime beyond reasonable doubt in an election petition. Is this law? I do not know where to find it? The law I know is that where a crime is alleged in an election petition, the petitioner must prove it beyond reasonable doubt. In the absence of such proof, can the appellants really claim that they proved the allegations in their petition?

4. The appellants made a very big and stormy weather of the non serialization of ballot papers. Although the Court of Appeal held that the respondents admitted that the ballot papers were not serialized, I do not see such admission by all the respondents. Assuming that all the respondents so admitted, how does that help the appellants. I have taken the view that as the appellants did not lead evidence to prove that non serialization affected substantially the result of the election within the meaning of section 146(1) of the Electoral Act, the appellants did not prove their case on non serialization. Can they really claim that they proved their case?

5. The appellants stated what they regarded as facts of non compliance with the Electoral Act. I do not see evidence of proof that non-compliance substantially affected the result of the election. As the appellants did not give evidence in proof of the facts, can they really claim that they proved their case?

6. The appellants sued Professor Maurice Maduakolam Iwu as a person instead of suing him in his official name of Chairman, INEC. Again that is an unfortunate legal advice and the victims of that advice, are once again, the appellants The Court of Appeal or this court or any court for that matter has no jurisdiction to repair parties, in a case with a view to making a wrong party wear the garb of the correct party in law. I am surprised that learned Senior Advocate relied on the case of Buhari v INEC and others, SC. 51/2008. Counsel in that case correctly sued the legal person of Chief National Electoral

Commissioner and not Professor Iwu. Unfortunately the appellants in this appeal sued the wrong person. Where is the legal basis for counsel relying on Buhari v INEC? Can the appellants really claim that they proved their petition after the name of the 5th respondent was rightly struck out by the Court of Appeal?

7. The 1st appellant had a legal duty to prove that the excess of about 22,630,848 votes of the 1st respondent are a result of non compliance with the Electoral Act and that if the Act was strictly complied with, he ought to have been the winner. Did the 1st appellant so prove? If he did not, can he really claim that he proved his case?

8. In paragraph 15.85, pages 295 to 306 of the Brief of 1st and 2nd respondents, learned Senior Advocate for the 1st and 2nd respondents undertook a detailed exercise in respect of the appellants not challenging the results or no proof of the allegations made by them. The appellants in their Reply Brief did not successfully dislodge the arguments in the paragraph. Can they really claim that they proved their case?

9. Relief 3 reads as follows:

"It may be determined that the said Presidential election held on 21st April 2007 is invalid for non compliance with the provisions of Electoral Act 2006 which non compliance had substantially affected the result of the election, and that the election be nullified."

The relief is based on section 146(1) of the Electoral Act. Are the appellants really justified in contending that the burden of proving the second arm of the relief is on the respondents? Is that contention consistent with the burden of proof in sections 135, 136, and 137 of the Evidence Act? Can the appellants really say that they proved their case? How and in what way? What law supports them? Did the appellants provide an answer to Issue No.4 of the 4th to 808th respondents Brief? Let me stop here on the questions.

A petitioner who contests the legality or lawfulness of votes cast in an election and the subsequent result must tender in evidence all the necessary documents by way of forms and other documents used at the election. He should not stop there. He must call witnesses to testify that the illegality or unlawfulness substantially affected the result of the election. The documents are amongst those in which the results of the votes are recorded. The witnesses are those who saw it

all on the day of the election not those who picked the evidence from an eye witness. No. They must be eye witnesses too.

Both forms and witnesses are vital for contesting the legality or lawfulness of the votes cast and the subsequent result of the election. One cannot be a substitute for the other. It is not enough for the petitioner to tender only the documents. It is incumbent on him to lead evidence in respect of the wrong doings or irregularities both in the conduct of the election and the recording of the votes; wrong doings and irregularities which affected substantially the result of the election.

In my view, the most important complaint in an election petition is the disenfranchisement of eligible voters who reported within the statutory time to cast their votes but could not for reasons of violation of the Electoral Act. If there is evidence that despite all the non compliance with the Electoral Act, the result of the election was not affected substantially, Election Tribunal must, as a matter of law, dismiss the petition, and that accords with section 146 (1) of the Electoral Act. To use a more positive expression, section 146 (1) is a friend of the respondent, a real friend which the respondent finds most useful at the greatest hour of need. And so the 4th and 5th respondents and by extension, all the respondents find in section 146(1) the greatest friendship in this appeal. I am not here implying that the friendship cannot be broken or severed. It can be broken or severed by a petitioner who satisfies the burden of proof placed on him by the subsection. In this case, the friendship is not broken or severed because the appellants did not satisfy the proof placed on them by the subsection.

A court of law can only pronounce judgment in the light of evidence presented and proved before it. A court of law cannot go outside the evidence presented and proved before it by embarking on a voyage of discovery in search of other evidence in favour of the parties.

Courts of law do not give judgment according to public opinion or to reflect public opinion unless such opinion represents or presents the state of the law. This is because the Judges clientele is the law and the law only. Public opinion is, in most instances, built on sentiments and emotions. Both have no company with the law. They

are kilometers and kilometers away from the law. The pulse of Nigeria's public opinion, if I can feel it, in this case, is to allow the appeal on the speculation or should I say, belief that the election was irregularly conducted in violation of the Electoral Act. The concern of the court is whether the appellants proved their case. Even if the Justices of the Court of Appeal were in the field of the election and saw irregularities and inwardly expressed some anger at the way the election was held, the adversary nature of our jurisprudence will not allow them to use what they saw to give judgment in favour of the appellants. They will insist on proof by the appellants because the Evidence Act does not allow them to take judicial notice of what they saw. This is what the Court of Appeal insisted and rightly too for that matter. The appellants failed because they did not satisfy the burden of proof placed on them by the Evidence Act and section 146 (1) of the Electoral Act. I cannot help or assist the appellants as I am bound by the law.

The Court of Appeal could not have moved to the streets in Nigeria to procure inculpatory evidence in favour of the appellants. For instance, the Court of Appeal could not have moved to Warri/Sapele Road, Warn, Lere Street Saminaka, Okpara Avenue Enugu or Barracks Road, Makurdi to collect evidence in favour of the appellants. The court must be in its building to receive evidence and that was what the Court of Appeal did.

From the trend of the judgment, the electorate and some Nigerians may ask, if I am saying that the Presidential Election was perfect and that there was no non compliance with the Electoral Act. I am not saying that. The point I am making is that the appellants did not prove that. They did not prove that acts of non-compliance affected substantially the result of the election. The appellants brought the case to the court and the law requires them to prove it. Our adjectival law of proof is golden as it is the basis of winning a case. And that golden law of proof applies to election petitions. Apart from sections 135, 136, 137 and 138 of the Evidence Act, section 146(1) of the Electoral Act has added to the bandwagon of proof, all heaped on the petitioners.

Learned Senior Advocate for the appellants has urged us to invoke section 22 of the Supreme Court Act. I do not see any reason for that. I therefore decline the invitation.

I should take briefly here the complaint on the language used by counsel. In his Reply Brief, learned Senior Advocate complained of the language and style of the Brief of the 1st and 2nd Respondents. He called the attention of the court to the use of the following words: puerile, spurious, faux pore., morally despicable, chasing shadows. He cited the case of *Udo v Eshiet*, where I said: B

“Learned counsel for the appellant used the forum of his brief to insult the respondents. He referred to the respondent as a person in a fanciful, and lie trapped businesses. Whatever that means, I must say that counsel has no right to use the forum of a brief to insult either the parties or their witnesses. Decent advocacy clearly forbids this style. Tactful advocacy too - while an advocate can suggest to a witness openly in court that he is a liar, it is not proper to use the forum of a brief to descend on the respondent in the way learned counsel did in this case” C
D

Counsel also cited what I said in my book titled *The Brief System in Nigerian Courts* (1999) at page 161.

“The rule of professional conduct requires lawyers to display a respectful attitude towards Judges and exhibit candour and fairness to the court and to the other lawyers. An insulting or abusive brief or derogatory brief tells so much of the meanness of the author and Justices have bad or low opinion on such counsel” E

I endorse the above here as they apply to the situation referred to by counsel for the appellants. F

In his oral submission in court, learned Senior Advocate for the 1st and 2nd respondents also complained of the language used in the Briefs of the appellants. He was not as specific as his colleague. It is possible he had not the time to do so. It is also possible that he had no tangible example. I should say that some of the words used by counsel for the 1st and 2nd respondents are not the best. While some are clearly bad, others need innuendo to untie the real meaning. He need not use some of the words. G

I will take the opportunity of the anger of counsel for the appellants to refer to a more serious language of insult in his Brief. In paragraph 5.11 (b), page 23 of the Appellants Brief, counsel said: H

“In defence of two judgments of the Federal High Court delivered in his favour on 7 March and 3 April, 2007 respectively, the 4th

Respondent and its Chairman, Professor Maurice Iwu, still maintained implacably the position that court judgment or no court judgment Vice- President Atiku Abubakar remained excluded unless the Supreme Court directed him to disobey the Constitution. This hard-line position was pursued in furtherance of former President Obasanjo's no-holds- barred feud against the 1st Petitioner, and his publicly avowed determination, in abuse of his office, as President, to use all means, even if illegal to exclude him from contesting the presidential election"

I should have allowed this to pass unnoticed pretentiously but for the complaint of counsel for the appellants. I do not think such a language is available or should be available to counsel. Certainly, the former President, Chief Olusegun Obasanjo, is not on trial and cannot be heard to defend himself of the very strong abusive and insulting language of "abuse of office". After all, a court of law is not a political soup box where parties freely trade insults. On the contrary, a court of law is a serious legal institution where parties place their case at the corridors of the law for adjudication and decision. Let us keep that sacred tradition and leave the type of language for the newspapers, the television and radio stations, the market place and all that; not for the courts. I know almost all the Senior Advocates who appeared for the appellants in this case. Most of them have appeared before me. They are fine, good and decent Advocates. I am therefore dazed and flabbergasted that they used such language against a person who is not even a party in the case.

I should say that involvement of counsel in a case qua advocate should not go beyond the professional relationship between him and his client. He should handle every case that comes to or before him in his professional capacity and not deeper than the requirements of the profession. Such type of derogatory and insulting language, in most cases, comes from the mouth of counsel if he is more involved in the case beyond professional boundaries. I do not say that such is the situation here. I do not have such evidence. Let us leave sentiments to other professions and professionals; not the legal profession. Again, I say, we should watch our language in court.

I should also make the point here that it is not quite ethical for counsel to assure his client that come rain come sunshine he will win

the case. Counsel is within his professional limits to assure his client that he has a good case and that he counsel will do his best to obtain victory, if that is the position. He should stop there and not assure his client that he will win the case. After all, his advocacy and the judgment is that of the court. By assuring his client that he will win, counsel himself is trying to interfere with the work of the Judge. That is bad. If at the end of the day counsel loses the case, all sorts and stories take the waves of the air most of them unfounded and against the Judge. Judges are not as cheap as that. We want to err only on the side of interpreting the law for lack of knowledge than on or for anything else. Again I do not say that counsel in this case assured the appellants that they would win the case. I do not have such evidence. It is possible that I am unnecessarily straying.

One last word — politics as it is played in Nigeria, leaves much to be desired. There is so much acrimony, bitterness and violence. Nigerians play politics as if they are in a battle field. It is not so. I do not agree that politics is a dirty game. It is a decent game; only some Nigerians make it dirty. The problem in Nigeria is the politics of winner takes it all. Another problem is the gain from it. I will suggest that politics should be made less attractive. If that is done, there will be less fight, acrimony and bitterness.

In years back, the fight in politics was within, in the sense that only the players of the game were involved. In more recent times, they have involved the Judiciary. Nigerian Judges are called all sorts of names by litigants. They are suspected for the slightest action. Parties do not seem to believe that Judges can dispense justice in the light of the law and the law alone. The insults are getting too much. Some of us have always taken the matter as one of occupational hazard. It is gone beyond that and that is very very worrying. In the administration of justice, somebody must be trusted. Why not the Judges. I hate to say what I want to say to end this judgment. But I must say it. No human being and I repeat no human being can influence me in the performance of my judicial duties. Only God can. Fortunately, God is holy and can never make us commit sin. Let every human being get that one straight for now and forever.

Despite all the insults, this court will continue to administer justice in the interest of our most cherished democracy. This court has

consistently promoted democracy in its judgments and will continue to do so in appropriate cases. I recall vividly in recent times that this court, in the promotion of democracy, consistently gave judgments in favour of one of the parties in this case. This court will not shy from its responsibilities as a final court in deserving cases to promote democracy in the performance of its judicial duties in accordance with section 6 of the Constitution. This court has no jurisdiction to interpret or construe clear provisions of the Constitution or a statute in the guise of promoting democracy when the enabling law does not allow it. As that will be a trespass on the constitutional role of the National Assembly, it will not do such a thing. Not at all. This is because this court has a constitutional responsibility to respect and adhere strictly to the separation of powers in the Constitution.

In sum, the appeal fails and it is dismissed. I declare that Alhaji Umaru Musa, Yar'Adua and Dr. Goodluck Jonathan shall continue to remain in office as the President and Vice President of the Federal Republic of Nigeria respectively. I make no order as to costs.

E

MUSDAPHER JSC

I have read before now the judgment of my Lord Aloysius Iyorgyer Katsina-Alu, JSC just delivered with which I entirely agree. In the aforesaid judgment, his Lordship has meticulously and comprehensively dealt with the relevant and crucial issues arising for the determination of the appeal. I only want to briefly comment merely for the sake of emphasis, Can a petition under The provisions of section 145 (1) of the Electoral Act be based on (1) unlawful exclusion of a validly nominated candidate in the election and (2) at the same time questioning the conduct of the election?

Section 145 (1) provides as follows:-

“145 (1) an election may be questioned on any of the following grounds,

- (a) That the person whose election is questioned was, at the time of the election, not qualified to contest the election;*
- (b) That the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act;*
- (c) That the respondent was not duly elected by majority or*

lawful votes cast at the election; OR

(cl) That the petitioner or its candidate was validly nominated but was unlawfully excluded from the election. ”

Now, the appellant's petition was based upon the following grounds of petition:-

(a) The first petitioner was validly nominated by the 3" petitioner bill was unlawfully excluded from the election; B

(b) The election was invalid by reason of corrupt practices.

(c) The election was invalid for reasons of non-compliance with the provisions of the Electoral Act 2006; C

(d) The first: respondent was not duly elected by the majority of lawful votes cast at April, 21st 2007 Presidential Elections. ”

In my view, the ground of petition provided under Section 145 I (d) relating to the exclusion of a candidate from contesting the election and the three earlier grounds under Section 145 (1) (a), (I), and (c) relating respectively to disqualification, corrupt practices and non-compliance and the failure to secure majority of lawful votes are mutually exclusive. A candidate who did not contest the election or who was unlawfully excluded from contesting the election cannot logically, reasonably and legally complain that the election of which he was excluded was marred by rigging, corrupt practices and non-compliance with the provisions of the Act. He was not allowed to participate in the election; he could not therefore be in a position to know or to be affected by any irregularities in the conduct of the election, lie would have no locus standi to question the conduct of the election except of course that lie was unlawfully excluded. Because no matter how well and fair the election-was conducted, it would amount to naught, if a candidate was truly unlawfully excluded; the court will be bound to declare the election void. To combine the provisions of Section 145 (I) (a), (b), (c.) and (d) in a pleading as the petitioner has done is inconsistent, contradictory and divergent It is approbating and reprobating at the same time. Where a petitioner relies on a ground of unlawful exclusion to contest the elections he is statutorily estopped from raising or relying on any other grounds in section 145 1 (a), (b) or (c). H

An Election petition is statutory and is unlike any other civil claim where there is so much latitude. Thus pleading in the alterna-

tive is an expedient which like most expedients, can be carried too far. An example where it was carried too far existed in the history of legal literature, it concerned an action brought against a neighbour for damaging a borrowed cart, the solicitor advised the defendant to plead "That he had never borrowed the cart; and that the cart was damaged and useless when he borrowed it; and that he used the cart with care and returned it undamaged, and that he had borrowed the cart from some person other than the plaintiff; and that the cart, was owned by the defendant himself; and that the plaintiff never owned any cart." This clearly was obviously framed to take the of the case benefit of anything that may turn up, without any clear idea; which the plaintiff is alleging. In the instant case, the court was right in my view when it held: at page 4754 of the printed record

"It is crystal clear from the foregoing that the petitioners are approbating and reprobating at the same time. This should not be allowed since it is frowned by the law. Accordingly this issue is resolved in favour of the respondent against the petitioners. We find that having relied on the ground of valid nomination and unlawful exclusion, the petitioners are, ordinarily, precluded from relying on other ground under section 145,(1) of the Electoral Act, 2006 and the alternative grounds ought to be struck cut. After all it has been variously held that where a statute provides a particular mode of performing a duly regulated by the statute, that method and no other, must have to be adopted. See NUHU SANI IBRAHIM Vs. INEC & OTHERS (1999) 8 NWLR (Pt.614) 334 at 352, MUHAMMADU BUHARI Vs. ALHAJI, MOHAMMED DIKKO YUSUF (2003) 4 NWLR (pt 841) 446 at 498 -499."

It has to be stressed that election petition is not (lie same as any civil claim where in a pleading a party can include alternative and inconsistent allegations from material facts as shown above see also .METAL CONSTRUCTION (W.A.) LTD. Vs. ABODERIN. (1998) 8 NWLR (pt 563)538

In any event the word "OR" as used in section 145 (1) of the Electoral Act, 2006 has been interpreted judicially see ALHAJI Vs. AIYELERU (1993) 3 NWLR (pt 208) 126, ABIA STATE UNIVERSITY Vs. ANYEBE (1996) 3 NWLR (pt 439) 646. The word "Or" is a disjunctive particle used to express an alternative or to give a choice

among one or more things. I do not buy the argument of counsel for the appellants that the word "OR "used in section 145 (1) has the same meaning with "and" used in the same section. See the opinion JESSEL M. R. in the case of MORGAN Vs. THOMAS (1882) 9 4 BD 643 at 645. It is my judgment that the court acted correctly in striking out the alternative grounds of the petition. B

Now, the question that falls for consideration is whether the first appellant was unlawfully excluded from contesting the presidential elections. In his pleadings and the evidence the 1st appellant clearly stated that he had taken part in the elections. See paragraphs 16, 18 C (a) (xxii), (a) (xxiii), 18 (a) (xxiv) and 20 where the appellants clearly pleaded participation in the election see also the evidence of the witnesses called by the appellants, Alhaji Omar Shittien, Chief Tom Ikimi, Senator Ben Obi, the 2nd appellant herein, Alhaji Lai Mohammed etc. In my view, the first appellant cannot be heard D to say he was unlawfully excluded from participating in the presidential elections.

It is for the above and for the fuller reasons contained in the judgment of my Lord Aloysius lyorgyer Katsina-Alu aforesaid, that I E too find the appeal unmeritorius and I accordingly dismiss it. I make no order as to costs.

OGUNTADE JSC (DISSENTING)

The 1st and 2nd appellants herein were the Presidential and F Vice-Presidential candidates of the 3rd appellant at the April 21st, 12007 Presidential election in Nigeria. The 1st and 2nd respondents were the Presidential and Vice-Presidential candidates of the 3rd respondent at the said election. Hie election was conducted by the 41st G respondent (hereinafter referred to as INEC) under the chairmanship of the 51st respondent. At the conclusion of the election, the 4th respondent declared that the 1st respondent, (he candidate of the 3rd respondent was the winner with 24,678,227 votes. The 1M H appellant came 3rd with 2,637,848 votes.

The appellants were dissatisfied with the declaration made by INEC that the 1st and 2nd respondents had won the election. They brought before the Court of Appeal (hereinafter referred to as the

court below) sitting as an Election Tribunal, a petition challenging the said declaration. The court below on 26-02-08 in its judgment dismissed the petition. The appellants were dissatisfied with the judgment of the court below. They have brought this final appeal against it on several grounds of appeal. Ten issues for determination were formulated out of the grounds of appeal. The ten issues read:

"1. Whether, after its Ruling on 20th September, 2007, the lower court, in its judgment delivered on 26th February, 2008, was not in error to have re-opened consideration of the issue that the petition in its entirety was incompetent and that 5th Respondent was wrongly joined in the petition. (Grounds 2, 3 and 4)

2. Whether the lower court is right in holding, firstly, that the 1st petitioner was not unlawfully excluded from the election and, secondly, that, having pleaded unlawful exclusion, he cannot question the election on any other ground. (Grounds 5, 7, 8, 9, 10, 14 & 15).

3. Whether the judgment on appeal to this court is not vitiated by the court's use of Section 146 of the Electoral Act 2006 to shield from invalidity, various infractions of the Act, including cases of non-compliance amounting to corrupt practice, non-compliance with the provisions relating to ballot papers and to the Voters' Register. (Grounds 11, 18, 20, 21, 34 & 36).

4. Whether the decision of the Court of Appeal sticking out the name of the 5th Respondent on the ground that he is not a juristic personality is correct having regard to the pleadings, evidence and entire circumstances of the petition. , (Ground 6).

5. Whether the Court of Appeal rightly deemed the 1st Respondent as having been duly elected President of the Federal Republic of Nigeria by majority of valid lawful votes of 24,638,063 in the face of the three conflicting 'Final' results of the election which the 4th and 6th Respondents were unable to explain or reconcile by their pleadings or by evidence at the trial. (Grounds 1, 23, 24, 25 and 38).

6. Whether the allegations of apparent similar handwriting on documents tendered by consent can only be established by calling expert handwriting analyst, when Respondents offered no explanation beyond bare denial through unnamed, un-sworn witnesses,

who wee not the authors of the said documents. (Ground 19).

7. Whether the decision of the Court of Appeal to the effect that the petitioners did not specifically identify any police officer or soldier who participated in the conduct of the election was correct having regard to the admissions on record, pleadings and evidence. (Ground 22). • B

8. Whether or not the failure of the Court of Appeal to consider the validity and admissibility of all the witnesses statements of the 1st & 2nd Respondents and some of those of the 4th - 808th Respondents occasioned a miscarriage of Justice. (Ground 31). C

9. Whether or not the total failure of (he Court of Appeal to evaluate and pronounce upon the evidence elicited from the 5th Respondent by way of answers to (he administered interrogatories occasioned a miscarriage of justice. (Ground 27, 28, 29, 30, 32).

10. Whether this is not a proper case for the Supreme Court D to invoke Section 22 of the Supreme Court Act to invalidate the elections in view of:

(i) failure of the Court of Appeal to evaluate evidence on vital issues relating to delivery and supply of ballot papers;

(ii) disregarding petitioners' submissions on thousands of exhibits that supported petitioners as highlighted in Schedules 1-25 incorporated into their final addresses; E

(iii) failure of the. Court of Appeal to properly evaluate and pronounce on evidence led by the petitioners in their witnesses prejudicial conclusions not borne by the records; F

(iv) allowing extraneous political considerations to affect their judgment to the prejudice of the petitioners. (Grounds 17, 18, 26, 33/37 & 39).

6. Whether the allegations of apparent similar handwriting on documents tendered by consent can only be established by calling expert handwriting analyst, when Respondents offered no explanation beyond bare denial through unnamed, un-sworn witnesses, who wee not the authors of the said documents. (Ground 19). G

7. Whether the decision of the Court of Appeal to the effect that the petitioners did not specifically identify any police officer or soldier who participated in the conduct of the election was correct having regard to the admissions on record, pleadings and evidence. H

(Ground 22).

8. Whether or not the failure of the Court of Appeal to consider the validity and admissibility of all the witnesses statements of the 1M & 2nd Respondents and some of those of the 4th - 808th Respondents occasioned a miscarriage of Justice. (Ground 31).

B 9. Whether or not the total failure of (he Court of Appeal to evaluate and pronounce upon the evidence elicited from the 5th Respondent by way of answers to (he administered interrogatories occasioned a miscarriage of justice. (Ground 27, 28, 29, 30, 32).

C 10. Whether this is not a proper case for the Supreme Court to invoke Section 22 of the Supreme Court Act to invalidate the elections in view of:

"(i) failure of the Court of Appeal to evaluate evidence on vital issues relating to delivery and supply of ballot papers;

D *(ii) disregarding petitioners' submissions on thousands of exhibits that supported petitioners as highlighted in Schedules 1-25 incorporated into their final addresses;*

(iii) failure of the. Court of Appeal to properly evaluate and pronounce on evidence led by the petitioners in their witnesses prejudicial conclusions not borne by the records;

E *(iv) allowing extraneous political considerations to affect their judgment to the prejudice of the petitioners. (Grounds 17, 18, 26, 33/37 & 39).*

F *(v) disallowing the petitioners' independent witnesses on subpoena from testifying on ground that their depositions were not front-loaded at the time of filing of the petition. (Ground 1, 2 & 4 of interlocutory appeal)."*

The issues formulated by the 1st and 2nd respondents are these:

G *"i. Upon a dispassionate interpretation of Section 145(l)(d) of the Electoral Act, 2006, whether the Appellants who complained of total exclusion from participation in the election could still rightly challenge the outcome of the election under any of the grounds stated in Section 145(l)(a)(b) and (c) of the same electoral Act -Grounds 5, 7, 8, 9 and 10.*

ii. Considering the fact that the objection raised to the competence of the appeal was/is jurisdictional, coupled with the fact that; the lower court did not dispose of the' merits of the said objection in

its Ruling of 20th September 2007, whether it can rightly be said that the said objection has been caught by issue estoppel to exclude the valid pronouncement made on it by the lower court in its final judgment Grounds 2, 3, 4 and 6.

iii. Having regard to the stale of the pleadings read together with the mandatory provisions of paragraph 4(1)(c) of the First Schedule to the Electoral Act, 2006 in conjunction with Section 141 of the same Electoral Act, whether the lower court was not perfectly right to have adopted the scores pleaded for both 1st Appellant and the 1st Respondent in the petition and as admitted in the Respondents' reply -Ground 1

iv Bearing in mind the state of the various criminal allegations contained in the petition vis-a-vis Sections 165, 136, 137 and 138 of the Evidence Act and decided and binding authorities of this court on electoral matters, coupled with the terse evidence placed before the court by the Petitioners/Appellants, whether the Appellants ever discharged the onus or burden of proof placed on them to warrant the grant of their petition/reliefs. Grounds 11, 22, 23, 24 and 39.

v. Juxtaposing the myriads and avalanche of criminal or quasi-criminal allegations of non-compliance with the provisions of the Electoral Act, 2006, with the lack of evidence to establish the said allegation, whether the lower court was not perfectly right by holding that the said allegations were unproven and/or that if they were peripherally proved, same was not sufficient to have affected the outcome of the election -Grounds 12, 13, 14, 15, 16, 20, 21, 34, 36 and 38

vi. Do Schedules 1-25 proffered by Appellants' counsel and attached Appellants' written address have any probative value to warrant any court using them to nullify the 1st Respondent's election? -Grounds 17, 18 and 33.

vii. Considering the pleadings of parties, the dearth of evidence of seemingly similar writings/signatures and the written addresses of their respective counsel wherein no invitation was made to the lower court to compare or contrast perceived similar writings/signatures, whether the lower court was under any duty or obligation to start comparing such perceived similar writings/signatures -Ground 19.

viii. Was the lower court not right by affirming the return of the

Respondents as made by the Chief Electoral Commissioner for the Presidential Election after painstakingly considering the evidence before it?. Grounds 25 & 26.

ix. *Considering the answers elicited by way of depositions through affidavits from the interrogatories, coupled with the fact that under any by virtue of Order 33 Rule 8(1) and (2) of the Federal High Court Civil Procedure Rules, Appellants did not complain that the answers elicited by them were insufficient to warrant an order for further answers, whether there was any need for the consideration of the said answers and/or whether the answers have any probative value to the Appellants -Grounds 27, 28, 29, 30 & 32.*

x. *Upon a holistic construction of the Election tribunal and Court Practice Directions 2007 (Practice Directions) whether Respondents' witness statements which Appellants copiously made use of at the lower court and in their brief before this court were/are not properly placed before the lower court — Grounds 30 & 31."*

The other respondents raised issues for determination in the appeal which are similar to those set out above.

The important issue 1 like to consider first in this judgment is whether or not the appellants had not complied with Section 145(1) of the Electoral Act, 2006 in the manner they framed the grounds upon which they asked that the election of 2 1st April, 2008 be set aside.

The Petitioners/Appellants in framing their grounds stated in paragraph 15 of the petition thus:

"15. The grounds on which (he petition is based are -

(a) The Is' Petitioner was validly nominated by the 3rd Petitioner but was unlawfully excluded from (he election.

ALTERNATIVELY THAT:

(b) The election was invalid by reason of corrupt practices.

(c) The election was invalid for reasons of non-compliance with the provisions of the Electoral Act, 2006 as amended, and

(d) The 1st Respondent was not duly elected by majority of lawful votes cast at the April 21, 2007 Presidential election."

Parties' counsel by their final addresses before the court below were locked in a serious argument as to whether or not the Petitioner who had raised the ground of unlawful exclusion from the April 21

2007 Presidential Election could still validly raise the other grounds in respect of acts said to have arisen during the course of the election. It was argued by the respondents that the ground of unlawful exclusion could not be raised in the petition in addition to 'those of corrupt practices, non-compliance and that the 1st respondent was not elected by a majority of lawful votes. The-appellant' counsel on the other hand argued that the claims were brought in the alternative and that it was permissible in law to do so. B

The court below in its judgment upheld the contention of the respondents by concluding thus: C

"Learned Senior counsel for the Petitioners confused reliefs sought in an election Petition and grounds therein, which in our humble view are distinct while reliefs or prayers can be made in the alternative in a i election petition, a ground of exclusion cannot be made in the alternative with other grounds. A ground of exclusion in an election petition stands clearly on its own. It is mutually exclusive of other grounds. It is crystal clear that from the foregoing that the Petitioners are approbating and reprobating at the same time. I his should not be allowed since it is frowned at by the law. D

Accordingly this issue is resolved in favour of the Respondents against the Petitioners. We find that having relied on the ground of valid nomination and (un)lawful exclusion, the Petitioners are ordinarily precluded from relying on any other ground under Section 145(1) of the Electoral Act, 2006 and the alternative grounds ought to be struck out. E F

Was the court below right in its decision to strike out the grounds raised by the petitioners/appellants oilier than that of unlawful exclusion? I think not. I shall now show why (he court below was in error to do so. G

Section 145(1) of Lie Electoral Act, 2006 which is applicable to this case provides:

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

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

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

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

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

B Section 145(1) above is easy to understand and I do not think that its application should have been made a ground for any contentious argument. When a counsel argues that a petitioner who places reliance on Section 145(1)(d) above could not at the same time make a feasible claim based on the grounds in (a), (b), (c) the coun-
C sel is saying the obvious. A court could not give judgment which at the same time concludes that a petitioner was excluded from the election and on any of the grounds stated above in (a), (b), (c) which deal with acts occurring in the course of the election. Given that po-
D sition it is difficult to understand why such a simple matter was al-
lowed to blossom into a big issue.

The well-established principle of procedure is that a plaintiff or petitioner may in his pleadings raise inconsistent claims. But the court will not give such plaintiff or petitioner a judgment upholding such
E inconsistent claims. The necessity to bring in the same suit claims which are inconsistent is based on common-sense, expediency and the necessity to save time. It is settled law that a plaintiff is not allowed to nibble at his claims or reliefs by bringing in successive suits the claims which could be considered in one and the same suit. This approach
F prevents the resort to a multiplicity of suits on a dispute where all the issues in the dispute could be resolved in one suit.

The petitioners/appellants in this case had approached the court below praying for some reliefs. They were not to be the judges. They could not determine in advance which of the reliefs they claimed
G would be granted. That was a matter to be decided by the court. They needed however to present all their claims to the court in one petition in order to obviate the need to bring another petition on grounds (a), (b), (c) of Section 145(1) should the court dismiss the claim under ground (d). It was incumbent on the court below to
H consider in succession each of the claims made by the petitioners/appellants. That the principal claim fails is all the more a reason to consider the alternative claims. There is no justification for a court to refuse to consider the claims in a suit on the ground that the claims

were brought in the alternative. To do so would lead to a multiplicity of suits arising from the same transaction.

It was argued that an election petition is sui generis and that it is not permissible for that reason to bring alternative claims which are inconsistent. My reaction to such argument is that Section 145(1) of the Electoral Act provides the grounds to be relied upon in an election petition. It does not set out the procedure for bringing the grounds. Paragraph 50 of the first Schedule to the Electoral Act, 2006 makes the Federal High Court (Civil Procedure) Rules applicable to the proceedings before Election Tribunals. Order 26 rules (12)(1) and (3) of the said Federal High Court Rules specifically permit the bringing of inconsistent claims. The said order 26 rules 12(1) and (3) provides:

"12 (1) Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly."

(3) Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief and the same rule shall apply to any counter-claim made or relief claimed by the defendant in his defence."

In *Metal Construction (W.A.) Ltd. v. Aboderin* [1998] 8 NWLR (Pt.563) 538 at 547 this Court per Iguh JSC observed:

"It cannot be disputed that either party to a suit may in a proper case include in his pleadings alternative and inconsistent allegations of material facts, as long as he does so separately and distinctly. A plaintiff is thus entitled to plead two or more inconsistent sets of material facts and claim relief in the alternative, thereunder. He may also rely on several different rights alternatively although they may be inconstant."

See also *Help (Nig.) Ltd. v. Silver Anchor (Nig.) Ltd.* [2006] 5 NWLR (Pt.972) 196 at 222.

The learned author of *PRACTICE & PROCEDURE OF THE SUPREME COURT, COURT OF APPEAL, and HIGH COURTS OF NIGERIA*, Aguda, at page 323 para. 26.121 discussing the issue writes:

"A plaintiff may make his claim in the alternative. He may even set up two or more inconsistent sets of facts and make claims in the

alternative, but care must be taken to plead facts separately and distinctly in respect of which the alternative reliefs are being asked. See Bagot v. East on [1877] 7 Ch.D. 1; Re Morgan, Owen v. Morgan [1904] 35 Ch. D. 492; and Davy v. Garret /1877] 7 Ch. D 473, 489."

B As will shortly be made manifest in this judgment, the facts relied upon by the Petitioners/appellants straddle between exclusion and non exclusion such that it was necessary for them out of elementary prudence to claim in the alternative. Not being diviners they could not have known at the commencement of their petition which facts would be accepted by the court and which would not. In any case, Section 145(1) does not create the procedure by which to make a claim in a petition. It merely creates causes of action. Guidance as to procedure is to be found in the Rules of Court.

D In the petition before the court below, it was pleaded thus in paragraph B:

"The grounds on which the Petition is based are-

(a) The 1st Petitioner was validly nominated by the 3rd Petitioner but was unlawfully excluded from the election.

E *ALTERNATIVELY THAT*

(b) The election was invalid by reason of corrupt practices.

(c) The election was invalid for reasons of non-compliance with the provisions of the Electoral Act, 2006 as amended; and

F *(d) The 1st Respondent was not duly elected by majority of lawful voters cast at the April 21, 2007 Presidential Election. "*

It is seen above that claims (b), (c) and (d) were made as an alternative to claim (r). In other words, the Petitioners/Appellants were saying to the court below 'if you find that we were not unlawfully excluded, please consider our claim on these other grounds.' They then proceeded to set out the material facts upon which they relied in support of the unlawful exclusion pleaded and the three alternative grounds. The duty falling upon the court below, as a court of first instance was to consider the evidence on the different ground;; H pleaded and return its verdict thereupon. The court below ought not to have heeded the entreaties of the respondents' counsel to shoot-down a legitimate procedure. The ploy of the respondents was to prevent a consideration of the alternative claims. As it turned out, the

court below did consider the alternative claims, albeit ex, abitate catitela but it is my firm position that even if the principal claim and the alternative claims made thereto might fail, a court of trial as a matter of constitutional duty must consider both. A plaintiff is entitled to a full hearing of his case before the court and the court has no business electing which of two inconsistent claims it will hear or not hear. Indeed, such an exercise was never necessary in the hearing before the court below. B

I shall now consider the important question as to whether or not the court below was correct in its judgment that the 1st petitioner/ C appellant was not excluded from the elections. In paragraph 16 of the petition, the petitioners/appellants pleaded their case on unlawful exclusion thus:

"16. FACTS OF UNLAWFUL EXCLUSION

(a) The 1st Petitioner was duly nominated by the 3rd Petitioner as its candidate for the 2nd April, 2007 Presidential Election; D

(b) Upon the nomination of the 1st Petitioner, the nomination form was duly completed and submitted to the 4th Respondent;

(c) After submission, the 4th Respondent on 28th Day of December, 2006 invited all the candidates including the 1st Petitioner to its screening and verification exercise; E

(d) Subsequent to the screening and verification exercise, the 4th Respondent published a statement of the full list of the names of candidates standing nominated pursuant to the Electoral Act; F

(e) In the statement of the full names of candidates standing nominated published by the 4th Respondent, the name of the 1st Petitioner was unlawfully excluded;

(f) In addition to sub paragraphs (a) - (e) above, the 4th and 5th Respondents, at different public fora and after nomination had closed, repeatedly declared and stated that the 1st Petitioner was disqualified from contesting the April 21, 2007 Presidential Election and implacably maintained this position until the day of the election,

(g) The Petitioners will contend further that the 4th and 5th Respondents were biased and deliberately failed to give the Petitioners equal opportunity as was given to other candidates to participate in the April 21st, 2007 Presidential Election. H

The court and the court has no business electing which of two

inconsistent claims it will hear or not hear. Indeed, such an exercise was never necessary in the hearing before the court below.

(h) The Petitioners will contend that the action of the 4th and 5th Respondents as enumerated in paragraphs (a) - (f) was deliberate and effectively excluded the 1st and 2nd Petitioners from engaging in a meaningful and effective contest as a candidate at Hie election for which he had been validly nominated by the 3rd Petitioner.

PARTICULARS OF UNLAWFUL EXCLUSION

i. The 3rd Respondent by a letter dated 18th January, 2007 actually instigated the events that led to the unlawful exclusion of the 1st Petitioner.

ii. Upon becoming aware of the letter by the 3rd Respondent during the screening, the 1st Petitioner, in his capacity as a nominated candidate, replied, through his Counsel, to the 4th Respondent, informing the 4th Respondent that the allegations made by the 3rd Respondent were unfounded.

iii. The 4th Respondent at no time thereafter reverted to the Petitioners about their response.

iv. On the 7th day of March, 2007, the Federal High Court in Suit No.: FHC/ABJ/CS/03/2007 between Action Congress v. INEC & Anor. Judgment was delivered by Kuewumi .1. in which it was adjudged, amongst others, that the 41st Respondent lacked power to disqualify a candidate at an election and that such power lies with the Court of Law,

The said Judgment shall be relied upon.

v. Thereafter, in defiance of the said Judgment, the 4th Respondent proceeded to publish its official list of candidates excluding the name of the 1st Petitioner, In addition, the said list was posted on INEC website.

vi. A letter was written by the 3rd Petitioner to the 4th and 5th Respondents on the 9th day of February, 2007 complaining about the unlawful exclusion of its candidate.

vii. The 4th Respondent replied the Petitioner's letter on 17th February, 2007 declining to revisit the unlawful exclusion.

viii. Following the insistence of 4th Respondent on the 1st Petitioner's unlawful exclusion, an action was instituted at the Federal High Court, Abuja in Suit No. FHC/AI3J/ CS/152/2007 (Alhaji Atiku

Abubakar & Anor. V. INEC & Anor.) before Tijani Abubakar .1., Judgment was delivered on the 3rd day of April, 2007 whereupon it was declared as follows:

'(1) That an order is made directing the Defendants not to exclude the 1st Plaintiff from contesting the election to the office of the President of (he Federal Republic of Nigeria. B

(2) That if excluded it is hereby ordered that Defendants include the Name of the 1st Plaintiff as the Presidential Flag bearer of the 2nd Plaintiff.

(3) That the Defendants are hereby restrained from excluding C the name of the 1st Plaintiff as the Presidential candidate of the 2nd Plaintiff except upon pronouncement by a Court of Law.

The judgment which is still subsisting shall be relied upon the trial.

ix Your Petitioners shall lead evidence that in defiance of the D Order Judgment of the Court, the 4th and 5th Respondents persisted in their decision to unlawfully exclude the Petitioner, and stated that it would only obey Orders made by the Supreme Court.

x. Your Petitioners shall lead evidence that apart from the final E list of presidential candidates published by the 4th Respondent on 1 5th March 2007, no further amended, supplementary or modified list of Presidential candidates was published by the 4 1 Respondent in which the name of the Petitioners were included.

xi. Notwithstanding the fact that the 1st Petitioner limegedecjto F allocate 2,637,848 votes to the Petitioner as candidate in the election.

xii. By reason of the unlawful exclusion, it became practically impossible for the 1st Petitioner to present himself effectively as a candidate at the election and for his supporters to canvass for votes on G his behalf.

xiii. The 1st Petitioner was, prior to the election, a two-term Vice-President, who had won two (2) previous Presidential Election, on a joint ticket with the incumbent President, General Olusegun H Obasanjo.

xiv. Upon joining the 3rd Petitioner, the 1st Petitioner pulled a substantial followership which stood him in good stead to have won the election but for the 41'1 Respondent's acts of unlawful exclusion.

xv. *In the course of seeking reversal of his unlawful exclusion, a Judgment of the Supreme Court was delivered on Monday, 16th April, 2007 where it was adjudged that the 41st Respondent had no power to disqualify a candidate in an election without a law Court Order.*

B xvi. *Notwithstanding the judgment of the Federal High Court of 3rd April, 2007 and the Judgment of the Supreme Court of 16th April, 2007, the 4th Respondent still refused to restore and/or publish the name of the 1st Petitioner on the list of candidates standing C nominated as at Tuesday, 17th April, 2007.*

xvii. *On Tuesday iZiLd/ZOL_2MZiJne 809th Respondent in contravention of the Electoral Act, 2006, and the Constitution of the Federal Republic of Nigeria, 1999 issued an Order prohibiting campaign and public meetings until after the date of the Presidential election, which order was brazenly enforced by the law enforcement agencies.*

xviii. *By the prohibition order issued by the Respondent, the Petitioners were effectively deprived of the opportunity to undertake their electioneering campaign up to the 20th of April, 2007, when by E law campaigns were to cease.*

xix. *That the party symbol of the 3rd Petitioner as approved by the 4th Respondent was not reflected on the ballot paper used for the April 21, 2007 Presidential Election the object and effect of which F was to exclude the Petitioners from a meaningful and effective participation in the election.*

At the trial, your Petitioners shall rely on Newspaper publications, video recordings, mobile phone visual recordings, photographs, correspondences, and other forms of communications and other relevant documents exchanged between the parties."

The court below, after giving consideration to the evidence called in support of the ground of unlawful exclusion came to a conclusion in these words at page 4763 - 4764:

H *"In our considered opinion, the above scenario points to the inescapable fact that the 1st Petitioner's name was published by INEC after the judgment of the Supreme Court of April 16, 2007 to contest the Presidential election of 21st April, 2007.*

At this point we appreciate the submissions of the leaned Senior Coun-

sel to the petitioners in respect of his stance over acts which he contended as amounting to acts that constitute exclusion. It appears that from the date of nomination until 16th of April, 2007, (he 4th Respondent attempted to exclude the 1st Petitioner from participating in the election. Certainly, some hurdles were placed on his way which ordinarily should not be so. But by the judgment of the Supreme Court of 16M April, 2007, the coast was cleared for him to contest the election. It needs no further gainsaying the fact that he participated in the election.

Exclusion means 'keeping out, barring, prohibited, eliminated, ruled out. The petitioners, from their own showing in their pleadings, evidence of their salient witnesses as depicted earlier on in this judgment, as well as their conduct after the judgment of the Supreme Court on 16th April, 2007, cannot be heard to say that they have been excluded from the Presidential Election. They were not excluded; they were included and actively participated in the election. This issue is accordingly resolved against (he petitioners and in favour of the Respondents."

From the passage reproduced above, it is apparent that the court below accepted that the 1st Petitioner/Appellant was at least excluded from the election until 16th April 2007 when the Supreme Court gave its judgment which restrained INEC from preventing the 1st Petitioner/Appellant from contesting the election. In coming to the conclusion that (he 1st Petitioner/Appellant was not excluded, the court below relied on (he meaning of exclusion by slating (hat

"exclusion means keeping out, barring, prohibited (sic), eliminated (sic), ruled out."

I am, to say the least disappointed that exclusion from an election did not receive a more incisive and illuminating consideration from their Lordships of the court below. An election in democratic system is not a football game or a theatre show where one pays to watch a game or performance and from which exclusion amounts to little or nothing. Participating as a candidate in an election means more than that. The jurisprudence of (he interpretation of election related laws imposes on a court an understanding of the attributes of democracy and its principles. In an election under a democratic system, all the political parties recognized under the law and their candi-

dates must be treated equally and fairly. The public body organizing (he election must ensure that all the political parties and their candidates are afforded equal opportunity to approach the electors with their party programmes. The public body must not show special favour or disfavour to any of the candidates. An election is like a bazaar where political candidates advertise their party programmes to electors and that is as it should be in a democracy. In (he interpretation of a provision in the Electoral Act, 2006, a court must be conscious of its duty to jealously guard the underlying principles of democratic governance as enshrined in our Constitution.

Sections 14(1), 17(1) and (2)(a) and 42(1) of the 1999 Constitution of Nigeria provide:

"14 - (1) The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice."

"17 - (1) The State social order is founded on ideals of Freedom, Equality and Justice

(2) In furtherance of the social order -

(a) every citizen shall have equality of rights, obligations and opportunities before the law;"

"42- (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex religions or political opinions."

Similarly, Article 3 of the African Charter on Human and Peoples Rights which is now part of the Law of Nigeria following the ratification of the Charter on 17/3/83 provides:

"1. Every individual shall be equal before the law.

2. Every individual shall be entitled to equal protection of the

Law.”

In the interpretation of the words “that the petitioners or its candidate was validly nominated but was unlawfully excluded from the election”, a court must bear in mind that the ‘exclusion’ postulated under Section 145(I)(d) is the refusal to accord to a candidate the equality of treatment as would enable him contest against the other candidates on level terms. You cannot prevent a political candidate from advertising his programmes’ to the electors and turn round to say he was not excluded. A candidate enters into” an election contest in order to engage in a competition of ideas. If the ideas of a candidate are not allowed to float equally with (those of the others before the electors, then the candidate has been excluded from the election. B
C

In an election, the exclusion of a candidate may take several forms. It may be that his name was not placed on the ballot paper or (that his name was on the ballot but the public body organizing (the election makes a statement or does an act which depresses the chance of success of the candidate. In the instant case the substance of the complaint of the 1st petitioner/appellant was that INEC placed obstacles in his way in that the electors in Nigeria were made to believe that he would not be permitted to contest the election. This position remained so until 4 days to the election when the Supreme Court in its judgment ordered INEC to place 1st petitioner’s/appellant’s case on the ballot. INEC’s chairman in his answers on oath to the interrogatories delivered on him stated: D
E
F

“That in answer to the above question I say that:

The initial ballot papers printed to be used for the Presidential election of 21st April, 2007 were serially numbered, with counterfoils and in booklets. However, following the Supreme Court judgment of April 16th the Commission produced a second batch of ballot papers which were not serially numbered because of the extremely limited time for their printing but were packed in bundles of equal quantity so that the quantity delivered could be easily ascertained.” G

The above deposition on oath of INEC’s chairman reveals the resolve of INEC to keep the 1st petitioner/appellant out of the election even to the point of not including his name on the ballot papers until four days to the election. The question is - Did the 1st appellant/ H

petitioner receive equality of treatment with the other candidates in the election as guaranteed to him under the Constitution of Nigeria and (he African Charter of Human and People Rights?

Section 101 of the Electoral Act 2006 provides:

B *“101-(1) For the purpose of this Act, the period of campaigning in public by every political party shall commence 90 days before polling day and end 24 hours prior to that day.*

(2) A registered political party which through any person acting on its behalf during the 24 hours before polling day:

C *(a) advertises on the facilities of any broadcasting undertaking; or*

(b) procures for publication or acquiesces in the publication of an advertisement in a Newspaper, for the purpose of promoting or opposing a particular candidate, commits an offence under this D act and is liable on conviction to a maximum fine of \$4500,000.”

If the other candidates in the election had 90 days for their campaign and the 1st petitioner/appellant had a mere 4 days, did he receive equality of treatment?

E (3) A person other than a political party or a candidate who procures any material for publication for the purposes of promoting or opposing a particular political party or the election of a particular candidate over the radio, television, newspaper, magazine, handbills or any print or electronic medium whatsoever called during 24 hours F immediately preceding or on polling day commits an offence and is liable on conviction to a maximum line of N500,00 or imprisonment for six (6) months or to both.

G 103 - (1) candidate not his party shall campaign for the elections in accordance with such rules and regulations as may he determined by the Commission.

(2) State apparatus including the media shall not be employed to the advantage or disadvantage of any political party or candidate at any election.

H (3) Media time shall be allocated equally among the political parties at similar hours of the day.

(4) At any public electronic media, equal ail time shall be allotted to all political parties during prime times at similar hours each day, subject to the payment of appropriate prices.

(5) At any public print media, equal coverage and conspicuity shall be allotted to all political parties.

(6) Any public media that contravenes subsections (3) and (4) of this Section commits an offence and is liable on conviction to a maximum fine of N800,000 in the first instance and to a maximum fine of N1,000,000 for subsequent conviction.”
(underlining mine)

Let me also emphasize that a court has the duty when interpreting a statutory provision to ascertain the purpose of the provision or the mischief which the lawmaker seeks to prevent. The learned author of Maxwell on the Interpretation of Statutes 12th Edition at page 137 writes on the subject thus:

“..... there is no doubt that ‘the office of the Judge is, to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief.’ To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined: quando aliquid prohibetur, prohibetur et omne per quod devenitur ad

This manner of construction has two aspects. One is that the court, mindful of the mischief rule, will not be astute to narrow the language of a statute so as to allow persons within its purview to escape its net. The other is that the statute may be applied to the substance rather than the mere form of transactions, thus defeating any shifts and contrivances which parties may have devised in the hope of (hereby) falling outside the Act. When the courts find an attempt at concealment, they will, in the words of Willes, C.J., ‘brush away the cobweb varnish, and show the transactions in their true light.’

I have no doubt in my mind that INEC willfully and recklessly excluded the 1st petitioner/appellant from the 21st April, 2007 elections. It persisted in the design to exclude the 1st petitioner/appellant even if it meant frittering away a lot of tax payers’ money. Even if at some stage, INEC had reason to want to exclude the 1st petitioner/appellant, it seems to me that commonsense should have guided INEC to include the 1st petitioner/appellant’s name on the ballot and

to announce to the electors that the 1st petitioner/appellant was not running in the event the judgment of the Supreme Court went against him.

I hold that the Petitioners/Appellants by a preponderance of evidence established that the 1st petitioner/appellant, a candidate
B validly nominated was unlawfully excluded from the election.

I therefore order that the Presidential Elections held in Nigeria on 21st April, 2007 be annulled and a new election conducted within 90 days from today.

Let me also observe that if I had to decide this case on the ground of non-compliance with Section 45(2) of the Electoral Act, 2006, I would -make the same order as I have made in Appeal No. SC. 5 1/2008 that the election be annulled. I would do so because there is abundant evidence including the sworn deposition tiled by
C the Chairman of INEC in answer to the interrogatories served o i him that the ballot papers used for the April 2 1 § 2007 Presidential Elections were not serialized and bound in booklets as required under Section 5(2) of the Electoral Act, 2007.
D

In conclusion, I feel compelled to say that the courts in Nigeria have a duty to ensure that the march towards a true enthronement of democracy is not stalled. If elections are to be held in Nigeria which are credible and rancour free, the starting point is the enforcement of the provisions of our Electoral Act. We cannot be witnessing violence
E resulting in the loss of many lives at each election. An interpretation of the Electoral Act in a manner which undermines rather than promotes the advent of democracy is bound to create avoidable problems for the country.
F

I make no order as to costs.

G

MUKHTAR JSC

At the last Presidential Election held on 21st April, the 1st ad 2nd Respondents in this appeal, Alhaji Umaru Musa Yar'Adua, and Dr. Goodluck Jonathan were elected and declared the President and Vice President of Nigeria respectively, on the ticket of the Peoples Democratic Party. The Petitioners who contested the election on the ticket of the Action Congress, being dissatisfied with the conduct and result of the election filed a Petition at the Court of
H

Appeal; being the court constitutionally empowered to hear the Petition in its appellate jurisdiction. In compliance with the Practice Direction of the court, the Appellants frontloaded their evidence, supporting documents and called witnesses. The Respondents also did the same. All these together with the addresses of Learned Senior Counsel for the parties were adopted and the learned court evaluated and considered the documents respectively, in its judgment, after which it dismissed the Petition. The Petitioners were not happy with the decision, and so appealed to this court on several grounds of appeal. Briefs of argument were exchanged by all the parties to the appeal, and appellant reply brief were also filed by the Appellants. All the briefs of argument were adopted at the hearing of the appeal and oral arguments were proffered by all the Learned Senior Advocates of Nigeria who appeared for the parties. Issues were formulated in the briefs of argument. Ten issues for determination are contained in the Appellants' brief of argument as follows:-

"1. Whether, after its ruling on 20th September, 2007, the lower court in its judgment delivered on 26th February, 2008 was not in error to have re-opened consideration of the issue that the petition in its entirety was incompetent and that 5th respondent was wrongly joined in the Petition.

2. Whether the lower court is right in holding, firstly that the 1st petitioner was not unlawfully excluded from the election and,??? 'secondly, that having pleaded unlawful exclusion, he cannot question the election on any other ground.

3. Whether the judgment on appeal to this court is not vitiated by / the lower court's use of section 146 of the Electoral Act 2006 to shield from invalidity various infractions of the act, including cases of non-compliance amounting to corrupt practice, non-compliance with the provisions relating to ballot papers and not to the voters register.

4. Whether the decision of the Court of Appeal striking out the name of the 5th respondent on the ground that he is not a juristic personality is correct having regard to the pleadings, evidence and entire circumstances of the petition.

5. Whether the Court of Appeal rightly deemed the 1st respondent as having been duly elected President of the Federal Republic of Nigeria by majority of lawful votes of 24,638,063 in the •

face of the three conflicting 'Final' results of the election which the 4th and 6th respondents were unable to explain or reconcile by their pleadings or by evidence at the trial.

B *6. Whether the allegations of apparent similar handwriting on documents tendered by consent can only be established by calling expert handwriting analyst, when respondents offered no explanation beyond bare denial through unnamed, unsworn witnesses, who were not the authors of the said documents.*

C *7. Whether or not the decision of the Court of Appeal to the effect that the petitioners did not specifically identify any police officer or soldier who participated in the conduct of the election was correct having regard to the a < 'missions on record.*

D *8. Whether or not the failure of the Court of Appeal to consider the validity and admissibility of all the witness statements of the 1st and 2nd respondents and some of those of the 4th - 808th respondents occasioned a miscarriage of justice.*

E *9. Whether or not the total failure of the Court of Appeal to overturn and pronounce upon the evidence elicited from the 5th respondent by way of answers to administer interrogatories occasioned a miscarriage of justice.*

10. Whether this is not a proper case for the Supreme Court to invoke section 22 of the Supreme Court Act to invalidate the election in view of.

F *(i) Failure of the Court of Appeal to evaluate evidence on vital issues relating to delivery and supply of ballot papers,*

G *(ii) Disregarding petitioners submissions on thousands of exhibits that supported petitioners' as highlighted in schedules 1 - 25 incorporated unto their final addresses; (iii) Failure of the Court of Appeal to properly evaluate and pronounce on evidence led by the petitioners in their witness statements and ascribing to such witness statements prejudicial conclusions not borne by the records; (iv) Allowing extraneous political considerations to affect their judgment to the prejudice of the Petitioners,*

H *(v) Disallowing the petitioners' independent witnesses on subpoena from testifying oil ground that their depositions were not frontloaded at the time of filing of the petition."*

The 1st and 2nd Respondents in their own brief of argument

formulated issues for determination of the appeal.

iii Having regard to the state of the pleading read together with the mandatory provisions of paragraph 4(1) (c) of the first schedule to the Electoral Act, 2006 in conjunction with Section 141 of the same Electoral Act, whether the lower court was not perfectly right to have adopted the scores pleaded for both 1st appellant and the 1st respondents' reply. B

iv. Bearing in mind the state of the various criminal allegations contained in the petition vis-a-vis Sections 135, 136, 137 and 138 of the Evidence Act and decided and binding authorities of this court on electoral matters, coupled with the terse evidence ' - placed before the court by the petitioners/appellants, whether the appellants ever discharged the onus or burden of proof placed on them to warrant the grant of their petition/reliefs. C

v. Juxtaposing the myriads and avalanche of criminal or quasi-criminal allegations of non-compliance with the provisions of the Electoral Act, 2006, with the lack of evidence to establish the said allegation, whether the lower court was not perfectly right by holding that the said allegations were unproven and/or that if they were peripherally proved, same was not sufficient to have affected the outcome of the election. D
E

vi. Do schedules 1-25 procured by appellants counsel and attached to appellants' witness address have any probative value to warrant any court using them to nullify the 1st respondent's election? F

The 3rd Respondent's Learned Senior Counsel formulated 11 issues that are virtually in pari materia with the issues reproduced supra, in the Appellants' brief of argument. Likewise the 4th - 808th Respondents' issues.

The 810th Respondent formulated a single issue in its brief of argument, and the issue reads:-

"Whether the 'soldiers' who were alleged to have committed electoral malpractice could be said to have participated in the conduct of the election, especially when the said 'soldiers' were not identified." H

A notice of preliminary objection was filed by the Learned Senior Advocate for the 1st and 2nd Respondent and it was argued in their brief of argument.

In the lower Court the, Respondents filed separate applications seeking to terminate the Petition on the alleged incompetence of the petition as a result of alleged misjoinder of the ground of unlawful exclusion with other grounds. The applications were dismissed.

B The grounds upon which the Appellants predicated their case are as follows:-

“(a) The 1st petitioner was validly nominated by the 3rd Petitioner but was unlawfully excluded from the election;

ALTERNATIVELY THAT:

C *(b) the election was invalid by reason of corrupt practices,*
(c) the election was invalid for reason of non-compliance with the provisions of the Electoral Act, 2006 as amended;

(d) the 1st Respondent was not duly elected by the majority of lawful votes cast at the April, 21, 2007 Presidential Election.”

D It is the argument of the Learned Senior Advocate for the Appellants that the question raised is whether, under Section 145(1) of the Electoral Act 2006, a Petitioner who pleads unlawful exclusion, cannot question the election on any other ground as a claim in the alternative. The question is not whether the grounds in Section
 E 145(1)(a) (b) and (c) can be pleaded together with, or in the alternative to, the grounds in Section 145(d). The argument is that unlawful exclusion, by its very nature, precludes its being combined with other grounds, whether together or in the alternative. The Learned Senior
 F Counsel stated the general principle of pleadings in ordinary, non-election civil proceedings is clear enough, and is stated by the Supreme Court in Metal Construction (W.A.) LTD. v. Aboderin 1998 8 NWLR part 563, which was re-affirmed by the same court in the cases of Newbreed Organisation Ltd. v. Erhomo 2006 5 NWLR part
 G 974 page 499, Help (Nig) Ltd. v. Silver Anchor (Nig) Ltd. 2006 5 NWLR part 972, and XS (Nig) Ltd. v. Taisei W.A. Ltd. 2006 15 NWLR part 1003 page 533. He also referred to Order 26 Rules 12 (1) and (3) of the Federal High Court Civil Procedure Rules 2000 made applicable in Election Petition proceedings by paragraph 50, of the 1st
 H Schedule to the Electoral Act supra, Bulen and LeaRe and Jacob's Precedents of pleadings, 12th Edition at page 41, and Nwadialo's, Civil Procedure in Nigeria, 2nd Edition at page 381. The Learned Senior Counsel after citing the above authorities, however agreed

that the decisions were only persuasive authorities, not binding. The Learned Senior Counsel continued that without a binding precedent, the issue has to be decided largely on the basis of the interpretation of the words used in Section 145(1) of the Electoral Act *supra*. Now, he is talking 1 would say. According to him the word 'or' as interpreted by the Court below was out of context, and also the lower court did not take into account the meaning of the word 'any' of the following grounds, which appear in the first line of Section 145(1) of the Electoral Act. He referred to the cases of Texaco Panama Inc. v. Shell PD.C.N. Ltd. 2002 5 NWLR part 759 page 209, Awuse v. Odili 2003. 19 NWLR part 851, page 116, Ndoma-Egba v. Chukwuogor 2004 6 NWLR part 869, and the Federal Steam Navigation Company Ltd., v. Department of Trade and Industry 1974 2 All ER 97. B C

In their own brief of argument, the learned Senior Advocate for the 1st and 2nd Respondents submitted that a Petitioner cannot combine the ground of exclusion envisaged and anticipated or even provided for under Section 145(1) (d) with the other grounds provided under Section 145(1) (a) (b) and (c) of the Electoral Act, as doing so will make his Petition speculative, self contradictory, inconsistent and devoid of any cause of action. He relied on the cases of Lakede v. Otubu 2001 7 NWLR part 712 page 256, and NBC v. Ezeifo 2001 12 NWLR part 726 page 11. The Learned Senior Counsel further argued that the use of 'any' in Section 145(1) of the Electoral Act is instructive, and that the use of the word 'any' in Section 145(1) of the Electoral Act *supra*, is to give the Petitioner only an opportunity to pick from one or the grounds listed in Section 145(1) (a) (b) and (c) of the Electoral Act. The use of the word 'or', according to him demarcates the list in Section 145(1) (a), (b) and (c) from Section 145(1) (d). The word 'or' makes it disjunctive. Reliance was placed on the cases of Arubo v. Aiyeleru 4 1993 3 NWLR part 280 page 126 and Abia State University v. Anyaibe 15 1996 3 NWLR part 439 page 646. It was further submitted that the use of the word 'alternative' cannot be allowed in respect of grounds for a Petition; if it can only be claimed or made in the alternative in respect of the reliefs. See ANPP v. Haruna 2003 14 NWLR part 841 page 546. The Learned Counsel likened the claim of the Appellants/petitioners to claim of trespass D E F G H

and possession, which cannot he says cannot hold, relying on the cases of Ibeziako v. Nwagbogu & Anor 1972 ANLR 693, and Aromire and ors. v. Awoyemi 1972 ANLR 105.

B The 3rd Respondent's Senior Counsel in reply contended that under Section 143(1) (a) - (c) a Petitioner may plead any or all of the grounds on the subsections but cannot plead those grounds in addition to ground (d) of the subsection. He referred to Section 18 (3) of the Interpretation Act.

C The Learned Senior Advocate submitted that the law makers were very decisive, exact and clear in their use of words and punctuations in the said Section 145 of the Act. That the word 'or' after (c), is disjunctive, dividing grounds (a), (b) and (c) on one hand, which can be pleaded collectively or alternatively from ground (d) which on the other hand is separate on its own.

D In their own Respondents' brief of argument the Learned Senior 5 Advocate for the 4th - 808th Respondents submitted that a Petitioner who relies on the ground of valid nomination but unlawful exclusion cannot rely on the ground of irregularities of corrupt practice in the conduct of the election, as the grounds of a petition cannot
E be pleaded in the alternative, only reliefs may be so presented. See ANPP v. Haruna supra. His argument as to the meaning of the words 'or' and 'any' in Section 145 are virtually the same with that of the 3rd Respondent. He, went further to urge the Court to dismiss the
F Petition, as it failed to meet the requirements of the law. He placed reliance on the cases of Adesanya v. President of the Federal Republic of Nigeria 1981 2 NCLR 358, Thomas v. Olufusoye 1985 1 NWLR part 18 page 669, Attorney General of Adamawa v. Attorney General of the Federation 2005 18 NWLR part 958 page 581, and
G Olagunju v. Yahaya 1998 3 NWLR part 542 page 501, saying this court has no jurisdiction to entertain the Petition.

H Basically, the argument under this issue should revolve around the interpretation of Section 145 of the Electoral Act supra only, and not other extraneous, or unrelated matters that have no bearing on the complaint in the / corresponding ground of appeal that is tied to this issue. The Independent Electoral Commission is a creation of the constitution vide Section 153 of the Constitution of the Federal Republic of Nigeria 1999, and so the. Electoral Act from which it

was made is the applicable law. That being the position, the provisions of the Act are binding, and in as far as proceedings in election matters are concerned, the said provisions govern them, irrespective of other constitutional provisions. An Electoral Tribunal is bound by them and must apply them accordingly. That is in fact why I think the gravamen of this issue rests on the interpretation of this pertinent provision. For the purpose of clarity I will reproduce the said provision hereunder. It reads:-

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

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

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

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

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

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

My immediate observation of the provisions is that (a), (b) and (c) are lumped together, in the sense that they are punctuated by semi colons. What does that mean? To be able to answer this question I will look at the definition of semi - colon as is in Shorter Oxford English Dictionary. It states:-

"In its present use it is the chief stop intermediate in value between the comma and the full stop."

I would add that it is a very short pause between two clauses. So in essence these paragraphs (a), (b) and (c) are like continuation of one to the other, but with pauses. In other words, they belong to the same class. After stating ground (c), together with the semi colon, the draftsman, then went on to add the word 'or', a word which I think distinguished the grounds in (a) (b) and (c) from the provision in paragraph (d) that immediately comes thereafter. My answer to the question I earlier asked is that paragraphs (a) (b) and (c) belong

to the same family and category. If all the paragraphs (a) (b) (c) and (d) were meant to fall within the same category, then the word 'or' wouldn't have been used. Now, what does the word 'or' stand for?. According to Section 18(3) of the Interpretation Act:-

B *"The word 'or' and the word 'other' shall, in any enactment be construed disjunctively and not as implying similarity."*

In the same Oxford Dictionary the word disjunctive is defined as :-

C *"Having the property of disjoining; characterized by separation. Involving a choice between two or more things or statements; alternative."*

The above definitions definitely shed some light on the fact that paragraph (d) is not an extension of the earlier paragraphs, but is separate, / and an alternative. If the legislature had wanted paragraph (d) to be a continuation of the three preceding paragraphs, there wouldn't have been any need to use the word 'or'.

E It is a cardinal principle; of law that a Statute must be given its correct and true interpretation and not an interpretation that does not represent the intent and purpose of the legislation, and what the legislature had in mind when it was enacted. The duty of the court is to construe each and every word the way it should be construed, and not to go outside it to give a different connotation from what was envisaged by the legislature.

F In the instant case the provision of Section 145 of the Electoral Act is as clear and crystal, as it is straight forward and written in plain language, as not to mislead any court in its interpretation. It is trite that words in an act should be given their ordinary and literal meaning, most especially where the words used are clear and unambiguous, as in the instant case. See *N.B.N. Ltd v. Opeola* 1994 1 NWLR part 319 page 126, *Akinfosile v. Ijose* 1960 SCNLR 447, and *Macaulay v. R.Z.B. Austria* 2003 18 NWLR part 852 page 286.

In this wise, I subscribe to the interpretation given by the Lower Court when it held thus:-

H *"We find that having relied on the ground of valid nomination and unlawful exclusion, the petitioners are, ordinarily, precluded from relying on any other ground under Section 145(1) of the Electoral Act, 2006 and the alternative grounds ought to be struck out. After*

all it has been variously held that where a statute provides a particular mode of performing a duty regulated by statute, the method, and no other, must have been adopted."

I couldn't agree more. It is instructive to note that the Appellants having presented a case that they have been unlawfully excluded from the election, they cannot again in the same breath allege malpractices in an exercise that they have alleged they were not a part of. By so doing, they are approbating and reprobating, a situation which the law frowns on. Perhaps, I should re-emphasise here, that the Appellants should have kept to the provision of Section 145 of the Electoral Act *supra* and predicate their Petition on any or all of the grounds stated in paragraphs (a) - (c), or paragraph (d) only of the said provision. Joining all together in one Petition was certainly against the tenet of the provision. Indeed, I would have also struck out the Petition for being incompetent, but because of the nature of the appeal, and its importance.

Since the position of the law as expounded above is that a Petitioner cannot base his petition on all the grounds stipulated in Section 145 *supra*, I will treat this appeal on ground (a) *supra* in the Petition, being the first ground in the Petition. Consequently, I will deal only with issue (2) *supra* in the Appellants' brief of argument, as it is the only issue relevant to the argument on ground (9). The issue is in *par materia* with issues i and v in the 3rd Respondent's brief of argument, issues (2) (3) in the 4th-808th Respondents' brief of argument, and issue (1) in the 1st and 2nd Respondents' brief of argument.

In arguing issue (2) the Learned Senior Advocate for the Appellants invoked the provision of Section 42 of the Constitution of the Federal Republic of Nigeria *supra*. This provision states the following:-

"42(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex/ religion or political opinion shall not, by reason only that he is such person -

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin,

sex, religions or political opinion are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions. The Learned Senior Counsel has urged the court to read the above provision together with the provision of Section. 17(1) and (2) of the same Constitution, which revolves on freedom, equality and justice. According to the Learned Senior Counsel fairness in an election requires that:-

(i) There is equality between the voters, none being allowed to cast more than one vote or to have greater weight attached to his vote;

(ii) Participation by the candidates is on the basis of equality of treatment by the authorities, none being subjected to unfair restrictions or have "hurdles" put in his way or be accorded in fair advantage or be otherwise unfairly favoured in relation to others, in language currently in common use, the authorities must maintain a level playing field for all the candidates;

(iii) Political parties are free to sponsor candidates and canvass for votes in a truly competitive sense and on the basis of equal treatment with other political parties;

(iv) The territorial units of representation are demarcated as to be equal in population as possible and so as not to favour some people against others (Sections 72 and 113 of the Constitution); (v) Those entrusted with the conduct of an election are not agents of, or are not subject to direction by, any of the contestants or the political parties sponsoring them (Sections 153-158 of the Constitution; Sections 29 and 30 of the Electoral Act 2006) (vi) The contest is in fact conducted impartially and fairly according to laid down rules binding on all, giving no unfair advantages to one candidate and his political party while imposing unfair restrictions on another.

(vii) The result are based on, and truly reflect, the votes lawfully cast at the election by the voters and are free of falsification, inflation or other fraudulent manipulation of figures;

(viii) The winner is determined by a majority or the highest number of such lawful votes.

It is the contention of the Learned Senior Counsel that an election is invalidated by the lack of or absence of any of the above elements of fairness. He placed reliance on the United States of America cases of *Baker v. Carr* 369 U.S. 186, and *Wesbeil TV v. Sanders* 376 U.S. 1. According to the Learned Senior Counsel if as the Lower Court observed “hurdles” were placed on the 1st Petitioner by the authorities, the 1st Petitioner cannot be said, reasonably and fairly, to have participated in the process of the election in the sense required by the principle of free, fair and credible election. Reliance was placed on the case of *Nwole v. Iwuagwie* 2004 15 NWLR part 895 page 61. The Learned Senior Advocate further argued that the lower court was in error when it focused solely on the 1st Petitioner’s participation on the polling day, ignoring the fact that an election is conceived by the Electoral Act 2006, not as a one day affair, but as a process spanning a period of time. He placed reliance on the cases of *PPA v. Saraki* 2007 17 NWLR part 1064 page 453, and *Ojukwu v. Obasanjo* 2004 12 NWLR part 866 page 169. It -was further argued that it was an error for the lower court to construe as participation by the 1st Petitioner, participation by the 3rd Petitioner, who was not a candidate, and could not, as a political party, have been a candidate having regard to Sections 37, 40, 41, 42, 72, 140(1), 144(2) and 145(l)(a) of the Electoral Act, and Section 177 of the Constitution supra; which expressly and specifically require a candidate to be a person.

In reply, the Learned Senior Advocate for the 1st and 2nd Respondents has argued that the Appellants were not arguing the issue within the provisions of the Electoral Act, but appealing to sentiment by referring to the provisions of the Constitution supra. He argued that there is nothing like constructive or technical exclusion within the meaning of Section 145 (l)(d) of the electoral Act. He referred to the statements of the Appellants’ witnesses, which were direct evidence from the Appellants themselves to debunk their claim of unlawful or technical or constructive exclusion from the election. Exhibit EP3/28 was also referred to, and according to the Learned Senior Counsel the cumulative effect of all this is that they constitute an admission against interest and such admission is the best form of evidence which an adversary will use against the opposing party and

which the court is also enjoined to believe. See Onyege v. Ebere 2004 12 NWLR part 889 page 20.

The Learned Senior Counsel for the 3rd Respondent in their brief of argument contended that the names of the 1st and 2nd Appellants were included in the list of Presidential candidates at the election, but they pleaded facts which showed that they participated in the election in paragraphs 18 and 20 of their Petition, and he also referred to the evidence of Chief Tom Ikimi, and Exhibit EP3/281. The Learned Senior Advocate for the 4th - 8th Respondents in response to the Appellants' submission referred the court to the Appellants pleading participation in the election. He contended that the Appellants' agents who were certified by the 3rd Respondent were at the election. Learned Senior Counsel also referred to the evidence of the Appellants' witnesses. According to Learned Senior Counsel the Petition was manifestly inconsistent, in the case it had sought to put forward. He further submitted that there can be no partial exclusion or partial participation in an election. It is either the Petitioners were candidates or they were not, and for this submission he referred to section 139 of the constitution supra and Section 144(1) of the Electoral Act supra.

The Learned Senior Advocate for the Appellants in the Appellants' reply brief replied that it is not inconsistent with claim of exclusion for excluded candidate to have agents at an election; nay at the collation centre. It is on record that the Court below made the following finding- "It appears that from the date of nomination until 16th of April ^ 2007, the 4th Respondent attempted to exclude the 1st {petitioner from participating in the election. Certainly, some hurdles were placed on his way which ordinarily should not be so. But by the judgment of the Supreme Court of 16th April, 2007, the coast was cleared for him to contest the election. It needs no further gain saying the fact that he participated in the election."

What were these hurdles?

In their Petition the Petitioners inter alia averred thus:-

"3. Your Petitioner is a registered Political Party in Nigeria. The 3rd Petitioner sponsored the 1st and 2nd Petitioners as candidates in the aforementioned Election.

14. Your Petitioners state that the Presidential Election held on

21st of April, 2007 was vitiated by acts of unlawful exclusion, widespread corrupt practices, bias and partiality; your petitioners also state that the result of the Election was substantially affected by non-compliance with the provisions of the Electoral Act. 2006.

16. FACTS OF UNLAWFUL EXCLUSION

The facts on which the ground of unlawful exclusion is based are:-

(a) The 1st Petitioner was duly nominated by the 3rd Petitioner as its candidate for the 21st April, 2007 Presidential Election;

(b) Upon the nomination of the 1st Petitioner, the nomination form was duly completed and submitted to the 4th Respondent;

(f) In addition to sub paragraphs (a) - (e) above, the 4th and 5th Respondents, at different public fora and after nomination had closed, repeatedly declared and stated that the 1st Petitioner was disqualified from contesting the April 21, 2007 Presidential Election and implacably maintained this position until the day of the election.

(h) The Petitioners will contend that the action of the 4th and 5th Respondents as enumerated in paragraphs (a) - (b) above, deliberated and effectively excluded the 1st and 2nd Petitioners from engaging in a meaningful and effective contest as a candidate at the election for which he had been validly nominated by the 3rd Petitioner.

Particulars of unlawful Exclusion

(i) The 3rd Respondent by a letter dated 18th January, 2007 actually instigated the events that led to the unlawful exclusion of the 1st Petitioner.

(ii) Upon becoming aware of the letter by the 3rd Respondent during the screening, the 1st Petitioner, in his capacity as the nominated candidate, replied through his counsel, to the 4th Respondent, informing the 4th Respondent.....

(iii) The 4th Respondent at no time thereafter reverted to the Petitioners about their response.

(iv) On the 7th day of March, 2007, the Federal High Court in suit No. FHC/ABJ/CS/03/2007 between Action Congress v. INEC & Anor. Judgment was delivered by Kuewumi J. in which it was adjudged, amongst others, that the 4th Respondent lacked power to disqualify a candidate at an election and that such power lies with the

court of law.

(v) *Thereafter, in defiance of the said judgment, the 4th Respondent proceeded to publish its official list of candidates excluding the name of the 1st Petitioner. In addition, the said list was posted on INEC website.*

B (viii) *Following the insistence of 4th Respondent on the 1st Petitioner's unlawful exclusion, an action was instituted at the Federal High Court, Abuja.....*

C (ix) *Your Petitioners shall lead evidence that in defiance of the Order/Judgment of the court, the 4th and 5th Respondents persisted in their decision to unlawfully exclude the Petitioners, and stated that it would only obey Orders made by the Supreme Court.*

D (xii) *By reason of the unlawful exclusion, it became practically impossible for the 1st Petitioner to present himself effectively as a candidate at the election and for his supporters to canvass for votes on his behalf.*

E (xv) *In the course of seeking reversal of his unlawful exclusion, a judgment of the Supreme Court was delivered on Monday, 16th April, 2007 where it was adjudged that the 4th Respondent had no power to disqualify a candidate in an election without a lawful court order.*

F (xvii) *On Tuesday 17th April, 2007 the 809th Respondent in contravention of the Electoral Act, 2006, and the Constitution of the Federal Republic of Nigeria, 1999 issued an order prohibiting campaign and public meetings until after the date of the Presidential Election, which order was brazenly enforced by the law enforcement agencies.*

G (xviii) *By the prohibition order issued by the 809th Respondent, the Petitioners were effectively deprived of the opportunity to under take their electioneering campaign up to the 20th April, 2007, when by law campaigns were to cease."*

H It is manifestly clear from paragraph 33a supra that the Appellants participated fully in the presidential election of 21st April 2007. There was ample evidence to support the fact that the Appellants .were not only candidates who participated in the said election, they took steps to comply with certain requirements expected of them. The evidence of the 3rd Appellant's Chieftain, like Chief Tom Ikimi,

Alhaji Lai Mohammed, Alhaji Jauro Audu etc., and members of the said Action Congress who performed various functions during the election and at the various election venues are some pointers. To illustrate this, I will reproduce an excerpt of the evidence of Alhaji Jauro Audu which reads thus:-

"That I am the party chairman of the Action Congress in Maiha Local Government representing the 1st Petitioner in this petition..... that I was the one charged with the responsibility of monitoring the conduct of Presidential Election in the Local Government."

If the names of the Petitioners were amongst the names of the Presidential candidates that participated in the said election, and the list of the score of votes, how can they then say they were excluded.? I am not unaware that the election itself is not the only process questioned, the processes that led to the election itself also must also be considered. But the reality on the ground is that the Petitioners in spite of their averments supra, and the evidence of the 2nd Petitioner that:

("The first Petitioner was the validly nominated candidate of the) (Action Congress; the political party that nominated us for the) (Presidential Election held on the 21st of April, 2007..... The 4th) (Respondent excluded us in the said election.....)

(.....)

(3. Atiku Abubakar AC 2,637,848", they stood for the) election.

That they participated in the election is not in doubt whatsoever, and the fact that there was no level playing grounds as submitted by Professor Kasunmu SAN in his oral address in court, does not deviate from the fact that Petitioners were candidates in the election and actively participated in the process of that day. In this wise, I refuse to agree that the Petitioners were unlawfully excluded from the exercise. It is either they were excluded altogether, or not excluded. There is no two ways about it. I find the findings of the Lower Court on this unlawful exclusion ground satisfactory and correct, and I endorse it.

For the foregoing reasoning I resolve the issue in favour of the Respondents, and dismiss the grounds of appeal they are related to,

because they fail. I have had the opportunity of reading the judgment just delivered by my learned brother Katsina-Alu JSC and I agree that the appeal lacks merit and deserves to be dismissed

ONNOGHEN

B This is an appeal against the judgment of the Court of Appeal, Abuja Division, (sitting as the Presidential Election Tribunal) in petition NO.EP3/2/07 delivered on the 26th day of February, 2008 in which the court dismissed the petition of the petitioners/appellants C resulting in the instant appeal.

The 1st and 2nd appellants were the duly nominated and sponsored candidates of the 3rd appellant for the Presidential election into the office of the President and Vice President of the Federal Republic of Nigeria held on the 21st day of April, 2007 at the D end of which the 1st and 2nd respondents, the candidates nominated and, sponsored by the 3rd respondent, the Peoples Democratic Party (PDP) were, on the 23rd day of April, 2007 declared elected by the 4th - 6th respondents as the President and Vice President of the Federal Republic of Nigeria. The appellants were aggrieved E with the return of the said 1st and 2nd respondents and consequently petitioned the Presidential Election Tribunal/Court calling for the nullification of the said election on the following grounds:-

F *“(a) The 1st petitioner was validly nominated by the 3rd petitioner but was unlawfully excluded from the election.*

ALTERNATIVELY THAT:

(b) The election was invalid by reason of corrupt practices;

(c) The election was invalid for reason of non-compliance with 1- the provisions of the Electoral Act, 2006 as amended.

G *(d) The 1st respondent was not duly elected by the majority of lawful, votes cast at the April, 21, 2007 Presidential Election”*

And claimed the following reliefs:-

H *“1. It may be determined that the Presidential Election of 21st April, 2007 be voided for unlawful exclusion of the 1st and 2nd petitioners who were duly nominated by the 3rd petitioner as its candidate at the Presidential election.*

ALTERNATIVELY THAT:

2. It may be determined that Alhaji Umaru Musa Yar'adua

who was returned by the 4th -6th respondents as the President elect based on the Presidential Election held on 21st April, 2007 was not duly elected (or returned) and his election is therefore void.

3. It may be determined that the said Presidential election held on 21st April, 2007 be annulled for non-compliance with the provisions of Electoral Act, 2006, which non-compliance had substantially affected the result of the election. B

4. It may be determined that the said Election, be invalidated or annulled by reason of corrupt practices.

5. It may be determined that a fresh election be conducted C into the office of the President of the Federal Republic of Nigeria, in accordance with section 147 of the Electoral Act, 2006 at which the 1st and 2nd petitioners shall be made contestants.

6. It may be determined that the 5th, 7th - 42nd respondents as officials of the 4th respondent, who directly and negligently mis-conducted the April 21, 2007 Presidential Election in contravention of the provisions of the Electoral Act, 2006 be recommended for criminal prosecution by the Attorney -General pursuant to section 157 of the Electoral Act, 2006. D

7. It may be recommended that the 5th, 7th-42nd respondents who supervised and/or mis-conducted the April 21, 2007 Presidential Election be prohibited from participating in the conduct of the fresh election which may be ordered in consequence of this petition.” E

As stated earlier in this judgment the petition was dismissed in a judgment delivered on the 26th day of February, 2008 resulting in the instant appeal, the issues for the determination of which have been stated by the Learned Senior Counsel for the appellants Prof. Ben Nwabueze, SAN in the appellants' brief of argument filed on the 19th day of May, 2008 as follows:- F

“1. Whether after its ruling on 20th September, 2007, the lower court, in its judgment delivered on 20th February, 2008, was not in error to have re-opened consideration of the issue that the petition in its entirety was incompetent and that 5th respondent was wrongly joined in the petition (Grounds 2,3, and 4). H

2. Whether the lower court is right in holding, firstly, that the 1st petitioner was not unlawfully excluded from the election and,

secondly, that, having pleaded unlawful exclusion, he cannot question the election on any other ground (Grounds 5,7,9,10,14 and 15).

B *3. Whether the judgment on appeal to this court is 'not vitiated by the lower court's use of section 146 of the Electoral Act, 2006 to shield from invalidity, various infractions of the Act, including cases of non-compliance amounting to corrupt practice, non-compliance with the provisions relating to ballot papers and to the voters' register. (Grounds 11,18,20,21,34,35 and 36).*

C *4. Whether the decision of the Court of Appeal striking out the name of the 5th respondent on the ground that he is not a juristic personality is correct having regard to the pleadings, evidence and entire circumstances of the, petition (Ground 6).*

D *5. Whether the Court of Appeal rightly deemed the 1st respondent as having been duly elected President of the Federal Republic of Nigeria by majority of valid lawful votes of 24,638,063 in the face of the three conflicting "final" results of the election which the 4th and 6th respondents were unable to explain or reconcile by their pleadings or by evidence at the trial (Grounds 1, 23,24,25 and 38).*

F *6. Whether the allegations of apparent similar handwriting on documents tendered by consent can only be established by calling expert handwriting analyst, when respondents offered no explanation beyond bare denial through an unnamed, un-sworn witnesses, who were not the authors of the said documents (Ground 19).*

G *7. Whether the decision of the Court of Appeal to the effect that the petitioners did not specifically identify any police officer or soldier who participated in the conduct of the election was correct having regard to the admission on record, pleadings and evidence (Ground 22).*

H *8. Whether or not the failure of the Court of Appeal to consider the validity and admissibility of all the witness statements of the 1st and 2nd respondents and some of those of the 4th - 808th respondents occasioned a miscarriage of justice (Ground 31).*

9. Whether or not the total failure of the Court of Appeal to evaluate and pronounce upon the evidence elicited from the 5th

respondent by way of answers to the administered interrogatories occasioned a miscarriage of justice „ (Grounds 27, 28, 29, 30 and 32).

10. Whether this is not a proper case for the Supreme Court to invoke section 22 of the Supreme Court Act to invalidate the elections in of view of:

(i) failure of the Court of Appeal to evaluate evidence on vital issues rating to delivery and supply of ballot papers;

(ii) disregarding petitioners submissions on thousands of exhibits that supported petitioners' as highlighted in schedules 1-25 incorporated into their final addresses;

(iii) failure of the Court of Appeal to properly evaluate and pronounce on evidence led by the petitioners in their witness statements and ascribing;

(iv) allowing extraneous political considerations to affect their judgment to the prejudice of the petitioners.

(Grounds 17,18,26,33,37 and 39);

(v) disallowing the petitioners independent witness on subpoena from testifying on ground that their depositions were not front-loaded at the time of filing of the petition. (Grounds 1, 2 and 4 of interlocutory appeal)"

In arguing Issue 1, the Learned Senior Counsel for the appellants, Prof. Ben Nwabueze, SAN in the appellant brief of argument filed on 19/5/08 and adopted in argument of the appeal on the 23rd day of October, 2008 referred to the ruling of the lower court delivered on the 20th day of September, 2007 allegedly overruling the preliminary objections of the 1st and 2nd respondents and that of 4th - 808th respondents as to the competence of the petition and the pending appeal by the respondents in respect of that ruling and the re-opening of the issues so ruled upon by the court at the final address stage of the proceedings before the lower court as well as the stand taken by that court on the said issues earlier ruled upon and submitted that the lower court usurped the exclusive appellate jurisdiction conferred on the Supreme Court by section 233(1) of the 1999 Constitution to hear appeals from the decisions of the Court of Appeal and that the lower court, in addition to the above violation, violated the provision of Order 8 Rule 11 of the Supreme Court

Rules, 1985 as amended prohibiting the lower court from entertaining any matter that has been properly and duly entered before this court; that by dismissing the objections that court became incompetent to re-open consideration of the issues in the final judgment as the court, had become functus officio, relying on Ukong vs Udobong (2007) 2 NWLR (Pt. 1077) 184; Anyaegbunam vs A-G, Anambra State (2001) 6 NWLR (Pt. 710), 532; Onyemobi vs President, O.C.C (1995) 3 NWLR (Pt. 381) 50; Ukachukwu vs Uba (2005) 18 NWLR (Pt. 956) 1; Mohammed vs Hussein (1998.). 14. NWLR (Pt. 584) 108; Lawal vs Dawodu (1972) 1 ALL NLR 707 etc; that once an issue has been raised and distinctly decided between the parties, neither party can be allowed to fight the issue again, whether in the same or subsequent proceeding relying on Cardozo vs Daniel (1986) 2 NWLR (Pt. 20) 1; Ebba vs Orodo (2000) 10 NWLR (Pt. 675) 387 at 406; Yusuf vs Obasanjo (2005) 18 NWLR (Pt. 956) 96 at 187 and urged the court to resolve the issue in favour of the appellants.

On his part, Learned Senior Counsel for the 1st and 2nd respondents; Chief Wole Olanipekun, SAN in the 1 and 2nd respondents brief of argument filed on 14/7/08 submitted that the issues raised in the preliminary objection were not considered by the lower court on the ground that same were better resolved during the hearing of the substantive matter- Learned Senior Counsel referred the court to the ruling of the lower court at pages 4749-4750 Of the record; that the principles of issue estoppel relied upon by the appellants do not apply to the facts of this case and that the case of Cadoso vs Daniel supra is irrelevant for the determination of this appeal and urged the court to resolve the issue against the appellants.

On behalf of the 3rd respondent, it was submitted by the Learned Senior Counsel for the 3rd respondent Chief Joe-Kyari Gadzama, SAN, in the brief of argument filed on 5/8/08 that the principles of issue estoppel do not apply to this case as the lower court did not decide the merit of the objections raised against the petition reserving same to the final determination of the petition, and urged the court to resolve the issue against the appellants.

The Learned Senior Counsel for the 4th -808th respondents Kanu Agabi, SAN in the brief of argument deemed filed on 25/9/08 referred to ruling of the lower court and stated that:

(i) The lower court took the view that the application was •
not made within reasonable time, and,

(ii) That at that interlocutory stage, the court was not going to delve into matters which called for determination in the main case; that there was no decision on the issues raised by the respondents in the objections; that the lower court was therefore not functus officio when it finally determined the issues as raised by the parties in the final addresses in the petition; that the principles of issue estoppel do not equally apply to the facts of this case and like his learned friends for the other respondents, urged the court to resolve the issue against C the appellants.

The facts relevant to this issue under consideration are as /
'follows:

On the 3rd of September, 2007 the Learned Senior Counsel for the 4 - 808th respondents filed an application by way of preliminary, cc objection in the lower court praying that the petition be stuck out or in the alternative: D

"(i) An order striking out the 2nd petitioner, Senator Ben Obi and pursuant thereto, an order striking out all paragraphs of the petition including the grounds and prayers relating to him, touching or concerning him and in particular paragraphs 1,2,3, prayers 1 and 5 and 2nd petitioners' name, signature and address at the foot of the petition. E

(ii) An order striking out the 5th respondent Professor Maurice F Maduakolam Iwu, and, pursuant thereto, an order striking out all paragraphs of the petition including the grounds and the prayers containing a/legations against the 5th respondent, touching or concerning him or seeking reliefs against him and in particular paragraphs 5,6,8,13,1 (f)(9)(b), 16(IX); 17(XXV), 17(XXVI), 18, 19, 20 G (a)(b)(c) and 28 and prayers 6 and 7 of the petition,

(iii) An order striking out the grounds in support of the petition because they are inconsistent with the pleadings of the petitioners and are speculative and fishy.

(iv) An order striking out the prayers of the petitioners because they are unsupported by the grounds of the petition, are speculative, contradictory, inconsistent and fishy" H

The grounds on which the application/objection was based are

stated as follows:

"(a) *The 2nd petitioner Senator Ben Obi, is not a necessary party and the court has no jurisdiction to grant him any reliefs.*

B *(b) The 5th respondents Professor Maurice Maduakolam Iwu, is not a juristic person within the contemplation of the constitution of the Federal Republic of Nigeria, 1999 or the Electoral Act, 2006 and cannot be sued in his personal name nor has the court any jurisdiction to grant the reliefs sought against him.*

C *(c) The petitioners have no locus standi to present this petition having said that they were excluded from the election.*

(d) The grounds submitted in support of the petition are speculative, inconsistent and fishy and cannot be sustained.

D *(e) The prayers of the petitioners are speculative, inconsistent, and fishy and are not sustained by the grounds submitted in support of the petition.*

(f) The court has no jurisdiction to entertain the petition once shorn of all contradictions, inconsistencies and irrelevancies."

E On the other hand, the Learned Senior Counsel for the 1st and 2nd respondents, Chief Wole Olanipekun; SAN filed his objection on the 13th day of September, 2007 praying the court for the following reliefs:

"1. An ORDER striking out the entire petition for being incompetent and a nullity.

F *OR IN THE ALTERNATIVE*

2. AN ORDER striking out the 5th respondent, Professor Maurice Maduakolam Iwu from this petition. ,

G *3. Pursuant to prayer supra AN ORDER striking out all paragraphs of the petition where allegations have been made concerning the said 5th respondent and/or all paragraphs of the petition relating to or concerning him including paragraphs 5,6,8,13,16(f)(g)(b)(ix); 17(xxv)(xxvi); 19, 20 and 23, AND prayers 2, 6, & 7.*

H *4. AN ORDER striking out paragraphs 15(a) of the petition dealing with unlawful exclusion of the 1st petitioner from the election, as well as the entire paragraph 16 dealing with facts of unlawful exclusion in the said petition, as well as prayer 1 thereof.*

5. In the alternative to 3 supra, AN ORDER striking out paragraph 15(b),(c) and (d) of the said petition, as well as prayers

2,3,4,5,6,7, and 7.”

The grounds of the objection were stated thus:-

"(i) The petition was endorsed on the ground of unlawful exclusion for the presidential election of 21/4/07 pari passu with other grounds under section 145(1) of the Electoral Act, 2006,

(ii) The petitioners' petition consisting of the ground of valid nomination but unlawful exclusion alongside other grounds is speculative, contradictory, incurable to which this honourable tribunal lacks the jurisdiction to entertain.

The 5th respondent, Professor Maurice Maduakolam Iwu is not a juristic person within the conducts and contemplation of the Electoral Act, 2006.

The 5th respondent, Professor Maurice Maduakolam Iwu cannot be sued in his personal name as a respondent in an Election Petition.

(v) 1st petitioner who in paragraph 3 of the petition claimed to have been sponsored by the 3rd petitioner to contest the election cannot ground his election petition on exclusion from contesting the election having pleaded as scoring 2,637,848 votes at the election,

(vi) This honourable court has no jurisdiction to entertain the grounds and facts relating to the 1st petitioner's exclusion as pleaded in paragraphs 15(a) and 16 of the petition.

(vii) 1st and 2nd petitioners who claimed to have been excluded from the election cannot challenge the result of the election on any other ground, particularly on the ground listed in paragraph 15(b)(c)(d), except on the sole ground of exclusion.

(viii) By virtue of paragraph 15(a) of the petition, paragraph 15(b)(c) and (d) and prayers 2,3,4,5,6,7, and 8 become academic and abusive of the process of court.

(ix) This honourable court lacks the jurisdiction to entertain paragraphs 15(a) and 16 and/or at the same time entertaining paragraph 15(a),(c) and (d)."

I have had to go into these details so as to enable us put the issues in proper perspective as the ruling of the lower court on the objections, which were consolidated by that court, is said to have rendered that court functus officio and that the principles of issue estoppel apply to the facts of this case thereby robbing that court the

jurisdiction to reconsider the issues again in its judgment following the final addresses of counsel. The prayers on the motion papers, the grounds on which they were based and the decision of the court thereon will surely and easily determine the issue as to whether the lower court, after taking the decision it did in its ruling of 20/9/07 became functus officio and that the resolution of the issues involved in the objections estopped the lower court from reconsidering the issues in its final judgment after they had been reargued by counsel in their final addresses.

The ruling of the lower court which gave rise to the issue under consideration is very short and can be seen at pages 4529 - 4530 of the record. It is as follows:

"I have listened to the arguments of counsel on all sides in these two applications to strike out the petition for incompetence and lack of jurisdiction or in the alternative to strike out some paragraphs and reliefs in the petition.

Both applications must be refused for the following two reasons.

(i) Paragraph 49(2) of the 1st schedule to the Electoral Act, 2006 provides that an application of this nature shall not be allowed unless made within a reasonable and when a party making it has not taken any fresh step in the proceedings.

In this case the applicant's have joined issues with the petitioners/respondents on all complaints made in the petition. They are therefore caught by this provision.

(2) It is trite law that in interlocutory stage issues that call for determination in the main case should be avoided. The issues of joinder and inconsistent claims are not jurisdictional matters but mere irregularities which can be sorted at the hearing of the petition. I see no proper challenge of jurisdiction in the two applications. This court has full jurisdiction to entertain the petition to enable all parties to ventilate their cases on merit ."

The question is whether from the ruling reproduced above in extenso, it can be properly said that the lower court decided the issues calling for determination in the two motions earlier reproduced in this judgment thereby rendering that court incompetent to re-open the matter in its judgment.

It is very clear from the above ruling that the lower court took the considered view that:

(a) the applications were not made within a reasonable time, and;

(b) that it is settled law that at the interlocutory stage the court is not to delve into matters which call for determination in the substantive case as issues had been duly joined on the issues in-controversy between the parties in their pleadings. B

I am of the considered view that the ruling of the lower court supra did not go into the merits of the issues raised in the; applications but merely deferred the decision thereon to the final determination of the issues as joined in the pleadings in the judgment of the court on the merits of the petition to come at the conclusion of hearing/trial. That being the case I do not agree with the submission of the Learned Senior Counsel for the appellants that having taken the decision the court did in the aforesaid ruling, the court became functus officio in respect of the issues not decided by that court in the ruling in issue. It is my view that the lower court can only become functus officio in relation to its decision as to the timeousness of the presentation of the applications and the issue as to whether a court can pronounce on the merits of a case at the interlocutory - stage of the proceedings. The two issues not being the issues re-opened before the lower court in the final addresses of the parties, they become very irrelevant and cannot constitute issue estoppel as known to law. C D E F

I therefore agree with the lower court that:

"It should be reiterated that the issues of exclusion of the petitioners and the juristic personality of the 5th respondent were never determined in the ruling handed out on 20th September, 2007. It is extant in the stated ruling that substantive issues were ordered to be taken on merit at the hearing of this petition. In effect, estoppel does not avail the petitioners. The objection is hereby overruled. And we hereby proceed to determine all deserving issues contained in the petition." G

I therefore resolve Issue 1 against the appellants. H

On Issue 2 which is whether the lower court is right in holding, firstly, that the 1st petitioner was not unlawfully excluded from the election and, secondly, that, having pleaded unlawful exclusion, he

/cannot question the election on any other ground, the Learned Senior Counsel for the appellants submitted that fairness in an election requires that participation in the election is on the basis of equality of treatment by the authorities with none being subject to unfair restrictions or have “hurdles” put on his way etc; that where any of the elements of fairness are lacking, an election conducted in such circumstance is invalid-particularly where “hurdles” are put on the way of a candidate by the authorities; that the dictionary meaning of the word “exclusion” should not be considered in this case, the issue being whether by the hurdles which the lower court admitted were placed on the way of the 1st petitioner, the 4th respondent (INEC) accorded the 1st petitioner equality of treatment with the -1st respondent and other candidates; that if the 4th respondent did not maintain a level playing field for all the candidates, as found by the lower court, the election is thereby invalidated “irrespective of whether or not the 1st petitioner was technically “excluded” according to the lower court’s definition of the word “exclusion””; that an election is not a day affair but a process spanning a period of time and comprising a series of actions; that despite having attended the 4th respondents verification/screening exercise as the candidate of the 3rd petitioner the 1st petitioner’s name was unlawfully excluded in the list of candidates for the election published by the 4th respondent as evidenced in exhibits EPT/03/16 and 18; that despite Federal High Court judgments in favour of the 1st petitioner, the 4th respondent continued to exclude the name of the 1st petitioner from the list of candidates for the election; that even the decision of this court on 16th April, 2007 did not mitigate the situations as the 4* respondent continued to exclude the 1st petitioner from a meaningful and effective participation by continuing to omit this name from the list of candidates; that the serious nature of the hurdles placed on the way of the 1st petitioner by the authorities for several months during the process of the election until the day of polling in which the 1st petitioner was allowed to participate as a nominal candidate distinguishes exclusion in this case from exclusion in other cases such as Effion R vs INEC (2004) ALL FWLR (Pt. 210) 1312; and PPA vs Saraki (2007) 17 NWLR (Pt. 1064) 453 and urged the court to give effect to the principle of fairness, epitomized by the equality of treatment of can-

didates, as the principle governing the validity of election to an elective public office and to hold that the hurdles placed on the way of the 1st petitioner by the authorities deprived the 21st April, 2007 presidential election of its fundamental and essential element of fairness and therefore rendered same null and void; and, urged the court to nullify the said election and set aside the decision of the lower court. B

On the sub-issue as to whether, having pleaded unlawful exclusion, the 1st petitioners cannot question the election on any other ground, the Learned Senior Counsel submitted that the issue can be determined by a close examination of and interpretation of the words used in section 145(1) of the Electoral Act, 2006 and by reference to judicial decisions. C

Referring to the case of Metal Construction (WA). Ltd vs Aboderin (1998) 8 NWLR (Pt. 563) 538; Newbreed Organisation Ltd vs Erhomo Sele (2006) 5 NWLR (Pt. 974) 499 at 544; Help (Nig) Ltd vs Silver Anchor (Nig) Ltd (2006) 5 NWLR (Pt. 972) 196 at 222; vs (Nig) Ltd vs Taisli WA Ltd (2006) 15 NWLR (Pt. 1003) 533 at 555; Order 26 Rules .12(1) & (3) of the Federal High Court (Civil Procedure) Rules 2000 etc; the Learned Senior Counsel for the appellants submitted that it is settled law that either party to an action may, in a proper case, include in his pleadings, alternative and inconsistent allegations of, material facts, as long as he does so separately and distinctly; Learned Senior Counsel admitted that the above cases do not constitute authority for the interpretation of section 145 (1) of the Electoral Act, 2006 as they are not election matters; that even the election cases such as Ngwu vs Niba (1999) 3 NWLR (Pt. 595) 400; Buhari vs Obasanjo (2005) 13 NWLR (Pt. 941) 1; Ngige vs Obi (2006) 14 NWLR (Pt. 999) 1; ANPP vs Haruna (2003) 14 NWLR (Pt. 841) 546; Falae vs Obasanjo (1999) 6 NWLR (Pt. 605-608) 283 are not binding as precedent since they are not based on the issue under consideration -whether unlawful exclusion can be claimed together with or in alternative to other grounds; that in view of the above, the issue has to be determined on the basis of the interpretation of the words used in section 145 (1) of the Electoral Act, 2006. E F G H

The Learned Senior Counsel submitted that the word "or" though appearing at the end of paragraph (c) of section 145(1), it

governs all the paragraphs of the sub-section, and that its interposition between paragraphs (c) and (d) is to avoid undue, repetition; that the above being the case, the word “or” is conjunctive, not disjunctive; that the phrase “any of the following grounds” appearing in the first line of section 145(1) is significant and determinative as regards the question whether a petitioner is limited to just one, but not more than one, of the four grounds specified in section 145(1); that the words control the meaning of the word “or” that the word “any” does not mean only one or a number of things but “every or all”; that “any of the following grounds” in section 145(1) means that an election may be questioned on one or more or all of the grounds specified in the sub-section either together or in the alternative; and urged the court to resolve the issue in favour of the appellants.

On his part, the Learned Senior Counsel for the 1st and 2nd respondents referred to the facts pleaded in paragraph 15(a) of the petition and the judgment of this court delivered on 16/4/07 - exhibit EPT/03/P/6 which clearly stated that the 1st appellant was not a disqualified candidate and submitted that, the way was thereby paved for 1st appellant’s participation at the said election of 21/4/07 and that the facts pleaded in paragraph 15(a) of the petition became irrelevant in challenging the result of the election on the ground of unlawful exclusion because, according to Learned Senior Counsel, the words of section 145(1) are very clear, simple and free from ambiguity and should be given their ordinary meaning, relying on Awolowo vs Shagari (1979) 6-9 SC; that a candidate who contested an election, as the 1st appellant in this case cannot ground his petition under section 145(1) (d) of the Electoral Act 2006; that grounds for challenging an election must fall within the grounds stated in section 145(1).

The Learned Senior Counsel submitted that the ground provided under section 145(1) (d) and the other grounds under section 145(1) (a), (b) and (c) are mutually exclusive; that the use of the word “any” in section 145(1) is to give the petitioner only an opportunity to pick from one of the grounds listed in section 145(l)(a)(b) and (c) and that the word “or” also used therein demarcates the list in the said section 145(l)(a)(b) and (c) from section 145(l)(d) as the word “or” is disjunctive relying on Arubo vs Aiyeleru (1993) 3 NWLR

(Pt. 280) 126 at 141-142; Abia State University vs Anyaibe (1996) 3 NWLR (Pt. 439) 646 at 661; that there is nothing like constructive exclusion, or technical exclusion under section 145 (1) (d) of the Electoral Act, 2006 and urged the court to resolve the issue against the appellants and dismiss the appeal.

In arguing the issue, the Learned Senior Counsel for the 3rd respondent CHIEF JOE-KYARI GADZAMA, SAN referred to section 145(1) of the Electoral Act, 2006 and submitted, just like Learned Senior Counsel for the 1st and 2nd respondents did, that under subsection 145(1) (a) - (c) a petitioner may plead any or all of the grounds of the subsection but cannot plead those grounds in addition to ground (d) of the subsection; that the word "or" used in subsection (1) of section 145 is disjunctive in the context in which is used; that whereas grounds (a) (b) and (c) of subsection 145(1) of the Electoral Act, 2006 can be pleaded collectively in the alternative, ground (d) on the other hand is separate and on its own; that the authorities cited and relied upon by the Learned Senior Counsel for the appellants do not support their case as the interpretation of the word "any" in those cases support the case of the respondents and urged the court to affirm the decision of the lower court on the issue. On his part, the Learned Senior Counsel for the 4th - 808th respondents Kanu Agabi, SAN submitted in line with his learned friends for the 1st and 2nd and 3rd respondents; that the word "or" as used in section 145(1) is not conjunctive but disjunctive. However, the Learned Senior Counsel for the 4th - 808th respondents submitted in addition that section 145(1) of the Electoral Act, 2006 does not admit of partial participation in a presidential election; that either a petitioner was a candidate or not; that facts disclosed in evidence show clearly that the 1st appellant was not excluded from the election in question but actively participated therein and urged the court to resolve the issue against the appellants.

Section 145 of the Electoral Act, 2006 provides as follows:

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

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

(b) that the election was invalid by reason of corrupt practices

or non-compliance with the provisions of this Act;

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

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

B The question is, what does the provision of section 145(1) mean? To answer the question, it is necessary to take a closer look at the Interpretation Act particularly section 18 (3) thereof where it is enacted as follows:

C *“The word “or” and the word “other” shall, in any enactment be construed disjunctively and not as implying similarity.”*

It is the case of the appellants’ that the word “or” in the context of section 145(1) of the Electoral Act, 2006 connotes conjunctive-act or is conjunctive, not disjunctive. The question is which of the ver-
D sions one should follow? I hold the considered view that we must follow the law as laid down by the legislature in section 18(3) of the Interpretation Act supra. By applying the said provision, section 18(3) of the Interpretation Act to section 145(1) of the Electoral. Act, 2006, it is very clear that the word “or” appearing after paragraph (c) thereof
E is disjunctive, dividing grounds (a), (b) and (c) on the one hand from ground (d) thereby showing clearly that grounds (a) (b) and (c) of section 145(1) of the Electoral Act, 2006 can be plead collectively or in the alternative while ground (d) stands on its own and cannot be
F pleaded either together with (a).(b) and (c) or as an alternative to (a) (b) and (c). In the case of Arubo vs Aiyeleru (1993) 3 NWLR (Pt. 280) 126 at 141 - 142 this court construed the word “or” as follows;

“.. the power given to the court under the rule is to either strike out or amend, the word “or” having a disjunctive connotation.

G *It does not give the court power to strike out and amend...”*

I agree with the submissions of Learned Senior Counsel for the respondents that the word “or” used in section 145(1) of the Electoral Act, 2006 introduced an alternative ground to grounds (a) (b) and (c) and that a petitioner who grounds his petition on (d)
H cannot plead grounds (a) (b) and (c) either in addition or as an alternative to ground (d). It stands to reason that a ground of valid nomination but unlawful exclusion cannot stand side by side with any other ground mentioned in section 145(1). Where the ground of

valid nomination but unlawful exclusion is pleaded together with the other grounds or in the alternative thereto the petition becomes speculative as a petitioner cannot be heard to complain of what transpired at an election when he was not a participant therein - such a petition is clearly speculative as it approbates and reprobates at the same time and ought not to be encouraged. How can a candidate who never participated in an election be heard to complain that the election, which he did not participate in, was marred by non-compliance with the provisions of the Electoral Act, 2006 and electoral malpractices as it is only a candidate at an election that has the locus standi to challenge the result of the election by an election petition. The words used in 'section 145(1) of the Electoral Act, 2006 are very clear and very unambiguous and therefore need no interpretation by the court. The sub-issue to the above is whether the 1st appellant was excluded from the election of 21st April, 2006. The appellants pleaded that the 1st appellant was excluded from the election though validly nominated as candidate for same by the 3rd appellant - see paragraphs 7, I5(a)(b), and (e); I6(h)(l), I6(b)(v); 16(h)(vi), 16(h)(vii), i), 16(h)(xvi).

However in paragraphs 18(a)(xxii), 18(a)(xxiii), 18(a)(xxiv); 20 etc, the appellants pleaded facts of their participation in the election. When one looks closely at the pleadings and evidence of the appellants and the submission of the Learned Senior Advocate for the appellants, it is clear that what the appellants are complaining about is really the absence of a level playing field for the candidates at the election in issue particularly as it relates to the appellants - that there was no equality of treatment of the candidates by the authority that be thereby making the participation of the 1st appellant of no meaningful impact. It should be noted that the lower court did find as a fact that obstacles were deliberately put on the way of the 1st appellant to the election in issue. I hold the view that the lower court was right in that finding as the same is supported by the evidence.

However, the issue is whether the placement of these obstacles, objectionable as they are, amounts to non participation or exclusion of the 1st appellant from participation at the election. It should be noted that the judgment of this court came less than one week to the election. Can all these amount to exclusion as provided for under the Electoral Act, 2006?

The word “exclusion” is not defined in the Electoral Act, 2006. However, Webster’s’ New Twentieth Century Dictionary, Unabridged Second Edition, 1975 at page 638 defines the word “excluded” inter alia, as follows:

B *“To refuse to admit, consider, include etc; shut out; keep from entering, happening, or being; reject; bar...”*

From the above definition, it is clear that there is no half way house in the matter; one is either included or excluded. You cannot therefore be partially excluded or included. The law does not make C partial exclusion or inclusion a ground for challenging an election, but exclusion after a candidate had been lawfully nominated by his political party. I once again say that what happened to the 1st appellant is unfortunate and regrettable but under the law, he was not excluded from the election of 21st April, 2007. He participated therein, D and even scored some votes. What if he had won the election? Would he still complain of exclusion from the election?

Under the circumstance in which 1st appellant found himself, it cannot be said that all is well with our electoral system. It is however clear that whatever is wrong with the system had nothing to do with E the law or legal provisions but the human beings operating the system. I need not say more.

In conclusion, I hold that the appellants having grounded their petition on the ground of unlawful exclusion and participation in the F election of 21st April, 2007 could not, under the Electoral Act, 2006 particularly section 145(1) thereof, on the same facts question the election on any other grounds available to a participant in the election and that having regard to the facts of this case as found by the lower court and which have not been demonstrated to be perverse, G the appellants, particularly the 1st appellant, were/was not excluded from the said election but participated therein.

I therefore find no merit in the appeal which is hereby dismissed, with no order as to costs.

Appeal dismissed.

H