

**SUPREME COURT OF NIGERIA**  
19TH DECEMBER, 2008 SC. 224/2007  
**CORAM:- A. I. KATSINA-ALU, A. M. MUKHTAR,**  
**M. MOHAMMED, F. F. TABAI,**  
**C. M. CHUKWUMA-ENEH, JJSC**

HONOURABLE GOZIE AGBAKOBA ..... APPELLANT  
AND  
1. INDEPENDENT NATIONAL  
ELECTORAL COMMISSION (INEC) ..... RESPONDENTS  
2. PEOPLES DEMOCRATIC PARTY  
3. HON. LYNDA CHUBA IKPEAZU

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APPEALS - Issues - Badly couched - Attitude of court thereto - As it is unjust to hold that because a blunder has been committed - The party in blunder has lost the opportunity of having his case determined on the merits - Courts would re-frame such issues in the interest of justice (H1)

ELECTIONS - Pre-election disputes - Jurisdiction - 1999 Constitution, s. 251 (1) (r) - The Federal High Court has exclusive jurisdiction to hear and determine pre-election disputes - Including disputes on submission of names of and substitution of names of nominated candidates (H2)

PRACTICE & PROCEDURE - Rules - Noncompliance - Objection thereto - Need to raise timeously - Where an action has been started by an irregular procedure - A party who took part in the proceedings without prior objection - Cannot be heard later to complain of the irregularity (H3)

ACTIONS - Commencement - Originating summons - Propriety of - In view of nature of the issue to be tried - Originating summons is the most appropriate means to commence this action - Affidavit evidence of parties provide sufficient material to deal with the issue (H4)

AFFIDAVITS - Conflicts - Constituents - Fact that a party's set of documents contain ex facie lies - Does not necessarily mean there is a

conflict - Such as to necessitate the taking of oral evidence to resolve it (H5)

APPEALS - Briefs - Respondent's brief - Tenor of - A respondent who has not cross-appealed against a judgment - Is estopped from raising and arguing any issue that is not based on appellant's grounds of appeal - As he is deemed satisfied with the judgment (H6)

WORDS & PHRASES - Post-election disputes - Purport of - In contrast to pre-election disputes - Post-election disputes arise from the holding of elections or return of elected candidates - They cover such grounds as qualification or unlawful exclusion of candidates among others (H7)

ELECTION PETITIONS - Tribunals - Jurisdiction - Scope of - Election tribunal which is a special tribunal - Created by the Constitution to handle post-election disputes - Has no jurisdiction over pre-election disputes - Such as substitution of candidates (H8)

EVIDENCE - Admissions - By implication - Uncontroverted affidavit evidence - In actions initiated by originating summons affidavits take the place of pleadings - So any material paragraph of the affidavit not specifically denied is deemed admitted (H9)

DOCUMENTS - Exhibits - Reliability - On the facts of the instant case - It is obvious that exhibits 1 and 2 of the 3rd respondent have lied ex facie - As such they are most unreliable documents liable to be discountenanced as an afterthought (H10)

ELECTIONS - Candidates - Substitution of - Validity - It is settled that once the reasons given for the change - Are not cogent and verifiable the case fails - The reason given in the instant case is neither cogent nor verifiable (H11)

COURTS - Supreme Court - Powers of - Supreme Court Act, s. 22 - Applicability - The section is applicable where the lower court failed - To decide an issue which it had power to decide - And in respect of

which there was evidence before it (H12)

ELECTIONS - Candidates - Sponsorship by political parties - Implication of - In the true sense of the letter and spirit of s. 221 of 1999 Constitution - It is the political parties that sponsor candidates that are the real winners or losers in an election - Not the candidate (H13)

### **FACTS**

The plaintiff/appellant had sued the defendants/respondents by way of originating summons claiming sundry declarations, order and injunction by which he was contending his alleged unlawful substitution as 2nd respondent's candidate for the national assembly election in respect of Onitsha North and South Federal Constituency. It was the case of the respondents that the substitution of the appellant was in accordance with the relevant provisions of the Electoral Act.

At close of hearing, the trial court dismissed the claims of the appellant. Dissatisfied, appellant appealed to the Court of Appeal. During the pendency of the said appeal, the national assembly elections of April 2007 were held and winners returned. On the next adjourned date following the election, the Court of Appeal suo motu raised the issue of whether the appeal has been rendered academic by reason of the election and required parties to address it thereon. After the address, that court ruled that the appeal had become academic and struck it out accordingly. Aggrieved, appellant has brought this appeal against the said ruling of Court of Appeal.

### **ISSUES FOR DETERMINATION**

*"1. Whether the Court of Appeal was right to hold that the conduct by the 1st Respondent of election into the Onitsha North/Onitsha South House of Representatives Seat while Appellant's appeal was pending at the Court of Appeal rendered the appeal a mere academic exercise.*

*2. Whether this appeal presents an appropriate occasion for the exercise of the general powers of the Supreme Court under section 22 of the Supreme Court Act to deal with Appellant's claim without remitting same to the Court of Appeal, and if it is, whether the Appellant is entitled to judgment on the merits of his claim."*

**HELD** (Unanimously allowing the appeal per **CHUKWUMA-ENEH JSC**)

**APPEALS - Issues - Badly couched**

1. In my view it is not in any doubt that issue 2 is bedeviled with the way it has been couched. I think it is only proper from the syntactic structure of the two clauses making up this otherwise longish issue (two) that it is restructured or re-ordered so as to bring to crystallization the real question in controversy as per Ground 3, notwithstanding that the appellant has thus blundered. It is settled in the case of A.Y. OJIKUTU V. FRANCIS E. ODEH (1954) 14 WACA 640 at 641 that *"Blunders must take place from time to time and it is unjust to hold that because a blunder ..... has been committed, the party blundering is to incur the penalty of not having the dispute between him and his -adversary determined upon the merits."* It would be most unjust to discountenance issue 2 on this ground alone.

This court in the interest of justice and to crystallize the real question in the appeal has the power to reframe issues for determination as here where appropriate. The exercise of this power by the court has never been in any doubt although being a circumspetive action the court has to bear in mind the Ground of Appeal in question. To bring out the real issue in Ground 3 therefore in Issue two, it is reframed thus:

*"2. Whether the appellant is (not) entitled to judgment on the merits of his claim, and if it is whether this appeal presents an appropriate occasion for the exercise of the general powers of the Supreme Court under Section 22 of the Supreme Court Act to deal with Appellant's claim without remitting same to the Court of Appeal, (the word in brackets supplied in order to state in the issue in the negative)".*

(the word in brackets supplied).

The arguments of the parties in the briefs have not been otherwise affected. I therefore, find no merit in the preliminary objection and I hereby overruled it; and hold that issue 2 is competent as reframed. (pp. 3360 G/3361 D/G)

**Pre-election disputes - Jurisdiction**

2. Section 32 regulates the submission of names of nominated candi-

dates to INEC while Section 34 deals with the procedure of changing of nominated candidates by political parties, and in this case by virtue of the provisions of Section 251(1) of the 1999 Constitution original jurisdiction to deal with and determine any disputes arising therefrom is vested exclusively in the Federal High Court. And pre-election disputes encompasses the stage of conducting party primaries to holding of actual elections; on the other hand, that post-election disputes contemplate actual election which is challengeable on the ground of undue election or undue return albeit on a specific ground(s) as prescribed by Section 145 (1) (a) to (d) of the Electoral Act 2006. That said, that pre-election disputes come under the exclusive jurisdiction of the Election Tribunals as per Section 140(1) and (2) of the Electoral Act 2006 for adjudication. And I so hold that the foregoing represents the true position of the law in this regard. (p. 3362 F)

***Rules - Noncompliance - Objection thereto***

3. Firstly, I must observe that having fought this matter this far, that is, on the instant form of action to this stage of the proceeding in this court which amounts to acquiescing in the propriety of the procedure, I think it is too late in the day to take the point of any irregularity about it. The guiding principle in this regard is very clear. It is that a breach of the Rule of practice and procedure can only render a proceeding irregular and not a nullity. And it is the duty of Counsel to take the point of irregularities in proceedings as they occur. The Respondents have not raised any objection to the procedure. So that where an action as in this case has been started by a procedure which is irregular a party who took active part in the proceeding without raising a formal objection to the irregular procedure cannot be heard later to set aside the action on the grounds of irregularity he acquiesced in. (p. 3364 A/D)

***Originating summons - Propriety of***

4. Even then instituting this action by way of Originating Summons appears to me all said, to be most appropriate form of action to speedily resolve in the context of Sections 32 and 34 of the Electoral Act 2006, that is to say, the controversy surrounding the nomination

and substitution of the appellant by the 2nd Respondent in this case. It is significant that the materials by way of facts deposed to and documents exhibited to the said affidavits of the parties and the ones tendered from the Bar provide more than sufficient materials to deal with the issue of whether the appellant has been properly substituted  
B in the circumstances. As they have not been challenged, they constitute admissible evidence. (p. 3365 A)

***AFFIDAVITS - Conflicts - Constituents***

C 5. The fact that a party's set of documents as against the ones of his opponent presents a disorderly nature by lying ex facie should not be a ground for alleging the presence of conflicting facts in the documentary exhibits of the parties to necessitate taking oral evidence to resolve it. Even though a factual issue as submitted by 2nd and 3rd  
D Respondent, it could be resolved by authentic documents before the court of which there are a number of them here as I will show later on and not only by calling oral evidence. More importantly, it is settled that oral evidence cannot be allowed to add to or subtract from or alter or contradict a written document. See Section 132(a) of the  
E Evidence Act. (p. 3366 C)

***Briefs - Respondent's brief - Tenor of***

F 6. I must restate that it is settled law that if a party to a matter is satisfied with the judgment or a finding in a judgment that is the end of the matter for him. It is only where a party is aggrieved by a decision and appeals on it that the appeal court can act. I make this point because the Respondents have spent a great of their time and energy and even space in the brief of argument of the 2nd and 3rd  
G Respondents particularly to urge on this court to proceed on a whole-sale re-evaluation of the evidence as regards the finding on the appellant's nomination as against his substitution and reverse a decision or a finding of fact on an issue which has not been brought on appeal before it.

H But, simply put, the 2nd and 3rd Respondents are estopped from raising and arguing on the question of the appellant's nomination. That question is closed as there is no cross-appeal by the Respondents on it, particularly as no finding of fact can be challenged

on appeal where there is no ground of appeal upon which the challenge can be based. (p. 3368 F)

***Post-election disputes - Purport of***

7. In contrast to pre-election disputes, post election disputes as the term suggests could only arise from disputes over holding of the election or return of the election; post-election disputes under Section 145(1) (a) to (d) may be questioned on any of the following grounds: B

*“(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

*“(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 unlawfully excluded from the election.”* D

The above provisions are plain and unambiguous in providing the grounds upon which a petitioner could question an election and they are not applicable to party primaries. (p. 3370 E)

***ELECTION PETITIONS - Tribunals - Jurisdiction - Scope of***

8. Section 285(1) (a) of the 1999 Constitution deals with whether any person has been validly elected as a member of the National Assembly. The provision is clear and unambiguous and literally construed is concerned with post-election disputes. Any dispute resulting from the conduct of an election is not a pre-election dispute but a post-election dispute. The dispute here has arisen from the substitution of the appellant by the 2nd Respondent as its candidate after winning at the party primary. The opinion of this court on this point as per decided cases I shall marshal out later on in this segment of my reasoning and are binding on this court. There is no basis for this case to inure to the Election Tribunal which is a special Tribunal created by the Constitution to handle post-election disputes. It has no jurisdiction over pre-election disputes. (p. 3371 B) F G H

***EVIDENCE - Admissions - By implication***

9. I accept the appellant’s submission that in actions initiated by Origin-

nating Summons, the affidavits filed by the parties in the matter take the place of pleadings and so any material paragraphs of the affidavit not specifically denied are taken as having been admitted, that is, as an unchallenged evidence upon which the court could act. And as in pleadings the denial must not be evasive but frontal.

B The 1st Respondent has not filed any Counter-Affidavit in response to the appellant's affidavits in this matter, if I may repeat. And as the answers to most of the paragraphs of the appellant's affidavits and as well as the facts deposed to therein are matters peculiarly within the knowledge of the 1st Respondent traversing them effectively could only come from the 1st Respondent and not from the 2nd and 3rd Respondents without disclosing the source of their information. The appellant's depositions being unchallenged in these respects are deemed admitted. And so, the 1st Respondent not having discharged the burden on it, it is bound to take the consequence, that is, that the appellant's depositions being unchallenged are deemed admitted and that the court is at liberty to act on them. (p. 3376 G)

### ***DOCUMENTS - Exhibits - Reliability***

E 10. In regard to the above reasoning, I have no difficulties in holding that the letter of 5/2/2007, that is, the substitution notification letter received by the 1st Respondent on 19/2/2007 and exhibit 2 of 20/2/2007 in its support cannot rightly be calling for the substitution of the Appellant unless truly the appellant's nomination form EC 4B (iv) has gotten earlier in time to the 1st Respondent. In the scenario that has emerged here, again, I have no difficulty in holding that appellant's nomination Form EC 4B (iv) has gotten to the 1st Respondent first before the 3rd Respondent's exhibits 1 and 2 got to the 1st Respondent. Exhibits 1 and 2 have been purportedly made even then belatedly to effect the change of the appellant, otherwise Exhibits 1 and 2 of 3rd Respondent cannot be talking of substitution if it were not truly the position on the ground at the time the exhibits were forwarded to the 1st Respondent. And so I hold that Exhibits 1 and 2 of 3rd Respondent have lied ex facie as to the dates they have been made by the 2nd Respondent and received by the 1st Respondent. Exhibits 1 and 2 of the 3rd Respondent being most unreliable documents are hereby discountenanced as an afterthought. And for the



avoidance of doubt I so hold. (p. 3380 A)

### ***Candidates - Substitution of - Validity***

11. It is settled that once the reasons given for change are not cogent and verifiable the case for change fails as in this case. In short what I am trying to say here is that in UGWU V. ARARAUME it was declared that “*error*” is not a cogent reason for substituting the party’s candidate and not in compliance with Section 34(2). So also is the reason “*submitted without enough information*” it is not a cogent reason nor has the reason been improved by exhibit 2 alleging “*inconclusive primary election*”; they are not sustainable in the circumstances. The reasons are not cogent and verifiable and must fail and I so hold. B

In the upshot, my answer to the above poser on exhibits 1 and 2 of the 3rd Respondent is that none of the exhibits has given any cogent and verifiable reasons for applying as per exhibits 1 and 2 to the 1st Respondent to effect a change of the appellant as the candidate for the 2nd Respondent for the Onitsha North and South Federal Constituency of Anambra State. (p. 3382 H) D

### ***Supreme Court - Powers of***

12. In the case of PETER OBI V. & INEC & ORS. (supra) this Court per Aderemi JSC has at pages 639-640 H-B set out the conditions I go on to scrutinize the conditions for bringing the provisions of Section 22 into play and they are summarized as follows:- E

1. the lower court or trial court must have the legal power to adjudicate In the matter before the appellate court can entertain it; F

2. the real issue raised by the claim of the appellant at the lower court or trial court must be seen to be capable of being distilled from the grounds of appeal; G

3. all necessary materials must be available to the court for consideration;

4. the need for expeditious disposal of the case or suit to meet the ends of justice must be apparent on the face of the materials presented; and H

5. the injustice or hardship that will follow if the case is remitted to the court below, must be clearly manifest itself.

For all this, I agree with the appellant that this is a case in which

this court is eminently positioned and justified to exercise its powers under Section 22 of the Supreme Court Act and determine the matter on its merits here and now, as the pre-conditions to so do as I have outlined above are conducive. (pp. 3385 A/3386 E)

**B ELECTIONS - Candidates - Sponsorship by political parties**

13. In line with cases of this nature decided by this Court in recent days this court held and I agree that as nominated candidates are sponsored by political parties that in the true sense of the letter and spirit of Section 221 of the 1999 Constitution it is the political party that sponsored the candidate that is the real Winner. It is in that context that the 3rd Respondent the Winner of the instant election of 21/4/2007 has to be seen. In further rationalization of my reasoning above I have in this regard to advert my attention to Section 221 of the Constitution and provides thus:

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

E In construing the foregoing provisions of Section 221 this court in AMAECHI V. INEC & ORS. (supra) opined as follows:-

*“If as provided in Section 221 above it is only a party that canvasses for votes, it follows that it is a party that wins election..... that whereas candidates may change in an election but the parties do not..... but in reality and in consonance with Section 221 of the Constitution, it is his party that has won the election.”* (p. 3386 F)

**G NOTABLE POINTS OF INTEREST  
CHUKWUMA-ENEH JSC**

1. *Successful petitioner is to serve for unexhausted tenure of sacked candidate*

H One other factor the court has to take into account is the urgency surrounding this matter as the tenure of the members of the National Assembly is for a period of four years and so far 18 months of that period have already been spent i.e. the appellant could only serve for the unexhausted tenure of 4 years. It does not augur well for

democracy to delay any further. Hence to remit this case back to the Lower Court to come back to this Court on appeal apart from causing great hardship to the appellant, it does not work in the interest of the constituents who are entitled to know their true representative at the National Assembly. (p. 3386 C)

B

### **TABAI JSC**

*2. Jurisdiction does not abate because of completion of action sought to be restrained*

A defendant, the propriety of whose act is being challenged in a judicial proceedings, cannot purport to continue the act to a supposed completion to plead that the court no longer has the jurisdiction to hear and determine the suit or that the hearing and determination of the suit has become a mere academic exercise. The Plaintiff/Appellant challenged the propriety of his substitution with the 3rd Respondent and that remains a live issue until its determination by the final appellate Court, notwithstanding any act taken by the Defendants/Respondents. I hold therefore that the court below erred in law on this issue. Its jurisdiction remained intact. It had a duty to hear and determine the appeal presented there for adjudication. (p. 3399 E)

E

### **REPRESENTATION**

Mr. Olisa Agbakoba, SAN, with C. Emeka and Miss Chinwe, for the Appellant.

F

Mr. F. O. Adekwu for the 1st Respondent.

Dr. Onyechi Ikpeazu, SAN, with Ike Ugbogu and P. Ozoilesike, for the 2nd and 3rd Respondents.

### **CASES REFERRED TO**

G

PETER OBI V INEC (2007) 1 NWLR (Pt.1046) 565 at 635-638

SANYAOLU V INEC (1999) 7 NWLR (Pt.612) 600 at 608

MAIKORI V LERE (1992) 3 NWLR (Pt.231) 525

DUOKP OLAGHA V GEORGE (1992) 4 NWLR (Pt.236) 444

NEC V. NRC (1993) 1 NWLR (Pt.267) 120 at 130-1

H

ADEBIYI V. BABALOLA ( 1999) 8 NWLR (Pt.614) 334 at 357

DIKE V. NZEKA (1986) 2 NWLR (Pt.34) 144

ENEMUO .V. DURU (2004) 9 NWLR (Pt.877) 75

UBA. V. UKACHUKWU (2004) 10 NWLR (Pt.881) 244

ONIA V. ONYIA (1989) 1 NWLR (Pt.99) 514

ADELAJA V. FANOBI (1990) 2 NWLR (Pt.131) 137 at 148

NZEKWE V. NZEKWE (1989) 2 NWLR (Pt.104) 373 at 423

MOMODU V. MOMODU (1991) 1 NWLR (Pt.169) 608 at 621

<sup>B</sup> ONAFIDE V. OLAYIWOLA (1990) 7 NWLR (Pt.161) 130

**STATUTES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1999, ss.251 and 285

<sup>C</sup> Court of Appeal Act, s. 16

Electoral Act, 2006, ss. 32, 34, and 140

Supreme Court Act, s. 22

**LEAD JUDGMENT BY CHUKWUMA-ENEH JSC**

<sup>D</sup> This appeal is filed by the plaintiff (appellant in this Court) against the unanimous decision of the Court of Appeal of the Enugu Judicial Division sitting in Enugu given on 28th June, 2007 striking out the appellant's appeal as it has become a mere Academic exercise.

<sup>E</sup> The plaintiff who is also the appellant in the Court of Appeal being totally Aggrieved by the decision has brought this appeal by a Notice of appeal dated and filed on 3rd of December, 2007 the leave of this Court having earlier on been granted on 21st of November, 2007 to that effect. In the trial Court, the plaintiffs suit which is hinged on the interpretation of Section 34 of the Electoral Act, 2006 vis-a-  
<sup>F</sup> vis the substitution of the appellant by the 2nd defendant (2nd respondent) for the 3rd defendant (3rd respondent in this Court) as its candidate for the Onitsha North and South Federal Constituency of Anambra State.

<sup>G</sup> Parties in this Court have filed and exchanged their respective briefs of argument in this matter. The appellant has in his brief of argument raised two issues for determination; and they are set out as follows:

<sup>H</sup> *"1. Whether the Court of Appeal was right to hold that the conduct by the 1st Respondent of election into the Onitsha North/ Onitsha South House of Representatives Seat while Appellant's appeal was pending at the Court of Appeal rendered the appeal a mere academic exercise.*

*2. Whether this appeal presents an appropriate occasion for the exercise of the general powers of the Supreme Court under section 22 of the Supreme Court Act to deal with Appellant's claim without remitting same to the Court of Appeal, and if it is, whether the Appellant is entitled to judgment on the merits of his claim."*

The 1st respondent has formulated two issues very identical to the appellant's all the same I set them out as follows:

*"1. Whether the Court of Appeal was right in holding that the Appellant's Appeal in the circumstances was a mere academic exercise.*

*2. Whether this appeal presents an appropriate occasion for the exercise of the general powers of the Supreme Court under Section 22 of the Supreme Court Act to deal with the Appellant's claim without remitting same to the Court of Appeal, and if it is, whether the Appellant is entitled to judgment on the merits of his case."*

The 2nd and 3rd respondents have on their part raised a joint brief of argument and also distilled two issues for determination and they are:

*"1. Whether the Court of Appeal was right to hold that the appeal had become an academic exercise in view of the fact that the election the subject matter of the appeal had been concluded and that by virtue of Section 285(1)(a) Constitution of the Federal Republic of Nigeria, 1999 and Sections 69(c), 140(1) and 145(1)(a) to (d) of Electoral Act, 2006 the Appellant's rights had inured to the Election Tribunal.*

*2. Whether the decision of the Court of Appeal not to consider and allow the appeal occasioned a gross miscarriage of justice."*

This action, I must emphasize, has been commenced by way of Originating Summons accompanied with an affidavit and has suffered one amendment. The facts of this case are not complicated. In the Amended Originating Summons dated 29th of March, 2007 filed before the trial Court, the appellant (plaintiff) has sought the following reliefs; thus:

*"1. A DECLARATION that the 1st Defendant's statutory power to substitute a nominated candidate of a political party, under section 34 of the Electoral Act 2006, is qualified AND not absolute.*

*2. A DECLARATION that the 1st Defendant has NO power to*

*substitute a nominated candidate of a political party less than 60 days to the election when the candidate is not dead.*

3. *A DECLARATION that the 1st Defendant CANNOT substitute a nominated candidate of a political party in the absence of cogent and verifiable reasons.*

B 4. *A DECLARATION that in view of section 36 of the 1999 Constitution the 1st Defendant CANNOT fairly and constitutionally determine the cogency and verifiability of substitution of a nominated candidate without some notice to the candidate or hearing or*  
C *some form of inquiry from or input by the affected candidate.*

5. *A DECLARATION that the legislative innovation introduced by section 34 of the Electoral Act is aimed at deepening and strengthening Nigeria's democracy in relation to substitution of a nominated candidate in an election.*

D 6. *A DECLARATION that the substitution of the Plaintiff by the 1st Defendant as the duly nominated candidate of the Peoples Democratic Party (PDP) for election into the House of Representatives in respect of Onitsha North and South Federal Constituency of Anambra State in the manner it did is ultra vires, undemocratic, arbitrary, unlawful, illegal, unconstitutional, null and void.*  
E

7. *AN ORDER setting aside the purported substitution, same being in excess of the statutory powers of the 1st Defendant, in abuse of power, breach of duty to cat (sic) fairly, unreasonable, illegal, unconstitutional, null and void.*

F 8. *AN ORDER OF PERPETUAL INJUNCTION directing the 1st Defendant to restore the plaintiff as the duly nominated, verified, cleared and published candidate for the Peoples Democratic Party for election into the House of Representatives in respect of Onitsha*  
G *North and South Federal Constituency of Anambra State."*

The copious affidavit in support supplies further facts; I shall come back to it later on. The 2nd and 3rd respondents have filed their joint counter affidavit in response to the appellant's affidavits; the 1st respondent has not filed any counter affidavit. Suffice it to say  
H that the appellant is vigorously challenging the alleged unlawful substitution of the appellant's name by the 2nd respondent for the 3rd respondent's name. The 2nd and 3rd respondents have countered by contending that the substitution of the appellant accords with the

procedure prescribed under Section 34 of the Electoral Act 2006 and therefore proper and lawful.

Meanwhile, it is to be noted that the election at the centre of this matter was held on 21st April, 2007 that is, during the pendency of this matter at the Court of Appeal. On 15th of May, 2007 the matter was listed before the lower Court for hearing; it suo motu raised the issue that the appeal has become a mere academic exercise since the election it has foreshadowed has been held, and the 3rd respondent having been elected, has since taken her seat in the House of Representatives representing the Onitsha North and South Federal Constituency of Anambra State. In the lower Court, the parties were ordered to file their respective written addresses on the crucial issue of whether the appeal is now a mere academic exercise. In compliance with the lower Court's order written addresses have been filed and exchanged.

Be it noted that in view of the peculiar fact scenario of this matter I have to emphasise that the parties joined issues as per their respective briefs of argument filed and exchanged in this matter in the court below to show that it is not in the least for want of presenting their cases for adjudication at the Court below that the real issue in dispute between the parties was not heard on the merits. There is therefore enough materials before the court below to enable it deal with this case on the merits.

However, sequel to the order to file written addresses by the court below on 15/3/2007, the appellant has filed a written address on 17th May, 2007; so also the 1st respondent on 22nd of May, 2007; the 2nd and 3rd respondents filed a joint written address on 22nd May, 2007. The Court below at the end of hearing in addition to the submissions of the parties found that the appeal is a mere academic exercise and in the lead judgment of the court below, it held at page 246 lines 19-22 and page 248 lines 16-22 of the Record, per Bada JCA, thus:

*"In my humble view by the combined effect of Section 285(1) (a) of the 1999 Constitution and Sections 69(1), 140(1) and 145(1) (a) to (d) of the Electoral Act 2006, this cause of action has inured to the election Tribunal."*

The Honourable Court went ahead to hold thus:

*"I also agree with the submissions of Learned Counsel for the 1st Respondent and Learned Senior Counsel for the 2nd and 3rd Respondents that since the elections have been conducted and concluded there are no more live issues to be determined by this Court as far as the reliefs being claimed by the appellant is concerned. And*  
 B *where there are no live issues to be determined, the court will treat such issues or questions as academic or hypothetical questions."*

By this decision, the appellant's substantive appeal before the court below has to be struck out without it being resolved on the merits of his claim. As I said above being understandably aggrieved  
 C by the precipitate decision of the Court below, thus preempting his case in this matter the appellant has appealed from the decision to this court. By the foregoing I have provided a robust factual background to this matter.

D Because of the foregoing the appellant has submitted as per his brief argument that it is a grave error on the part of the lower Court to hold that the appellant's appeal since the election has been conducted has become a mere academic exercise or has inured-to the Electoral Tribunal to hear and determine.

E To determine whether an action has become academic because the hearing protracted beyond the event or action exemplified as in the case of state of emergency that has given rise to the cited suit; the appellant has referred to the case of PLATEAU STATE V. ATTORNEY GENERAL OF THE FEDERATION (2006) 3 NWLR  
 F (Pt.967) 346 at 419, where also the hearing of the case has protracted beyond the event i.e. the state of emergency that gave rise to the suit. He also has referred to and relied on the case of PETER OBI V INEC AND OTHERS (2007) 11 NWLR (Pt. 1046) 565, and  
 G AMAECHE V. INEC & ORS. (2008) 1 SC (Pt.136) (2008) 5 NWLR (Pt.1080) 227 to submit that in the circumstances similar to this case the Court upheld the claims, notwithstanding that the election of 21st April, 2007 in both instances were concluded during the pendency of the cited cases.

H The appellant has referred to the steps he has taken to keep things in status quo ante right from the initiation of the instant claim on 16th of March, 2007 to the election on 21st April, 2007; they include applying for an interim injunction to stay the said election;



the application for the same has been refused and struck out. The appellant has also canvassed the point that he has asked for an injunction besides other reliefs in his Originating Summon before the trial court to show that the wrong sought to be restrained is not in prospect but real yet the 1st respondent has gone ahead with the said election for the said seat for the Onitsha North and South Federal Constituency of Anambra State and has thus purportedly rendered nugatory the Res in this matter. He has also pointed out that the appeal has been pending at the lower Court at the time of the election and that the processes have come to the notice of the 1st respondent before the said election. The 1st respondent's over-reaching conduct in these respects has been deprecated as disrespectful to the Court hence the appellant has urged the Court to react as in the decision of DANIEL V FERGUSON (1891) 2 ch. 27 at 30 where the Court ordered the pulling down of a 39-feet wall built to preempt the Court's order and also the case of B.F.A.T.B. V. EZEGBU (1993) 6 NWLR (Pt.297) 1 at 25-1319 and more recently as decided in AMAECHI V. INEC & ORS. (Supra). The Court is urged to condemn the 1st Respondent for foisting on the court a situation of helplessness.

The appellant has referred to and relied on cases similar to the appellant's case here, which have been resolved even post-election including - Amaechi v INEC an others (supra); Bob v Akpan, Unreported Suit (CA/A/97M/2007) delivered on 3/7/2007 PLATEAU STATE V. ATTORNEY GENERAL OF THE FEDERATION (supra); and has urged that the instant case be so treated.

The point is made that under Section 34 of the Electoral Act 2006 all pre-election disputes are by virtue of Section 251(1)(p)(g) (r) of the 1999 Constitution within the exclusive jurisdiction of the Federal High Court and that section 285 of the 1999 Constitution has not derogated from this jurisdiction nor have the powers of the lower Court in this regard abated in the circumstances. See NDIC V OKEM LIMITED AND ANOTHER (2004) 10 NWLR (pt.880) 182 at 183; PETER OBI V INEC (2007) 1 NWLR (Pt.1046) 565 at 635-638; SANYAOLU V INEC (1999) 7 NWLR (Pt.612) 600 at 608 GH. The point is taken that the cases of MAIKORI V LERE (1992) 3 NWLR (Pt.231) 525 DUOKP OLAGHA V GEORGE (1992) 4 NWLR

(Pt.236) 444, NEC V. NRC (1993) 1 NWLR (Pt.267) 120 at 130-1, ADEBIYI V. BABALOLA ( 1999) 8 NWLR (Pt.614) 334 at 357 A.B. demonstrate that the Election Tribunals have no jurisdiction to hear and determine pre-election disputes. The Court is urged to resolve issue one in the appellant's favour.

B On issue two the appellant in restating the point that the lower Court has found that the election has been conducted; that the instant appeal has become a mere academic exercise, he then has opined that the lower Court's failure to hear on the merits the  
C appellant's case placed before it on the briefs of argument filed and exchanged between the parties is based on a misconception of the law. It is contended by the appellant that the case he has presented before the lower Court to consider is centred on the question that the 1st respondent has not discharged the burden of proof cast on it  
D by traversing the appellant's case as per his depositions in the affidavits in support of the Originating Summons and that his depositions not having been rebutted are deemed admitted and that the court has to accept his case as proved and deserving of the court's judgment accordingly. This is so as this action has been commenced by  
E Originating Summons and the evidence is by affidavit.

Challenging his substitution, the appellant has alleged non-compliance with the provisions of Section 34 of the Electoral Act 2006. In this regard he has alleged that his substitution has come within sixty  
F days to the election date for no cogent and verifiable reasons and even moreso without any chance given him to confront it. The appellant has raised seriously the allegation of improper construction by the lower court of Exhibits 1 and 2 of the 3rd respondents' counter affidavit moreso as regards the dates of making each of them as against  
G the dates on Exhibits 1 and B tendered from the Bar on behalf of the appellant's case. He submits that Exhibit 1 i.e. Substitution notification letter of the 3rd respondent dated on 5th of February, 2007 has showed by the date stamp on it that it has been received on 19th of February, 2007 by the 1st Respondent when the appellant's nomination form EC 4B (IV) Exhibit 1 of 20th February, 2007 for forwarding to INEC according to the date stamp on it, showed it has  
H been received only on 21st February, 2007 by the 2nd Respondent National Headquarters (as confirmed by its certified true copy. Ex-

hibit 'B' in the 1st Respondent's custody) for forwarding to the 1st Respondent. And that simply put that the National Office of the 2nd Respondent has received the appellant's from EC 4B (IV) only on 21st February, 2007 for submission to INEC, that is to say, two days after INEC purportedly received Exhibit 1 of the 3rd Respondent's substitution notification letter of 5/2/2007 to INEC from the 2nd Respondent (the PDP). He then submits that the next critical question is why go ahead to submit the appellant's form EC. 4B(IV) to the 1st Respondent. It has to be emphasized again that the 1st Respondent has not by affidavit evidence countered any of the appellant's depositions herein. The appellant contends that this has boosted his case; he urges the Court to uphold his case accordingly and to find for the appellant and to deem him as the person who stood the election for the Onitsha North and South Federal Constituency of Anambra State. The 1st Respondent has acknowledged the claim before the Court to include declaratory and injunctive reliefs but has observed of a total failure on the part of the appellant to seek to preserve the Res by seeking for interlocutory orders in both lower courts hence the proceedings have proceeded to the stage of striking out the appeal as constituting a mere academic exercise. He says that the appellant is therefore estopped from seeking to undo what is now past.

On whether the appeal has become a mere academic exercise it submits that this is so where it has no bearing with live issues or its determination would be an exercise in futility. DIKE V. NZEKA (1986) 2 NWLR (Pt.34) 144 AND PLATEAU STATE V. ATTORNEY GENERAL OF THE FEDERATION (2006) 3 NWLR (Pt.967) 346 at 419. It submits that the appeal with no live issues no longer has any value to the appellant and that it is needless to rely on PETER OBI V. INEC AND ORS. (supra) and DANIEL V. FERGUSON to undo what has been done.

On issue two it has alleged that the pre-conditions for the exercise of the powers under Section 22 of the Supreme Court Act are non-existent in this case and that the Court does not grant a relief not claimed. See: ATTORNEY GENERAL OF ANAMBRA STATE V. OKAFOR (1992) 2 NWLR (Pt.391). It contends that Section 22 does not empower the Court to override the exclusive power of the Court below to hear appeals from the High Court. See: HARRIMAN V.

HARRIMAN (1987) 3 NWLR 244. And that even where this Court finds merit in the Appeal it should remit the case to the lower Court to determine.

B On Section 34(2) it submits that exhibits 1 and 2 of the 3rd Respondent have been forwarded to the 1st Respondent 60 days to the election and that the reason given in both exhibits read together is cogent and verifiable as it is self demonstrating and can be checked out.

C I find this brief interesting as it has engaged in a few skirmishes. The brief is silent on the salient questions of not filing a counter-affidavit to the appellant's affidavits. This represents the case for the 1st Respondent.

D The 2nd and 3rd Respondents in their joint brief of argument and their oral submissions have supported the decision that the appeal has presented academic questions and has been rightly struck out. They have disputed the argument advanced on issue one, just as they have applauded the lower court for rightly striking out this matter. In the event that their objection to the competency of issue two of the appellant is overruled, they have argued that based on the conflicting facts of this case even though reduced to documents it is inappropriate to urge the court to invoke Section 22 of the Supreme Court Act relying on them. They have submitted that even though the action has commenced by Originating Summons and supporting  
E affidavit that to act on them will be improper as they have raised the problem of conflicting facts although documentary. They have illustrated thus by reference to Exhibits 'B' and 'C' of the appellant, which bear no dates the party primaries took place and on their faces do not refer to either the Senate or House of Representatives elections.  
F They complain that the Party Primary result-sheets are not signed by the National Chairman and Secretary of the PDP as required nor authenticated by the electoral officer. Even then that the Appellant and his agents have not signed the result-sheet. Exhibit 'C' they have alleged suffers from the same fate, not dated, nor signed nor stamped  
G and is addressed to nobody.  
H

Exhibit 1 equally is not dated, not signed by the National Chairman and Secretary as required nor addressed to INEC. Coming back to Exhibits 1 and 2 written by 2nd Respondent to the 1st Respon-

dent raised on behalf of the 3rd Respondent they submit, they have been received within time and as regards Exhibit 1 they have contended it has been submitted without enough information as deposed to by the 2nd and 3rd Respondents at paragraph 12 of the Counter-affidavit; Exhibit 2 is a letter to the 1st Respondent signed by the National Chairman and Secretary to complement Exhibit 1 and has been found by the trial court as having been received in time by the 1st Respondent. B

Consequently, it is submitted that the cases of ARARAUME V. INEC (2008) 6 SC (Pt.1) 88 and AMAECHI's case (supra) are distinguishable. Besides, that the reasons given in this case for the substitution as per Exhibits 1 and 2 of the 2nd and 3rd Respondents are cogent and verifiable and have been reached after a report of a panel of inquiry set up by 2nd Respondent to look into the allegations in a petition written by the 3rd Respondent complaining of the said party primary. They submit that the exercise is within the exclusive preserves of the 2nd Respondent for which it is not answerable to any one but itself. They have relied on ONUOHA V. OKAFOR (1983) 2 SCNLR 244; ARARAUME V. UGWU & ORS. (supra) for so opining. They also have expressed the view that the veracity of the reason is neither for the Court nor INEC to inquire into, and that at the time the 2nd Respondent forwarded Exhibits 1 and 2 of the 2nd and 3rd Respondents to the 1st Respondent, it is clear that the Appellant's nomination papers have not been sent to INEC by the 2nd Respondent for processing. Thus, they have raised serious questions as to Exhibit T and 'B' of the appellant particularly as to when the appellant's documents are alleged to have been received by the 1st Respondent. They point out that Exhibit 'B' is an incomplete document in every respect as important details as to the officer in INEC who received it, the date it was received and signature, name and rank of the receiving officer have not been inserted and that these pieces of information ought to have been ascertainable from Exhibit 'B' ex facie. C D E F G

Coming to impugning Exhibits 1 and 2 of the 2nd and 3rd Respondents by the appellant they submit that this has showed that the action is hostile in nature and inappropriate to be commenced by way of Originating Summons. H

As to the mischief which Section 34 is aimed at tackling the court is urged to ignore, the cases of ENEMUO .V. DURU (2004) 9 NWLR (Pt.877) 75; ABANA V. OBI (2004) 10 NWLR (Pt.881) 319, and UBA. V. UKACHUKWU (2004) 10 NWLR (Pt.881) 244, decided Under Section 59 (c) of the Electoral Act, 2002 cited by the appellant as inapplicable in considering the question. They contend that these are cases where INEC had gone ahead to cancel already declared results to announce those persons who did not contest the election, and that the facts and circumstances of the cited cases are not on all fours with the facts of this case. They submit that Section 34 of the Electoral Act 2006, has not been promulgated to meet the mischief arising from the cited cases as has been submitted by the appellant.

On the submission that INEC has failed to take a decision on the cogency or verifiability of the reasons given in Exhibits 1 and 2 and having been accentuated by the fact that the appellant has not been given a hearing on it as contended by the appellant, they point to the substitution of the appellant as deposed to in his affidavit in support as evidence of the change; furthermore that the Act has not by its language prescribed any form such change should take and so the 2nd Respondent is not obliged to give to the appellant any notice or a hearing particularly as he is not indicted in any way by the reasons in the said Exhibits 1 and 2. It is argued that the application is simply to give effect to a substitution or change already effected by Exhibit 2 which as has been submitted above contains the reasons for the change or substitution of the appellant thus making the invocation of Section 36(1) of Nigeria 1999 Constitution otiose and inapplicable. And furthermore, that Section 34(1) and (2) by its import has neither expressly nor impliedly incorporated Section 36(1) of the 1999 Constitution and they refer to ATTORNEY-GENERAL BENDEL STATE V. ATTORNEY GENERAL OF THE FEDERATION (1982) 3 NCLR 1 and OBASANJO V. YUSUF (2004) 9 NWLR (Pt.877) 144 at 210 to show the impropriety of the appellant reading Section 36(1) of the 1999 Constitution into Section 34 of the Electoral Act 2006. They also contend that the word “verifiable” as per Section 34 (2) of the Act cannot be construed to mean that the 1st Respondent has to hold an inquiry to ascertain the same, failing which Section 36(1) of

1999 Constitution stands violated. They acknowledge that the 1st Respondent has not filed a Counter-Affidavit in this matter, which should not prejudice the case of the 2nd and 3rd Respondents although it has associated itself with the case of the 2nd and 3rd Respondents and in this connection that Exhibits 1 and 2 of the 2nd and 3rd Respondents are public documents. See Section 109 of the Evidence Act, and that the 1st Respondent can rely on them in proving its case. B

The 2nd and 3rd Respondents while emphasizing that their Exhibits 1 and 2 have been received by the 1st Respondent on 19th and 20th February, 2007 respectively as per the date stamps inscribed on each of them, have asserted that the change or substitution has occurred before 60 days to the actual election of the 3rd Respondent and so they have pointed out that the appellant's nomination papers on the other hand have not disclosed ex-facie the date they were forwarded to the 1st Respondent for processing. D

The 2nd and 3rd Respondents have also impugned the evidential quality and disorderly nature of the documents exhibited to the appellant's supporting affidavit and the ones tendered from the Bar on his behalf; and as spurious documents which otherwise have not improved but have diminished the quality and evidential weight of the said Exhibits, that is, as against Exhibits 1 and 2 which are public documents: See Section 97 (2) (c) of the Evidence Act and NZEKWE V. NZEKWE (1989) 2 NWLR (Pt.104) 373 at 404. The Court is urged to uphold the decision of the Lower Court and dismiss this appeal as wanting in merit. E F

The 2nd and 3rd Respondents in their joint brief of argument have raised a notice of preliminary objection as to the competence of issue two distilled from ground 3 of the Grounds of Appeal by the Appellant. G

The appellant in his reply briefs has attended to the preliminary objections and other points treated in the Respondents' briefs. Reply brief related to addressing issues adequately espoused in the main brief I have decided to ignore and discountenance them as he is not allowed by the Rules of this court to have a second bite at the cherry. H

I think, I should deal straightaway with the instant preliminary

objection in order to get it out of the way in this matter so as to enable me see my way to deal with the real questions in controversy here. This is even so before delving into the parties' cases as presented here. It should, however, be noted that the 1st Respondent has not joined the 2nd and 3rd Respondents to object to issue 2 of the appellant. It has raised two identical issues to the two issues as formulated by the appellant. I have listed them for completeness of the issues formulated by the parties in this case. I now deal with the objection.

The 2nd and 3rd Respondents have taken the position in the preliminary objection that an issue for determination in an appeal must relate to a ground of appeal. See; WESTERN STEEL WORKS LTD & ANOTHER V. IRON STEEL WORKERS UNION OF NIGERIA & ORS. (1987) 2 SC. (Pt.II) AT 45; and AJA & ANOR. V. OKORO & ORS. (1991) 9/10 SCNJ 1 at 11. That issue 2 distilled from ground three, to say the least, bears no relationship to nor relevance to ground 3. This is so as the lower court in its decision appealed from, has neither made a determination on the invocation of the general powers of the Supreme Court under Section 22 of the Supreme Court Act, nor has it pronounced upon whether the appellant is entitled to a judgment on the merits; also that there is no findings by the court below on any of these questions, they have therefore contended. See: ADELEKAN V. ECU-LIVE N.V. (2006) 12 NWLR (PT.993) 33 at 49. They have therefore urged this Court to discountenance the said issue two as being at large and to strike out ground 3 as having been abandoned; since no issue derives from it. The 1st Respondent has not objected to issue 2, indeed it has adopted issue 2 in toto as issue 2 in its brief of argument and has rendered its argument in that regard. And so, the two issues it has formulated in its brief are identical to the two issues of the appellant's; I think I say no more in its behalf in this regard.

The appellant in his reply brief has boldly asserted that for this court to exercise its powers under Section 22 of the Supreme Court Act it is necessary that there is a ground of appeal suggesting a discussion of the appositeness of the Supreme Court invoking its general powers under the said Section 22 and that the lower court need not as is being contended by the appellant in this case make "a determi-



nation on the issue”. He refers to PETER OBI V. INEC & ORS. (2007) 11 NWLR (Pt.1046) 565 and INAKOJU AND ORS. V. ADELEKE & ORS. (2007) 1 SC (Pt.1) to show that it is not the Rule that the lower court has to make a determination first to ground the exercise of the power under Section 22. He makes the point that where, however, the Lower Court fails to give a decision on the merits that this court is competent particularly where it has been so raised as one of the reliefs sought in the Notice of Appeal to deal with it as such, that is , i.e. as a matter of course. The appellant has viewed issue 2 in the 2nd and 3rd Respondents’ brief of argument as conceding the point that the appeal has not been heard on the merits, and that the decision not to so consider the appeal is a determination that has denied the appellant a decision on the merits occasioning a miscarriage of justice. I now go into the matter of the preliminary objection.

In his notice of the preliminary objection the 2nd and 3rd respondents are challenging the competence of issue two of the appellant. They have urged that as it does not stem from ground three of the appellant’s grounds of Appeal it should be discountenanced and struck out forthwith.

Above is the submissions of 2nd and 3rd respondents in regard to their objection and the appellant’s response thereto. I will highlight on their points as I go along in this discussion.

However, it is settled as in the case of SHA V. KWAN (2000) FWLR (Pt.11) 1798 as in so many other decided cases of this Court that the main purpose of formulating issues for determination is to enable the parties get focused on the real questions in controversy in the ground(s) of appeal. In any appeal in this Court only issues formulated within the parameters of the grounds of appeal and stemming from the decision appealed from are competent to be ventilated. See: ONIAH V. ONYIA (1989) 2 SCNJ 69. An issue could cover one or more grounds of appeal and therefore, if an issue is not related to any ground of appeal as the 2nd and 3rd respondents are contending in respect of issue 2 here, it becomes irrelevant and liable to be struck out as it goes to issue. See: OGBUANYIYA V. OKUDO (1990) 4 NWLR (Pt.146) 551 at 568. It is settled that an appellate court as this court, I must emphasize, determines appeal before it solely on the issues formulated from the grounds of appeal filed in

the appeal before it. Consequently, where as it is being urged here that no competent issue has been raised from ground 3 it is settled, it would be deemed abandoned and to be discountenanced. In other words, the court should not hear any submissions or arguments in regard to a ground of appeal from which no issue has been raised. I refer and rely on the following decided cases for the foregoing conclusions. See: ATTORNEY-GENERAL ANAMBRA STATE V. ONUSELOGU ENTERPRISES LIMITED (1987) 4 NWLR (Pt.66) 547; ONIA V. ONYIA (1989) 1 NWLR (Pt.99) 514; ADELAJA V. FANOBI (1990) 2 NWLR (Pt.131) 137 at 148; NZEKWE V. NZEKWE (1989) 2 NWLR (Pt.104) 373 at 423; MOMODU V. MOMODU (1991) 1 NWLR (Pt.169) 608 at 621; ONAFIDE V. OLAYIWOLA (1990) 7 NWLR (Pt.161) 130; JOHN BANKOLE AND OTHERS V. MOJIDI V. PELU AND OTHERS (1991) 8 NWLR (Pt.24) 523 at 537.

Issue two of the appellant's brief of argument being challenged, if I may set it out again here, is as follows:-

*"2. Whether this appeal presents an appropriate occasion for the exercise Of the general powers of the Supreme Court under Section 22 of the Supreme Court Act to deal with appellant's claim without remitting same to the Court of Appeal, and if it is, whether the appellant is entitled to judgment on the Merit of his claim".*

On the other hand Ground 3 of the Amended Notice of Appeal (without its particulars) from which the above issue two is distilled reads, thus:

*"The Court of Appeal erred in law when on the ground, that the appeal was academic and hypothetical, it failed to consider or determine the appellant's Appeal on the merits and grant the reliefs sought therein despite all the Materials placed before it enabling it in that behalf, and thereby came to Wrong decision which has occasioned a grave miscarriage of justice."*

I have gone through the instant parties' submissions in this regard as per their respective briefs of argument and I have given serious consideration to them and it is now well settled if I may repeat, that an issue must arise from a Ground of Appeal to be competent of being canvassed in the resolution of questions in an appeal as the instant one. The crucial question here is therefore, whether in the context of ground three, issue two has been raised from it. To answer

this question I need to examine closely issue two. Issue two of the appellant is made up of two separable clauses. The first clause of issue two is and I quote:

*“whether the appeal presents an appropriate occasion ...Remitting same to the Court of Appeal”, this clause precedes the conjunctive word “and” in the long sentence of Issue 2.”* B

The clause as formulated has raised the invocation of the general powers given to this court as envisaged in the provisions of Section 22 of the Supreme Court Act, which when exercised will decide the fate of the appeal one way or the other as is being urged in the instant appeal. The provisions of Section 22 of the Supreme Court Act have conferred on this Court powers to consider whether to remit a case before it to the lower court to determine on the merits as is being urged by the 2nd and 3rd Respondents or where, as here, there are sufficient materials before the court in respect of the said issue which the lower court has failed to deal with on its merits the power of the trial court to deal with it having been granted to this court under Section 22 of the Supreme Court Act, The instant ground 3 is not rooted in Section 22 of the Supreme Court Act as is being urged by the appellant. The court is empowered by Section 22 of the Act to make whatever orders as the courts below. See: ABAYE V. OFILI (1986) 1 SC 231; 1986 1 NWLR (Pt. 15) 134 and ODEBE V. INEC (2008) 7 SC 25. This part of issue two clearly does not spring from ground three and a ground of Appeal cannot be founded upon it. There is no finding or decision in the judgment of the lower court upon which to predicate it. The second clause that is, which reads and I quote: C D E F

“whether the appellant is entitled to judgment on the merit of his claim”, leaving out the words “if it is” in that conditional Clause, it has raised questions which have been tailored to the real issue in controversy in the said ground three, although it is not couched in the negative to make it more pungent and audacious. This part of the issue two clearly has its roots in the decision of the court below. In this respect even issue 2 of the 2nd and 3rd Respondents is clearly supportive of this conclusion as it presupposes that the decision not to consider and allow the appeal connotes that the decision is not on the merits of the claim; thus leading to a miscarriage of justice. There- G H

fore the way and manner by which the appellant has presented issue two consisting of the first clause vis-a-vis the second clause in a reverse order, with respect, appears to me like putting the cart before the horse as the second clause should give cause to discussing the invocation of the powers of this court under Section 22 of the Supreme Court Act, that is, where finally the instant second clause has been upheld and not the other way round. It is the successful consideration of the issue of whether the appellant is entitled to judgment on the merits of his claim as per the second clause that may give rise to i.e. result in considering the first clause for making the order the Courts below could have made after a rehearing on the record, that is, without remitting the case to the Courts below to rehear.

In other words, in this matter the second clause gives cause to the consideration of clause one and not vice versa. Besides, the 2nd Relief the appellant is seeking in the appeal as set out in his Notice of Appeal he has urged the Court to exercise its powers under Section 22 of the Supreme Court Act and it reads as follows:-

*“Deal with the appeal in exercise of the general powers of the Supreme Court pursuant to Section 22 of the Supreme Court Act and Order and Rules 12 (1), (2) and (5) of the Supreme Court Rules by assuming jurisdiction over the whole proceedings as it has been instituted in this court”.*

The appellant appears to be repeating the first clause of Issue 2. I think it is rightly stated as a relief to be sought for in cases of this nature. The invocation of the power of this court under Section 22 of the Supreme Court Act is to make any orders the courts below are empowered to make. See: DANTATA AND ANOR. V. MOHAMMED (2000) 5 SC 12; (2000) 7 NWLR (Pt.664) 176 at 200. This matter has been taken so far as it seems to me from the above reasoning that it is the form i.e. the format of couching, issue two amounting to a technicality that is worrisome here and not its content as such. ***In my view it is not in any doubt that issue 2 is bedeviled with the way it has been couched. I think it is only proper from the syntactic structure of the two clauses making up this otherwise longish issue (two) that it is restructured or re-ordered so as to bring to crystallization the real question in controversy as per Ground 3, notwithstanding that the appellant***

***has thus blundered. It is settled in the case of A.Y. OJIKUTU V. FRANCIS E. ODEH (1954) 14 WACA 640 at 641 that***

***“Blunders must take place from time to time and it is unjust to hold that because a blunder ..... has been committed, the party blundering is to incur the penalty of not having the dispute between him and his -adversary determined upon the merits.” It would be most unjust to discountenance issue 2 on this ground alone.*** It is established in the case of ATTORNEY GENERAL, BENDEL STATE V. ATTORNEY GENERAL OF THE FEDERATION (1981) 10 SC. 1 that the Court will do justice in any case that comes before it and will not be deterred by objections raised on technicalities. This court by upholding an identical issue almost in similar circumstances as here did not go that far. It considered a similar issue in ODEBO V. INEC (2008) 7 SC 23 at 56 per Tobi JSC, and held “*Issue No.3 which urges this court to exercise its power under Section 22 of the Supreme Court Act cannot be formulated as a ground of appeal*”; it has been raised and discussed as an issues in the cited case. And I agree with the reasoning.

***This court in the interest of justice and to crystallize the real question in the appeal has the power to reframe issues for determination as here where appropriate. The exercise of this power by the court has never been in any doubt although being a circumspective action the court has to bear in mind the Ground of Appeal in question.*** It is important to appreciate that ground 3 here even though it may have been superseded by Issue two has not been challenged in any way by the 2nd and 3rd Respondents. This power has sufficiently been espoused and followed in one of such cases as FABAYI V. ADEWUYI (2000) 5 SC 31 at 42, and as in the cases cited immediately above. ***To bring out the real issue in Ground 3 therefore in Issue two, it is reframed thus:***

***“2. Whether the appellant is (not) entitled to judgment on the merits of his claim, and if it is whether this appeal presents an appropriate occasion for the exercise of the general powers of the Supreme Court under Section 22 of the Supreme Court Act to deal with Appellant’s claim without remitting same to the Court of Appeal, (the word in brackets supplied in order to state in the issue in the negative)”.***

**(the word in brackets supplied).**

***The arguments of the parties in the briefs have not been otherwise affected. I therefore, find no merit in the preliminary objection and I hereby overruled it; and hold that issue 2 is competent as reframed.***

B Having put to rest the disputation as to the propriety of the competence of issue two raised for determination by the appellant; I have to say that the two issues as raised on both sides of this matter are similar. Issue one on both sides is unarguably similar. The same  
C goes for the reframed appellant's issue two and the 2nd and 3rd respondents' issue two. I have already adverted my attention to the two issues raised by the 1st Respondent above. They are arguably central to the question whether or not the appeal arising from the decision of the lower Court has rightly held that the appeal is a mere  
D academic exercise. It is consequent upon so holding that the appellant's case on appeal submitted for adjudication before the Lower Court on being struck out pre-emptorily has given rise to the poser as per issue two of the 2nd and 3rd Respondents whether the decision has not occasioned a miscarriage of justice.

E The two issues on both sides being similar I now go ahead to consider the submissions in this appeal made by the parties. The two issues as formulated in the appellant's brief of argument will form the basis of my discussion.

F My overview of this case as per the parties' respective briefs of argument is that under pre-election dispute the appellant as well as the Respondent has referred to and relied on Section 32 and 34 of the Electoral Act 2006 as they deal with nomination and substitution, that is, in the procedure of changing nominated candidates. Specifi-  
G cally that ***Section 32 regulates the submission of names of nominated candidates to INEC while Section 34 deals with the procedure of changing of nominated candidates by political parties, and in this case by virtue of the provisions of Section 251(1) of the 1999 Constitution original jurisdiction to deal with and determine any disputes arising therefrom is vested exclusively in the Federal High Court. And that pre-election disputes encompasses the stage of conducting party primaries to holding of actual elections; on the other hand, that post-***  
H

***election disputes contemplate actual election which is challengeable on the ground of undue election or undue return albeit on a specific ground(s) as prescribed by Section 145 (1) (a) to (d) of the Electoral Act 2006. That said, that post-election disputes come under the exclusive jurisdiction of the Election Tribunals as per Section 140(1) and (2) of the Electoral Act 2006 for adjudication. And I so hold that the foregoing represents the true position of the law in this regard.*** B

The kernel of the appellant's case here is that fundamentally the reliefs claimed in the Originating Summons relate to a pre-election dispute (and not a post-election dispute) which is within the jurisdiction of the regular Courts. And so the holding of the election on 21st of April, 2007 has not affected or foreclosed the appellant's cause of action; as a pre-election dispute; in this case it has outlived the said election and so, has not been reduced to a mere academic exercise: See: NATIONAL ELECTORAL COMMISSION (NEC) V. N.R.C. (1993) 1 NWLR (Pt.267) 120 at 131. C D

I should now go ahead to consider the appeal based on the appellant's issue one as formulated by him and issue two as reframed by the court but before then I have to advert my mind very briefly to the 2nd and 3rd Respondents taking to task, indeed, respectfully agitating strenuously over the question of commencing this action by way of Originating Summons. Their joint brief of argument is resonant with sporadic attacks on this procedure which rightly in my view has been chosen by the appellant to ventilate his case. After all in matters of this nature, facts and circumstances, on which the parties rely are deposed to in affidavit and enabling Rules of Court being relied upon reflected on the body of the motion. The parties i.e. the appellant, as against the 2nd and 3rd Respondents have filed their respective affidavits and counter-affidavit in this case in the trial court. The 2nd and 3rd Respondents have filed their Counter-affidavit without first raising any challenge to the procedure of conducting this case by affidavit evidence. And they should not be heard to complain as they are deemed to have waived the irregularity. The instant challenge of the procedure of commencing this suit by Originating Summons therefore, is a fresh issue as it has not been taken in the courts below. No leave has been sought and, granted to raise it here. E F G H

The challenge of this process under Originating Summons I must say, also has not been taken formally. There is no formal motion to raise and treat this question in its proper context.

**Firstly, I must observe that having fought this matter this far, that is, on the instant form of action to this stage of the proceeding in this court which amounts to acquiescing in the propriety of the procedure, I think it is too late in the day to take the point of any irregularity about it.** Originating Summons as gathered from decided cases of this court comes handy where the questions in controversy for determination turn on the simple questions of construction and would not call for settlement of pleadings. See: NATIONAL BANK OF NIGERIA V. ALAKIJA & ANOTHER (1978) 2 LRN 78. It is to be made clear hereunder that the issue of using the instant procedure is to construe Sections 32 and 34 of Electoral Act 2006, against the substitution of the appellant on the backdrop of the documents exhibited to the affidavits in this case. **The guiding principle in this regard is very clear. It is that a breach of the Rule of practice and procedure can only render a proceeding irregular and not a nullity.** See: NIGER - BENUE TRANSPORT CO. LTD. V. NARUMAL & SON LTD. (1986) 4 NWLR (Pt.33) 117. **And it is the duty of Counsel to take the point of irregularities in proceedings as they occur.** See: SALIBA V. LABABEDI (1972) 12 SC 197. Also ATTORNEY GENERAL, BENDEL STATE V. ATTORNEY-GENERAL OF THE FEDERATION (1981) 10 SC. 1. **The Respondents have not raised any objection to the procedure. So that where an action as in this case has been started by a procedure which is irregular a party who took active part in the proceeding without raising a formal objection to the irregular procedure cannot be heard later to set aside the action on the grounds of irregularity he acquiesced in.** See: NOIBI V. EKOLATI (1987) 1 NWLR (Pt.52) 619. See: SAUDI V. ABDULLAHI (1989) 4 NWLR (Pt.116) 387 at 428. The 2nd and 3rd respondents as can be seen from the reasoning above have taken active part in the proceeding. It seems to me that they are the ones catching at the straw of an apparent irregularity in the procedure of initiating this suit for the sole purpose of reversing their misfortunes in this case and thus checkmate if not stifle the appellant's case.



***Even then instituting this action by way of Originating Summons appears to me all said, to be most appropriate form of action to speedily resolve in the context of Sections 32 and 34 of the Electoral Act 2006, that is to say, the controversy surrounding the nomination and substitution of the appellant by the 2nd Respondent in this case. It is significant that the materials by way of facts deposed to and documents exhibited to the said affidavits of the parties and the ones tendered from the Bar provide more than sufficient materials to deal with the issue of whether the appellant has been properly substituted in the circumstances. As they have not been challenged, they constitute admissible evidence.*** See: SHITTA-BAY V. ATTORNEY GENERAL OF THE FEDERATION (1998) 10 NWLR (Pt.570) 392. And again, the applicable law in this instance is not being contested. There is no application before the courts below for oral evidence, none whatsoever. This is so as the matter is conceded on both sides to be predicated on documentary evidence. It is the effect of these documents and exhibits visa-vis on the matter in controversy, that is, the substitution of the appellant that the court is called to adjudicate upon. By contending that the action should have been commenced by Writ of Summons as there are apparently conflicting facts in the documents exhibited to the affidavits on both sides is missing the point. It is of great moment that the 1st Respondent has failed in its duty to counter important facts which are material to this case by not filing a Counter affidavit. This is not a hostile suit by a long shot.

I make this point because I am convinced the 2nd and 3rd Respondents have not made the case of conflicting affidavits an issue at the trial court and not even in this appeal.

I can find no justification for the precipitate attacks on this form of action and the documents relied on by the appellant, which otherwise constitute admissible evidence. Besides, the documents relied on herein even by both parties as conceded by the 2nd and 3rd Respondents have emanated from proper source i.e. from the custody of the 1st Respondent (INEC) and are public documents duly certified by it. These are authentic documents by any standards to be relied upon and therefore are entitled to be given credence and weight. See: SHITTA-BAY V. ATTORNEY GENERAL OF THE FEDERATION

(1998) 10 NWLR (Pt.570) 392. The 1st Respondent, for reasons not too apparent on the record has not filed any affidavit in response to the appellant's supportive affidavits in the trial court. It as well has not challenged the documentary exhibits by appealing. It therefore is rather a belated attempt by the 2nd and 3rd Respondents to renege from the effects of these documents or even try to destroy or weaken their evidential value or quality by attacking even the authenticity or source of the documents, a point the 2nd and 3rd respondents respectfully have not seen fit before now to raise before the courts below. This is more so as the 2nd and 3rd respondents have not cross-appealed on these grounds.

***The fact that a party's set of documents as against the ones of his opponent presents a disorderly nature by lying ex facie should not be a ground for alleging the presence of conflicting facts in the documentary exhibits of the parties to necessitate taking oral evidence to resolve it. Even though a factual issue as submitted by 2nd and 3rd Respondent, it could be resolved by authentic documents before the court of which there are a number of them here as I will show later on and not only by calling oral evidence*** -See: Shitta-Bay's case (supra). ***More importantly, it is settled that oral evidence cannot be allowed to add to or subtract from or alter or contradict a written document. See Section 132(a) of the Evidence Act, NNUBIA V. ATTORNEY GENERAL, RIVERS STATE*** (1999) 3 NWLR (Pt.593) 82; ***B.O.N. LTD. V. AKINTOYE*** (1999) 12 NWLR (Pt.631) 392; ***U.B.N. V. OZIGI*** (1994) 3 NWLR (Pt.333) 385 and ***KOIKI V. MAGNUSSON*** (1999) 8 NWLR (Pt.615) 492. Moreso, here where the action is not hostile. In the end, I have no doubt in my mind that the instant procedure by way of Originating Summons avails the appellant of a proper way of initiating this action in seeking a quick and ready resolution of his grievances as per his claim. This in my respectful view has settled this question.

I now come to the appeal itself at last and I intend to deal with it on the two issues of the appellant. At the hearing on 15th April, 2007 of this appeal before the Court of Appeal it-suo motu has ordered the filling of addresses on the question whether or not the instant appeal has become a mere academic exercise. The lower court

in its decision held as follows as at page 246 LL 18-21 of the record:

*"In my humble view by a combined effect of Section 285(1)(a) of the 1999 Constitution and Sections 69 140(1) and 145(1) (a) to (d) of the Electoral Act 2006, this cause of action has inured to the Election tribunal."*

To put the issues raised for determination in proper perspective, I think I should first set forth in extenso the reliefs claimed by the appellant in his Originating Summons as follows:

*"1. A DECLARATION that the 1st Defendant's statutory power to substitute a nominated candidate of a political party, under section 34 of the Electoral Act 2006, is qualified AND not absolute."*

*2. A DECLARATION that the 1st Defendant has NO power to substitute a nominated candidate of a political party less than 60 days to the election when the candidate is not dead."*

*3. A DECLARATION that the 1st Defendant CANNOT substitute a nominated candidate of a political party in the absence of cogent and verifiable reasons."*

*4. A DECLARATION that in view of section 36 of the 1999 Constitution the 1st Defendant CANNOT fairly and constitutionally determine the cogency and verifiability of substitution of a nominated candidate without some notice to the candidate or hearing or some form of inquiry from or input by the affected candidate."*

*5. A DECLARATION that the legislative innovation introduced by section 34 of the Electoral Act is aimed at deepening and strengthening Nigeria's democracy in relation to substitution of a nominated candidate in an election."*

*6. A DECLARATION that the substitution of the Plaintiff by the 1st Defendant as the duly nominated candidate of the Peoples Democratic Party (PDP) for election into the House of Representatives in respect of Onitsha North and South Federal Constituency of Anambra State in the manner it did is ultra vires, undemocratic, arbitrary, unlawful, illegal, unconstitutional, null and void."*

*7. AN ORDER setting aside the purported substitution, same being in excess of the statutory powers of the 1st Defendant, in abuse of power, breach of duty to cat fairly, unreasonable, illegal, unconstitutional, null and void."*

*8. AN ORDER OF PERPETUAL INJUNCTION directing the*

*1st Defendant to restore the plaintiff as the duly nominated, verified, cleared and published candidate for the Peoples Democratic Party for election into the House of Representatives in respect of Onitsha North and South Federal Constituency of Anambra State."*

B Section 32 of the Electoral Act (in paraphrase) is clear and unambiguous it deals with nomination by a political party of candidates after screening for submission to INEC for the actual election. Section 34 of the Electoral Act deals with the procedure for effectual substitution of a candidate duly nominated by a political party.

C The court has in recent times in a number of decided cases scrutinized the provisions of Section 32 and 34 of the Electoral Act 2006. It is clear that they provide the dividing line between pre-election disputes and post-election disputes. The two sections deal with the preliminary matters to holding of actual elections. See: UGWUV. ARARAUME (2007) 6 SC (Pt.I) 88; ODEBO V. INEC & ORS. (2000) 7 SC (Pt.7) 24; AMAECHI V. INEC & ORS. (2008) 1 SC (Pt.I) 36; and PAM V. MOHAMMED USMAN (2008) 5-6 SC 53.

E All the reliefs set out above relate to questions of nomination and substitution of the appellant and clearly have made Sections 32 (1) and (2) and Section 34 of the Electoral Act 2006 the central questions in this matter. Because of the position I have taken in this appeal that what is before this court is circumscribed within the narrow question of whether the appellant has been properly substituted having been duly nominated. ***I must restate that it is settled law that if a party to a matter is satisfied with the judgment or a finding in a judgment that is the end of the matter for him. It is only where a party is aggrieved by a decision and appeals on it that the appeal court can act. I make this point because the***

F ***Respondents have spent a great of their time and energy and even space in the brief of argument of the 2nd and 3rd Respondents particularly to urge on this court to proceed on a wholesale re-evaluation of the evidence as regards the finding on the appellant's nomination as against his substitution and***

G ***reverse a decision or a finding of fact on an issue which has not been brought on appeal before it.*** See: EJOWHOMUV. EDOK-EDER LTD. (1986) NWLR (Pt.39) 1 per Obaseki JSC.

***But, simply put, the 2nd and 3rd Respondents are es-***

**topped from raising and arguing on the question of the appellant's nomination. That question is closed as there is no cross-appeal by the Respondents on it, particularly as no finding of fact can be challenged on appeal where there is no ground of appeal upon which the challenge can be based.** See: UNDERWATER ENGINEERING CO. LTD. V. DUBEFON (1995) 6 SCNJ 55. The trial Court in its decision has made an important pronouncement on this crucial point in this context and it runs thus: at page 118 LL 4-9 of the Records:

*"I am of the view that the instant case has nothing to do with the internal affairs of a political party. This is because having nominated its candidate in accordance with Section 32 of the Electoral Act 2006, the party had put forward the candidate and was bound to deal with the candidate subsequently in accordance with Section 34 on substitution".*

At page 111 LL. 15-19 of the record it concluded on the above findings as follows:

*"I therefore find that the plaintiff was duly nominated by the PDP to Contest elections into the House of Representatives for the Onitsha North and South Federal Constituency."*

This finding is clear, unequivocal and conclusive of the issue of the appellant's nomination as the 2nd Respondent's candidate. This means that the only question which is open on appeal to this court by the appellant's Notice of Appeal is as to the question of the appellant's substitution. This is borne out by the grounds of appeal filed against the trial court's decision and the issues formulated therefrom; the issues have been set out herein. This finding has put a final seal on the question of due nomination of the appellant by the 2nd Respondent. It remains so in this Court as it is not challenged by a cross appeal even as the 2nd and 3rd Respondents have fiercely attacked the appellant's nomination in the context of the party primary i.e. for the Onitsha North and South Federal Constituency of Anambra State, in their joint brief of argument and it can only be set aside on appeal. It is a finding of fact that is binding on both sides and it is settled that the finding does not extend beyond the issue of the appellant's due nomination. The 2nd and 3rd Respondents are bound by that finding and cannot be seen to stir up further dust about the

question of the appellant's nomination by the 2nd Respondent, with respect, subtly, through the backdoor and foist it on the court to rehear and determine. Another important point to make is that up to the trial Court's judgment in this case, both parties have proceeded with the proceedings as a pre-election matter although it is true to state that the instant election was held on 21st April, 2007. The question at the centre of this matter is whether this action continues under the jurisdiction of the regular courts i.e. the Federal High Court as a pre-election dispute or it has inured to the Election Tribunal with the power to deal with post election disputes of the said election of 21/4/2007.

The court below in the lead judgment of Bada JCA as per the record has opted for the ground that the action having inured to the Election Tribunal that there are no live issues to be determined as regards the reliefs claimed by the appellant; and that the issues have become a mere academic exercise, that is to say, Relying on the combined effect of Sections 285(1) of the 1999 Constitution, Sections 69, 140(1) and 145(1) (a) to (d) of the Electoral Act, 2006.

***In contrast to pre-election disputes, post election disputes as the term suggests could only arise from disputes over holding of the election or return of the election; post election disputes under Section 145(1) (a) to (d) 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 unlawfully excluded from the election.”***

***The above provisions are plain and unambiguous in providing the grounds upon which a petitioner could question an election and they are not applicable to party primaries.*** I will come back to this section later on.

With respect to the views of the court below, respectfully, none of the provisions of the law relied upon to make the declaration that

the instant action inures to the Election Tribunal is applicable to this case.

In this regard, let me examine closely the provisions of the said sections that is - 285(1) (a) of the 1999 Constitution; Sections 69(c), 140(1) and 145(1) of the Electoral Act 2006 as they have formed the very foundation of the decision of the Lower Court. **Section 285(1) (a) of the 1999 Constitution deals with whether any person has been validly elected as a member of the National Assembly. The provision is clear and unambiguous and literally construed is concerned with post-election disputes. Any dispute resulting from the conduct of an election is not a pre-election dispute but a post-election dispute. The dispute here has arisen from the substitution of the appellant by the 2nd Respondent as its candidate after winning at the party primary. The opinion of this court on this point as per decided cases I shall marshal out later on in this segment of my reasoning and are binding on this court. There is no basis for this case to inure to the Election Tribunal which is a special Tribunal created by the Constitution to handle post-election disputes. It has no jurisdiction over pre-election disputes.** See Amaechi's case, (supra).

Section 69 (c) of the Electoral Act 2006 on the other hand deals with the decision of the Returning Officers on any questions arising from the declarations of scores of candidates and the return of candidates and it contemplates packaging of and pronouncements of the scores of candidates at the actual election. The appellant has stood election as a candidate for the party primaries, a pre-election event which leads to the actual election. The scores under the section are referable to the scores of actual votes cast at an election. The appellant's complaint here is of his substitution predicted on his having won at the party primaries. The cases of INEC V. RAY (2004) 14 NWLR (Pt.892) 97 and NWOBODO V. ONOH (1984) 1 SCNJ 21 have expatiated on the point further.

Section 140(1) concerns proceedings questioning an election in any manner other than by a petition complaining of undue election or undue return in which a person is elected and it is the Election Tribunals that have exclusive jurisdiction over such disputes that is,

post-election disputes. The appellant here is not questioning the actual election either of the 3rd Respondent or any other election for that matter in which he was involved but his unlawful substitution by the 2nd Respondent as the party's candidate' having won at the party primaries. His complaints do not relate to matters of undue election  
 B or undue return in any manner whatsoever. The section is a non sequitur.

Section 145(1) (a) to (d) of the Electoral Act 2006 on the other hand provides for the grounds of petition for questioning an  
 C actual election. I have dealt with this section above, though not exhaustively. None of the subsections is of any relevance here; it has no provision to question the unlawful substitution of the appellant by the 2nd Respondent when he has won in the party primaries. The grounds set out under this section are not conducive for questioning  
 D the conduct of party primaries either, therefore none of its subsections applies to this case; understandably, the disputes that are covered by them are post-election disputes and not pre-election disputes, which are preliminary disputes to the actual election. In support of my views above I refer to AMAECHI V. INEC & ORS. (supra), UGWU V. ARARAUME & ORS. (supra) and ODEDO V. INEC & ORS (supra).  
 E

The implication of the above findings in law is that the judgment of the court below has no basis upon which it can stand, it is  
 F clearly not sustainable; all the legal props declared in its support and propping it up having been knocked down one after the other. So that the instant suit with its live issues still subsists within the jurisdiction of the regular courts (Federal High Court) (with the reliefs claimed by the appellant) being a pre-election dispute by virtue of Section  
 G 251(1) (a) of the 1999 Constitution; it is not a post-election dispute; it cannot be. See: AMAECHI V. INEC (supra). These findings have clearly showed that the instant Reliefs claimed in the Originating Summons have arisen from a pre-election dispute and that a pre-election dispute does not necessarily metamorphose into a post-election dispute  
 H by holding of the actual election it has foreshadowed. My next stop also is to consider whether a pre-election dispute as the instant case has become a mere academic exercise. In that vein, it is a grave error for the court below to hold that this suit is devoid of live issues



and so has become a mere academic exercise. I go on to expatiate. It is again in this vein that I should examine the case of the appellant that his substitution is entirely unlawful and ultra vires and should be so declared, for so contending, he relies on Section 34 of the Electoral Act 2006 which provides as follows:-

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

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

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

The appellant's specific complaint in this matter is the non-compliance with the provisions of Section 34(2) of the Electoral Act 2006 and Section 36(1) of the 1999 Constitution in changing him for the 3rd Respondent as the 2nd Respondent's candidate for the Onitsha North and South Federal Constituency of Anambra State. The Respondents are in unison in contending that the appellant's substitution is proper and lawful and in accordance with Section 34(2) of the Electoral Act 2006.

I have therefore to determine first when is an action said to become a mere academic exercise; and whether this case to all intents and purposes has become one of mere academic exercise as held by the court below. It is settled principle of law that the court's attitude in matters of academic exercise is to decline to decide the point that is what the 2nd and 3rd Respondents are urging here. See: ATAKE V. AFEJUKU (1994) 9 NWLR (Pt.368) 379 per Bello CJN; ADEREDOLU V. AKINREMI (1986) 2 NWLR (Pt.25) 710 per Nnamani JSC; NKWOCHA V. GOVERNOR OF ANAMBRA STATE (1984) 6 SC. 302, GOVERNOR OF KADUNA STATE V. PAPA (1986) 4 NWLR (Pt.38) 687 and FAWEHINMI V. AKILU (1987) 12 SC 136 at 213 per ONU, JSC. The Respondents' contention here is that the appellant's appeal on the election of 21/4/2007 having been conducted, there subsists no live issues in the Appeal for the court to decide upon; that the appeal from that point of view is dead as a dodo. In that wise, there is nothing that can be achieved in deciding

the appeal even moreso when there is no longer anything left to controvert over between the parties in the appeal as the appeal has been completely emptied of itself. I must say, respectfully, at this stage in respect of this case that I do not buy this legal postulation as my reasoning will show later on.

B But firstly, the Black Law Dictionary 5th Edition at page 11 has defined “academic question” as “An issue which does not require answer or adjudication by court, because it is not necessary to case; hypothetical or moot question”.

C An action becomes hypothetical or raises mere academic point when there is no live matter in it to be adjudicated upon or when its determination holds no practical or tangible value for making a pronouncement upon it; it is otherwise an exercise in futility. When an issue in an appeal has become defunct it does not require to be answered or controvert about and leads to making of bare legal postulations which the court should not indulge in; it is like the salt that has lost its seasoning. And like the salt in that state it has no practical value to anybody and so also, a suit in that state has none particularly, and practically to the Plaintiff. This view has found support in this Court’s  
D  
E decision as recent as in the case of PLATEAU STATE V. ATTORNEY GENERAL, OF THE FEDERATION (2006) 3 NWLR (Pt.67) 346 where in answering to a poser whether the action brought by the Plateau State in the cited case has become academic said per Tobi JSC and I quote as at page 419 of the report:  
F

*“A suit does not necessarily become spent merely because it was heard after the act or conduct which gave rise to the action. It is clear from the case file that the action was filed on June 24, 2004, about Ninety-six days after the declaration of the State of emergency  
G in the State. That the matter was not heard until the expiration of the emergency is not the fault of the Plaintiff and it will be improper for the court to throw out the Suit on that ground.....”*

*A Suit is academic where it is merely theoretical, makes empty sound, and of no practical utilitarian value to the Plaintiff even if  
H judgment is given in his favour. A Suit is academic if it is not related to practical situations of human nature and humanity.”*

My position on the instant case is thus fortified and whether a suit has become a mere academic exercise is a matter of mixed law

and facts. The appellant is far from conceding that the appeal has become academic and rightly so for that matter. He has blamed this conclusion on the Lower Court's misconception of shifting of the burden of proof between the parties in this case on the state of the affidavit evidence before the court and its misapplication in this case by the Lower Court. Follow up from the above reasoning before examining Section 34(2), I accept the appellant's submission that the crucial question of the burden of proof in this case has been misplaced otherwise this case would have been revolved differently; simply put, who would lose on the state of the affidavit evidence before the court if no further evidence is called i.e. as between the appellant and the 2nd and 3rd Respondents,' i.e. as regards the facts in contention. The appellant rightly contends that on the state of the affidavit evidence on both sides of the case the 1st Respondent has not discharged the burden of proof cast on it by the appellant's case. The answer to this poser becomes self-evident in the course of this judgment. That is to say, the evidential burden cast on the parties, based on the state of the affidavit evidence of the parties before the court in this case. There is by virtue of Section 137 of the Evidence Act in civil cases the principle that the party who asserts certain facts must prove them and once this is done the burden shifts to the other party - it is true, it is not permanent, the burden shifts between the parties and against the party whom judgment would have been given if no more evidence is adduced. See: BRAIMAH V. ABASI (1998) 13 NWLR (Pt.581) 167. ALHAJI OTARIS AND SONS LTD. V. IDRIS (1999) 6 NWLR (Pt.606) 330 and IDUUMA V. AKPO-IME (2000) 7 SC (Pt.II) 24; TEWOGBADE & CO. V. ARASI AKANDE & CO. (1968) NMLR 440. Viewed from this prism the appellant has deposed to at pages 31 to 34 of the Record as follows; i.e. in paragraphs (12), (13) & (17h) of his affidavit to wit:

*"(12) - Notwithstanding my listing by the 1st Defendant as duly nominated verified and cleared candidate, the 1st Defendant went ahead to substitute my name on the candidates' list on a date after 20th February, 2007."*

*"(13) - I made entreaties to officials of the 1st Defendant to furnish me with the substitution documents to enable me challenge the action in Court but none was given to me just as the 1st Defen-*

*dant did not notify me or hear from me before the substitution.....*

*“(17(h)) - In furtherance of the above, my substitution was made less than 60 days to the election which will hold on 21st April, 2007.”*

B *And in the further affidavit at pages 55 to 56 of the Record he has deposed to as follows:*

*“(6), I live in Abuja and my checks at the 1st Defendant’s head office and with my party up to 21st February, 2007, revealed that*  
C *my name was still on the list as candidate.*

*(7) I now have reasonable grounds to believe that the 1st Defendant removed my name on the application of some party official in Abuja less than 60 days to the election and without any cogent and verifiable reason notwithstanding my nomination to the 1st De*  
D *fendant as per Form CF.002C, a copy of which is herein attached as Exhibit K.”*

These depositions have raised very serious allegations of facts on Oath deserving of prompt traversing on Oath by the 1st Respondent who is the only party before the joinder of 2nd and 3rd Respondents and capable to furnish direct answers to the depositions. The 1st Respondent has filed no counter affidavit in response to counter these serious depositions. I can find no reasons not to believe the appellant’s case on this issue, that he has been cleared after  
E screening by the 1st Respondent and that his substitution has come after 20/2/2007 and that in the result he has applied unsuccessfully for the substitution document to enable him challenge the issue to no  
F avail and that his change has taken place less than 60 days to 21/4/2007 when he has been the party’s candidate as at 21/2/2007. The  
G 1st Respondent has not countered these facts within its peculiar knowledge.

***I accept the appellant’s submission that in actions initiated by Originating Summons, the affidavits filed by the parties in the matter take the place of pleadings and so any material paragraphs of the affidavit not specifically denied are taken as having been admitted, that is, as an unchallenged evidence upon which the court could act. See: LONG-JOHN V. BLAKK***  
H ***(1996) 6 NWLR (Pt.555) 524 at 532 and as in pleadings the de-***

**nial must not be evasive but frontal** - See: GEORGE V. DOMINION FLOUR MILLS LTD. (1963) 1 ANLR 71; BARCLAYS BANK D.C.O. V. HASSAN (1961) ANLR 836.

***The 1st Respondent has not filed any Counter-Affidavit in response to the appellant's affidavits in this matter, if I may repeat. And as the answers to most of the paragraphs of the appellant's affidavits and as well as the facts deposed to therein are matters peculiarly within the knowledge of the 1st Respondent traversing them effectively could only come from the 1st Respondent and not from the 2nd and 3rd Respondents without disclosing the source of their information. The appellant's depositions being unchallenged in these respects are deemed admitted. And so, the 1st Respondent not having discharged the burden on it, it is bound to take the consequence, that is, that the appellant's depositions being unchallenged are deemed admitted and that the court is at liberty to act on them.***

See: AGBAJE V. IBRU SEA FOODS LTD (1972) 5 SC 50 at 53 and EGBUNA V. EGBUNA (1989) 2 NWLR (Pt.106) 773 at 777. One other thing is that 2nd and 3rd Respondents copious attacks on the documents exhibited to the appellant's affidavits have been by impugning the documents as disorderly for containing conflicting facts has ignored the fact that they are authentic public documents from the 1st Respondent custody particularly exhibits 1 and 2 of the 3rd Respondent and Exhibit 1 and B of the appellant, upon which this crucial issue is pivoted. I make this observations as I have read the Counter Affidavit filed by the 2nd and 3rd Respondents at pages 68 to 71 of the Record particularly paragraphs 5, 6, 7, 8, 11 and 13.1 also note their submissions that on the whole no further burden of proof is on the 1st Respondent beyond the evidence already presented before the court and that once evidence is so presented in court a party is not precluded from using it to his advantage merely because he is not the party who produced it. See: ADUKE V. AIYE LABOLA (supra) and OFOMAJA V. HON COMMISSIONER FOR EDUCATION (1995) 8 NWLR (Pt.411) 49. I have dealt with the questions herein to the effect that the documentary exhibits, exhibited to the appellant's affidavit have not offended Sections 80 to 82 of the Evidence Act. There can be no doubt that the most critical

exhibits in this matter of the appellant's substitution are exhibits 1 and 2 of the 2nd and 3rd Respondents vis-a-vis Exhibits 1 and B of the Appellants. I am satisfied that these exhibits have emanated from the 1st Respondent's proper custody and are authentic and admissible. Also they could not have gotten to the 1st Respondent's custody except via the 2nd Respondent and there is no credible evidence to the contrary. And so, having so found I can proceed to examine their impact on the overall question of the appellant's substitution. I do not however, lose sight of the fact that the result of exhibits 1 and 2 is the "nomination" of the 3rd Respondent as the 2nd Respondent's candidate for the election. I bear this in mind in discussing the issue of burden of proof in this case.

At last I come to Section 34(2) of the Electoral Act, that is, on the substitution of the appellant. The provisions of Section 34 (2) are clear and unequivocal and have been construed in the cases decided by this Court. Considering Section 34(2) and in this regard I am bound by these decisions within the context of construing Section 34 which deals on the procedure for due substitution of nominated candidates, I have already set out the provisions of Section 34 above. I proceed to construe Section 34 which is plain and unambiguous and is literally construed.

Firstly, my examination has showed that it recognizes the power of a political party for the emergence by party primaries of candidates for elective offices as in the instant case for the Onitsha North and South Federal Constituency of Anambra State, otherwise known as nomination of candidates. Any application (written) for a change of a candidate duly nominated has to be done before 60 days to the actual election and the application for the change has to give cogent and verifiable reasons except in the case of death when a deceased candidate could be replaced even later than 60 days to the actual election.

I have already identified Exhibits 1 and B tendered on behalf of the appellant and Exhibits 1 and 2 exhibited of the 3rd Respondents Counter affidavit as the critical ones in regard to the appellant's substitution. Exhibit 1 of the 3rd Respondent (substitution notification letter) dated 5/2/2007 has set the ball rolling, it has been received by the 1st Respondent on 19/2/2007 by the date stamp on it.

Exhibit 2 of the 3rd Respondent to the 1st Respondent has given further reasons for the substitution and was forwarded on 20/2/2007. Exhibit 1 of the appellant is dated 20/2/2007 written by the State Chairman of the 2nd Respondent forwarding the appellant's nomination forms which have been received at the National office of the 2nd Respondent on 21/2/2007. Exhibits B is the certified true copy of that Exhibit from the 1st Respondent's custody. Obviously, by a simple calculation Exhibit 1 i.e. (appellant's Form EC 4B (iv) has reached the National office of the 2nd Respondent 2 (two) days after the 1st Respondent had received Exhibits 1 and 2 of the 3rd Respondent. Exhibit B has showed that the appellant's form EC 4 (iv) has gotten to the 1st Respondent as deposed to unchallenged by the appellant - the copy in court is a certified true copy by the 1st Respondent. B C

It is crucial to ask whether the appellant's Exhibit 1 i.e. Form EC 4B (iv) (certified true copy Exhibit B) has been forwarded by the 2nd Respondent to the 1st Respondent after the substitution notification letters of 5/2/2007 followed on 20/2/2007 by Exhibit 2 of the 3rd Respondent have been forwarded to the 1st Respondent. To my mind it makes no sense particularly to do so when the 3rd Respondent's exhibit 1 of 5/2/2007 has been received on 19/2/2007 by INEC and it is for the substitution of the appellant at a date when the appellant's Form EC 4B (iv) - Exhibit 1 has not even gotten to the National office of the 2nd Respondent let alone being forwarded to INEC, the 1st Respondent as the 2nd Respondent's nominated candidate. It has gotten there i.e. to the 2nd Respondent's National office only on 21/2/2007; respectfully, there is something fishy in the making and forwarding of Exhibits 1 and 2 to the 1st Respondent which has defied the 2nd and 3rd Respondents' explanation. The onus of explaining this material discrepancy is on the Respondents. Having failed to do so, it is fatal to their case. D E F G

I agree with appellant that the trial court should have drawn the necessary inferences under Section 149 of the Evidence Act from these facts and surrounding circumstances in reaching a decisions in this case. Not having done so, this court having construed the documents is in a vantage position as the trial court to do so. There is no question that these documentary exhibits are admissible evidence H

and this court has the power to evaluate the evidence and draw its conclusions. See: FASHANU V. ADEKOYE (1974) 1 ANL (Pt.I) 35.

***In regard to the above reasoning, I have no difficulties in holding that the letter of 5/2/2007, that is, the substitution notification letter received by the 1st Respondent on 19/2/2007 and exhibit 2 of 20/2/2007 in its support cannot rightly be calling for the substitution of the Appellant unless truly the appellant's nomination form EC 4B (iv) has gotten earlier in time to the 1st Respondent. In the scenario that has emerged here, again, I have no difficulty in holding that appellant's nomination Form EC 4B (iv) has gotten to the 1st Respondent first before the 3rd Respondent's exhibits 1 and 2 got to the 1st Respondent. Exhibits 1 and 2 have been purportedly made even then belatedly to effect the change of the appellant, otherwise Exhibits 1 and 2 of 3rd Respondent cannot be talking of substitution if it were not truly the position on the ground at the time the exhibits were forwarded to the 1st Respondent. And so I hold that Exhibits 1 and 2 of 3rd Respondent have lied ex facie as to the dates they have been made by the 2nd Respondent and received by the 1st Respondent. Exhibits 1 and 2 of the 3rd Respondent being most unreliable documents are hereby discountenanced as an afterthought. And for the avoidance of doubt I so hold.***

On the basis of my finding on Exhibits 1 and 2 of the 3rd Respondent there can be no doubt that there is no lawful substitution of the appellant. As can be seen the whole manipulative manoeuvrings by the 1st and 2nd Respondents have fallen flat on their face. Every attempt to make them stand has failed. In the general process of properly nominating a candidate or substituting a candidate, Exhibits 1 and 2 of the 3rd Respondent could not fall into either part under Section 34. However, I find exhibits 1 and 2 of the 3rd Respondent as a most disorderly set at documents carefully contrived to subvert the transparent nomination of the appellant as the 2nd Respondent's candidate for the Onitsha North and South Federal Constituency of Anambra State.

In very many decided cases of this court much uncomplimentary remarks have been leveled at the 2nd Respondent's negative



tendencies in subverting its own constitution by practices aimed at truncating due nomination and substitution of its candidates for election and what an irony? I needn't go into any questions and answers in this regard again, save to say that a word is enough for the wise.

To determine whether the change of the appellant by the 2nd Respondent as its candidate for the Onitsha North and South Federal Constituency of Anambra State for the 3rd Respondent in this case is regular and valid depends on whether exhibits 1 and 2 of the 3rd Respondent have complied strictly with the provisions of Section 34 of the Electoral Act 2006. I have variously in this judgment pronounced Exhibits 1 and 2 of the 3rd Respondent as most unreliable documents having been deliberately skewed in the interest of the 3rd Respondent. It is important to restate that the result of giving effect to exhibits 1 and 2 of the 3rd Respondent is tantamount to the "*nomination*" of the 3rd Respondent as the 2nd Respondent's nominated candidate. The provisions of Section 34 are clear and unequivocal and have prescribed that to satisfy the requirements of changing its candidate a political party seeking to change its candidate has to make a written application to INEC not later than 60 days to the date of election giving cogent and verifiable reasons for the change.

The question is, has the instant "*application*" as per exhibits 1 and 2 of the 3rd Respondent met the conditions? Without much ado, the change in this case has been initiated by what the 2nd Respondent calls "*substitution notification letter*" instead of a clear-cut written application containing cogent and verifiable reasons; a political party has to apply as provided in Section 34. I think the most crucial factor in this exercise is whether exhibits 1 and 2 of the 3rd Respondent have given what the Respondents have dubbed cogent and verifiable reasons.

Coming to the question of whether the reasons in Exhibits 1 and 2 are cogent and verifiable; in exhibit 1 of the 3rd Respondent the reason is given as "*without enough information*" while Exhibit 2 has alleged "*inconclusive party primary election*" as the reason for applying to change the appellant's name for the 3rd Respondent's name. The question is whether the 2nd Respondent has thereby made out cogent and verifiable reasons for the substitution of the appellant. The trial court has read the reasons in both exhibits together to

come to the conclusion that cogent and verifiable reasons have been given to support the substitution.

The terms “*cogent*” and “*verifiable*” have been given judicial interpretation in decided cases of this court in recent cases. I shall found on them. The appellant in his brief has submitted that there is  
B no cogent and verifiable reasons given for the substitution. The Respondents have maintained the contrary.

In the case of *UGWU V. ARARAUME* (supra) at pages 522-533 I said that it is my view that the reason has inter alia to fit into the  
C surrounding circumstances of the case to be otherwise cogent and verifiable. It is in this respect that I hold the view that INEC has to make a determination on the application as the matter is also justiciable. I have no doubt that INEC’s decision is challengeable in court and if this is so it has to be premised on a determination of INEC as  
D there can be no doubt the decision of INEC on this point would not be final.

On the first reason as per Exhibit 1 “*submitted without enough information*” like the reason of “*error*” given in the cited case above it is no reason at all. In fact it makes no sense as a reason. The other  
E reason of “*inconclusive primary election*” begs the question based on the surrounding circumstances of this case of how the party primary in which the appellant has scored 648 votes as against 33 votes for the 3rd Respondent could be challenged as inconclusive to warrant a change of candidate for a consensus candidate; I accept the appellant’s  
F submission that the said party primary could not have been inconclusive when the 2nd Respondent’s State Chairman (who was at the venue of the party primary elections) has gone out of his way to send a letter of congratulation to the appellant and has forwarded the  
G appellant’s name and nomination form EC 4B (iv) along with the names of the other successful candidates for the National Assembly to the Party Headquarters for onward transmission to the 1st Respondent for the purpose of nominating him. What makes the reason a suspect is that inspite of the available time the party rather than  
H go for a re-run of the election it has opted for a consensus candidate in the person of the 3rd Respondent. ***It is settled that once the reasons given for change are not cogent and verifiable the case for change fails as in this case. In short what I am trying***

**to say here is that in UGWU V. ARARAUME it was declared that “error” is not a cogent reason for substituting the party’s candidate and not in compliance with Section 34(2). So also is the reason “submitted without enough information” it is not a cogent reason nor has the reason been improved by exhibit 2 alleging “inconclusive primary election”; they are not sustainable in the circumstances. The reasons are not cogent and verifiable and must fail and I so hold.**

**In the upshot, my answer to the above poser on exhibits 1 and 2 of the 3rd Respondent is that none of the exhibits has given any cogent and verifiable reasons for applying as per exhibits 1 and 2 to the 1st Respondent to effect a change of the appellant as the candidate for the 2nd Respondent for the Onitsha North and South Federal Constituency of Anambra State.** See: UGWU V. ARARAUME (supra). The finding of the trial court in the circumstances is therefore in regard to the above, perverse and this court rightly has to intervene to set aside the perverse findings as they cannot be supported by the evidence as per the Record. See: ADEOSUN V. JIBESIN (2001) 11 NWLR (Pt.724) 290 at 319, ADEKUNLE V. STATE (2002) 4 NWLR (Pt.756) 168 at 192 A-D. USMAN V. GARKE (1999) 1 NWLR (587) 466 at 483-484, B.O.N. LTD. V. BABATUNDE (2002) 7 NWLR (Pt.766) 389 at 409, BASIL V. FAJEBE (2001) 11 NWLR (Pt.725) 592 at 625-626F.

Even moreso, I must as a follow up to my reasoning above say that although evaluation of evidence as well as the ascription of probative value to evidence of the parties before the court is the primary function of the trial court, this court has to intervene as here to avert an obvious miscarriage of justice and even so as the evidence in question is mainly documentary this court is not in way disadvantaged; it is in a vantage position as the trial court; it can interfere in the circumstances to draw the correct inferences from the facts and circumstances as per exhibits 1 and 2 of the 3rd Respondent and Exhibits 1 and B of the appellant. See: ODUWALE V. AINA (2001) 17 NWLR (Pt.741) 1 at 47 D-H; also See: F.A.T.B. V. PARTNERSHIP INVESTMENT CO. LTD. (2003) 18 NWLR (Pt.851) 35 at 65-66 C-A.

In the final analysis, I hold that the conduct of the election of 21/4/2007 although it has taken place it has not translated the case

to one subject to the jurisdiction of the Election Tribunal, nor has the case been reduced to a mere academic exercise. .

I now come to the final segment of this judgment, that is, in regard to the question whether this is an appropriate case for this court to exercise its general powers under Section 22 of the Supreme Court Act and deal with this matter on the merits of the case. The appellant is urging the court to do so and has urged it to follow the cases of PETER OBI V. INEC & ORS. (supra); AMAECHE V. INEC & ORS. (supra); INAKOJU V. ADELEKE (2007) 4 NWLR (Pt.1025) 423 to determine the merits of the case. The Respondents have vehemently opposed the invocation of Section 22 in this case as the route to it is strewn with unchartered legal problems.

However in dealing with this matter I have brought to the fore the appellant's attempts to preserve the Res in this case in status quo ante, they have come to no avail. Reference in this regard has to be made to the interim injunction sought in this proceedings which was refused and struck out. The claim for a perpetual injunction in this case is one of the substantive reliefs sought in this matter and one of its implications is to warn against pre-empting Court's order in every respect. The 1st Respondent nonetheless has conducted the said election of 21/4/2007 even then while this appeal has been pending at the lower court; clearly it has pre-empted the Court's order and thus has made it nugatory. I, therefore, do not agree with Mr. Adekwu 1st Respondent's counsel, that the appellant slept on his rights to preserve the Res and should take the consequences.

Section 22 is similar to Section 16 of the Court of Appeal Act it encompasses wide powers given to the Court; the enactment is longish and it has been construed and applied in very many cases decided by this court as recently as in the cited case above. And the section says in brief that "The Supreme Court..... generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted and presented as a Court of first instance....."

The point has to be made that this court cannot exercise jurisdiction directly over the decision of the High Court. This is clearly provided for in Section 233 of the 1999 Constitution. See: ODUNTAN V. AKIBU (2000) 13 NWLR (Pt.685) 446 and KWAJAJFA V. B.O.N. LTD. (2004) 13 NWLR (Pt.88a) 146 at 17 E-F. The power which this court exer-

cises under Section 22 of the Supreme Court Act is not derogated from or abated in any way by the provisions of Section 233 of the 1999 Constitution.

***In the case of PETER OBI V. INEC & ORS. (supra) this Court per Aderemi JSC has at pages 639-640 H-B set out the conditions I go on to scrutinize the conditions for bringing the provisions of Section 22 into play and they are summarized as follows:-***

***1. the lower court or trial court must have the legal power to adjudicate In the matter before the appellate court can entertain it;***

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

***3. all necessary materials must be available to the court for consideration;***

***4. the need for expeditious disposal of the case or suit to meet the ends of justice must be apparent on the face of the materials presented; and***

***5. the injustice or hardship that will follow if the case is remitted to the court below, must be clearly manifest itself.***

These conditions as enunciated above have informed important landmark decisions in the cases cited above in this connection. See: PETER OBI V. INEC & ORS. (supra); AMAECHI V. INEC & ORS. (supra) and INAKOJU V. ADELEKE & ORS. (supra). These conditions have to be tested against the facts and circumstances of this case for this court to invoke the provisions of Section 22.

In considering the power of the trial court over the instant matter, I have already listed above the reliefs claimed by the appellant in this case. Each and every relief in the claim is justiciable and they raise pre-election matters which come within the jurisdiction of the Federal High Court by virtue of Section 251(1) (p) (q) and ® of this 1999 Constitution. The competency of the suit in this respect is not in any doubt.

On the second condition, I accept the appellant's contention that the real issue raised by the appellant's claim is as distilled from ground 3 of the grounds of Appeal. I have found on the backdrop of

the said issue that this matter has neither inured to the Election Tribunal nor has it as a pre-election matter abated by Sections 178(2) and 285(2) of the 1999 Constitution.

It is my observation that there is available to this court more than enough materials, to enable the court deal with this matter rather expeditiously without remitting it to the court below to deal with. Apart from the Originating Summons, there are filed the affidavits of both the appellant and the 2nd and 3rd Respondents and their briefs of argument. The 1st Respondent has also filed its brief argument. One other factor the court has to take into account is the urgency surrounding this matter as the tenure of the members of the National Assembly is for a period of four years and so far 18 months of that period have already been spent i.e. the appellant could only serve for the unexhausted tenure of 4 years. It does not augur well for democracy to delay any further. Hence to remit this case back to the Lower Court to come back to this Court on appeal apart from causing great hardship to the appellant, it does not work in the interest of the constituents who are entitled to know their true representative at the National Assembly.

***For all this, I agree with the appellant that this is a case in which this court is eminently positioned and justified to exercise its powers under Section 22 of the Supreme Court Act and determine the matter on its merits here and now, as the pre-conditions to so do as I have outlined above are conducive.*** See: PETER OBI V. INEC & ORS. (supra); AMAECHI V. INEC & ORS. (supra) and OBEDO V. INEC & ORS. (supra).

***In line with cases of this nature decided by this Court in recent days this court held and I agree that as nominated candidates are sponsored by political parties that in the true sense of the letter and spirit of Section 221 of the 1999 Constitution it is the political party that sponsored the candidate that is the real Winner. It is in that context that the 3rd Respondent the Winner of the instant election of 21/4/2007 has to be seen.*** In further rationalization of my reasoning above I have in this regard to advert my attention to Section 221 of the Constitution and provides thus:

***“No association, other than a political party shall can-***

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

***In construing the foregoing provisions of Section 221 this court in AMAECHI V. INEC & ORS. (supra) opined as follows:-***

***“If as provided in Section 221 above it is only a party that canvasses for votes, it follows that it is a party that wins election..... that whereas candidates may change in an election but the parties do not..... but in reality and in consonance with Section 221 of the Constitution, it is his party that has won the election.”***

This court has stated the underlying principle guiding it in exercising its wide powers under Section 22 very articulately in Amaechi’s case (supra) of similar facts and circumstances as the instant case and it is binding on this court; I set it out in the words per Oguntade JSC as follows:

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

His Lordship then went on to further hold as follows:

*“.....This was a pre-election matter. The justice of this case lies in making an order that the person properly nominated by the PDP should step into the shoes of the person that won the election”*

I said above that this court is bound by AMAECHI V. INEC & ORS. (supra) even then the foregoing is in tandem with my opinion on this question. Applying the finding mutatis mutandis to this case; Hon. Gozie Agbakoba must be deemed the candidate in the election

of 21/4/2007 that won the election for PDP. In the eyes of the Hon. Ikpeazu was not the candidate at the said election. And so, the justice of this case lies in making an order that Hon. Gozie Agbakoba being the person properly nominated by the PDP step into the shoes of Hon. Ikpeazu who won the election. And I order.

B In concluding this matter I have to reiterate that this matter has not inured to the Election Tribunal nor has it become a mere academic exercise because the election of 21/4/2007 has been conducted, it is still within the jurisdiction of the Federal High Court (Regular Courts) being a pre-election matter.

C Having also found that the 3rd Respondent has not been properly and validly constituted for the appellant as per Section 34(2) of the Electoral Act 2006, and again having showed that it is the party that i.e. PDP on the construction of Section 221 of 1999 Constitution that has won the election, I have no difficulty in holding that it is the appellant not the 3rd Respondent that must be deemed the true winner of the election; not the 3rd Respondent.

I accordingly find that Honourable Gozie Agbakoba is the proper person entitled to represent the Onitsha North and South Federal Constituency of Anambra State as its member at the House of Representative and not the 3rd Respondent - Hon. Linda Ikpeazu. And I so hold.

This appeal is therefore meritorious and it is hereby allowed. The decision of the Court of Appeal of 28/6/2007 is hereby set aside in its entirety.

The appellant is entitled to the costs of this appeal which is assessed and fixed at N50,000.

G

### **KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment of my learned brother Chukwuma-Eneh JSC in this appeal. I agree completely with it and for the reasons he has given, I also allow the appeal with N50,000.00 costs in favour of the appellant.

H



**MUKHTAR JSC**

By way of originating summons the appellant in this appeal sought the following reliefs:-

*"1. That the 1st Defendant's statutory power to substitute a nominated candidate of a political party, under Section 34 of the Electoral Act 2006, is qualified AND not absolute."* B

*2. A DECLARATION that the 1st Defendant has no power to substitute a nominated candidate of a political party less than 60 days to the election when the candidate is not dead.*

*3. A DECLARATION that the 1st Defendant CANNOT substitute a nominated candidate of a political party in the absence of cogent and verifiable reasons.* C

*4. A DECLARATION that in view of Section 36 of the 1999 Constitution the 1st Defendant CANNOT fairly and constitutionally determine the cogency and verifiability of substitution of a nominated candidate without some notice to the candidate or hearing or some form of inquiry from or input by the affected candidate.* D

*5. A DECLARATION that the legislative innovation introduced by Section 34 of the Electoral Act is aimed at deepening and strengthening Nigeria's democracy in relation to substitution of a nominated candidate in an election.* E

*6. A DECLARATION that the substitution of the plaintiff by the 1st Defendant as the duly nominated candidate of the Peoples Democratic Party (PDP) for election into the House of Representative in respect of Onitsha North and South Federal Constituency of Anambra State in the manner it did is ultra vires, undemocratic, arbitrary, unlawful, illegal, unconstitutional, null and void.* F

*AN ORDER setting aside the purported substitution, same being in excess of the statutory powers of the 1st Defendant, in abuse of power, breach of duty to act (sic) fairly. In reasonable, illegal, unconstitutional, null and void.* G

*AN ORDER OF PERPETUAL INJUNCTION DIRECTING THE 1ST Defendant to restore the Plaintiff as the duly nominated, verified cleared and published candidate for the Peoples Democratic Party for election into the House of Representative in respect of Onitsha North and South Federal Constituency of Anambra State."* H

Pertinent averments in the supporting affidavit to the originat-

ing summons are as follows :-

*“7. I verily believe that my substitution by the 1st Defendant is unreasonable, not based on any cogent or verifiable reasons; as a matter of fact.*

B *(a) I scored 648 votes, the highest at my party’s primaries and my party has never stated any reservations about my candidature till date, nor was there any application for my substitution.*

C *(b) the State Chairman of my party sent me a congratulatory letter upon my nomination and as at the time of filing this action the party has neither withdrawn my nomination nor the letter of congratulation. A copy of the said letter is herewith attached as EXHIBIT G.*

D *(c) I was cleared by my party to contest the primary election, I won the primary election with a very wide margin; my name was submitted to the 1st Defendant as candidate; I went through the 1st Defendant’s verification exercise, I was cleared and my name displayed by the 1st Defendant as candidate.*

*(d) no other candidate at the primary election was so verified and cleared.*

E *(e) the 1st Defendant did not hear me upon any complaint or application for my substitution as candidate.*

*(f) the 1st Defendant’s action in substituting my name was unilateral and no notice was given to me before or after the action.*

F *(g) the 1st Defendant will by their action most likely deny my party of opportunity to field a validly nominated candidate.*

*(h) in furtherance of the above, my substitution was made less than 60 days to the election which will hold on 21st April, 2007.”*

G In her counter-affidavit to the affidavit in support, the 3rd respondent made the following pertinent averments.

*“17. Paragraph 17 (a) (b) (c) (d) (e) (f) (g) (h) (i) of the affidavit in support are false as the substitution was based on cogent and verifiable reasons submitted by 2nd Defendant and accepted by the 1st Defendant.*

H *(i) The primaries with respect to Onitsha North/South Federal constituency were inconclusive and therefore nothing cogent materialized there from.*

*(ii) Exhibit G is inconsequential. The submission of list of can-*

*didates for the Federal Constituency elections within the PDP is not the business of the state chairman but the National Chairman and Secretary Exhibit G is therefore a private letter not written with the authority of the PDP.*

(iii) *With respect to paragraphs 17(c) and (d) of the affidavit in support I repeat paragraphs 3 to 17 above and maintain that the plaintiff was never a candidate for the 2nd Defendant in the general election and his name was never published as such.* <sup>B</sup>

(iv) *As presently informed by my aforesaid counsel at the aforesaid time and place and I verily believe him paragraph 17 (e) (f) and (g) of the affidavit in support are erroneous as the issue is between the 1st and 2nd Defendants. Neither the 1st or 2nd Defendants are complaining about the substitution duly effected.* <sup>C</sup>

(v) *The substitution was made more than 60 days before the date scheduled for the election. Paragraph 17(h) of the affidavit in support is therefore not correct.* <sup>D</sup>

Written addresses by the parties were exchanged, and the learned trial judge after a careful consideration found inter alia as follows:-

*"I therefore find that the Plaintiff was duly nominated by the PDP to contest elections unto the House of Representatives for the Onitsha North and South Federal Constituency."* <sup>E</sup>

In spite of the above finding he, however found that the plaintiffs action lacked merit and dismissed it. Dissatisfied with the judgment the plaintiff appealed to the Court of Appeal, which struck out the appeal on the ground that there were no live issues to be determined, elections having been held and concluded. Again the plaintiff appealed to this court. Briefs of argument were exchanged, and they were adopted in court. Two issues for determination were raised in the appellant's brief of argument as follows:- <sup>F</sup>

*"1. Whether the Court of Appeal was right to hold that the conduct by the 1st Respondent of election into the Onitsha North/ Onitsha South House of Representatives seat while Appellants appeal was pending at the Court of Appeal rendered the appeal a mere academic exercise.* <sup>H</sup>

*2. Whether this appeal presents an appropriate occasion for the exercise of the general powers of the Supreme Court Act to deal*

*with Appellant's claim without remitting same to the Court of Appeal, and if it is, whether the Appellant is entitled to judgment on the merits of his claim."*

These issues have been thoroughly dealt with in the lead judgment, and so the need to go into the detail of the argument and their merit is obviated. I will however merely, highlight some points in the second issue supra. It is instructive to note that the gravamen of this appeal revolves around whether the substitution of the appellant's name originally sent to the 1st respondent by the 2nd Respondent with the 3rd Respondent was done in compliance with the provision in Section 34(2) of the Electoral Act, 2006, which stipulates that substitution must contain cogent and verifiable reason. It is obvious from the face of Exhibit T (which was written on February 5, 2007 well before Exhibit '2') did not contain cogent and verifiable reasons advanced therein. It is perhaps the inadequacy of the letter, Exhibit '1' that led to the writing of Exhibit '2' which contain reasons that could be described as cogent and verifiable. Exhibit '1' was definitely short of the requirement of the law, and so it cannot plug any lacunae that may have been created. That being the position, the substitution letter is of no moment. Then there is the provision of Section 34(1) which stipulates the time limit within which to substitute candidates to be 60 days to the election. It is on record that the subsequent letter of substitution which contains some reasons bears February 20, 2007, and the date of election to the House of Representative was 21st April, 2007. The 60 days if properly computed should be clear days i.e exclusive of the date the second letter of substitution bears. By virtue of the provision of Section 15(2)(a) of the Interpretation Act; Cap. 192, Laws of the Federation of Nigeria, 1990:-

"A reference in an enactment to a period of days shall be construed '-

(a) Where the period is reckoned from a particular event, as excluding the day on which the event occurs."

(vi) A careful computation of 60 days should be from 21st February, which reveals that there was a lapse of only 59 days to the election date, which obviously was short of the 60 days provided by the said Section 34(1) of the Electoral Act supra.

What I find interesting was the inability and refusal of the 2nd

respondent to conduct and hold another nomination exercise when it realized that the first one was inconclusive and riddled with irregularities as was revealed in Exhibit '3'. This was over 140 days to the election date, a period sufficient enough to have conducted another exercise of nomination. The 2nd respondent rather preferred to send the name of a consensus PDP candidate. The 2nd respondent definitely left undone what it should have done. B

In the light of the above reasoning, I find that this a case that deserves the interference of this court, and so it will be in order to disturb the decision of the lower courts. In the circumstances it is appropriate for this court to exercise its general powers. In this wise, I agree with the judgment of my learned brother Chukwumah-Eneh, which I have had the opportunity of reading in advance, that the appeal has merit, and should be allowed. I abide by the consequential orders made in the lead judgment. C D

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### **MOHAMMED JSC**

This appeal is against the judgment of the Court of Appeal Enugu Division delivered on 28th June, 2007, striking out the Appellant's appeal against the decision of the Federal High Court Enugu upholding the substitution of his name as the P.D.P candidate for the Onitsha North/South constituency for the House of Representatives election with that of the 3rd Respondent on the ground that the appeal had become academic with the conduct of the election and the declaration of results. E F

I have had the opportunity of reading before today, the judgment of my learned brother Chukwuma-Eneh, JSC which has just been delivered. I agree with the reasoning and conclusion reached by him in resolving the two issues identified in the Appellant's brief of argument. G

It is not in dispute between the parties that the name of the Appellant was the first to find its way to INEC as the candidate of the P.D.P. to contest the 21st April, 2007 election. The letter of substitution dated 5th February, 2007 duly signed by the Chairman and Secretary of the P.D.P. asking for the substitution of the Appellant's name with that of the 3rd Respondent, if anything, confirmed that H

the name of the Appellant was already with INEC before the request for substitution. In the absence of cogent and verifiable reason for the substitution, the Appellant remained the candidate of the P.D.P. who contested the election of 21st April, 2007 and therefore entitled to remain as such member of the House of Representatives representing Onitsha North/South Constituency of Anambra State.

For the foregoing reasons and fuller reasons contained in the judgment of my learned brother Chukwuma-Eneh, JSC, I also allow this appeal and abide by the orders made in the lead judgment including the order on costs.

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### **TABAI JSC**

This action was commenced at the Enugu Division of the Federal High Court by way of an originating summons. The Plaintiff was the Appellant at the court below and is also the Appellant herein. The Defendants were the Respondents and are also the Respondents herein.

The reliefs claimed by the Plaintiff/Appellant in the amended originating summons are as follows:

1. A DECLARATION that the 1st Defendant's statutory power to substitute a nominated candidate of a political party under Section 34 of the Electoral Act 2006 is qualified and not absolute.
2. A DECLARATION that the 1st Defendant has no power to substitute a nominated candidate of a political party less than 60 days to the election when the candidate is not dead.
3. A DECLARATION that the 1st Defendant cannot substitute a nominated candidate of a political party in the absence of cogent and verifiable reasons.
4. A DECLARATION that in view of Section 36 of the 1999 Constitution the Defendant cannot fairly and constitutionally determine the cogency and verifiability of substitution of a candidate without some notice to the candidate or hearing or some form of inquiry from or input by the affected candidate.
5. A DECLARATION that the legislative innovation introduced by Section 34 of the Electoral Act is aimed at deepening and strengthening Nigeria's democracy in relation to substitution of a nominated

candidate in an election.

6. A DECLARATION that substitution of the Plaintiff by the 1st Defendant as the duly nominated candidate of the Peoples Democratic Party (P.D.P) for election into the House of Representatives in respect of Onitsha North and South Federal Constituency of Anambra State in the manner it did is ultra vires, undemocratic arbitrary unlawful, illegal unconstitutional null and void. B

7. AN ORDER setting aside the purported substitution, same being in excess of the statutory powers of the 1st Defendant, in abuse of power, breach of duty to hear fairly, unreasonable, illegal, unconstitutional, null and void. C

8. AN ORDER OF PERPETUAL INJUNCTION directing the 1st Defendant to restore the Plaintiff as the duly nominated verified cleared and published candidate for the Peoples Democratic Party for election into the House of Representatives in respect of Onitsha North and South Federal Constituency. D

In support of the originating summons were filed a 24 paragraph affidavit to which were attached Exhibits A, B, C, D, E, F and G. The Plaintiff/Appellant filed a further affidavit of 11 paragraphs to which were attached Exhibits H, I, J and K. E

The 3rd Respondent, Hon. Lynda Chuba Ikpeazu deposed to a 19 paragraph counter affidavit on the 30/3/2007 to which were attached Exhibits 1, 2 and 3.

The parties, through their counsel, filed and exchanged written addresses. In the judgment on the 5th of April 2007, the learned trial judge O.A. Faji J. dismissed the claim for lack of merit. F

The Plaintiff was not satisfied with the decision and went on appeal to the court below. By its unanimous judgment on the 28th of June 2007 the appeal was dismissed. G

The Plaintiff/Appellant was still not satisfied and has come on appeal to this court. The parties have, through their counsels, filed and exchanged briefs of argument. The Appellant's brief was prepared by Olisa Agbakoba, O.O.N. S.A.N. He also prepared the Appellant's Reply brief to the 1st Respondent's brief and another Reply brief to the 2nd and 3rd Respondents' joint brief. The 1st Respondent's brief was prepared by Emoye O. Adekwu. And the brief of the 2nd and 3rd Respondents was prepared by Dr. Onyechi H

Ikpeazu, O.O.N. SAN.

In the Appellant's brief Olisa Agbakoba, SAN formulated two issues for determination which he couched as follows:-

1. Whether the Court of Appeal was right to hold that the conduct by the 1st Respondent of election into the Onitsha North/  
B Onitsha South House of Representatives Seat while Appellant's appeal was pending at the Court of Appeal rendered the appeal a mere academic exercise.

2. Whether this appeal presents an appropriate occasion of  
C the exercise of the general powers of the Supreme Court under Section 22 of the Supreme Court Act to deal with Appellant's claim without remitting same to the Court of Appeal, and if it is, whether the Appellant is entitled to judgment on the merits of his claim.

Both Emoye O. Adekwu and Dr. Onyechi Ikpeazu SAN also  
D proposed two issues for determination in their respective briefs. The issues are, in substance, the same as those of the Appellant and I do not consider it necessary to reproduce them.

Now with specific reference to the first issue for determination the Court of Appeal per Jimi Olukayode Bada J.C.A. declared as  
E follows:-

*"Furthermore, I also agree with the submissions of learned counsel for the 1st Respondent and learned senior counsel for the 2nd and 3rd Respondents that since the elections have been conducted and concluded there are no more live issues to be determined by this Court as far as the reliefs being claimed by the Appellant is concerned. And where there are no live issues to be determined, the court will treat such issues or questions as academic or hypothetical questions.*

4. *It is trite that a court cannot and should not engage in academic exercise, it is not the function or indeed the duty of the court to embark on advisory opinion or obstruct or on speculation. The court has no jurisdiction to do that. The courts are established to determine live issues see the following cases: A-G ANAMBRA STATE  
F v A. G. FEDERATION (supra) OLALE v EKWELENDU (supra); OLANIYI v AROYEHUN (supra) and MAMMA v SALUADEEN (supra). In view of the foregoing, I arrive at the inevitable conclusion that this appeal is academic and it is accordingly struck out."*



See pages 248-249 of the record.

In his contribution James Ogenyi Ogebe JCA (as he then was) had this to say.

*"I agree entirely with the opinion of my learned brother Bada JCA just delivered that the appeal is now merely academic. The mischief which the appeal seeks to avoid has already been done and this court cannot engage in an academic exercise to satisfy any party."*

Learned Senior Counsel for the Appellant tried to fault the above opinion of the Court of Appeal contending that a court will not fold its hands and allow a party who takes a step to render an anticipated order of court nugatory to have his way. He cited a number of authorities to support his argument amongst them PETER OBI v INEC & 7 ORS (2007) 11 NWLR (Part 1046) 565, DANIEL v FERGUSON (1891) 2 CH 27 at 30 F.A.T.B. v EZEGBU (1993) 6 NWLR (Part 297) 1 at 25.

Dr. Onyechi Ikpeazu SAN for the 2nd and 3rd Respondents on the other hand argued that the election having taken place the Court of Appeal could not, at that stage, have granted the reliefs sought as to grant such reliefs would have amounted to nothing other than engaging in mere academic exercise. He relied on NWOBOSI v A.C.B. (1995) 6 NWLR (Part 404) 658; OYENEYE v ODUGBESAN (1972) 4 SC 244 and MAMMAN v SALADEEN (2005) 18 NWLR (Part 958) 478.

I have considered the address of counsel for the parties on this issue. The case of PETER OBI v INEC & ORS (supra) relied upon by the Appellant is very instructive on the point. In it this court Per Oguntade JSC at page 610-611 had this to say:

*"The 1st Respondent (INEC) however ought to know that the Plaintiff/Appellant's case from its nature postulated that the Governorship election in Anambra State ought not to be held as he had not exhausted his term of office. Notwithstanding however, the 1st Respondent proceeded to conduct an election in which the 5th Respondent was declared the winner. Under the doctrine of its pendens, parties for proceeding in court ought not to do anything which may have the effect of rendering nugatory the judgment of the court. The Plaintiff/Appellants had by his suit been seeking a declaratory and injunctive relief. However by the time we gave our judgment on*

the 14/6/07 the elections had been held and 5th Respondent supposedly installed, a situation which would have confronted the court with a *fiat accompli* if this court had not ordered that the 5th Respondent should vacate the office which he took while proceedings were pending. The lesson is plain and straight forward. A party may not  
 B alter to his advantage or disadvantage of his opponent the issues in contest in a pending suit. ”

In his own contribution Chukwuma-Eneh JSC added at page 694:

“I must say the court does not allow litigant parties pending  
 C litigation to foist on the court a *fiat accomplice* and thus render the decision of the court utterly nugatory. In this regard the 1st and 5th Respondents should in the overall interest of the rule of law have averted the untoward consequences of having proceeded unabash-  
 D edly with the conduct of the Governorship election in Anambra State and his subsequent swearing in of the 5th Respondent as the Governor of Anambra State.

The electoral process relating to this office should have waited the outcome of this matter and save everybody, If I may so put it, the  
 E unnecessary embarrassment. The 1st Respondent should have known better with a team of lawyers assisting it. ”

In ADEOGUN & ORS v PDP (2008 5 SCNJ 363 at 377-378 in circumstances similar to the one in the instant case, I said:-

“In my view, the fact of the election of the 24/4/07 notwith-  
 F standing, the dispute as to whether the 1st Defendant/Appellant was rightly substituted for the Plaintiff/Respondent still remains a live issue for determination by the Court. A court which has jurisdiction to  
 G ply because a defendant, in some vantage position and in complete disregard for the outcome of the pending suit, goes ahead to do that which is sought to be prevented in the suit. Put in another way a Defendant in a cause has no legal authority to determine the out-  
 H come of the claim against him by purporting to complete the very act sought to be prohibited in the suit. That would amount to the court’s abdication of its constitutional and sacred duty of dispensing justice in disputes between persons or between government or other authorities. It will send a rather dangerous signal to a genuinely aggrieved

*Plaintiff that he cannot obtain redress for a wrong committed by a defendant in some vantage position."*

On the specific issue of substitution I added:

*"The Defendant/Appellants in this case cannot by persevering in the very substitution which is being challenged, fetter the jurisdiction of the court to make its final pronouncement on the issue presented to it for adjudication. The corollary of this is that an unlawful act which illegality is being pursued in a judicial proceeding cannot metamorphose into a legitimate one by a plea of the defendant that the act has been completed. After all it is settled principle of law that a party committing an illegality cannot be allowed by the court to benefit from the self-same illegality, lest the court will portray itself as an instrument of injustice....."*

*In my view once a person who is aggrieved or injured by the action of another comes to court to seek redress, the court must jealously guard its jurisdiction to hear and determine the case to its finality. If it cannot surrender and subject its jurisdiction to the dictates and manipulations of the defendant."*

I want to state that I do not have any cause to depart from the principle embodied in the opinion which I expressed above. A defendant, the propriety of whose act is being challenged in a judicial proceedings, cannot purport to continue the act to a supposed completion to plead that the court no longer has the jurisdiction to hear and determine the suit or that the hearing and determination of the suit has become a mere academic exercise. The Plaintiff/Appellant challenged the propriety of his substitution with the 3rd Respondent and that remains a live issue until its determination by the final appellate Court, notwithstanding any act taken by the Defendants/Respondents. I hold therefore that the court below erred in law on this issue. Its jurisdiction remained intact. It had a duty to hear and determine the appeal presented there for adjudication. The 1st issue is accordingly resolved in favour of the Plaintiff/Appellant.

With respect to the 2nd issue it is my humble view that my learned brother Chukwuma-Eneh JSC dealt with it exhaustively and comprehensibly and I do not think I have anything more to add.

For the above reasons and the fuller reasons very ably articulated in the lead judgment, I also allow the appeal. I agree entirely

with consequential orders contained therein which I therefore also adopt as mine.

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