

**SUPREME COURT OF NIGERIA**  
12TH DECEMBER, 2008. SC. 51/2008  
**CORAM:- I.L. KUTIGI CJN, A. I. KATSINA-ALU, N. TOBI,**  
**D. MUSDAPHER, G. A. OGUNTADE, A.M. MUKHTAR,**  
**W. S. N. ONNOGHEN, JJSC**

GENERAL MUHAMMADU BUHARI ..... PETITIONER/  
APPELLANT

AND

1. INDEPENDENT NATIONAL  
ELECTORAL COMMISSION
2. CHIEF NATIONAL ELECTORAL  
COMMISSIONER (PROFESSOR ..... RESPONDENTS  
MAURICE IWU)
3. THE INSPECTOR-GENERAL  
OF POLICE
4. UMAR MUSA YAR'ADUA
5. DR. JONATHAN GOODLUCK

---

APPEALS - Grounds of appeal - Validity - Effect of - An appeal may still be competent though several of its grounds be invalid - Since a single valid ground can sustain an appeal (H1)

PRACTICE & PROCEDURE - Practice directions - Meaning of - They could be described as a written explanation of how to proceed in a particular area of law - In a particular court - Which explanation is declared by the relevant authority - In this case the president of Court of Appeal (H2)

PRACTICE & PROCEDURE - Practice directions - Legal status - They have force of law in the same way as rules of court - Being themselves part of rules of court - But they are subordinate to the Constitution and to statutes - In our hierarchy of laws (H3)

PRACTICE & PROCEDURE - Court of Appeal - Practice directions of 2007 - Legality of - As Court of Appeal Act defines rules of court to be rules made or deemed to have been made under that Act - Practice directions qualify as such - Therefore they are legal (H4)

**ESTOPPEL** - Estoppel by conduct - Import of - Practice directions - Once a party has intimated that he consents to an act - As appellant in this case has consented to use of the practice directions - He cannot later be allowed to question the legality of that act (H5)

**EVIDENCE** - Rebuttable presumption - Effect - Burden of proof - Where there is a rebuttable presumption of a fact - As in this case, the authenticity of election results declared by a returning officer - The burden is on the person who denies the authenticity to rebut the presumption (H6)

**ELECTION PETITIONS** - Evidence - Burden of proof - Where petitioner has alleged noncompliance as in this case - The onus lies on him not only to prove noncompliance - But also to prove that it could have affected the result of the election (H7)

**JUDICIAL PRECEDENTS** - Stare decisis - Call for departure - Attitude of courts - As departure from a decision of court is a major judicial exercise - Which if done often will ruin the stable rules of judicial precedent - Courts will not do so just for the asking (H8)

**COURTS** - Functus officio - Meaning of - It means to become bereft of legal force, having fulfilled ones function and commission - So a judge who has decided a question brought before him becomes functus officio - And cannot review the decision (H9)

**COURTS** - Functus officio - Applicability - A court cannot be functus officio by giving an anticipatory order - Which is conditional to the possible implementation of the order - As in this case the order admitting the documents subject to later objections (H10)

**AFFIDAVITS** - Depositions - Admissibility of - Evidence Act, s. 83 - A court is not to admit in evidence an affidavit proved to have been sworn - Before a person on whose behalf it is offered or before his legal practitioners - This includes by extension written deposition of witnesses (H11)

ELECTION PETITIONS - Documents - Admissibility - Objections thereto - When to raise - It ought to be raised timeously - And when the party raising the objection has not taken any fresh step in the proceedings - As was rightly done by the respondents herein (H12)

EVIDENCE - Notary public - Powers - Limitations thereto - No notary public shall exercise any of his powers - Including the power to administer oaths or to attest and certify documents - In any matter in which he is interested (H13)

PRACTICE & PROCEDURE - Court processes - Leave to file - Effect of grant - The granting of leave to file court processes by a court - Does not estop that court from subsequently ruling on the validity - Or merit of the processes in the same proceedings (H14)

DOCUMENTS - Admissibility - When to rule thereon - A court need not wait for final address of parties to rule an admissibility of a document - It may rule thereon at the point it is sought to be tendered - Though it always has power to reconsider its ruling when writing judgment (H15)

AFFIDAVITS - Validity - Evidence Act, ss. 86 & 87 - Effect of - Where some depositions in an affidavit comply with s. 86, while some violate s. 87 - The entire depositions are invalid - As a court is not competent to pick those that comply and ignore others (H16)

DOCUMENTS - Tendered as exhibits - By witness other than the maker - Power to comment thereon - Though a document may be tendered and admitted through a witness other than the maker - Such witness lacks the competence to comment thereon unless he is an expert (H17)

PRACTICE & PROCEDURE - Practice directions - Binding effect of - Extent - In the hierarchy of our jurisprudence practice directions come last in terms of authority - In event of conflict with the Constitution or even the enabling rules of court - The latter prevails (H18)

PRACTICE & PROCEDURE - Depositions - Objections thereto -  
 When to raise - If an objection is not radical like objection on  
 jurisdiction - Such objection must be raised at the earliest opportunity  
 - Or the party may be deemed to have accepted the state of things -  
 B And so be estopped (H19)

APPEALS - Grounds of appeal - Basis of - A ground of appeal must  
 be based on the ratio decidendi of the judgment appealed against -  
 C Not on an orbiter dictum (H20)

COURTS - Similar documents - Ruling on admissibility - Scope of -  
 Court's ruling on admissibility of document - Is a specific adjudicatory  
 act tied to the particular document - It does not automatically cover  
 D subsequent similar documents sought to be tendered in the proceed-  
 ings (H21)

ADMINISTRATIVE LAW - Commissions of inquiry - Nature of - The  
 setting up of a commission of inquiry has some content of quasi-  
 E judicialism - So findings of the commission are clearly judicial -  
 Therefore appropriate courts of law have jurisdiction to inquire into  
 their validity (H22)

F ELECTIONS - Presidential candidates - Qualifications - Challenge to  
 - Proper time to raise - The proper time to challenge the qualification  
 of a presidential candidate - Should be after the conduct of election  
 and the announcement of result (H23)

G ADMINISTRATIVE LAW - Commissions of inquiry - Power to set up  
 - Scope of - Power of state governor to set up commissions of inquiry  
 - Does not extend to setting up commissions - To inquire into activities  
 of public servants in another state - Under our Constitution (H24)

H WORDS & PHRASES - Indictment - Meaning of - 1999 Constitution,  
 s. 137 (1)(i) - Indictment embraces an allegation or committal of  
 something in the nature of a felony - Warranting the drafting of a  
 charge with a view of prosecuting the indicted - Therefore Exhibit EP2/

34 is not an indictment (H25)

ELECTION PETITIONS - Evidence - Proof - Nature of - Allegation that result sheets were not delivered or non-counting of votes - Cannot be proved by mere documentary evidence - It also requires direct evidence of those who observed the noncompliance (H26) B

PLEADINGS - Averments - Admissions - How determined - In considering whether an averment is admitted - Court must consider the totality of the relevant paragraph - Bearing in mind that admissions must be unequivocal, not speculative (H27) C

JUDGMENTS - Basis - Public opinion - Place of - Courts of law do not give judgments according to public opinions - But according to evidence and law - However true may appear the public opinion - It needs to be proved by evidence to influence the court (H28) D

### **FACTS**

The petitioner/appellant sued the respondents/respondents before the Court of Appeal sitting as the presidential election petition tribunal, in its original jurisdiction. The case of the appellant was that the 4th and 5th respondents were not qualified to contest the presidential election having been indicted by the findings of a commission of inquiry. Appellant also alleged noncompliance with the Electoral Act in the conduct of the elections. Accordingly, he sought for an order nullifying the elections and mandating the conduct of fresh presidential elections in which the 4th and 5th respondents would not participate. E F

At the end of trial, the Court of Appeal held that the 4th and 5th respondents were qualified. It also held that though there was proof of non compliance, in that the ballot papers were not numbered as required, the noncompliance was not proved to have affected the results of the election. Aggrieved, appellant has brought this appeal against the judgment of the Court of Appeal. G H

### **ISSUES FOR DETERMINATION**

*"2.01 Whether the Court of Appeal was right when it held that the petitioner presented evidence on four States only.*

*2.02 Whether on a proper evaluation of the evidence adduced in this petition, the petitioner was not entitled to judgment.*

*2.03 On who does section 146(1) of the Electoral Act place the onus of proof of the effect of established substantial non-compliance with the provisions of the Act on the result of an election conducted under the Electoral Act 2006, the Petitioner or the Respondents?*

*2.04 Whether the Court of Appeal properly placed the onus of proof of the effect of established substantial non-compliance with the provisions of the Electoral Act on the Petitioner.*

*2.05 Whether the power of the President of the Court of Appeal under any section of the Nigerian Constitution including sections 248 and 285 extends to the power to issue Practice Directions to the court in its original jurisdiction under section 239(1) of the Constitution.*

*2.06 Whether the court below had the competence to reverse itself on its ruling on 23/10/07 on the averments in the Petitioner's pleadings.*

*2.07 Whether the court below was right when on 19/11/07 it rejected the petitioner's inspection witness depositions already filed before it.*

*2.08 Whether the Court of Appeal was right when it failed to declare the depositions jointly filed by the 1st and 2nd respondents and those jointly filed by the 4th and 5th Respondents respectively as incompetent despite being inapplicable to the proceeding.*

*2.09 Whether the Court of Appeal was right in striking out 18 out of 19 witness depositions filed with the petition after adopting the depositions unconditionally by order of court on 19/11/07.*

*2.10 Whether the Court of Appeal was right when it assumed jurisdiction to inquire into the propriety of Exhibit EP2/34."*

**HELD** (Dismissing the appeal per **TOBI JSC**, Oguntade, Mukhtar and Onnoghen JJSC dissenting)

**H Grounds of appeal - Validity**

1. Let me take first the preliminary objection on the, grounds of appeal. Learned Senior Advocate for the 4th and 5th respondents objected to Grounds 1, 2, 3, 4, 7, 8, 10, 11, 13, 14, 15, 16, 17 and 19.

He did not object to Grounds 5, 6, 9, 12 and 18. As a single ground can sustain an appeal, I will not strike out the appeal as urged by counsel for the 4th and 5th respondents. I will therefore take the appeal on its merits. (p. 3505 F)

### ***Practice directions - Meaning of***

2. Practice Direction, as the name implies, direct the practice of the court in a particular area of procedure of the court. A Practice Direction could be described as a written explanation of how to proceed in a particular area of law in a particular court. The word “practice” in its larger sense like procedure, denotes the mode of proceedings by which a legal right is enforced as distinct and separate from the law that gives and defines the right. The word “practice” is the form, manner and order of conducting and carrying on suits or prosecutions in the courts, through their various stages according to the principles of law and the rules laid down by the respective courts. Practice is our adjectival law, that is, the law regulating procedure; for example, the law of pleading, procedure, evidence, etc. They are rules of civil conduct which declare the rights and duties of all who are subject to the law and who come before the court to seek redress. The dictionary meaning of the word “direct” in our context is an order conveying instruction by a person in authority or backed by an authority; the refusal to carry it out is on the pain of sanction or punishment. In law, “*direction*” in our context, means command or precept emanating from an authority, who in the 2007 Practice Directions, is the President of the Court of Appeal. (p. 3506 E)

### ***Practice directions - Legal status***

3. What is the legal status of Practice Directions? Practice Directions have the force of law in the same way as rules of court. I held in *Abubakar v. Yar'Adua* (2008) 4 NWLR (Pt. 1078) 455 at 511 that rules of court include Practice Directions. Practice Directions will however not have the force of law if they are in conflict with the Constitution or the statute which enables them. (p. 3507 A)

### ***Practice directions of 2007 - Legality of***

4. Are the Practice Directions made by the President of the Court illegal

or unconstitutional?

Both section 248 of the Constitution and Order 19 Rule 7 of the Rules of Court of the Court of Appeal are very clear enabling provisions for the President of the Court of Appeal to make rules. Section 248 vests in the President to make rules regulating the practice and procedure of the Court of Appeal, subject to the provisions of any Act of the National Assembly. There is no Act known to me prohibiting or inhibiting the President of the Court of Appeal to make rules for the court. Not even the Court of Appeal Act, 2004. Rather, the Act recognizes the making of rules for the court. This is clear from section 30, the interpretation clause of the Act, which defines “rules of court” as “made or deemed to have been made under this Act.” And so the Practice Directions of 2007 made by the President of the Court of Appeal are either made or deemed to have been made under the Court of Appeal Act, 2004. (p. 3507 C/E)

***Estoppel by conduct - Import of***

5. I think Issue No. 5 is caught by the principles of estoppel by conduct. I come to this conclusion because the appellant was the first person to invoke the Practice Directions in the proceedings and he cannot deny it. That was the origin in the English courts of equity of the doctrine of *estoppel in pais* that is, by formal words or conduct. Once a party, either by his words or conduct, has intimated that he consents to an act, as in this case, the use of the Practice Directions, which has been done and that he will offer no opposition to it, he cannot later question the legality of the act he had so sanctioned to the prejudice of those who have given faith to his word. (p. 3512 B)

***EVIDENCE - Rebuttable presumption - Effect***

6. Election results are presumed by law to be correct until the contrary is, proved. It is however a rebuttable presumption. In other words, there is a rebuttable presumption that the result of any election declared by a returning officer is correct and authentic and the burden is on the person who denies the correctness and authenticity of the return to rebut the presumption. (p. 3519 D)

***ELECTION PETITIONS - Evidence - Burden of proof***



7. In *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1, when the case came to the Supreme Court on appeal, the court held that where an allegation of non-compliance with the electoral law is made, the onus lies on the petitioner firstly to establish the non-compliance, and secondly, that it did or could have affected the result of the election. It is after the petitioner has established the foregoing that the onus would shift to the respondent whose election is challenged, to establish that the result was not affected. B

There is a very important requirement and it is this. The respondent is required to satisfy the burden of proof under the second arm only after the petitioner has proved the burden placed on him in the whole subsection. Once the appellant satisfies the burden placed on him by the subsection, the burden of proving the contrary that non-compliance did not affect substantially the result of the election is shifted to the respondent. (pp. 3526 G/3534 G) C  
D

***Stare decisis - Call for departure - Attitude of courts***

8. As departure from a decision of a court or overruling a decision of a court is a very major judicial exercise, which if done often will ruin or jeopardize the stable rules of judicial precedent, and particularly the rules of stare decisis, courts of law, even the highest court of the land, will not yield to the invitation of counsel just for the asking, in the sense that the case sought to be overruled is not in favour of the party. In asking for a case to be overruled, the party should take into account or consideration, the totality of the decision, meaning that the ratio decidendi must be considered along with the facts of the case. The party should also make a distinction, if any, in the case between a ratio decidendi and an obiter dictum. If a party's worry is an obiter dictum, a court of law will not depart from its earlier judgment or overrule it because obiter does not ipso facto have or possess any force in the judgment. And when I say this I am not ignorant of the law that obiter dictum of this court followed by this court in certain instances could ripen into a ratio decidendi by frequent adoption. As the appellant has not made a case for overruling *Buhari* decided by this court in 2005, I will disobey learned Senior Advocate that I should overrule the decision. (p. 3539 A) E  
F  
G  
H

***COURTS - Functus officio - Meaning of***

9. The next issue is whether the Court of Appeal was functus officio. Functus officio ordinarily means a task performed; having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. See Black's Law Dictionary.  
 B 6th edition, page 673. The latinism means in practice the idea that the specific duties and functions that an officer was legally empowered and charged to perform have now been wholly accomplished and thus the officer has no further authority or legal competence based on the original commission. This is because the thing which originally had life  
 C becomes dead or moribund after the performance of the duty or function by the authority. In our context, a Judge who has decided a question brought before him is functus officio, and cannot review his decision. (p. 3541 E)

D  
***Functus officio - Applicability***

10. A court cannot be functus officio if it gives an anticipatory order, which is conditional to the possible implementation of the order or otherwise as in this case. This is because at the point of fulfillment, the  
 E party involved in the anticipatory order will return for a permanent relief. An order of a court made subject to the happening of an event is not one given in total or whole and therefore cannot make the court functus officio. In this case the objector or objectors were given the  
 F right to raise objection on the admissibility of the documents and the Court of Appeal was perfectly in order to rule on their admissibility one way or the other. After all, the latinism of functus officio applies when the whole matter is resolved or dealt with by the court. It will not apply where only a part of it is resolved or dealt with and a part of it is  
 G hanging. That part which was hanging in this case was the order “subject to the right of the opposing parties...”. The Judge has to remove the hanger and he is not functus officio to do so. That was what Fabiyi, JCA did and he is right in doing that. The appellant is wrong in castigating him for doing the right thing. (p. 3541 H)

H  
***AFFIDAVITS - Depositions - Admissibility of***

11. While conceding that by section 83 of the Evidence Act, the court is enjoined not to admit an affidavit which is proved to have been

sworn before a person on whose behalf the same is offered, or before his legal practitioners, learned Senior Advocate argued that that means an affidavit ought to be tendered as exhibit (which is admitted) and not a deposition which is written testimony in lieu of oral testimony which is open to cross examination. He pointed out that the fundamental difference is that when a deponent of a deposition goes into the witness box to adopt the deposition as his or her testimony before the court, such a deponent is first sworn; and when that happens the deposition becomes the sworn oral testimony before the court thereby healing any defect in the swearing of the depositions with the deponent thereafter exposed to cross-examination. He submitted that the deposition does not thus become an exhibit before the court like a tendered document or affidavit in support of an application whose deponent is not exposed to a fresh oath or cross-examination. Section 83 of the Evidence Act, learned Senior Advocate argued, anticipates the later affidavit and not a procedural deposition which is normally re-sworn at the adoption and that it requires proof to decide on section 83.

I am in grave difficulty to agree with the submission of learned Senior Advocate. First, the first leg of his submission implies that an affidavit admitted as an exhibit is not open to cross-examination. This conclusion is drawn from his argument that the difference between an affidavit and a deposition which is a written testimony is that the latter is open to cross-examination. That is not my understanding of the law.

The second argument is on the swearing of the deponent. Again, I am not with him in the distinction. Although there could be difference between affidavit and deposition, it does not seem to apply to the case. (pp. 3542 G/3543 G/H)

### ***ELECTION PETITIONS - Documents - Admissibility***

12. I should now relate the sub-paragraph to the factual situation. Learned Senior Advocate submitted that the issue could not be taken at the address stage. What stage could the respondents have taken the issue? Counsel did not provide an answer and I expected him to provide an answer.

The issue was raised in the course of the proceedings and the

Court of Appeal overruled the respondents. The next available opportunity is at the end of the case when parties gave their final addresses and that was what happened. Learned Senior Advocate submitted that paragraph 49(2) is sui generis in which case it acquires a special peculiarity and must be so applied. The fact that election petitions in their total content are sui generis does not mean that each section of the Act and the paragraphs of the Schedule to the Act are sui generis. That is not my understanding of the expression which latinism means “of its own kind and class”. I do not see any peculiarity in paragraph 49(2). It merely put in the form of a legislation the procedural rules of raising an objection timeously and when the party raising the objection has not taken any fresh step in the proceedings. There is nothing peculiar in the sub-paragraph and I so hold.  
(p. 3545 G)

***Notary public - Powers - Limitations thereto***

13. Section 19 of the Notaries Public Act Cap. N141, Laws of the Federation of Nigeria 2004 also provides as follows:

*“No notary shall exercise any of his powers as a notary in any proceedings or matter in which he is interested.”*

Although the Notaries Public Act does not specifically state the duties or functions of a notary as section 2(2) of the Act vaguely and lazily provides that a notary appointed by the Chief Justice of Nigeria shall perform the same duties and exercise the same functions as a notary in England, a notary in England performs the function of administering oaths and attest and certify by his hand and official seal some categories or classes of documents. As a matter of practice, notaries in Nigeria perform such functions.

The expression, “*interest*” in section 19 is professional interest. The professional interest in section 19, in my view, is involvement in the case in the sense of participation as counsel qua legal practitioner. And so, section 19 of the Notary Public Act vindicates section 83 of the Evidence Act. There is no dispute that Val I. Ikeonu is a legal practitioner. There is also no dispute that the depositions of 18 of the witnesses were sworn to before him. Only one was not sworn before him. The swearing of the depositions of the witnesses before Val I. Ikeonu violates both section 83 of the Evidence Act and section 19 of

the Notary Public Act. I therefore agree entirely with the Court of Appeal that all the depositions made before Val I. Ikeonu, which were earlier admitted, were expunged from the record of the court. (p. 3548 A/E)

***Court processes - Leave to file - Effect of grant***

14. Learned Senior Advocate for the appellant has made so much weather of the Court of Appeal authorizing the appellant to file the depositions. In reply, all counsel for the respondents submitted that allowing the appellant to file the depositions is different from granting relief based on the documents. I entirely agree with them. Granting a party leave to file a court process does not mean that the court will grant the relief sought in the process if filed. It is to enable the party to file the process and argue it before the court for determination. At the point of filing a court process, the court is not in a position to know the merits of the process. After all, the court has not looked at the process and so cannot determine its legal strength. It is when the process is argued that the court is in a position to rule one way or the other. And so, counsel was not on a strong footing when he said at page 82 of the Brief that “*no mention was made on the issue of whether the filing of the depositions had earlier been authorized by the court on 30/10/07 or not.*” Why the storm? There is no need for it. No, not at all. (p. 3549 B)

***DOCUMENTS - Admissibility - When to rule thereon***

15. Let me now take the Ruling of the Court of Appeal in the light of the submissions of counsel. Was the Ruling of the Court of Appeal premature? I think not. A court of law can rule on the admissibility or otherwise of a document by examining the contents of the document in the light of the Evidence Act. If the contents of the document sought to be admitted are not in line with the Evidence Act in the sense that they violate a provision or provisions of the Act, the court is competent to reject it. That is the whole essence of admissibility or inadmissibility of documents tendered in court as exhibits. A court of law need not wait for the final stage when parties address the court. This is because our laws of procedure expect counsel tendering a document as an exhibit to present arguments in favour of the admis-

sibility of the document. Although a court of law can reconsider its earlier decision on the admissibility or inadmissibility of the document at the stage of writing judgment, that is not the same thing as saying that the court must wait for other evidence before it to rule on the document tendered. (p. 3552 H)

**AFFIDAVITS - Validity - Evidence Act, ss. 86 & 87**

16. It is clear to me that the twenty inspection depositions do not contain only facts within the knowledge of the witnesses or from information which they believed to be true, but also objections, prayers and legal arguments; thus offending section 87 of the Evidence Act

While some of the depositions accord with the provisions of section 86 of the Evidence Act, the above samples do not. I must say that there are quite a large number of such like depositions. I merely took the above as sample analysis. It is my view that the depositions which complied with section 86 of the Evidence Act cannot save the entire depositions, as they are drowned by those which violated section 87 of the Act. This is because a court of law is not competent to pick depositions in affidavit which are consistent with section 86 of the Evidence Act and ignore those which violate section 87 of the Act. The Court of Appeal was therefore right in rejecting the depositions. (p. 3557 C)

**DOCUMENTS - Tendered as exhibits**

17. That takes me to the second reason given in paragraph 4.04B(vii)(ii) at page 82 of Appellant's Brief. It is that the witnesses were not the makers of the documents inspected and have no legal competence to comment on them. Although by section 91(2) of the Evidence Act, a document is admissible in evidence notwithstanding that the maker of the document is not available. The subsection does not cover the point made by the Court of Appeal regarding the competence of the witnesses to comment on the document.

I should consider one other point and it is whether they are experts in election or electoral matters within the meaning of section 57 of the Evidence Act? Mr. Iwuamadi is a fish farmer. Mr. Ogu is a trader. Mr. Anyanwu is also a trader. Mr. Elosuiba is a businessman. In fairness to them, they did not claim to be experts and so they did

not make the comments as experts. In the light of the above, I am in the company of the Court of Appeal when that court held that the witnesses had no legal competence to comment on the documents. The function of a witness who is not an expert within the Evidence Act is to give evidence on the facts. He cannot make inference on the facts or parade before the court in the witness box opinions and legal arguments purportedly drawn from the facts. He must leave that to his counsel and the court to do so. (pp. 3557 H/3558 H/3559 C)

***Practice directions - Binding effect of - Extent***

18. I will go to the last one and it is that the application had no support in the Practice Directions.

With the greatest respect, I am not with the Court of Appeal. I am rather with Learned Senior Advocate for the appellant. In the hierarchy of our jurisprudence, Practice Directions come last in terms of authority in the area of conflict. I do not think I sound clear. Let me make myself clearer. If there is a conflict between the Constitution and Practice Directions the former will prevail. This is too obvious to be mentioned. If there is a conflict between an enabling statute and Practice Directions, the former will also prevail. This is also an obvious one. Perhaps the less obvious one is where there is a conflict between enabling Rules of Court and Practice Direction. In my view, even here, the enabling rules of court will prevail. This is, because in certain cases Rules of Court empower the head of court to make Practice Directions. And so in the event of any conflict, the authority of the mother who gave birth to the child (putting it on the lighter side) should be recognized first as the first and foremost authority. (p. 3559 F)

***Depositions - Objections thereto - When to raise***

19. It is clear from the above that counsel for the appellant did not raise any objection to the depositions when they were tendered. In the words of counsel, they were “*adopted by consent and order of court.*” Was it not too late in the day for learned Senior Advocate to urge this court “*to resolve the issue in the negative and in favour of the petitioner and allow ground 11.*” While issue of jurisdiction can be raised at any time in the proceedings, even on appeal in the Su-

preme Court, I do not think the issue raised is one of jurisdiction.

In Chief Fawehinmi v. NBA (No. 1) (1989) 2 NWLR (Pt. 104) 409, this court held that if an objection is not radical and does not go to the essence, like jurisdiction, as opposed to mere formal objection, then such an objection must be raised at the earliest opportunity; otherwise the party objecting, by failing to do so on time may be deemed to have accepted the state of things as it was and may otherwise be estopped by his conduct from raising the objection in a future date. (p. 3562 B)

***APPEALS - Grounds of appeal - Basis of***

20. From the above conclusion of the Court of Appeal, I do not think there is really an issue in respect of whether the evidence led by the appellant was in respect of only four States or not. I say this because by the conclusion, it is clear that even if the evidence on the four States is in favour of the appellant, the petition would have failed. It is in respect of that conclusion that I am in agreement with learned Senior Advocate for the 1st and 2nd respondents that the conclusion was an obiter dictum. The law is trite that a ground of appeal cannot be based on an obiter dictum. A ground of appeal is based on a ratio decidendi. An orbiter dictum is, as a general principle of law, not binding on courts; a ratio decidendi is. (pp. 3563 H/3564 D)

***COURTS - Similar documents - Ruling on admissibility***

21. Ruling on the admissibility or otherwise of a document is a specific adjudicatory act or function of the trial court. The ruling is specific on the document or documents tendered for admission as exhibit or exhibits. The ruling is therefore tied to the particular document or documents and cannot in anyway affect any previous documents admitted or rejected or any future documents yet to be tendered before the court. This is a most elementary procedure and logic. Documents may be of the same make, content or quality. This does not mean that an earlier admission of similar document possessing the same make, content or quality means that the other documents yet to be tendered but have the same toga or status of the admitted or rejected documents are admitted. That cannot be law and it is not law. Documents in a case, to say on the lighter side, are



not twins and the court cannot treat them as such. Even twins, at times and in most times, act differently and their parents treat them in their specific conduct displayed. Parents do not foist the conduct of one twin on the other. Why then documents? (p. 3567 B)

***Commissions of inquiry - Nature of***

22. Let me take the one I am surer. I am in some difficulty to agree with learned Senior Advocate for the appellant that the setting up of the Commission was totally and fully an administrative act. I am of the view that it has some content of quasi-judicialism. I should take it further by saying that the findings of the Commission headed by a Judge of the High Court of Abia State are clearly judicial and therefore the appropriate courts of law, including the Court of Appeal, have jurisdiction and competence to inquire into the validity or otherwise of the findings of the Commission; relevantly Exhibit EP2/34. (p. 3570 E)

***Presidential candidates - Qualifications - Challenge to***

23. A person so indicted has the constitutional right to seek redress in a competent court of law. In my humble view, a court of law of competent jurisdiction is in a position to order that the election to the office of President be deferred pending the determination of the case. This will certainly cause some hardship, not only to the candidates but also to Government.

That, I think, is the basis or rationale for the decisions learned Senior Advocate for the 1st and 2nd respondents cited in paragraph 5, pages 31 and 32 of the Brief. In order to avoid hardship to the other candidates and more importantly to the itinerary of Government in terms of scheduling the Presidential election, the proper time to challenge the qualification of a Presidential candidate should be after the conduct of the election and the announcement of result. This is what section 145(1) of the Electoral Act, 2006 provides. See Obasanjo v. Yusuf (2004) 9 NWLR (Pt. 877) 144. As correctly pointed out by learned Senior Advocate for the 1st and 2nd respondents, that is what the appellant did in this case as in the petition in paragraph 8(a) which reads:

*“The grounds upon which this petition is brought are as fol-*

lows:

(a) *The 5th Respondent Umaru Musa Yár'Adua was at the time of the election not qualified to contest the election.*"  
(p. 3572 A)

**B Commissions of inquiry - Power to set up**

24. By section 4(7), the Governor of Abia State can only set up a Commission of Inquiry in respect of public officers in Abia State. He has no constitutional competence to set up a Commission of Inquiry to inquire into activities of public servants in any other State. It is in this respect I agree with learned Senior Advocate when he pointed out that the 4th and 5th respondents had never been in the public service of Abia State. He correctly pointed out that at the material time they were Governors of Katsina and Bayelsa States respectively. D How come the commission of Inquiry on them? The purported Commission of Inquiry set up by the Governor of Abia State attempts to destroy the federal arrangement in the Constitution. As the Governor had not the constitutional power to set up the Commission of Inquiry, the findings arising from the Inquiry as in Exhibit EP2/34 are E a nullity and I so hold. (p. 3573 B)

**Indictment - Meaning of**

25. Section 137(l)(i) talks of indictment. An indictment is a written accusation preferred against a person charging him with an offence or offences before a court of law. In short, an indictment is an information or charge preferred by the State against a person. In Okotie-Eboh v. Manager (2004) 18 NWLR (Pt. 905) 242, Pats-Acholonu, JSC, in search of the meaning of indictment, said at pages 287 and G 288:

*"It needs hardly said that the term 'indictment' in the content it is used in the text to wit, section 66(1 )(h) of the Constitution impresses me that the word embraces an allegation or committal of something in the nature of a felony, which act having been committed has occasioned the drafting of a charge with a view to prosecuting the person."* H

I entirely agree with Pats-Acholonu, JSC that an indictment involves an allegation or committal of a crime which necessitates the

drafting of a charge. That is the essence of section 137(1)(i) of the Constitution which provides specifically for the offence of embezzlement or fraud. The question is whether the Commission of Inquiry set up by the Governor of Abia State found the 4th and 5th respondents guilty of embezzlement or fraud? There is nothing in the words "having done their job contrary to the Laws, Rules, Principles and Regulations", to so suggest. In other words, the 4th and 5th respondents were not specifically found guilty of embezzlement and fraud and so Exhibit EP2/34 does not articulate or vindicate section 137(1)(i) of the Constitution, as it is clearly on its own and therefore to no avail to the appellant. (pp. 3574 H/3575 D)

***ELECTION PETITIONS - Evidence - Proof - Nature of***

26. The Court of Appeal rightly, in my view, held that proof of the allegation that result sheets were not delivered to the States and polling units, non counting of votes and announcement of scores of the polling units throughout the country as contained in paragraph 9B(iv)(a) and (b) cannot be established by looking at the documentary exhibits tendered. It can only be established by the direct evidence of those who observed the non-compliance.

The basic aim of tendering documents in bulk was to ensure the speedy hearing of election petitions and that is good because it facilitates the speedy hearing of the petition. But that does not ipso facto permit the court to attach probative value to documents that lack such value. At the end of the day and the end of the day is the writing of judgment, the trial Judge will remove the chaff from the grain by scrupulously examining the documents to see whether they have the content of probative evidence. As the documents failed the test, the Court of Appeal, in my view, was right in expunging them. (p. 3582 F)

***PLEADINGS - Averments - Admissions - How determined***

27. In considering whether an averment in a paragraph is admitted, the court must consider the totality of the paragraph and not words in isolation or in quarantine. This is the only way to procure the intention of the party. Paragraph 12 of the Reply of the 1st and 2nd respondents unequivocally denied paragraph 9B(ii) of the Petition.

The paragraph did not stop there. It went further to aver that the ballot papers used in the election throughout the Federation were regular and were in accordance with the Electoral Act. The paragraph further averred that if any such ballot paper did not have serial number or counterfoil or were not in book form (which were not admitted) any such irregularity, omission or error did not affect either the conduct or the results of the election which was conducted substantially in accordance with the Electoral Act, as the bundles containing the ballot papers were serialized for audit purposes. It is clear to me that the words “audit purposes” do not have an independent life in the paragraph, as it is parasitic to or on the basic denial of paragraph 9B(ii) of the Petition. The Court of Appeal, with the greatest respect, was wrong in relying on the two expressions to come to the conclusion that there was admission by the 1st and 2nd respondents. In the law of pleadings, admission must be unequivocal; not speculative or based on conjecture. The adverse party admitting must leave the court in no doubt as to the fact admitted.  
(p. 3588 C)

***JUDGMENTS - Basis - Public opinion - Place of***

28. Courts of law do not give judgments according to public opinion or to reflect public opinion unless such opinion represents or presents the state of the law. This is because the Judge’s clientele is the law and the law only and alone.

The Court of Appeal cannot collect evidence from the market overt; for example from the Balogun market, Lagos; Dugbe market, Ibadan; main market, jos; Central market, Kaduna; Central market (former Gwari market), Minna; Wuse market, Abuja. On the contrary, the Court of Appeal, has to wait for evidence, as the court did, in the court building duly constituted as a court qua adjudicatory body. Courts of law being legal and sacred institutions do not go on a frolic or on a journey to collect inculpatory or exculpatory evidence. On the contrary, they deal only with evidence before them which are procedurally built on arid legalism. For the avoidance of doubt, I am not saying by this judgment that all was well with the conduct of the Presidential Election conducted in 2007. What I am saying is that there was no evidence before the Court of Appeal to

dislodge section 146(1) of the Electoral Act.

It is sad that so much has been said in the newspapers of this country on the case. The new technology of internet reporting has added to the comments, some of them doubting our integrity to do justice according to law. I regard them as blackmail and I will not succumb to blackmail. (p. 3594 A) B

## **NOTABLE POINTS OF INTEREST**

### **TOBI JSC**

*1. Practice direction - Effect of inconsistency with Evidence Act could be cured by waiver* C

Learned Senior Advocate for the appellant in his Reply Brief, submitted that the Practice Directions violate provisions of the Evidence Act. I have read sections 109, 111 and 112 of the Evidence Act and I do not see any material deviation or departure from the provision by the Practice Directions. Assuming that the Practice Directions are in conflict with the Evidence Act, has the appellant not waived his right to complain having used them? I say so because he did not complain that they violated the Constitution. If he so complained, he should have been on a strong position as he cannot waive a constitutional right which he shares in common with the public. Sections 109, 111 and 112 of the Evidence Act do not have the same status as the Constitution. I should say that the Practice Directions vindicate the constitutional right to fair hearing by providing for the speedy hearing of petitions. As a matter of law, the need for speedy hearing of petitions is the fulcrum of the Practice Directions and this court is always on the side of speedy hearing of cases. (p. 3513 D) D

*2. Judicial Precedents - Issue of loss of potency* G

Learned Senior Advocate for the appellant, in urging this court to follow Swem decided in 1966 contended that Akinfosile which was decided in 1960 was consigned to the “archive of judicial precedents” because this court in Swem confined the decision to the “facts and pleadings delivered therein”. With the greatest respect, I am not with him. A decided case of this court cannot be “consigned to the archive of judicial precedent”, whatever that means, merely because a subsequent case did not follow it on the ground that the facts are differ- H

ent. It is good law that all cases are decided on the facts before the court. I know of no case which is not decided on the facts before the court, including his darling, Swem.. (p. 3529 H)

*3. Justice of a case cannot be determined in vacuo but within the facts of the case*

Learned Senior Advocate said that this court can depart from its previous decision in the following circumstances:

- (a) If the decision was given per incuriam and it was manifestly erroneous.
- (b) If rigid adherence to it may perpetrate injustice, or
- (c) If it unduly restricts the proper growth of the law.

The second one is where rigid adherence to the decision will cause injustice. Counsel is unable to show what injustice will be caused in following Buhari. If Buhari is overruled as contended by learned Senior Advocate, will that be justice to the 4th and 5th respondents? Justice of a case cannot be determined in vacuo but in relation to the facts of the case. Justice so to say, which is not done within the facts of a case is not justified properly so called but justice in inverted commas and therefore injustice. (p. 3537 D/3538 B)

*4. Reasonable man - Means one who takes proper but not excessive precautions*

The reasonable time in paragraph 49(2) can only be determined in the light of the facts of the case and from the point of view of a reasonable man. It cannot be determined outside the facts of the case. And who is that reasonable man? He is the reasonable man wearing the shoes of the applicant or respondent with or 'possessing a good reasonable faculty who acts sensibly, takes proper but not excessive precautions, does things without serious delay and weighs matters carefully but not over specifically. A reasonable man is neither perfect nor indifferent. (p. 3545 C)

*5. Evidence - Weight - Document tendered by non-maker*

Weight can hardly be attached to a document tendered in evidence by a witness who cannot or in a position to answer questions on the document. One such person the law identifies is the one who did not

make the document. Such a person is adjudged in the eyes of the law as ignorant of the contents of the document. Although section 91(2) allows him to tender the document, the subsection does not deal with the issue of weight, which is dealt with in section 92. Weight in section 92 means weight of evidence, which is the balance or preponderance of evidence; the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other. See Black's Law Dictionary, 6th edition, page 1594. In view of the fact that cross-examination plays a vital role in the determination of the weight to be attached to a document under section 92, and a person who did not make the document is not in a position to answer questions on it, I see the point made by the Court of Appeal. (p. 3558 D) B  
C

*6. A witness can not testify a second time in the same matter without prior leave of court* D

There is one final point and it is in respect of Emmanuel Iwuamadi. He had earlier adopted his deposition filed along with the petition in his capacity as State Collation Supervising Agent of Imo State. This is at pages 85 to 88 of volume 1 of the Record of Appeal. And so by the application of learned Senior Advocate for the appellant, Emmanuel Iwuamadi was to give evidence in the matter the second time. The procedure known to me is that if a party wants a witness who had earlier testified in court to give further evidences, an application is made before the court to that effect. With leave of the court, the witness is recalled to give further evidence. Was that procedure followed? If not, why not? Did the Practice Directions prohibit the procedure? If not why was the procedure not followed? Can a witness who had earlier given evidence in court appear before the court to give evidence without leave of the court? I leave the matter. I will not pursue it. (p. 3560 G) E  
F

*7. A judge should never mingle in politics*

I see from Exhibit EP2/34 the need for Nigerian Judges to maintain a very big distance from politics and politicians. Our Constitution forbids any mingling. As Judges, we must obey the Constitution. The two professions do not meet and will never meet at all in our democ- H

racy in the discharge of their functions. While politics as a profession is fully and totally based on partiality, most of the time, judgeship as a profession is fully and totally based on impartiality, the opposite of partiality. Bias is the trade mark of politicians. Non-bias is the trade mark of the Judge. That again creates a scenario of superlatives in the realm of opposites. Therefore the expressions, “politician” and “Judge” are opposites, so to say, in their functional contents as above; though not in their ordinary dictionary meaning. Their waters never meet in the same way Rivers Niger and Benue meet at the Confluence near Lokoja. If they meet, the victim will be democracy most of the time. And that will be bad for sovereign Nigeria. And so Judges should, on no account, dance to the music played by politicians because that will completely destroy their role as independent umpires in the judicial process. Let no Judge flirt with politicians in the performance of their constitutional adjudicatory functions. When I say this, I must also say that I have nothing against politicians. They are our brothers and sisters in our homes. One can hardly find in any Nigerian community or family without them. There cannot be democracy without them and we need democracy; not despotism, oligarchy and totalitarianism. They are jolly good fellows. The only point I am making is that their professional tools are different from ours and the Nigerian Judge should know this before he finds himself or falls into a mirage where he cannot retrace his steps to administer justice. That type of misfortune can fall on him if the National Judicial Council gets annoyed of his conduct. Ours are not theirs. Theirs are not ours. I will not say more. I will not say less too. So be it. (p. 3576 C)

**OGUNTADE JSC** (Dissenting)

8. *Respondent ought to prove non-substantial effect of non-compliance in election results*

It seems to me, that, given the fact that laws are made to be obeyed, it will be sufficient for a petitioner to lead evidence of non-compliance, and if such evidence is satisfactory, the petitioner should be entitled to judgment unless the respondent in its defence shows that there was no such non-compliance or that, if there was one, it did not affect the principles of the Electoral Act and in addition that it did not substantially affect the result of the election. To accept otherwise



i.e. that it is the petitioner who should prove non-compliance and, still go further to prove its substantial effect on the result of the election, is in my view akin to approaching the matter on the basis or notion that laws are not primarily made to be obeyed. In my humble view, it is the person who has broken the law through non-compliance with the provisions of the law, who should in a state of remorse plead 'I am sorry this non-compliance occurred, but it has not compromised the principles of the Electoral Act; and the result of the election would still have been the same even if there was compliance with the provisions of the Act. (p. 3618 A)

*9. Pleadings - Traverse - An evasive traverse is no traverse at all*  
Any averment pleaded by the plaintiff or a petitioner as in this case which is not denied by the defendant or respondent is deemed as admitted and there is no issue on the point to go to trial: Surely, the 1st and 2nd respondents who organized and supervised the 2007 Presidential elections ought to know whether or not the ballot papers used for the elections were serialized and bound in booklets as required by section 45(2) of the Electoral Act. On the state of pleadings before the tribunal, the 1st and 2nd respondents had clearly admitted that the ballot papers used were not serialized and bound in booklets as required under Section 45(2) Electoral Act. The averment that the ballot papers were serialized for audit purposes is plainly evasive and mischievous.

The court below correctly appraised the pleadings when at page 2704 of Volume VII in its judgment it said:

*These (sic) in effect is an admission that the ballot papers were not numbered serially and bound in booklets. This averment therefore is considered proven and constitutes non compliance with the provisions of the Electoral Act. " (p. 3623 B/E)*

*10. Proof of invalid ballot paper is of substantial effect on election results*

Even on the supposition that the burden to prove that the failure to use the ballot papers which did not conform with the law did substantially affect the result of the election was on the petitioner/appellant, it is my firm view that the petitioner/appellant discharged the

burden. A ballot paper not in conformity with Section 45(2) is prima facie an act of non-compliance. It is therefore an invalid ballot paper. Since it is the same invalid ballot paper that converts later in the process of an election into a vote, the resulting vote must also become an invalid vote. It was never the case of the respondents that the unserialized ballot papers were only used in some of the States in Nigeria. If that were their defence and the court below had found that this was truly the case, that would have placed on the court below the duty to determine what percentage of the votes cast at the election was valid or invalid. If the 4th and 5th respondents would still have won by a majority of the valid votes, the petition was liable to fail. But in this case, all the ballot papers used to cast votes for all the candidates in the election were invalid. The result is that each of the candidates at the Presidential Elections 2007 scored zero or no votes, An invalid ballot paper cannot yield a valid vote. (p. 3630 C)

**MUKHTAR JSC** (Dissenting)

*11. Pleadings - Unchallenged averments dispenses with the need for evidence*

Pleading come before evidence, and in that succession one must be considered before the other when a party files its pleading and then adduce evidence in its support. It is the duty of a Judge to peruse the pleading and then the evidence adduced to ensure that they are within the periphery of the averments in the pleading. Where the evidence is outside the pleading, the evidence is discountenanced as non issue. When the evidence has pleading to back it up then the evidence is evaluated. There is however a principle of law that dispenses with evidence. Where averments in pleading are not challenged or denied then it becomes a different ballgame, as in that circumstance the party asserting does not require to adduce evidence in support of the averments in the pleading. In law, it is said that the opponent has admitted the facts in the pleading. (p. 3651 F)

*12. Transparency should be the watchword in election processes*

Transparency should have been the watch word of the commission in all the election processes. I agree that, because of the inclusion of

another Presidential Candidate in the Presidential race (courtesy of this Court's judgment) the Respondents were faced with certain predicaments, but that is not to say that such fundamental requirements should have been ignored. That exigency, I believe should not have prevented the Respondents from complying with this very important provision of Section 45(2) supra. How can an election be described as free and fair when its most important component was fraught with incurable infractions? I cannot and will not be swayed by the excuse of shortage of time. The serialization could have been done the same time the ballot papers were being printed. (p. 3656 A)

**ONNOGHEN JSC** (Dissenting)

*13. Some noncompliance with election procedure may render an election void*

I had already held that the burden of proving non-compliance and the substantiality of the non-compliance on the result of the election lies on the petitioner/appellant. Has he discharged that onus? I hold the view that he has. There are non-compliances that go straight to the fundamentals of an election thereby affecting condition precedents for the holding of an election while others may just affect the result of the election where one had been validly held. In other words, some non-compliance may render an 'election' void in which case there is no result of the election to substantially affected by the non-compliance while others may substantially affect the result of an election validly conducted.

For instance, if the non-compliance with the provisions of the Electoral Act complained of have to do with the validity of the voters register used at the election which non-compliance is found proved, will that alone not be enough to invalidate the election without the requirement of the further prove of how the non-compliance affected substantially the result of the election when in law there could not have been an election in the first place as no election can take place without a valid voters register.

In my view two things are crucial and fundamental to the holding of an election. These are Voters Register and Ballot Papers. It is common knowledge that the two are the targets of election riggers, if not properly handled. (p. 3668 H)

**REPRESENTATION**

Chief M. I Ahamba, SAN for the appellant with him, are Cheo Nkire, Chief Femi Falana, Joi Munich, Ibrahim Majaheed, A.T.U Ibinola. -  
 B For the appellant

Kanu G. Agabi (CON), SAN for the 1st and 2nd respondents with him are A. B Mahmoud, SAN, Amaechi Nwaiwu, SAN, Bello Fadile, Esq, O. O Uzzi, Esq, Wole Adebayo Esq, O. S Obande Esq, Musa C Elayo Esq, C. U Ekomaru, Esq, Okon Efut, Esq, O. O Obono-Obla Esq, Irene Ideva (Mrs), P. O Ofikwu Esq, "R. A Umiom, Esq, Ayo Akam Esq. Chuka Ugwu Esq, Patience Osagiede (Miss), Rita "N Ogar (Mrs), Darracott Osawe Esq, Adam Abdullahi Esq, Egang Agabi Esq, Ifunanya O. Obumsele (Mrs), John Ochogwu Esq, A. Ugar (Miss), A. D Sadauki, I. S Utuk, Umar Alhassan.

N. O Ibom(CSC) for the 3rd respondent with him are Pamela Ohabor (ACSC), C. I Erhebor (ACSC), Rotimi Ogunjide, A. M Kayode.

E Chief Joe Kyari Gadzama SAN, for the 4th and 5th respondents with him are Dr. Alex A. Izinyon, SAN, Chief Joe Gadzama, SAN, C. P Oli, Esq, S. I Bamgbose, D. H Bwala, Esq, Yusuf Yenfa, Eami Jibrin (Miss), Ezinne Nwaogu (Miss), Audu Anuga, Esq, Oladele Gbadeyan, Esq, F Chinedu Umeh, Kenneth Omoruan, Hannatu Abdurrahman (Mrs), Friday Izinyon, Ibironke Izinyon (Mrs), Olugbenga Adeyemi, Kabir Akingbolu, Ezennade Amuche (Miss), Ozoagu Ifeoma (Miss), Farouk Asekoma.

**G CASES REFERRED TO**

Imiere v. Salami (1989) 2 NWLR (Pt.131) 131 at 159  
 Na'Bature v. Mahuta (1992) 9 NWLR (Pt. 263) 85 at 105  
 Goodrich v. Peimer (1957) AC 65 at 88  
 Atuyeye v. Ashamu (1987) 1 NWLR (Pt. 49) 267 at 278  
 H Thompson v. Gool and Co. (1910) AC 409 at 420  
 Attorney-General Kano State v. Attorney-General of the Federation (2007) All FWLR (Pt. 364) 238 at 258  
 Obi v. INEC (2007) 11 NWLR (Pt. 1046) 565 at 643

Ladoja v. INEC (2007) 7 SC 99 at 138

Tsoho v. Yahaya (1999) 4 NWLR (Pt. 600) 657 at 662

Peters v. David (1999) 5 NWLR (Pt. 603) 486 at 495-496

Balewa v. Muazu (1999) 5 NWLR (Pt. 604) 636 at 644-645

Falae v. Obasanjo (No. 2) (1999) 4 NWLR (Pt. 599) 476 at 515

Imam v. Sheriff (2005) 4 NWLR (Pt. 914) 80 at 168-169

Action Congress v. INEC (2007) 30 (Pt. II) NSCQR 1254 at 1287

B

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

Constitution of the Federal Republic of Nigeria, 1999, ss. 6, 36, 248, 285

Electoral Act, 2006, ss. 45, 145, 146, 159

Evidence Act, ss. 83, 86, 87, 91, 92, 93, 111, 112 & 146

Election Tribunal & Court Practice Directions, 2007, Paragraphs 1 & 2

D

Election Tribunal & Court Practice Amendment Directions, 2007

Court of Appeal Rules, O. 19 r. 7

### **BOOK REFERRED TO**

Black's Law Dictionary, 6th Edition

E

### **LEAD JUDGEMENT BY TOBI JSC**

The Presidential Election was conducted on 21st April, 2007 through out Nigeria. In that election, the country is one constituency and it is the Presidential Constituency. The results were announced, two days later and precisely on 23rd April, 2007. The 2nd respondent, Professor Maurice Iwu, announced the results at a World Press Conference. He declared Alhaji Umaru Musa Yar'Adua and Dr. Goodluck Jonathan, the 4th and 5th respondents respectively as the winners. They were the 5th and 6th respondents in the Court of Appeal. Their families and supporters jubilated. They were happy. The two candidates were happy too. They should be. They contested the election and they won. There could not have been a happier moment in their lives at the material time. In the results, Major General Muhammadu Buhari, ANPP, scored 6,605,291 votes. Alhaji Umaru Musa Yar'Adua, PDP, scored 24,638,063 votes.

F

G

H

While the 4th and 5th respondents were happy, the appellant

was not happy He rejected the results. He felt that the election was inconclusive. He filed an election petition together with Chief Edwin Ume-Ezeoke, his running mate. Chief Edwin Ume-Ezeoke later withdrew from the petition they filed together. They therefore parted ways. General Muhammadu Buhari asked for the following reliefs in paragraph 27 of the petition:

*“(i) That the 5th Respondent was not qualified to contest the Presidential election of 21st April, 2007 consequent upon which his election together with the 5th Respondent as President and Vice-President respectively is void.*

*“(ii) That the election to the office of President of the Federal Republic of Nigeria conducted on the 21st April, 2007 is invalid and therefore cancelled,*

*“(iii) That the 3rd Respondent is guilty of gross misconduct for, without any just or probable cause involving the military in purely civil matter, the conduct of election, contrary to the powers conferred on his office by section 217 of the Constitution of the Federal Republic of Nigeria.*

*“(iv) That the 1st Respondent conducts another election for the office of the President of the federal Republic of Nigeria between the remaining 22 (Twenty-two) candidates within three (3) months.*

*“(v) That the 2nd Respondent in the person of Professor Maurice Iwu be disqualified from participation in the conduct of any future elections in the Federal Republic of Nigeria.*

*“(vi) That the President of the Senate takes over the duties of the President of the Federal Republic of Nigeria in accordance with section 146 of the Constitution pending the conduct of another election.”*

The appellant relied on this petition and written statements on oath by witnesses in which his case is stated in detail. After a number of interlocutory applications, the matter was heard and the Court of Appeal dismissed the petition. That court declared the 4th and 5th respondents winners of the election. Fabiyi, JCA, in his lead judgment, said at page 2747 of the Record:

*“In sum, I come to the conclusion that all the issues raised in the petition have not been established. Accordingly, it is hereby dismissed. Since the two consolidated petitions have failed, it follows*

*that Alhaji Umaru Musa Yar'Adua and Dr. Goodluck Jonathan remain the elected President and Vice President respectively of the Federal Republic of Nigeria. ”*

Dissatisfied, General Muhammadu Buhari, the appellant, has come to this court. Briefs were filed and duly exchanged. The appellant formulated the following ten issues for determination; B

*“2.01 Whether the Court of Appeal was right when it held that the petitioner presented evidence on four States only.*

*2.02 Whether on a proper evaluation of the evidence adduced in this petition, the petitioner was not entitled to judgment.* C

*2.03 On who does section 146(1) of the Electoral Act place the onus of proof of the effect of established substantial non-compliance with the provisions of the Act on the result of an election conducted under the Electoral Act 2006, the Petitioner or the Respondents?* D

*2.04 Whether the Court of Appeal properly placed the onus of proof of the effect of established substantial non-compliance with the provisions of the Electoral Act on the Petitioner;*

*2.05 Whether the power of the President of the Court of Appeal under any section of the Nigerian Constitution including sections 248 and 285 extends to the power to issue Practice Directions to the court in its original jurisdiction under section 239(1) of the Constitution.* E

*2.06 Whether the court below had the competence to reverse itself on its ruling on 23/10/07 on the averments in the Petitioner's pleadings.* F

*2.07 Whether the court below was right when on 19/11/07 it rejected the petitioner's inspection witness depositions already filed before it.* G

*2.08 Whether the Court of Appeal was right when it failed to declare the depositions jointly filed by the 1st and 2nd respondents and those jointly filed by the 4th and 5th Respondents respectively as incompetent despite being inapplicable to the proceeding.*

*2.09 Whether the Court of Appeal was right in striking out 18 out of 19 witness depositions filed with the petition after adopting the depositions unconditionally by order of court on 19/11/07.* H

*2.10 Whether the Court of Appeal was right when it assumed*

*jurisdiction to inquire into the propriety of Exhibit EP2/34.*”

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

B “3.02 *Whether the President of the Court of Appeal had power to issue the Practice Directions 2007 and if so whether the petition was rendered incompetent by the appellant’s refusal or neglect to comply with the same.*

C 3.03 *Whether the Court of Appeal was right when it assumed jurisdiction to inquire into the question whether or not the 4th respondent was qualified to contest having regard to exhibit EP2/34 issued by the Government of Abia State purporting to indict him.*

3.04 *Whether the Court of Appeal was right when it held that the petitioner presented evidence on four States only.*

D 3.05 *Whether the depositions filed by the Petitioners were unconditionally adopted by the court and if not whether the Court of Appeal was entitled to reject those depositions which failed to meet the mandatory requirements of the Evidence Act.*

3.06 *Whether the court below reversed its ruling made on the 23rd day of October, 2007.*

E 3.07 *Whether the document sought to be tendered by the Petitioner on the 19th day of November, 2007 was a witness deposition and if not whether the Court of Appeal was entitled to reject it, as it did for the reason that it gave.*

F 3.08 *Whether the Court of Appeal properly evaluated the evidence in this case and came to the right conclusion in dismissing the petition.*

G 3.09 *Whether the onus was on the Petitioner or on the Respondents to prove that the election was not conducted in accordance with the provisions of the Electoral Act, 2006 having particular regard to the provisions of section 146(1) of the Electoral Act; and if the onus was on the Petitioners whether that onus was discharged in the instant case.”*

H The 3rd respondent formulated the following issue for determination:

“*Whether the Supreme Court can hear and determine this appeal when the Notice and Grounds of Appeal does not relate or pertain to the 3rd respondent and after the appellant had severed*



*his case from criminal allegation, withdrawn all pleaded facts bordering on “criminal conducts and Ground 9 of his petition dismissed by the lower court.”*

The 4th and 5th respondents formulated the following nine issues for determination:

*i. Whether the court below was not perfectly right when it held that appellant was unable to establish act of non-compliance with the provisions of the Electoral Act, 2006, capable of rendering invalid or void the Presidential Election held on 21st April, 2007.* B

*ii. Whether the court below was not right when it pronounced as incompetent the depositions of the appellant witnesses which were established to have been sworn by Val. I. Ikeonu, Esq, who is one of the appellant’s counsel.* C

*iii. Whether or not appellant’s petition did not suffer from paucity of evidence, as rightly held by the lower court, leading to its dismissal.* D

*iv. Was the 5th respondent disqualified from contesting the Presidential Election as claimed by the appellant?*

*v. Upon a critical and deep appraisal of the appellant’s petition as couched, whether the lower court was not right by holding that the appellant failed to plead sufficient facts in support of paragraphs 9B(iii)(g) and 9B(iii)(h) of the petition.* E

*vi. Going by the provisions of the 1999 Constitution, whether the court below was not right when it held that the President of the Court of Appeal has both constitutional and statutory powers to make Practice Directions to govern election petition.* F

*vii. Considering the fact that appellant failed to lead any evidence regarding the non display of Voters’ Register and its effect, whether the court below was not in order when it held that it was a non issue.* G

*viii. Whether the court below was not right when in its ruling of 19/11/07 it rejected the depositions of appellant’s witnesses who claimed to have inspected INEC documents at the INEC headquarters when the documents sought to be tendered had already been tendered from the Bar by the appellant’s counsel.* H

*ix. Considering the provisions of paragraph 1(iii) of the Election tribunal and Court Practice Amendment Directions 2007 which*

*govern presentation of election petitions before the court below, whether or not the 4th and 5th respondents' witnesses statements attached to their Reply are competent."*

The 4th and 5th respondents have also raised a preliminary objection as follows:

B *"TAKE NOTICE that before or at the hearing of this appeal, 4th and 5th respondents... will by way of Preliminary Objection pray the court to strike out the entire appeal and or the Grounds of Appeal hereinunder identified or referred to."*

C The respondents have relied on seven grounds of objection. I will return to the preliminary objection later in this judgment. Let me for now take the Briefs of the parties.

Learned counsel for the appellant, Chief M. I. Ahamba, SAN, first took Issues Nos. 3 and 4 together on the onus of proof of effect D of established non-compliance with the Electoral Act. Quoting from what the Court of Appeal said on section 146 of the Electoral Act, learned Senior Advocate submitted that the statement of the court is the ratio decidendi that disfigured the reasoning of the court and more than anything else influenced the ultimate dismissal of the petition; otherwise, the court having found the substantiality of the non-compliance with section 45(2) proved, should have annulled the election without more. He argued that the statement does not; unfortunately represent the law and any existing judicial authority which places the onus of proving effect of established non-compliance on a petitioner is per incuriam. He referred to section 146(1) of the Electoral Act and the cases of Imiere v. Salami (1989) 2 NWLR (Pt.131) 131 at 159; Na'Bature v. Mahuta (1992) 9 NWLR (Pt. 263) 85 at 105; Goodrich v. Peimer (1957) AC 65 at 88; Atuyeye v. Ashamu (1987) 1 NWLR (Pt. 49) 267 at 278; Thompson v. Goold and Co. (1910) AC 409 at 420; Aqua Ltd, v. Ondo Sports Council (1988) 3 NSCC (Vol. 19) (Pt. 111) 22 at 34; Oviawe v. NIRP Ltd. (1993) 3 NWLR (Pt. 492) 126 at 137; Attorney-General Kano State v. Attorney-General of the Federation (2007) All FWLR (Pt. 364) 238 at 258; Obi v. H INEC (2007) 11 NWLR (Pt. 1046) 565 at 643 and Ladoja v. INEC (2007) 7 SC 99 at 138.

The duty of the court, counsel contended, is to discern whose responsibility it should be to satisfy the tribunal or court that a chal-

lenged election was conducted in accordance with the principles of the Electoral Act and that the established non-compliance did not affect the result of the election. He submitted that it would amount to standing the law on its head to imagine that the Legislature would have intended that such a burden should be placed on a petitioner who has already pleaded in his petition that an election was invalid and has come to the tribunal or court to establish the invalidity, resting on section 145(1)(b) of the Act. common sense, learned Senior Advocate submitted, would place the onus to satisfy the court on the party who asserted that the election was properly conducted and who would lose if the court is not satisfied. He cited sections 135(1) and 36 of the Evidence Act and Swem v. Dzungwe (1966) NMLR 297 at 303. Learned Senior Advocate said that Akinfosile v. Ijose (1979) 6-10 SC at 110 is no more the correct position of the law and that Swem v Dzungwe represents the correct position of the law. He urged the court to overrule the decisions in Awolowo v. Shagari (1979) 6-9 SC 51 and Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) 1 as both decisions were rooted in Akinfosile v. Ijose. Learned Senior Advocate submitted that continued adherence to the two decisions would perpetrate a situation whereby the electoral body which conducted the election is left with no responsibility to explain anything, thereby fuelling the impunity of continued brazen acts of non-compliance in future elections. He cited Abubakar v. Yar'Adua (2008) 1 SC (Pt. 11) 77 at 122 on the need of the court to do substantial justice.

On Issue No. 5, learned Senior Advocate submitted that the Constitution does not vest any power on the President of the Court of Appeal to make any rules or Practice Direction in respect of presidential petition proceedings in which the court exercises original jurisdiction. He cited Ladoja v. INEC (2007) 7 SC 99 at 138; Abubakar v. Yar'Adua, supra; and section 248 of the Constitution.

On Issue No. 9, learned Senior Advocate submitted that the Court of Appeal was wrong in striking out nineteen of twenty witness depositions filed with the petition after adopting the depositions unconditionally by order of court on 19th October, 2007. Counsel contended that the Court of Appeal was wrong in ruling on the issue at the trial when counsel for the appellant raised the jurisdictional question of competence on the part of the court to adjudicate on the

question of the mode of swearing the appellant's witnesses' depositions. The substance of the jurisdictional question, according to counsel, was that (a) the point was not properly before the court to enable the court adjudicate on it; (b) following the agreement and consequent order of court on 19/11/07 adopting the deposition, which order was virtually imposed on the appellant, the court was *functus officio* on that point, and neither party could complain thereafter; (c) raising the issue at that stage was prohibited by paragraph 49(2) of the First Schedule to the Electoral Act. Learned Senior Advocate took time and pains to address the above three aspects from page 55 to page 74 of the Brief. Counsel cited quite a number of authorities. On Issue No. 7, learned Senior Advocate seems to point out that the Court of Appeal reneged on its decision to allow the appellant call at least the inspection witnesses into the witness box to tender the documents they obtained from the 1st and 2nd respondents following an order of court made under section 159(1) of the Electoral Act on 14th May, 2007. Counsel questioned the Record of the Presiding Justice on the issue. Although he relied on the Record of Fabiyi and Abba Aji, JJCA on the issue, he said that at the Ruling, no mention was made on the issue of whether the filing of the depositions had earlier been authorized by the court on 30th October, 2007 or not. On Issue No. 8, learned Senior Advocate submitted that the Court of Appeal was wrong when it failed to declare the depositions filed on behalf of 4th and 5th respondents as being inapplicable in the proceedings. Counsel pointed out what he regarded as irregularities in the depositions of the 4th and 5th respondents witnesses at pages 87 to 89 of the Brief.

Learned Senior Advocate took Issues 1, 3 and 6 together. He submitted that the Court of Appeal was wrong when it held that the petitioner presented evidence on four States only. He also submitted that there was no proper evaluation of the evidence adduced by the appellant and that the court had not the competence to reverse itself on its ruling of 23rd October, 2007. Counsel referred the court to the evidence led by the appellant in relation to the States at pages 91 to 234 of the Brief. He relied on some exhibits and annexed some tables to make the point that the appellant led enough evidence to prove his petition.

Learned Senior Advocate submitted on Issue No. 10 that the Court of Appeal was wrong in exercising its jurisdiction under section 239(1) of the Constitution to enquire into the validity or otherwise of Exhibit EP2/34 or the competence of the instituting authority which is not a party to the 'proceedings. Counsel submitted that the Court of Appeal was wrong in holding that the 4th respondent was eminently qualified to contest the election without making any finding on the competence of the instituting authority. Since the Court of Appeal failed to make any pronouncement on the vital issue of its competence to determine the validity or otherwise of Exhibit EP2/34, the Supreme Court is in as good a position to do so. He cited *Woluchem v. Gudi* (1981) 5 SC 291; *Kate Ent. Ltd. v. Deawoo* (1985) 2 NWLR (Pt. 5) 116; *Mogaji v. Odofin* (1978) 4 SC 91 at 93 and section 22 of the Supreme Court Act.

Concluding the Brief, learned Senior Advocate submitted that as appellant led evidence of non-compliance with the Electoral Act, this court should allow the appeal and grant the reliefs sought by the appellant. ,

Learned counsel for the 1st and 2nd respondents, Mr. Kanu Agabi, SAN, questioned that if the Practice Direction is unconstitutional, how could proceedings founded on it form the basis of upholding the appeal and granting all the reliefs sought? how can the appellant rely on a finding by the Court of Appeal based on a Practice Direction which the appellant himself stigmatizes as unconstitutional, learned Senior Advocate questioned the second time? He contended that by stigmatizing the Practice Direction, the appellant is in effect confessing that the foundation upon which he filed and prosecuted the petition was faulty or even non-existent. If the foundation is faulty, as the appellant professes, there is nothing that this court can do except dismiss the appeal, learned Senior Advocate logically submitted. Relying on section 248 of the Constitution, counsel submitted that the President of the Court of Appeal has the power to make the Practice Direction. He cited *Abubakar v. Yar'Adua* (2008) 4 NWLR (Pt. 1078) 465 at 511 and *Okereke v. Yar'Adua* SC/246/2008 delivered on 9th May, 2008 (unreported). Learned Senior Advocate pointed out that as the appellant applied the Practice Direction in his favour, this court cannot allow him to approbate and reprobate at

the same time.

On Issue No. 2, learned Senior Advocate submitted that the eligibility of a candidate to contest an election may be questioned after the election and that the court has jurisdiction to inquire into it. He cited Tsoho v. Yahaya (1999) 4 NWLR (Pt. 600) 657 at 662; <sup>B</sup> Peters v. David (1999) 5 NWLR (Pt. 603) 486 at 495-496; Balewa v. Muazu (1999) 5 NWLR (Pt. 604) 636 at 644-645; Falae v. Obasanjo (No. 2) (1999) 4 NWLR (Pt. 599) 476 at 515; Imam v. Sheriff (2005) 4 NWLR (Pt. 914) 80 at 168-169; Action Congress v. INEC (2007) <sup>C</sup> 30 (Pt. II) NSCQR 1254 at 1287 and Amaechi v. INEC (2008) 33 NSCQR (Pt. I) 332 at 412.

Taking Issue No. 3, learned Senior Advocate submitted that the Court of Appeal was right when it held that the petitioner presented evidence on four States only. Counsel pointed out that as the <sup>D</sup> depositions of 19 out of the 20 witnesses were not admitted on the ground that they were made before Val. I. Ikeonu's Notary Public, the appellant could not have proved his case in respect of all the States he had complaints of irregularity. He relied on section 83 of the Evidence Act. Counsel pointed out that there were no witness <sup>E</sup> depositions in respect of 31 States and the Federal Capital Territory, and that was enough to dismiss the petition.

Taking Issue No. 4, learned Senior Advocate submitted that as the depositions filed by the petitioner were not unconditionally adopted <sup>F</sup> by the Court of Appeal, that court was entitled to reject those which failed to meet the mandatory requirements of section 83 of the Evidence Act. He said that the concept of unconditional adoption of evidence is novel, arguing that evidence must meet the standard of law to be admissible and if it does not, it cannot be admitted. Learned <sup>G</sup> Senior Advocate contended that the Court of Appeal was not involved in technical justice when it struck out appellant's witnesses depositions in order to act only on legal evidence. It was doing substantial justice, which requires that only legal evidence be produced in court, counsel submitted.

<sup>H</sup> Dealing with Issue No. 5, learned Senior Advocate submitted that it does happen, from time to time, that documents are admitted which ought not to be and when that happens, the court expunges them from its record and refuses to place any reliance upon them

and in such a situation the court is not reversing itself but is merely saying that the documents ought not to have been admitted in the first place. The action of the court in purporting to admit them was null and void and nothing is deemed to have happened. The Ruling, counsel contended, did not affect documents yet to be tendered pointing out that it was a misconception of the appellant on it. He did not see *Nnaji for v. Ukonu* (1985) 2 NWLR (Pt. 9) 686 at 706 and *Skenconsult Ltd v. Ukey* (1981) NSCC 1 cited by counsel for the appellant applicable. B

Taking Issue No. 6, learned Senior Advocate submitted that the document sought to be tendered by the petitioner on 19th November, 2007 did not contain witness depositions properly so-called and therefore the Court of Appeal was entitled to reject it; as it did, on the ground that it was a needless commentary on documents before the court made by persons who had no competence. Counsel pointed out that as they were neither the makers of the documents nor claimed special knowledge of them they were inadmissible and therefore rightly rejected by the court. He cited section 159(1) of the Electoral Act. He said that new issues were sought to be raised in the so-called witness statements sought to be tendered which the law does not allow the petitioner to do. He cited *Ambassador Obi-Odu v. Duke* (2005) 10 NWLR (Pt. 932) 81 at 134. Counsel submitted that as the appellant has failed to show that the document if allowed would have substantially influenced or swayed the mind of the court in his favour, the issue should be resolved against him. C D E F

Arguing Issues 7 and 8 together, learned Senior Advocate submitted that the Court of Appeal properly evaluated the evidence, and came to the right conclusion in dismissing the petition. He also submitted that the onus was on the petitioner to prove that the election was not conducted in accordance with the provisions of the Electoral Act having particular regard to the provisions of section 146(1) of the Electoral Act and that the onus was not discharged. Learned Senior Advocate argued that as little or no evidence was called, there was little or no evidence for the court to evaluate in the light of the fact that of the 20 witnesses depositions filed, nineteen were struck out because they failed to meet the requirements of section 83 of the Evidence Act. In consequence, the entire petition became totally de- G H

efficient of evidence to support the grounds and prayers of the petitioner. This left the entire petition with only one witness deposition that of Bernard Nimfa Bamfa of Plateau State. The witness deposed to facts concerning the Presidential Election in just one polling station of about 1,892 votes in Plateau State, a State where the conduct of the election was not challenged by the appellant, learned Senior Advocate said. Assuming, without conceding, that there was non-compliance with the provisions of the Electoral Act, this could not reasonably affect the outcome of the election in any substantial way so as to result in the nullification of the election, counsel opined. He quoted extracts from the judgment of the Court of Appeal evaluating the evidence as well as *Agbi v. Ogbe* (2006) 11 NWLR (Pt. 990) 65 at 119; *Buhari v. Obasanjo* (2005) 23 NSCQR; *Usman v. Garke* (2003) 15 NSCQR 24 at 36; *Kwajaffa v. Bank of the North* (2004) NSCQR 343 at 566 and *Jikantoro v. Dantoro* (2004) 18 NWLR 646 at 670 and submitted that the Court of Appeal properly evaluated the evidence before it. Counsel examined the evidence in 11 States at pages 96 to 101 of the Brief.

Learned Senior Advocate enumerated paragraphs 2, 4, 9, 9C(x) of the petition at pages 10 to 102 of the Brief which were either struck out or abandoned. He also enumerated in paragraph 10.14, page 103, of the Brief reliefs sought by the appellant which were abandoned by the appellant as a result of the abandonment by him of all allegations of corrupt practices or as a result of their having been previously struck out by the Court of Appeal.

Learned Senior Advocate submitted that the pleadings in respect of allegations of non-compliance with the provisions of the Electoral Act fell short of the requirements of the rules of pleadings. He contended that the pleadings consist of general complaints bereft of specific facts, speculative assertions and legal arguments and conclusions. He dealt with paragraph 9B of the petition from pages 108 to 111. He also dealt with the pleadings of non-compliance with the provisions of the Electoral Act in those States where the conduct of the election was challenged by the appellant, which according to counsel, failed woefully to meet the requirements of the law relating to pleadings, from pages 114 to 116. He cited quite a number of authorities on drafting of pleadings and failure of a party to lead evi-



dence on his pleadings. He urged the court to dismiss the appeal.

Learned counsel for 3rd respondent, Mr. Unana Ibom, submitted that as the appellant did not appeal against the findings of the Court of Appeal on the 3rd respondent, the court should dismiss the appeal against the respondent. I think I can straight away finish this. As the appellant withdrew all criminal allegations in his petition, and in the light of the judgment of the Court of Appeal, the case against the 3rd respondent is dismissed. B

Learned Senior Advocate for the 4th and 5th respondents, Chief Wole Olanipekun, submitted as follows in his preliminary objection: C

(i) As the two appeals filed by General Buhari and Alhaji Abubakar are not yet consolidated by an order of this court, the appeal as presently constituted by the appellant is incompetent and should be struck out. D

(ii) Grounds 1, 2, 3, 4, 7, 14 and 19 are basically narrative, unwieldy, prolix and argumentative.

(iii) Grounds 5, 8, 10, 13 and 17 are vague and not understandable.

(iv) Leave of this court or the Court of Appeal is needed before the appellant can raise Grounds 15 and 16 and as such leave was not obtained, the grounds should be struck out. (v) There is no nexus between Grounds 15 and 16 and the record of proceedings and should therefore be struck out. E

Taking the merits of the appeal in the alternative, learned Senior Advocate argued Issues 1, 3 and 7 together. He submitted that the age-long principle of law is that he who asserts must prove and that there is a presumption in favour of any result declared by INEC to be genuine, legal and authentic and the burden-of proving otherwise rests squarely on the person who challenges the result, who in the instant case is the appellant. He cited sections 135 and 138 of the Evidence Act; *Mogaji v. Odofin* (1978) 4 SC 91; *Agballah v. Nnamani* (2005) All FWLR (Pt. 245) 1052; *Hashidu v. Goje* (2003) 15 NWLR (Pt. 843) 361 at 363 and *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. H 941) 1 at 122. Counsel submitted that the onus of proof placed on the appellant was not discharged thus the Court of Appeal was right when it concluded in its judgment that the unsubstantiated allegation F G H

contained in the petition cannot be relied upon to nullify the election of the 4th respondent. Counsel relied on the respondent's answer to the appellant's allegations enumerated from pages 23 to 26 of the Brief. Counsel also examined the evidence of the 19 witnesses from pages 27 to 33 and submitted that apart from signifying nothing, the  
 B depositions were restricted in scope and persons, as well as geographical spread. No agent of the appellant from any of the States in respect of which he made wild allegations bordering on non-compliance with the Electoral Act, 2006 deposed to any witness statement,  
 C learned counsel argued.

Reproducing paragraphs 14, 16, 18, 19 and 21 of the petition, learned Senior Advocate wondered why the appellant did not tender a single ballot paper to substantiate his averment that the ballot papers used for the election were illegal and also his failure to call  
 D at least one of the agents to testify in respect of the averment in paragraph 16 of the petition. He cited some cases at pages 37 to 60 of the Brief.

Learned Senior Advocate submitted on Issue No. 2 that the Court of Appeal was right when it pronounced as incompetent the  
 E depositions of the appellant's witnesses which were sworn before Val. I. Ikeonu who is one of the appellant's counsel. Relying on section 83 of the Evidence Act, section 19 of the Notaries Public Act and a number of cases; learned Senior Advocate submitted that the Court of  
 F Appeal was right in rejecting the depositions of 18 witnesses sworn before Val. I. Ikeonu, one of the counsel of the appellant.

On Issue No. 4, learned Senior Advocate submitted that the 4th respondent, Alhaji Umaru Musa Yar'Adua, was not disqualified from contesting the Presidential Election as claimed by the appellant.  
 G Learned counsel said that it is not only laughable but ludicrous that the 4th and 5th respondents who were formerly Governors of Katsina and Bayelsa States respectively could be indicted by a Commission of inquiry set up by Abia State Government for doing their job. Counsel submitted that Exhibit EP2/34 did not constitute an indictment  
 H as required by section 137(1)(1) of the Constitution. He relied on *Amaechi v. INEC (2008) 5 NWLR (Pt. 1080) 227*.

Taking Issue No. 5, learned Senior Advocate submitted that upon a critical and deep appreciation of the appellants petition as

couched, the Court of Appeal was right by holding that the appellant failed to plead sufficient facts in support of paragraphs 9B(iii)(g) and 9B(iii)(h) of the petition. He relied on paragraphs 1 to 23 of the respondents pleadings and cited *Onyenge v. Ebere* (2004) 13 NWLR (Pt. 889) 39; *Fagunwan v. Adibi* (2004) 17 NWLR (Pt. 093) 544 at 566 and *Ojiegba v. Okwaranya* (1962) 2 SCNLR 358 at 360. B

Dealing with Issue No. 6, learned Senior Advocate submitted that going by the provisions of the 1999 Constitution, the Court of appeal was right when it held that the President of the Court of Appeal has both constitutional and statutory powers to make Practice Directions to govern election petitions. He relied on sections 248 and 239 of the Constitution in that order and on cases in respect of construction of statutes. He contended that it is rather strange that appellant who formulated and presented his petition under the Election Tribunal and Court Practice Directions, 2007 would again turn around D to take a summersault to attack the same Rules. If for a moment, one agrees with counsel's submission that the Practice Directions are unconstitutional then it goes without saying that the petition itself has no foundation or platform on which it can be based, learned Senior Advocate argued. He referred to *Chukwuogor v. Chukwuogor* (2007) E All FWLR (Pt. 349) 1154 at 1167; *Haruna v. Modibbo* (2004) 16 NWLR (Pt. 900) 487; *Owuru v. Awuse* (2004) All FWLR (Pt. 211) 1429 at 1439-1440.

Learned Senior Advocate submitted on Issue No. 9 that considering the provisions of paragraph 1(ii) of the Election Tribunal and Court Practice Amendment Directions 2007 which govern presentation of election petitions before the Court of Appeal, the 4th and 5th respondents' witnesses statements attached to their Reply are competent. Learned counsel contended that it is now an accepted part of F our jurisprudence that in deserving cases, a court has the powers to consider what the position of a law was at a given point in time, the mischief inherent in the law as it then stood, the reaction to the mischief by way of an amendment and the expected impact of the amendment on the law after amendment. He cited *Onyeausi v. Miscellaneous Offences Tribunal* (2002) FWLR (Pt. 113) 272; *Noibi v. Fikolati* (1987) 1 NWLR (Pt. 52) 619; *Amaechi v. [NEC]* (2008) 5 NWLR (Pt. 1080) 227; *Awojugbade Light Industries v. Chinukwe* (1995) 4 NWLR G H

(Pt. 390) 379 at 426; Adeniji v. NBN (1989) 7 NWLR (Pt. 960) 212 at 220; Obun v. Egun (2006) All FWLR (Pt. 327) 419 at 442; Attorney-General Ondo State v. Attorney-General of the Federation (2002) FWLR (Pt. III) 1972 and Yakubu v. Abioye (2001) FWLR (Pt. 83) 2212 and 2326.

B Reacting to the documentation in the Brief of the appellant, learned Senior Advocate observed that from the voluminous documentation submitted to the court by the appellant's counsel, more than half of the documentation contains imaginative charts drawn by  
C counsel without any bearing to the petition presented at the Court of Appeal, and pleadings of the petitioner before that court, the terse evidence led before that court and the judgment of the court. He urged the court to totally discountenance the analyses as they are of no consequences, and therefore, of no effect. Counsel urged the  
D court to dismiss the appeal.

Learned Senior Advocate for the appellant in his Reply Brief to the 1st and 2nd respondents brief identified two major issues of law. They are first, whether or not the thousands of INEC documents  
E tendered in evidence by the petition competent before the Court of Appeal and second is, who, between the petitioner and the respondents, does the law place the onus to prove that a proven piece of substantial non-compliance has not substantially affected the result.

Taking the second issue first, learned Senior Advocate repeated  
F his earlier submission that the Court of Appeal was wrong in its interpretation of section 146(1) of the Electoral Act, 2006 and the respondents have persisted in reading the last leg of the subsection without the word "not". He called the attention of the court to his earlier arguments at pages 20 to 45 of Appellant's Brief and urged  
G the court once again to revisit the line of authorities beginning from Akinfosile v. Ijose, supra, to Buhari v. Obasanjo, supra, and restore Swem v. Dzungwe, supra, to its pride of place as the locus classicus in this area of our law.

H Taking the first issue, learned Senior Advocate relied on his earlier submission at pages 90 to 113 of the Appellant's Brief and repeated quite a junk of the arguments earlier referred to and thus coming to almost square one in the whole matter. Citing University of Lagos v. Aigoro (1984) NSCC 745; Abubakar v. Yar'Adua (2008)

1 S.C (Pt. 11) 77 at 122; Ogbuinyinya v. Okudo (1979) 6-9 SC 32 at 42, 43 and 45; Balonwu v. Obi (2007) 5 NWLR (Pt. 1028) 488 at 535; sections 93(1), 111(1) and 112 of the Evidence Act, learned Senior Advocate submitted that if the Court of Appeal had nullified the Practice Directions, reliance could still have been placed on other relevant rules of procedure. He called in aid section 239(1) of the Constitution, paragraphs 50 and 51 of the First Schedule to the Court of Appeal Act. B

In his reply to the Brief of the 4th and 5th respondents, learned Senior Advocate in his response to the preliminary objection submitted that the ground's of appeal are competent. He submitted in the alternative that as long as there are some competent grounds to sustain the appeal, the court should not strike out the appeal. C

Learned Senior Advocate submitted that unless the voters register from units in different parts of the country admitted and marked exhibits on record are declared illegal evidence because they were tendered from the bar, the unrebutted, unchallenged and unexplained irregularities on the exhibits eloquently bear testimony that the register of voters manifested such fundamental irregularities that belie its authenticity. As the 1st and 2nd respondents admitted that election in different parts of the country were not held, proof of the fact was not necessary, counsel contended. I realize that as the entire reply brief is a repetition of the appellant's brief. I do not therefore intend to summarise it any further. D E

In his reply to the Brief of the 3rd respondent, learned Senior Advocate urged the court to strike out the brief as the single issue is not distilled from the grounds of appeal. F

***Let me take first the preliminary objection on the, grounds of appeal. Learned Senior Advocate for the 4th and 5th respondents objected to Grounds 1, 2,3,4,7, 8, 10, 11, 13, 14, 15, 16, 17 and 19. He did not object to Grounds 5, 6, 9, 12 and 18. As a single ground can sustain an appeal, I will not strike out the appeal as urged by counsel for the 4th and 5th respondents. I will therefore take the appeal on its merits.*** G H

Although the issue on the validity of the Practice Directions was not raised as a preliminary objection, I should take it at this early stage of the judgment because if I come to the conclusion that the

Practice Directions are invalid, the entire proceedings based on them will be declared null, void ab initio.

Following the constitution of the Election Tribunals, the President of the Court of Appeal, Hon. Justice Umaru Abdullahi, made the Election Tribunals and Court Practice Directions, 2007 by virtue of the powers conferred on him by section 285(3) of the Constitution of the Federal Republic of Nigeria, 1999, and paragraph 50 of the First Schedule to the Electoral Act, 2006. The Practice Directions which came into effect on 3rd April, 2007, contain six main paragraphs.. In summary, paragraph 1 provides for the mode of filing a petition by a petitioner. Paragraph 2 provides for the respondent's reply. Paragraph 3 provides for pre-hearing session and scheduling order, while paragraph 4 provides for evidence at the hearing. Paragraph 5 specifically provides for hearing the petition. Finally, paragraph 6 provides for motions and applications. It should also be mentioned that the President, by the Election Tribunal and Court Practice Amendment Directions, 2007 effected amendments on paragraph 1(1 )(a) and (b). The amendments also came into effect on 3rd April, 2007.

***Practice Direction, as the name implies, direct the practice of the court in a particular area of procedure of the court. A Practice Direction could be described as a written explanation of how to proceed in a particular area of law in a particular court. The word "practice" in its larger sense like procedure, denotes the mode of proceedings by which a legal right is enforced as distinct and separate from the law that gives and defines the right. The word "practice" is the form, manner and order of conducting and carrying on suits or prosecutions in the courts, through their various stages according to the principles of law and the rules laid down by the respective courts. Practice is our adjectival law, that is, the law regulating procedure; for example, the law of pleading, procedure, evidence, etc. They are rules of civil conduct which declare the rights and duties of all who are subject to the law and who come before the court to seek redress. The dictionary meaning of the word "direct" in our context is an order conveying instruction by a person in authority or backed by an authority;***

***the refusal to carry it out is on the pain of sanction or punishment. In law, “direction” in our context, means command or precept emanating from an authority, who in the 2007 Practice Directions, is the President of the Court of Appeal.***

***What is the legal status of Practice Directions? Practice Directions have the force of law in the same way as rules of court. I held in Abubakar v. Yar’Adua (2008) 4 NWLR (Pt. 1078) 455 at 511 that rules of court include Practice Directions. See also Owuru v. Awuse (2004) All FWLR (Pt. 211) 1429. Practice Directions will however not have the force of law if they are in conflict with the Constitution or the statute which enables them.***

***Are the Practice Directions made by the President of the Court illegal or unconstitutional?*** Section 248 of the Constitution of the Federal Republic of Nigeria provides:

*“Subject to the provisions of any Act of the National Assembly, the President of the Court of Appeal may make rules for regulating the practice and procedure of the Court of Appeal.”*

Order 19 Rule 7 of the Court of Appeal Rules also provides:

*“The President may at any time, by notice declare a, practice of the court as a practice direction, and whenever the declaration was made, such declaration shall be regarded as part of these rules.”*

***Both section 248 of the Constitution and Order 19 Rule 7 of the Rules of Court of the Court of Appeal are very clear enabling provisions for the President of the Court of appeal to make rules. Section 248 vests in the President to make rules regulating the practice and procedure of the Court of Appeal, subject to the provisions of any Act of the National Assembly. There is no Act known to me prohibiting or inhibiting the President of the Court of Appeal to make rules for the court. Not even the Court of Appeal Act, 2004. Rather, the Act recognizes the making of rules for the court. This is clear from section 30, the interpretation clause of the Act, which defines “rules of court” as “made or deemed to have been made under this Act.” And so the Practice Directions of 2007 made by the President of the Court of Appeal are either made or deemed to have been made under the Court of Appeal Act,***

**2004.**

Order 19 Rule 7 is consistent with section 30 of the Court of Appeal Act, 2004 as the Act relates to the definition of rules of court. I say this because a Practice Direction declared by the President of the Court of Appeal qualifies as a rule of the court. Order 19 Rule 7  
 B says so and very clearly too. That is also the decision of this court in *Abubakar v. Yar'Adua*, *supra*.

Learned Senior Advocate for the appellant construed the words “these rules” in Order 19 Rule 7 as “*the Rules of the Court of Appeal which is (sic) applicable to proceedings in its appellate jurisdiction only*.” Why that construction? What rule in the Court of Appeal Rules justifies that type of dichotomy or cleavage? I do not see any. Unfortunately for the appellant, learned Senior Advocate did not refer the court to any rule. On the contrary, he moved to the use by the Court  
 C of Appeal of sections 239(1) and 285(3) of the Constitution in dealing with the issue. He submitted that neither section 239(1) nor section 285(3) of the Constitution upon which the Court of Appeal based its decision on the point made any reference either directly or indirectly or by necessary implication to the President of the Court of  
 D Appeal, or the making of any rules or practice direction for any court or tribunal.  
 E

What did the Court of Appeal say in respect of sections 285 and 239? The court said at page 2667:

“*The powers of the President of the Court of Appeal under sections 239 and 285 of the Constitution is not limited to the Practice and Procedure of the Court of Appeal in its appellate jurisdiction, it does extend to the power to issue Practice Directions not only in the appellate jurisdiction of the Court of Appeal, but also in its original  
 F jurisdiction under section 239 of the Constitution. The Petitioners counsel submitted that this court lacks the competence to set aside the Practice Directions. It then follows that the argument is entirely  
 G misconceived and same is hereby discountenanced.*”

I agree with the interpretation above. I had made similar point  
 H on the dichotomy learned Senior Advocate for the appellant tried to make in respect of when the court exercises its original or appellate jurisdiction. That apart, I agree with the submission of learned Senior Advocate for the appellant that the use of section 285 of the Consti-



tution by the Court of Appeal is not appropriate, as that section has nothing to do whatsoever with the rule making power of the President. I think learned Senior Advocate for the appellant got the point; but how that help his client in the determination of the issue can hardly be considered in favour of the appellant. I do not agree with learned Senior Advocate on his submission in respect of section 239. B The Court of Appeal was right by referring to the section when dealing with the original jurisdiction of the court. That is the content of section 239 and the Court of Appeal is not wrong in referring to the section.

Learned Senior Advocate for the appellant in arguing the issue referred to the decision of this court in *Ladoja v. INEC* (2007) 7 SC 00 where this court, (per Oguntade, JSC) held that a court may interpret the Constitution but cannot rewrite it”, and submitted that what the Court of Appeal tried to do (was) to rewrite the Constitution of the Federal Republic of Nigeria by extending the constitutional powers of the President of the Court of Appeal thereby expanding not expounding the provisions of section 248 and 285(3) of the Constitution. With respect, I am not with him. The Court of Appeal did not do what counsel said it did. That court did not attempt to re-write the Constitution. On the contrary, the court merely invoked its interpretative jurisdiction to interpret the provision of the Constitution. In doing so, the court went into section 285, a section which is not appropriate to the issue before the Court. That act of the court can be regarded as a surplausage which can be discountenanced without’ any harm to the decision of the Court of Appeal on the issue. C D E F

Courts of law, in interpreting the Constitution or a statute have no jurisdiction to read into the Constitution or statute what the legislators did not provide for, and afortiori read out of the Constitution or statute what is provided for by the legislators. In either way, the courts are abandoning their constitutional functions and straying into those of the Legislature by interfering or interloping with them. As that will make nonsense of the separation of powers provided for in sections 4 and 6 of the Constitution, courts of law will not do such a thing, whatever is the pressure by counsel. I see the submission of learned Senior Advocate for the appellant in that way. As section 248 G H

did not provide for the dichotomy, the Court of Appeal was clearly on the right side by not taking the position of learned Senior Advocate.

Both Chief Olanipekun and Mr. Agabi, Senior Advocates of Nigeria, submitted in their Briefs that the appellant followed the Practice Directions in filing his petition and participated in the proceedings in line with the Practice Directions. Chief Ahamba, Senior Advocate of Nigeria, did not deny it. Let me pause here to enumerate some specific areas where the appellant followed the Practice Directions made by the President of the Court of Appeal:

1. The petition accompanied by statement indicating the number of witnesses to be called, written statements on oath of witnesses and copies of list of every document to be relied upon. This is the content of paragraph 1(1)(a), (b) and (c) of the Practice Directions; what is generally called as front loading for lack of better expression. This is what the appellant did from page 45 of Volume 1 of the Record. As a matter of fact, the appellant in his list of documents at page 45, enumerated 15 documents. There are quite a number of such lists in other volumes of the Record.

2. The appellant invoked paragraph 3 of the Practice Directions at pages 220 to 223, Volume 1 of the Record in respect of pre-hearing session.

3. The appellant tendered the evidence of his witnesses from the Bar. This is the procedure provided for in paragraph 4(2) of the Practice Direction. Learned Senior Advocate for the appellant freely availed himself of the direction in paragraph 4(2).

4. The appellant filed some motions in which he relied on the Practice Directions. At page 234 of Volume 1 of the Record, the heading of the Motion on Notice reads: “*Brought Pursuant to Paragraphs 10(2) and 22(1) of the 1st Schedule to the Electoral Act, 2006; paragraph 5(2) of the Election Tribunal and Court Practice Directions 2007 and under the inherent jurisdiction of the court.*” At page 951, Volume III of the Record, the appellant filed a motion “*Pursuant to Paragraphs 4(8) and 6(2) of the Election Tribunal and Court Practice Direction, 2007.*” The motion was for leave to apply to file additional witnesses’ depositions. And finally at page 1435, Volume IV of the Record, the appellant filed a motion “*Pursuant to Paragraphs 6(1*

(2), (3) of the Practice Directions, 2007...” Learned Senior Advocate for the 1st and 2nd respondents, reacting to the issue, said at pages 27 and 28 of his Brief:

*“Appellant’s challenge to the validity of the Practice Directions, 2007 is half-hearted and tainted with malice At the onset, the appellant relied on the provisions of the Practice Directions by accompanying his Petition with the list of witnesses, list of Documents and the witness depositions as prescribed by paragraph 1 of the Practice Directions. This simplified and expedited the presentation of the Petition, to his ultimate benefit. At that time, when it suited him, he did not complain of the invalidity of the Practice Directions. Indeed, the appellant expressly demonstrated reliance on the Practice Directions in filing motions and other processes pursuant to provisions of the Practice Directions.”*

Learned Senior Advocate for the 4th and 5th respondents also said rhetorically at pages 103 and 104 of his Brief:

*“For example, how did the Petitioner come about the issue of front loading of his witness statements? Where did he get the idea of pretrial hearing in which he participated? Under what rules of court will he compartmentalize or hinge his Witness Statements which he adopted from the Bar? Why then did he have the gut to challenge the Respondents’ Witness Statements? What Rules of Court permit(s) him to tender all the thousands of documents he has tendered? Why has he consistently made use of the said Practice Directions throughout the proceedings before the court below and particularly in bringing motion aid applications?”*

I do not have adequate or appropriate answers to the above submissions by both counsel and I do not think counsel for the appellant has answers. After all, he did not provide answers in his Reply Brief. I take it that if he had answers, he should have taken the opportunity of the Reply Brief to do so. There is a vernacular adage in my village that if you have nothing to say, say nothing, than say the wrong thing, because it will turn out to be nothing at the end of the day.

What is the moral basis of Issue No. 5 formulated by the appellant? And that takes me to equity, which is morality personified in many areas of our law. Has the appellant done equity on this issue?

Has he come with clean hands? Why should he indulge himself in a court process in one breath and then turn around in another breath to question the legality or constitutionality of the process? Will equity allow him to benefit from the court process and at the same time urge the court to discountenance it? Equity with its hands of cleanliness and purity will not allow the appellant to blow hot and cold with the same breadth. This is because then is the possibility of injuring his health, and equity will not like him to injure his health.

***I think Issue No. 5 is caught by the principles of estoppel by conduct. I come to this conclusion because the appellant was the first person to invoke the Practice Directions in the proceedings and he cannot deny it. That was the origin in the English courts of equity of the doctrine of estoppel in pais that is, by formal words or conduct. Once a party, either by his words or conduct, has intimated that he consents to an act, as in this case, the use of the Practice Directions, which has been done and that he will offer no opposition to it, he cannot later question the legality of the act he had so sanctioned to the prejudice of those who have given faith to his word.*** See Akanni v. Makanju (1978) 11 SC 13 at 26; Chief Okpuriwu v. Chief Okpokan (1988) 4 NWLR (Pt. 90) 554; Ferponle v. UTITHBM (1991) 4 NWLR (Pt. 183) 43; Hi-Flow Farm Ind. v. Unibadan (1993) 4 NWLR (Pt. 290) 719; Ondo State University v. Folayan (1994) 7 NWLR (Pt. 354) 1.

Both Mr. Agabi and Chief Olanipekun made a very important point in the unlikely event that the Practice Directions are illegal and unconstitutional. I will not paraphrase what they said. I will quote verbatim et literatim what they said Mr. Agabi said at page 26 of the Brief of the 1st and 2nd respondents:

*“If the appellant has not complied with the Practice Directions in presenting his petition, what rules then did he comply with? Front loading of evidence is a requirement of the Practice Directions. It is not a requirement, either of the Federal High Court Rules or the Court of Appeal Rules. If you uphold the submission that the Practice Directions is unconstitutional then the inevitable conclusion must be that the petition was incompetent ab initio.”*

Chief Olanipekun made similar point at page 103 of the Brief

of the 4th and 5th respondents:

“If for a moment, one agrees with counsel’s submission that the Practice Directions is unconstitutional, then it goes without saying that the petition itself has no foundation or platform on which it can be based.

Learned Senior Advocate for the appellant does not have an answer to the above valid submissions. Does counsel for the appellant wish this court to strike out the petition? Is that what his client wants? I think not. But that is the legal essence and consequence of his submission, if I agree with him.

In the light of the fact that the Practice Directions are not illegal or unconstitutional but rather legal and constitutional, I will not strike out the petition which was conducted materially on them. This court and the Court of Appeal have consistently held that Practice Directions are legal. See *Abubakar v. Yar’Adua*, supra; *Okereke v. Yar’Adua*, SC 246/2007 delivered on 19th May, 2008 (Unreported); *Haruna v. Modibbo* (2004) 16 NWLR (Pt. 900)487

Learned Senior Advocate for the appellant in his Reply Brief, submitted that the Practice Directions violate provisions of the Evidence Act. I have read sections 109, 111 and 112 of the Evidence Act and I do not see any material deviation or departure from the provision by the Practice Directions. Assuming that the Practice Directions are in conflict with the Evidence Act, has the appellant not waived his right to complain having used them? I say so because he did not complain that they violated the Constitution. If he so complained, he should have been on a strong position as he cannot waive a constitutional right which he shares in common with the public. Sections 109, 111 and 112 of the Evidence Act do not have the same status as the Constitution. I should say that the Practice Directions vindicate the constitutional right to fair hearing by providing for the speedy hearing of petitions. As a matter of law, the need for speedy hearing of petitions is the fulcrum of the Practice Directions and this court is always on the side of speedy hearing of cases.

I see learned Senior Advocate for the appellant saying the same thing from two sides of the mouth. In the Court of appeal, he made his client, the appellant, to use the Practice Directions. As a matter of fact, he used them copiously. In Ground 11, particulars (c) he relied

on the Practice Directions. In this court, he attacked them and urged us to discountenance them as they are illegal and unconstitutional; thus moving against Ground 11, particulars (c). That is the position in the main Brief. Counsel piped down in the Reply Brief and submitted as follows at page 5 thereof:

B *"If therefore, it is true that the Court below indeed, refused to even look at the thousands of documentary evidence placed before it because they were not covered by witness depositions, then it is our humble submission that this court should with all due respect,*  
 C *give a most liberal interpretation to paragraph 1(1) of the Practice Directions 2007 for this, we submit, is the only way the appeal can be decided on the merits and the ends of justice be served."*

If learned Senior Advocate for the appellant is not confused, I am. First, counsel is not even sure whether the Court of Appeal refused to look at the "*thousands of documentary evidence*". That is the meaning of the conjunction "if. But that is not that important. The important point is why the change of gear from the position taken in the main Brief? I ask the question because I do not see the submission as a strictly alternative one. Does counsel expect this court to allow Issue No. 5 in the light of the confused state of the submissions? I think not.

This is not the first time the President of the Court of Appeal has made Practice Directions. I will refer to only one previous instance. Following election appeals filed in 1983, the Court of Appeal was inundated with such appeals; so much so that the court had little or no time to hear regular appeals. In view of the fact that time was of the essence in the hearing of election appeals, the President of the Court at the material time, Hon. Justice Mamman Nasir, saw the need to introduce the brief system to handle the multiplicity of the appeals which flooded the court by way of experiment. This was done by Practice Directions of eight paragraphs. More election appeals were heard. Seeing the wisdom of his experiment, the President, in the exercise of his powers under the Constitution of the Federal Republic of Nigeria, as amended by the Constitution (Suspension and Modification) Decree No. 1 of 1984 amended the 1981 Rules of the court, by introducing formally the brief system. This was made possible by the making of the Court of Appeal (Amendment)

Relies, 1984. By the amendment, a new Order 6, which provided for the brief system was introduced, while the old Order 6 of the 1981 Rules which dealt with miscellaneous matters became Order 7. This shows the potency of Practice Directions. I drop the issue.

Section 145(1) of the Electoral Act, 2006 provides for the grounds for questioning an election. By the subsection, an election B 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 C or non-compliance with the provisions of (the) Act;

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

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

By section 145(2), an act or omission which may be contrary to an instruction or directive of the Commission or of an officer appointed for the purpose of the election but which is not contrary to the provisions of the Act shall not of itself be a ground for questioning the election. As it is, section 145(2) curtails or lessens the legal impact E of section 145(1); though not substantially.

A petitioner who files a petition under section 145(1) of the Electoral Act has the burden to prove the ground or grounds. This is because he is the party alleging the grounds and he has a duty to F prove the affirmative. He is the party who will lose if no evidence is given on the grounds. If the petitioner does not prove his case under section 145(1) of the Act, the action fails.

When does section 146(1) of the Act come into play in the determination of the petition? Is it before section 145(1)? Is it after G section 145(1)? Or is it concurrently with section 145(1)? It cannot be before or after section 145(1). It should be concurrently with the subsection. I say so because the tribunal or court can only arrive at the decision in section 146(1) in relation to the proof of section 145(1) by the petitioner. The tribunal or court cannot arrive at the decision H in section 146(1) in vacua or in a vacuum but only in relation to the case presented by the petitioner in terms of proof. I seem to be repeating myself. I do not have any apology for that. It is for emphasis.

Section 146(1) seems to create the impression that the respondent is not concerned with it or out of it. This is because the subsection only talks about the satisfaction of the tribunal or court that the election was conducted substantially with the principles of the Electoral Act. The impression, being an image or effect' that is produced in my mind, not being a realism, is not the actual meaning and content of the application of the subsection. In view of the fact that a tribunal or court of law in our adversary system, cannot go out and search for evidence to satisfy itself that the election was conducted substantially with the principles of the Electoral Act, the respondent comes in. He has to bring exculpatory evidence that non-compliance with the provisions of the Electoral Act did not affect substantially the result of the election.

At what point or at what stage will the respondent bring the exculpatory evidence? In other words, at that point or stage will silence or a conduct of mute on the part of the respondent be detrimental to his case? The respondent should not wait for the time when the tribunal or court forms the opinion in section 146(1). As the tribunal or court can only form the opinion at the point or stage of writing judgment and thereafter delivery of the judgment, the respondent should give evidence that "*non-compliance did not affect substantially the result of the election*" at the trial. He cannot afford to wait for another opportunity because it will never come his way. The gates of the tribunal or the court will be closed. He no longer has the section 146 redress. With the evidence placed before the tribunal or court by the petitioner, vide section 145(1) of the Electoral Act and the one placed by the respondent, vide section 146(1) of the Act, the tribunal or court concurrently evaluates the evidence and give judgment to one of the parties.

The above subsection apart, section 239(1)(a) vests in the Court of Appeal exclusive original jurisdiction to hear and determine any question as to whether any person has been validly elected to the office of President or Vice President under the Constitution. While section 145(1) is a general provision relating to all elective positions under the Electoral Act, section 239(1)(a) is a specific provision relating to only the election of the President or Vice President. It would appear that the general provision of section 145(1)(c) of the Elec-



toral Act can be assimilated into section 239(1) of the Constitution. In *Obasanjo v. Yusuf* (2004) 9 NWLR (Pt. 877) 144, this court held that section 239(1)(a) of the Constitution provides; a sole ground for questioning whether a person has been validly elected to the office of President or Vice President. Kutigi, JSC (as he then was) after stating the relevant position of the 2002 Electoral Act and section 239(1) of the Constitution, in his lead Judgment, said at page 181:

*“It appears clear to me from the provisions of the Constitution and the Act set out above that:*

*(a) A presidential election petition can be presented based on the sole ground stated under section 239(1)(a) of the Constitution (see above).*

*(b) A presidential election petition can also be presented on any of the four (4) grounds as prescribed under section 134(a)-(d) of the Act (see above). ”*

Though one of us on the panel took a different view, I entirely agree with the view expressed by Kutigi, JSC (as he then was). Although section 239 of the Constitution mainly provides for the jurisdiction of the Court of Appeal, it will be wrong to ignore the clear provision of section 239(1)(a) which vests in the court the original jurisdiction to determine and question as to whether “any person has’ been validly elected to the office of President or Vice President under the Constitution.

The grounds of the petition are contained in paragraph 26 thereof:

*“(a) the 5th Respondent was at the time of the election not qualified to contest election for the post of the President of the Federal Republic of Nigeria and that his election was void;*

*(b) the election of the 5th Respondent is on account of (a) above also void;*

*(c) the Presidential elections of 21st April, 2007 is invalid for non compliance with the provisions of the Electoral Act, 2006;*

*(d) the Presidential election of 21st April, 2007 is invalid by reason of corrupt practices that negate the spirit and principles of the Electoral Act, 2006.;*

*(e) the 2nd, 3rd and 4th Respondents committed sets and omissions which were corruptive of the electoral system and process*

*in the conduct of the election.”*

There is no dispute that the grounds are borne out by section 145(1) of the Electoral Act, 2006 and section 239(1) of the 1999 Constitution. The only point I want to take is in respect of Ground 26(d) on corrupt practices. I see from the Record that the appellant  
B withdrew, in the course of the proceedings, allegations of corrupt practices, vide Ground 26(d) of the petition and the Court of Appeal struck it out. The Court of Appeal said at page 2707 of the Record:

*“On allegation of corrupt practices in the petition, I do not  
C deem it necessary to go into it because the Petitioner has withdrawn all pleaded facts bordering on criminal conduct in paragraph 36.05c of his written address found at page 585 thereof, wherein he expressly stated that he has severed his case from criminal allegations and settled on the civil aspect only. This severance is also reiterated in  
D the oral address by his counsel before the court. Ground 9c of the petition fails and is hereby dismissed. That also disposes of all the allegations against the 3rd respondent, the Inspector General of Police. The case against the Inspector General of Police is hereby dismissed.”*

E The matter was put beyond doubt and therefore at a complete rest when learned Senior Advocate for the appellant in his Reply Brief to the Brief of the 1st and 2nd respondents expressed his displeasure of the Brief taking the issue of corruption that was abandoned in the Court of Appeal. Counsel said in paragraph 1.13, page  
F 7 of the Brief:

*“Apart from the two issues of law hitherto dealt with, there are other issues raised by the 1st and 2nd Respondents in their Brief, filed in response to Appellant’s Brief of Argument that are equally  
G intriguing. One such troubling issue is why on earth a Respondent would, on appeal, dedicate ten pages (96-105) of his Brief to the issue of allegation of corrupt practices unequivocally abandoned by the Appellant in the court below and subsequently struck out by that court in its judgment, if it is not just to annoy?”*

H As learned Senior Advocate for the 1st and 2nd respondents agree in paragraph 10.12, pages 95 and 96 of the Brief that the petitioner abandoned all allegations of corrupt practices made in the petition, I do not see the reason, with the greatest respect to counsel,

to take the issue in his Brief, from page 96 to page 106. A matter or issue withdrawn by its owner is no more a subject of litigation. The court will accordingly dismiss all the allegations of crime as if they are not part of the proceedings. That was what the Court of Appeal did by dismissing the allegations of crime. It was therefore wrong for the 1st and 2nd respondents to re-open the issue. The position taken by the learned Senior Advocate for the appellant is justified. I am not however quite sure that the intention of his colleague was to annoy. I take it as a wrong decision probably arising from the zeal and enthusiasm to defend his clients. I do not think Mr. Agabi will go to that extent to purposely annoy his colleague. The legal effect of the withdrawal of the allegations of crime and the subsequent order of the Court of Appeal is that paragraphs 4, 8(c), 9B(iv)(e), 9B(v), 9c and some other paragraphs I cannot identify in my hurried reading, as they relate to allegations of crime are discountenanced and of no effect.

***Election results are presumed by law to be correct until the contrary is, proved. It is however a rebuttable presumption. In other words, there is a rebuttable presumption that the result of any election declared by a returning officer is correct and authentic and the burden is on the person who denies the correctness and authenticity of the return to rebut the presumption.*** See *Omoboriowo v. Ajasin* (1984) 1 SCNLR 108; *Jalingo v. Nyame* (1992) 3 NWLR (Pt. 231) 538; *Finebone v. Brown* (1999) 4 NWLR (Pt. 600) 613; *Hashidu v. Goje* (2003) 15 NWLR (Pt. 343) 361 and *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941)1.

Section 137 of the Evidence Act, 2004 provides for the burden of proof in civil cases. The burden of first proving the existence of a fact lies on the party against whom the judgment of the court could be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings. If such party adduces evidence which might reasonably satisfy a court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced; and so on successively until all the issues in the pleadings have been dealt with. Where there are conflicting presumptions, the case is the same as if there were evidence.

By section 137 the burden of proof is not static. It fluctuates between the parties. Subsection (1) places the first burden on the party against whom the court will give judgment if no evidence is adduced on either side. In other words, the onus probandi is on the party who would fail if no evidence is given in the case. Thereafter, B the second burden goes to the adverse party by virtue of subsection (2). And so the burden change places almost like the colour of a chameleon until all the issues in the pleadings have been dealt with.

By section 137(2), the burden of proof shifts between the parties in the course of giving evidence in the proceedings. From the C language of the subsection, there is some amount of versatility in the shifting process of the burden. The shifting process, in the language of the subsection, will be so on successively until all the issues in the pleadings have been dealt with.

D Section 139 of the Evidence Act provides for the proof of a particular fact. By the section, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person, but the burden may in course of a case E be shifted from one side to the other. In considering the amount of evidence necessary to shift the burden of proof, regard shall be had by the court to the opportunity of knowledge with respect to the fact to be proved which may be possessed by the parties respectively. See F Abdul-Raham v. Commissioner of Police (1971) NMLR 87; Arase v. Arase (1981) 5 SC 33; Savannah Bank of Nigeria Ltd. v. Pan Atlantic Shipping and Transport Agencies Ltd. (1987) 1 NWLR (Pt. 49) 212; Fadlatah v. Arewa Textile Ltd. (1997) 8 NWLR (Pt. 518) 546

G The standard of proof in civil cases, including election petitions, is on the preponderance of evidence or the balance of probabilities See Okuarume v. Obabokor (1965) All MLR 360; Are v. Adisa (1967) 1 All NLR 148; Odulaja v. Haddard (1973) 11 SC 357; Imana v. Robinson (1979) 3-4 SC 1; Elias v. Omobare (1982) 5 SC 25.

H In determining either the preponderance of evidence or the balance of probabilities in the evidence, the court is involved in some weighing by resorting to the imaginary scale; of justice in its evaluation exercise. Accordingly, proof by preponderance of evidence sim-

ply means that the evidence adduced by the plaintiff/in our context the petitioner or appellant) should be put on one side of the imaginary scale mentioned in *Mogaji v. Odofin* (1978) 3 SC 91 and the evidence adduced by the defendant (in our context, all the respondents) put on the other side of that scale and weighed together to see which side preponderates. In arriving at the preponderance of evidence, the Court of Appeal in its capacity as a court (tribunal) of first instance need not search for an exact mathematics figure in the imaginary “weighing machine” because there is in fact and in law no such machine and therefore no figures, talk less of mathematical exactness. On the contrary, the Court of Appeal, in its capacity as a court (tribunal) of first instance, should rely on its judicial and judicious mind to arrive at when the imaginary scale preponderates; and that is the standard, though oscillatory and at times nervous. I will be guided by the above principles on burden and standard of proof when considering Issues 2 and 4 of the Appellant’s Brief which I will take anon.

The methodology I will adopt in this judgment is to consider all the issues formulated by the appellant. And in order to be consistent, I will follow the arrangement in the Appellant’s Brief as it relates to the issues argued by learned Senior Advocate. And that takes me to issues 3 and 4 first.

Both issues deal with the onus of proof in respect of section 146(1) of the Electoral Act. Section 146(1) reads:

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

In considering the section as it relates to the burden of proof, Fabiyi, JCA, in his lead judgment said at pages 2706 and 2707 of Volume 7 of the Record and I will quote him in some detail:

“It is incumbent on the Petitioner pursuant to the provisions of section 146 of the Electoral Act to establish that the non compliance established by him substantially affected the result of the election. This he has failed to do in the instant case. In *HARUNA vs. MODIBBO* (2004) 16 NWLR (Pt. 900) 487, this court held that where a Peti-

tioner makes non compliance with the Electoral Act, the foundation of his complaint, he is fixed with the heavy burden to prove before the court by cogent and compelling evidence that the non compliance is of such a nature as to affect the result of the election. He must show and satisfy the court that the non compliance substantially affected the result of the election to his disadvantage.

Also in BUHARI vs. OBASANJO (2005) 13 NWLR (Pt 941) 1 BELGORE, JSC, IN INTERPRETING THIS PROVISION OF SECTION 135(1) OF THE Electoral Act 2006, had this to say:

‘It is manifest that an election by virtue of section 235(1) of the Act shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provisions of the Act. It must be shown clearly by evidence that the non-compliance has affected the result of the election. Election and its victory is like soccer and goals scored. The Petitioner must not only show substantial non compliance but also the figures, i.e. votes that the compliance attracted or omitted. The elementary evidential burden of “the person asserting must prove” has not been derogated from by section 135(1). The Petitioners must not only assert but must satisfy the court that the non compliance has so affected the election results to justify nullification”. See also AWOJOWO vs. SHAGARI (1979) 6-9 SC 51; ITUTE vs. INEC (1999) 4 NWLR (Pt. 599) 360; AKINFOSILE vs. IJOSE (1960) SCNLR 447; and AJADI vs. AJIBOLA (2004) 16 NWLR (Pt. 898) 91.

It is clear from the above authorities that the onus of proof of the substantiality of the non compliance and the substantiality of the effect of the non compliance on the election result rests on the Petitioner. The Petitioner has in the instant case established the substantiality of the non compliance with section 145(2) of the Electoral Act, but has failed to establish the substantiality of this non compliance on the result of the election. This issue is therefore resolved in favour of the respondents.”

What is the legal content of section 146(1) of the Electoral Act? In *Basheer v. Same* (1992) 4 NWLR (Pt. 236) 491, a case in the Court of Appeal, I interpreted the provisions of section 92(1) of the State Government (Basic Constitution and Transitional Provisions) Decree No. 50 of 1991, which is in pan materia with the provisions of

section 146(1) of the Electoral Act, 2006. I said at page 519:

*“The word substantially in section 92(1), in my view, means either materially or essentially. The word is used twice in the subsection. In the first limb of the subsection, an election will not be invalidated for non compliance if it was conducted substantially in accordance with the principles of the Decree. In the second limb, an election will not be invalidated for non compliance if the non compliance did not substantially affect the result of the election.”* B

I also dealt with the word “principle” in the case. I expressed my dislike of the word:

“I would like to say by way of passing remark that I do not like the word ‘principle’ in the subsection. I would have preferred the word ‘provisions’. I say this because it is not quite easy for a tribunal or this court to determine what constitutes the ‘principle’ of the Decree particularly in the absence of a definition of the word. But that does not lie in my mouth, the Judge that I am. It lies in the mouth of the maker and so let it be ‘principle’.” C

The use of the expression is not without an historical background. As a common law country, the history is traceable to section 13 of the English Parliamentary and Municipal Election Act, 1872. The section provided inter alia that “no election shall be declared invalid by reason of non-compliance... if it appears to the Tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act and that such non-compliances... did not affect the result of the election.” F I do not think I will be wrong to say that the Nigerian Electoral Regulators of 1955 got the word from the 1872 Act of England. So far so good.

In 1949, the position changed when section 37 of the Representation of the People Act dropped the almighty word “principle” and simply used the words “substantially in accordance with the law.” That is not the end. The Nigerian Electoral Decree 1977 also dropped the word “principle” and provided inter alia: “... that the election was conducted substantially in accordance with the provisions...” Thus both the English Act and the Nigerian Decree buried, in my view, admirably the word “principle”. In *Morgan v. Simpson* (1975) 1 QB 151, Stephenson, LJ, said at page 167: G H

*“Gone are the principles laid down in the body of the Act and in their stead is substantial accordance with the law.”*

Out of the blue, and wrongly in my humble view, section 92(1) of State Government (Basic Constitutional and Transitional Provisions) Decree No. 50 of 1991 reintroduced the word “principle”.  
 B And that is what section 146(1) of the Electoral Act, 2006 contains, this time around in plural as opposed to Decree No. 50 which was in singular.

I must confess that in 1992 when I expressed my dislike of the  
 C word, I did not have any knowledge of the above history. It was in the course of my research in this appeal that I got the history. I just did not like the vague, nebulous and large content of the word. It is my hope that the Electoral Reform Committee headed by Hon. Justice M. L. Uwais, former Chief Justice of Nigeria will have a look at  
 D the provision. I sell it to the Committee. They have a choice not to buy it. I lack the power to question their choice. I will not question their decision. In my judgment, section 146(1) is one of the most important sections in the Act as it appears to me to be the final bus stop; it looks to me like the fulcrum or cynosure of the Act in terms of  
 E the power of the court to nullify election results. Can the lawmaker afford to leave the provision open to speculation or conjecture? I think not. As I have said above, it is the same word that is in section 146(1) of the Act. The word in its nebulous content, in my view,  
 F means contextually basic laws or canons. It could also lazily mean credo or decretum. All that I am doing is in the realm of speculation and guess, Which I ought to avoid as a Judge. If the draftsman used the word “provisions” I will not be involved in the exercise of diction and syntax. All members of the legal profession know the meaning  
 G and content of the word “provision” and will contextually refer to the sections of the Electoral Act, 2006. If the word “principles” is now a darling of the draftsman (and it appears so) then it is my view that the word should be interpreted in the interpretation clause. If it is not interpreted, the courts may have some problem of interpretation. Is  
 H the word “principles” larger in scope than “provisions”? If so, how larger is it? Conversely, if the word is “smaller” in scope than the word “provision”, how smaller in scope and here smaller is used as conveying less legal content. I am confused. I could be alone in the



pool of confusion. Election, particularly in Nigeria, is a very emotional and quarrelsome matter; it is a matter where Nigerians fight to a finish. In the circumstances, words in an Act policing it cannot afford to be vague and nebulous. It is possible I am wrong. Some other Judge may have a precise definition of the word in the context it is used in section 146(1). I should therefore blame my lack of adequate knowledge. B

Let me leave the word alone but certainly not the subsection. On who does the burden of proof lie in section 146(1)? Learned Senior Advocate says that the burden of proof of the second leg of the section that “*the non compliance did not affect substantially the result of the election*” is on the respondents. Learned Senior Advocates for the respondents disagree. To them the burden of proof of the entire section 146(1) is on the appellant. That is the quarrel. C  
I now go to the case law. I will not do so in any chronological order. D  
I take Chief Awolowo v. Alhaji Shagari (1979) 6-9 SC 37. In his contribution to the majority judgment, Obaseki, JSC said at pages 82 and 84:

“There is no evidence that the non compliance with the section 34A (1)(c.)(ii) one of the provisions of Part II has affected the result i.e. but for the non-compliance, the petitioner would have won, to enable the tribunal declare the result invalid. The petitioner pleaded a substantial non-compliance i.e. failure to obtain one-quarter of the votes cast in each of at least two-thirds of all the States in the Federation. But the evidence established this non-compliance in only one State. In other words, the evidence established that the 1st respondent obtained in each of the 12 States one-quarter or more of the votes cast but did not in the 13th State in Kano State. The 3rd respondent claimed that 1st respondent received 25% of the votes in 2/3 Kano State. There is no evidence of counting in 2/3, Kano State... G  
In this appeal, the appellant has failed to satisfy the tribunal and this court that the non-compliance has affected the result of the election or has prevented a majority of votes in his favour with effect, and for that reason the appeal must fail. H

In Akinfosile v. Ijose (1960) 5 FSC 192, one of the earliest cases, if not the earliest, it was held that the onus is on the petitioner to prove not only that there was substantial non-compliance with the

Electoral Act, but also that such non-compliance affected the result of the election. The decision was followed in the case of *Kudu v. Aliyu* (1992) 3 NWLR (Pt. 231) 598.

In *Ihute v. Independent National Electoral Commission* (1999) 4 NWLR (Pt. 599) 360, it was held that in an election petition, when  
 B a petitioner makes an allegation of non-compliance with the electoral law as the basis-or foundation of his case, he has a heavy burden to show the tribunal by cogent and compelling evidence that the non-compliance is of such a nature as to affect the result of the election.  
 C The court followed the decision in *Kudu v. Aliyu*, *supra*. The decision was followed in the case of *Haruna v. Modibbo* (2004) 16 NWLR (Pt. 900) 487. The court added in *Haruna* that the petitioner must satisfy the tribunal that he is a victim of the alleged malpractices. The court also relied on *Nabature v. Mahuta* (1992) 0 NWLR (Pt. 253)  
 D 585 and *Awolowo v. Shagari*, *supra*.

In *Buhari v. Obasanjo* (2005) 2 NWLR (Pt. 910) 241, the Court of Appeal held that by virtue of section 135(1) of the Electoral Act, 2002, an election shall not be liable to be invalidated by reason of non-compliance with the provisions of the Electoral Act if it appears  
 E to the election tribunal or court that the election was conducted substantially in accordance with the principles of the Act and that non-compliance did not affect substantially the result of the election. In other words, non-compliance with the provisions of the Act without  
 F more is not sufficient to invalidate an election. Consequently, unless there is some proof that non-compliance with the provisions of a section of the Act substantially affected the result, the election will not be invalidated; and that non-compliance with the Electoral Act, without more, is not sufficient to invalidate the election.

G ***In Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1, when the case came to the Supreme Court on appeal, the court held that where an allegation of non-compliance with the electoral law is made, the onus lies on the petitioner firstly to establish the non-compliance, and secondly, that it did or**  
 H ***could have affected the result of the election. It is after the petitioner has established the foregoing that the onus would shift to the respondent whose election is challenged, to establish that the result was not affected.***

The above cases have decided along the same line and it is that the first burden is on the petitioner to establish not only substantial non-compliance with the principles of the Electoral Act but also that such non-compliance affected the result of the election.

Learned Senior Advocate for the appellant has called our attention to the case of *Swen v. Dzungwe*, supra. He has argued very strenuously and strongly that this court should overrule the decision in *Buhari v. Obasanjo* and accept the decision in *Swen v. Dzungwe*. He has argued very seriously that Buhari does not represent the law and that Swen does. I will take Swen in some detail, starting from the facts.

The petitioner, the first respondent in this appeal, complained that the second respondent failed generally to preform the duties imposed on him by law and in particular did not as he was bound to do, make necessary arrangements to ensure that voters were able to cast their votes in secret. He asked the court to nullify the election on the grounds of widespread malpractise; these included corrupt practises and on the part of the appellant and intimidation, undisguised acts of thuggery, impersonation, unjustified interruption of polling, interference with official duties and the like by the supporters of the appellant.

The Learned trial judge held that there was no compliance with Pt.II of the Electoral Act, 1972. The Appeal Court disagreed with this view. On a further appeal. the Supreme Court held inter alia: (a) once a petitioner establishes non-compliance, and the court or other tribunal can not say whether or not the result of the election could not have been affected by such non-compliance, the election will be avoided on the ground that civil cases are proved by a preponderance of accepted evidence. At that stage, the onus shifts to the respondent to show that the non-compliance did not affect the result of the election. (b) As the appellant did not discharge the onus which squarely rested on him, and on the accepted evidence, it was not possible for the learned trial judge to speculate on the actual effect of the acts constituting the non-compliance found.

By the decision, if the court or tribunal can say or come to the conclusion that the result of the election was not affected by the non-compliance, the election will be declared invalid. That the positive

position of the negative position stated by Coker, JSC, at pg. 303 of the report. Let me quote it at the expense prolixity.

*"It follows clearly, therefore, that if at the end of the case of the petitioner, a case of non-compliance is established which may or may not affect the result of the election and it is impossible for the tribunal to say whether or not the results were affected by the non-compliance established, unless there be evidence on behalf of the respondent that such non-compliance as found could not and did in fact affect the results of the election, then the petition is entitled to succeed on the single ground that civil cases are proved by a preponderance of accepted evidence."*

At page 302 of the judgment, Coker, JSC, said:

*"These facts coupled with the more obvious fact of the relatively small difference between the overall majority of the appellant in the entire constituency at sixty-six stations and the number of registered voters in the offending stations are clearly sufficient, as indeed found by the learned trial Judge, to ground a case of non-compliance under section 92 of the Electoral Act 1962. The first ground of appeal therefore fails."*

Coker, JSC, had earlier quoted the following statement of the learned trial Judge at page 300 of the judgment, which I quote here in part:

*"Though there are allegations in respect of other stations these are the only ones at which I find that there was a substantial non-compliance. According to Exhibit "A" the total registered voters at those stations are 4,105. The total poll for the constituency was 18,730 and the 2nd respondent's majority was about 4,400. Where I find that there were serious instances of non-compliance at stations where the total of registered voters amounted to almost a quarter of the votes cast in the constituency, I can hardly say that the election was conducted substantially in accordance with the provisions of Part II and in fact I hold that it was not."*

Coker, JSC, corrected the wrong figures of the learned trial Judge which were pointed out to him by counsel in the case; figures which eventually affected the trial Judge's figure of one-quarter. Coker, JSC reacted to the submission of counsel for the appellant at page 301:

*“Learned counsel for the appellant complained that according to Exhibit C (Record of Votes Cast) the total number of voters was 28,730 and that the Judge was clearly mistaken to have taken 18,730 instead of 28,730 as the figure for the total poll of the constituency and also to have referred to the total number of registered voters in the four offending stations as being in the order of one-quarter of the votes in the entire constituency, the appellant’s majority at the election being 4,376. We agree that the Judge made a mistake in writing down 18,730 instead of 28,730 and it is obvious therefore that the total number of registered voters in the four offending stations is not about one quarter of the total number of voters in the constituency.”*

The above analysis on the bare face of it may appear abstract and irrelevant but it is neither. If the figures are related to what Coker, JSC said or described as “relatively small difference between the overall majority of the appellant in the entire constituency of sixty-six stations and the number of registered voters in the offending stations... and the majority of votes in this appeal”, the point I am struggling to make becomes obvious. I should recall here that the appellant scored a total of 6,607,409 as opposed to 24,784,227 scored by the 4th respondent. This gives a difference of 18,176,818. Coker, JSC could not have referred to the figure, 18,176,818 as “relatively small difference. I do not think I will be wrong in coming to the conclusion that Coker, JSC was influenced by the “small difference” in the results in his judgment.

Interpreting section 93(1) of the Electoral Act, 1962 which is in pan materia with section 146(1) of the Electoral Act, 2006, Coker, JSC said correctly at page 302:

*“The section does not directly state the reasons for invalidating an election but clearly provides for circumstances in which an election might not be invalidated, even after it had been established that there was a non-compliance with Part 2 of the Act in the conduct of the elections.”*

I entirely agree with Coker, JSC. It is a correct interpretation of the section.

Learned Senior Advocate for the appellant, in urging this court to follow Swem decided in 1966 contended that Akinfosile which was decided in 1960 was consigned to the “archive of judicial prece-

dents” because this court in Swem confined the decision to the “facts and pleadings delivered therein”. With the greatest respect, I am not with him. A decided case of this court cannot be “consigned to the archive of judicial precedent”, whatever that means, merely because a subsequent case did not follow it on the ground that the facts are different. It is good law that all cases are decided on the facts before the court. I know of no case which is not decided on the facts before the court, including his darling, Swem. If the submission of learned Senior Advocate is taken to its logical conclusion it will mean that Swem should be consigned to the archive of judicial precedents (again whatever that means) in the light of the decisions in Chief Awolowo v. Shagari, supra and Buhari v. Obasanjo, supra and the group of cases. Cases are not jettisoned or bottled in that way in the hierarchy of judicial precedent; and so I will not obey him. Counsel cannot rubbish the decision of this court, in the way he has done. That is not available to him.

Learned Senior Advocate for the appellant has urged the court to overrule its decisions in Awolowo v. Shagari and Buhari v. Obasanjo on the ground that both decisions were rooted in Akinfosile v. Ijose which had been earlier overruled by the court in Swem v. Dzengwe. Is that a proper step to take in this appeal, particularly in the light of my analysis of the case above? Why should Swem be the final bus stop in this matter? Why should Swem be the king and the cases of Awolowo and Buhari be subjects or better the servants?

In Buhari v. Obasanjo (2005) 2 NWLR (Pt. 910) 241, the Court of Appeal examined Swem. After quoting what Coker, JSC said at page 303, Tabai, JCA (as he then was) in his lead judgment rightly, in my view, said at page 370 of the judgment:

*“Both learned senior counsel rely on this statement of the Supreme Court. On the principle of the decision, it is common ground that the petitioner must first establish the non-compliance. The controversy is only as to the point at which the onus shifts to the respondents to prove that the non-compliance, though established, did not substantially affect the election and the result. In my considered opinion whether or not at the end of the case of the petitioner, the onus shifts to the respondents to prove that the non-compliance did not substantially affect the election and result depends on the court’s own*

*perception of the effect of the non-compliance. Where the court is of the opinion that the non-compliance did not and could not have had any impact whatsoever on the election, then the petitioner has failed to shift the onus of proof and the petition thus fails. But where in the opinion of the court, the effect of the non-compliance is fundamental and has created in the court's mind a doubt on the regularity of the election and authenticity of the ensuing result, then the onus shifts on the respondents. In such a situation, unless the respondents lead evidence to establish that the non-compliance did not affect the election and the result, the petition succeeds. It is my respectful view that in such a situation, proof is not beyond reasonable doubt but on the preponderance of evidence."*

In his contribution, Abdullahi, PCA said at page 434, with particular reference to collation.

*"It is for the petitioner to establish a case of non-compliance that is non-compliance, before the 2nd set of respondents could be called upon to rebut the same. In Swem v. Dzungwe (1960) 1 SCNLR 111; (1966) NMLR 297; (1960 NMR, Supreme Court said: 'If at the end of the case of the petitioners, a case of non-compliance is established, the onus then shifts on the respondents to establish the contrary.' The petitioners failed to establish this non-compliance of non-collation at the State level which is not, therefore, made out."*

I cannot put the position of the law better than my two brothers. That is the correct interpretation. Flowing from the decision, it is clear that the first burden is on the petitioner, who is both the petitioner and the appellant in this case. If learned Senior Advocate for the appellant thinks that Swem provides all the answers for his client, he should have another look, a deeper one for that matter, at the decision. The Court of Appeal has provided a very useful interpretation, which though persuasive, has enough beef or meat to persuade me.

In Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) 1, Belgore, JSC, said at page 191:

*"It is manifest that an election by virtue of s. 135(1) of the Act shall not be invalidated by mere reason it was not conducted substantially in accordance with the provisions of the Act, it must be shown clearly by evidence that the non-substantiality has affected*

the result of the election. Election and its victory, is like soccer and goals scored. The petitioner must not only show substantial non-compliance but also the figures, i.e. votes, that the compliance attracted or omitted. The elementary evidential burden of “The person asserting must prove” has not been derogated from by s.135(1). The petitioners must not only assert but must satisfy the court that the non-compliance has so affected the election result to justify nullification.”

I entirely agree with the above because it correctly states the law.

I return to section 146(1) of the Electoral Act. The third word in the section is “shall”. It is an obligatory and mandatory word conveying a command and compulsion. It is peremptory in nature and content. It is a word of authority imposing a duty mostly on an unnamed person. Courts of law mostly interpret the word in the above context of authority and command; bereft of discretion. See *Achineku v. Ishagba* (1988) 4 NWLR (Pt. 89) 411; *UNTHBM v. Nnoli* (1994) 39 NWLR (Pt. 363) 376; *Lt.-Gen .Bamaiyi (Rtd) v. Attorney-General of the Federation* (2001) 12 NWLR (Pt. 727) 468; *Ogidi v. The State* (2005) 5 NWLR (Pt. 918) 286. Although the word could, at times, convey a permissive meaning, like “may” it is my view that it conveys its usual and ordinary meaning of obligation and command in section 146(1). This means that an election cannot be invalidated by reason of non-compliance with the provisions of the Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principles of the Act and that the non-compliance did not affect substantially the result of the election. In other words, a petitioner cannot be heard to say that an election is invalid by reason of non-compliance with the principles of the Act if it appears to the Election Tribunal or Court that the election was conducted substantially in accordance with the principles of the Act and that the non-compliance did not affect substantially the result of the election. The words “cannot be heard to say” above are trite legalism that express the notion of estoppel, as a respondent can say in defence, the petitioner cannot be heard to say that the election is invalid.

I move to the word “appears”. The word in the context of section 146(1) does not mean to become able to be seen or come



into sight or become noticeable or to be properly before a court of law or coming to a court by a party to a suit. On the contrary, the word means, “seems”. It means in the context that the tribunal or court has a particular idea or feeling about the conduct of the election based on the generality or totality of the activities of the election. Although the word “appears” seems to convey element of speculation or conjecture, that is not the meaning it conveys in section 146(1). The tribunal or court must base its conclusion on the facts before it and nothing but the facts. The tribunal or court cannot introduce facts not before it. The tribunal or court must confine itself to the facts before it. It has no jurisdiction to read into the Record facts not presented by the parties. It cannot also read out of the Record facts presented by the parties. It seems I am repeating myself. Repetition is, at times, useful for emphasis and so be it. I should say that Black’s law Dictionary, 6th edition defines “appear” also as “to be in evidence; to be proved.” This relates to the point I have made above, as the tribunal or court can only come to a conclusion one way or the other after hearing evidence from the parties. B  
C  
D

And that takes me to the word “substantially”. The word is used twice in the subsection. While the first adverb qualifies the noun “election”, the second one qualifies the noun, “non-compliance”. The adjective “substantial” is defined by Black’s Law Dictionary as of real worth and importance, of considerable value; valuable; actually existing; real; not seeming or imaginary; not illusion, but solid; and verifiable. The word also means abundant, ample, concrete, consequential, considerable, established, existent, existing, genuine, gravis, great importance, large, plentiful and significant. It is a word of many parts in terms of synonyms. The word in section 146(1) may not convey all the above synonyms. The important aspect is that in determining the issue in the subsection, the tribunal or court need not be satisfied that the election was conducted totally in accordance with the principles of the Act, whatever is the meaning of principles; and a’fortiori the non-compliance totally affected the result of the election. E  
F  
G  
H

The final word I should examine briefly is the conjunction “and” joining the larger part of the subsection with the smaller part of “that the non-compliance did not affect substantially the result of the elec-

tion.” The word “and”, being a conjunction, performing the function of joining two expressions or sentences which could be inseparable, integrated, joint or matched. As a co-ordinating conjunction, some writers do not use it to begin a sentence but in a part of the sentence as it in section 146(1). Others do. I do not think there is any fast rule.

B That should not be my concern. My concern is the interpretation of the word in section 146(1). Although the word “and” could, in appropriate cases, be interpreted as “or”, it is my view that the word as used in section 146(1) is conjunctive and not disjunctive like, “or”.

C See Ndoma-Egba v. Chukwuogor (2004) 6 NWLR (Pt. 869) 382.

I have taken the time to examine section 146(1) because it is central to this appeal. Although previous judgments have equally interpreted the subsection or its equivalent, litigants have always raised issues on it. I thought I should add my bit to it; hoping that the quarrel on the subsection will abate.

On the burden of proof, I associate myself with the position taken by the Court of Appeal in Buhari v. Obasanjo. And here I split the subsection into two unequal parts by way of the wordings. The first part, that is the first arm, ends with the word “Act”. Here, I am not talking about the first “Act” in between the words “this” and “if”. Rather I am talking about the second “Act” in between the words “this” and the conjunction “and”, in the second limb. In other words, the dividing line is in the word “and”. In my view, while the burden in the first limb is in the first place unequivocally and totally on the petitioner, the burden on the second limb is shifted to the respondent after the petitioner has satisfied the burden placed on him to prove that the non-compliance substantially affected the result of the election. In other words, the burden on the respondent is not automatic like the day meeting the night, **there is a very important requirement and it is this. The respondent is required to satisfy the burden of proof under the second arm only after the petitioner has proved the burden placed on him in the subsection. Once the appellant satisfies the burden placed on him by the subsection, the burden of proving the contrary that non-compliance did not affect substantially the result of the election is shifted to the respondent.** As the tribunal or court can only come to the conclusion that the election was conducted substantially

in accordance with the principles of the Act based on evidence, the party who should give the evidence is the respondent, because he is the one deemed by the subsection to assert that the non-compliance with the principles of the Act did not affect substantially the result of the election. But that should be after the petitioner has proved that the non-compliance affected substantially the result of the election. I realize I sound repetitive. It is intentional. B

This position reminds one of the decision of this court in Elemo v. Omolade (1968) NMLR 359, where it was held that burden of proof has two distinct and frequently confusing meanings. It means: (a) the burden of proof as a matter of law and pleadings; the burden as it has been called of establishing a case whether by preponderance of evidence or beyond reasonable doubt; and (b) the burden of proof in the sense of introducing evidence. As regards the first meaning attached to the term, “burden of proof”, this rests upon the party ‘whether plaintiff or defendant who substantially asserts the affirmative of the issue. It is fixed at the beginning of the trial by the state of the pleadings and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it and never shifting in any circumstances whatever. In deciding what party asserts the affirmative, regard must be had to the substance of the issue, and not merely to its grammatical form which later the pleader can frequently vary at will. A negative allegation must not be confounded with the mere traverse of an affirmative one. The true meaning of the rule is that where a given allegation whether affirmative or negative forms an essential part of a party’s case, the proof of such allegation rests on him. While the burden in the first sense is always stable, the burden of proof in the second sense may shift consistently more as one scale of evidence or the other preponderates. In this sense, the onus probandi rests upon the parties who would fail if no evidence at all or no more evidence is gone into upon the party asserting the affirmative or the party against whom the tribunal at the time the question arises would give judgment if no further evidence were adduced. The test as to who is to begin is determined by asking how judgment would be entered on the pleadings if no evidence at all were given on either side. The party against whom judgment would in that event be given is entitled to begin. C D E F G H

Elemo clearly states the adjectival position of the law. I should look at the petition and the respondent's reply. The appellant as petitioner made allegations of non-compliance with the Electoral Act in paragraphs 9B, 9C, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of the petition. By the provisions of the Evidence Act that I have referred to above, the case of Elemo v. Omolade and the group of cases, it is my view that the first burden of proof based on the preponderance of evidence is on the appellant. This is because he asserted the affirmative and the burden is clearly on him. Putting the position negatively, where he fails to prove the allegations in the above mentioned paragraphs his petition must fail.

As the 4th and 5th respondents denied virtually all the above paragraphs in paragraphs 15 to 44 of their reply, issues were joined and the burden was unequivocally and clearly on the petitioner to prove the affirmative of his allegations.

In paragraph 22 of the petition the petitioner averred:

*"To avoid the repetition of same facts all over again, the petitioners plead that similar malpractices of failure to take election materials to the polling booths, failure to deliver result sheets to booth and ward levels, preparing results without collation proceedings, excluding agents of political parties other than the PDP from proceedings at wards, Local Government Areas and State levels and general collusion of the 1st respondent and their other agents and staff with the PDP members and thugs, the military and the police in perpetrating malpractices that were corruptive of the entire system and process occurred in the remaining States of Niger, Rivers, Kogi, Enugu and Taraba States. Evidence shall be led on these facts at the hearing of this petition."*

In their reply, the 4 and 5 respondents averred as follows:

*"46. The respondents in denying paragraph 22 of the petition state that elections were conducted in substantial compliance with the law in Niger, Rivers, Kogi, Enugu and Taraba States and due - return were made from these States and that the paragraph lacks particulars and details to sustain it."*

*47. Furthermore the respondents state that the presidential elections conducted in Niger, Rivers, Kogi, Enugu and Taraba States on the 21st April, 2007 were conducted in substantial compliance*

*with the provisions and scheme of the Electoral Act 2006.*”

As paragraph 46 of the 4th and 5th respondents’ reply that the elections were conducted in substantial compliance with the law in Niger, Rivers, Kogi, Enugu and Taraba States was a reply to paragraph 22 of the petition, the burden did not shift on the respondents. It rested on the appellant. B

Learned Senior Advocate for the appellant in his interpretation or construction of section 146(1) of the Electoral Act, called the attention of the court to a number of cases on statutory interpretation; cases I have mentioned above. It is my view that the interpretation I have given to section 146(1) falls in line with the decisions cited by counsel. I have not substituted my own words for the words of section 146(1) of the Electoral Act. I have not also read into the Electoral Act, particularly section 146(1), words which are not there. On the contrary, I have ascertained the actual words used in section 146(1) in their ordinary grammatical meaning and give them effect as to ‘their tenor. C

Learned Senior Advocate for the appellant has urged us to depart from our decision in *Buhari v. Obasanjo*. Learned Senior Advocate said that this court can depart from its previous decision in the following circumstances: E

(a) If the decision was given per incuriam and it was manifestly erroneous.

(b) If rigid adherence to it may perpetrate injustice, or F

(c) If it unduly restricts the proper growth of the law. He relied on *Ottih v. Onoyivwe*.

Counsel also cited what I said in *Abubakar v. Yar’Adua* on substantial justice. He quoted me as follows:

*“If courts of law are bound to do substantial justice in ordinary civil matters, how much less in an election petition. I should take the question to another level and it is this: if tribunals are bound to do substantial justice in election petitions, how much less, a Presidential Election Petition in which the whole country of Nigeria is one constituency.”* H

Let me take the two submissions on the need of this court to depart from *‘Buhari v. Obasanjo* and the need of this court to do substantial justice as indicated in *Abubakar v. Yar’Adua*. First, the need

to depart from Buhari v. Obasanjo. The expression *per incuriam* is one of latinism. It generally means through inadvertence. In law, it means the Judge giving a judgment in ignorance or forgetfulness of an enabling statute of some binding authority on the court.

Learned Senior Advocate urged this court to follow the decision in Swem and drop the decision in Buhari. In the light of the analysis I made on Swem, I am unable to accept the invitation by counsel to drop Buhari. The second one is rigid adherence to the decision will cause injustice. Counsel is unable to show what injustice will be caused in following Buhari. If Buhari is overruled as contended by learned Senior Advocate, will that be justice to the 4th and 5th respondents? Justice of a case cannot be determined in vacua but in relation to the facts of the case. Justice so to say, which is not done within the facts of a case is not justifies properly so called but justice in inverted commas and therefore injustice.

I think this is the proper place to deal with what I said in Abubakar v. Yar'Adua. I made that statement in the context of the filing of interrogatories and the statement should be restricted to the issue before the court. Departing from a judgment of a court, particularly by a court which delivered it, is a matter of hard law which should be taken with all the caution or precaution. The court should be able to overrule the decision not just for the asking by one of the parties to favour him, but do justice in the case before it.

The final one is that if the judgment will unduly restrict the proper growth of the law. Learned Senior Advocate did not show how Buhari will unduly restrict the proper growth of the law. A court of law inclined to overruling its earlier decision in this circumstance must quickly remind itself that it is making an effort to nullify a provision of a statute, a function it lacks in the light of the division of powers in the Constitution. In other words, a court trying to embark on the above should remind itself that it is leaving its domain in section 6 and trying to flirt with the powers of section 4, which constitutionally belongs to the Legislature. I say this because a court which pronounces that a particular statute restricts the proper growth of the law, will certainly cut away those aspects of the statute that will restrict the growth of the statute. That will certainly affect the legislative tenor of the statute and that will be re-writing the statute; a function that courts

of law lack.

***As departure from a decision of a court or overruling a decision of a court is a very major judicial exercise, which if done often will ruin or jeopardize the stable rules of judicial precedent, and particularly the rules of stare decisis, courts of law, even the highest court of the land, will not yield to the invitation of counsel just for the asking, in the sense that the case sought to be overruled is not in favour of the party. In asking for a case to be overruled, the party should take into account or consideration, the totality of the decision, meaning that the ratio , decidendi must be considered along with the facts of the case. The party should also make a distinction, if any, in the case between a ratio decidendi and an obiter dictum. If a party's worry is an obiter dictum, a court of law will not depart from its earlier judgment or overrule it because obiter does not ipso facto have or possess any force in the judgment. And when I say this I am not ignorant of the law that obiter dictum of this court followed by this court in certain instances could ripen into a ratio decidendi by frequent adoption. As the appellant has not made a case for overruling Buhari decided by this court in 2005, I will disobey learned Senior Advocate that I should overrule the decision.*** I should also make a final point on the issue that the case of Morgan v. Simpson cited by learned Senior Advocate for the appellant is not helpful. As counsel did not copiously rely on it as in the case of Abubakar v. Yar'Adua. SC. 72/2008, I will stop here on the case. I adopt what I said in Abubakar v. Yar'Adua here.

As I have already taken the issue on the Practice Directions, the next issue I should take, in the order, taken in the appellant's brief, is striking out of 18 of the 19 witness depositions filed with the petition by the appellant. That is Issue 9.

I should start from what the Court of Appeal said in its judgment on the issue. In his written address, learned Senior Advocate for the appellant in the Court of Appeal, the same counsel here, submitted before that court that objection to the admissibility of the deposition ought to have been taken before their admission. Reacting to the submission in the judgment, Fabiyi, JCA said at page 2674:

“The Petitioner’s counsel, M. I. Ahamba, SAN, had argued that the objection to the admissibility of these depositions ought to have been taken before they were admitted, having not objected at the material time, the respondents have waived their right to object to the documents and they cannot be heard to object to it after the documents have been admitted. These documents were admitted by the court based on clear agreement by the parties that all documentary and material exhibits shall be admitted subject to the right of the opposing parties to raise objections to the admission at a later stage. The petitioner cannot, at this stage, resile from this agreement. More importantly, where a court erroneously admits a patently inadmissible evidence, the court can at any stage of the proceedings, expunge the inadmissible ‘evidence from its record.’”

Rejecting the documents sworn before Val. I. Ikeonu, the learned Justice said at pages 2673 and 2674: ,

“It is a fact before the court that all the witnesses depositions, but Bernard Nimfa Banfa’s were taken before Val. I. Ikeonu, Esq., Notary Public. The said Val. I. Ikeonu, Esq. has consistently appealed before us as one of the counsel to the Petitioner, up to the time we took final addresses. It is also clear to us from the oral testimony of PW1, Emmanuel Iwuamadi that at the time these depositions were taken, Val. I. Ikeonu, Esq., had already been employed by the Petitioner. Also on record before us, are several affidavits sworn to by Val. I. Ikeonu in his capacity as petitioner’s counsel. The respondents have now challenged the legality of these depositions on the ground that the depositions were not taken before a person authorized to do so by law. Section 83 of the Evidence Act, provides as follows:-

‘An affidavit shall not be admitted which is proved to have been sworn before a person on whose behalf the same is offered, or before his legal practitioner, or before a partner or clerk of his legal practitioner.’

The provisions is clear and unambiguous and appears to me that the word “shall” is clearly mandatory. These depositions were made in favour of the petitioner, General Muhammadu Buhari. Mr. Ikeonu is no doubt a Notary Public, but he is also a legal practitioner representing General Muhammadu Buhari in this petition. He is, therefore, precluded from taking depositions which are in fact, affi-



davit evidence in this petition.

Also section 19 of the Notaries Public Act, Cap. 331 LFN 1996 provides as follows:

‘No Notary shall exercise any of his powers as a notary in any proceedings or matter in which he is interested.’

The combined effect of these two provisions is that Val. I. Ikeonu being a petitioner’s counsel lacked the competence to notarise any document used in the petition.”

The above is the crux of the quarrel between the parties. The first issue is whether the Court of appeal in adopting the depositions gave an unconditional order, as submitted by learned Senior Advocate for the appellant. With respect, I do not think so. It is clear to me from the above that the Court of Appeal gave a conditional order that the documents were admitted as exhibits “subject to the right of the opposing parties to raise objections to the admission at a later stage” In the circumstances, learned Senior Advocate is not correct in contending that the documents were admitted unconditionally. There was a clear condition and it is the right of opposing parties to raise objection at the later stage.

***The next issue is whether the Court of Appeal was functus officio. Functus officio ordinarily means a task performed; having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. See Black’s Law Dictionary, 6th edition, page 673. The latinism means in practice the idea that the specific duties and functions that an officer was legally empowered and charged to perform have now been wholly accomplished and thus the officer has no further authority or legal competence based on the original commission. This is because the thing which originally had life becomes dead or moribund after the performance of the duty or function by the authority. In our context, a Judge who has decided a question brought before him is functus officio, and cannot review his decision. See also Sanusi v. Ayoola (1992) 9 NWLR (Pt.265) 275; Onwuchekwa v. CCB (1991) 5 NWLR (Pt. 603) 409; Anyaegbunam v. Attorney-General of Anambra State (2001) 6 NWLR (Pt. 710) 532; INEC v. Nnaji (2004) 16 NWLR (Pt. 900) 473. A court cannot be functus offi-***

***cio if it gives an anticipatory order, which is conditional to the possible implementation of the order or otherwise as in this case. This is because at the point of fulfillment, the party involved in the anticipatory order will return for a permanent relief. An order of a court made subject to the happening of an event is not one given in total or whole and therefore cannot make the court functus officio. In this case the objector or objectors were given the right to raise objection on the admissibility of the documents and the Court of Appeal was perfectly in order to rule on their admissibility one way or the other. After all, the latinism of functus officio applies when the whole matter is resolved or dealt with by the court. It will not apply where only a part of it is resolved or dealt with and a part of it is hanging. That part which was hanging in this case was the order “subject to the right of the opposing parties...”. The Judge has to remove the hanger and he is not functus officio to do so. That was what Fabiyi, JCA did and he is right in doing that. The appellant is wrong in castigating him for doing the right thing.***

The following cases cited by the court are germane to the principle; and I agree with the court: *UBN Plc v. Sparkling Breweries Ltd.* (2000) 15 NWLR (Pt. 698) 200; *Kabo Air v. INCO Ltd.* (2003) 6 NWLR (Pt. 816) 323; *Agbi v. Ogbé* (2006) 11 NWLR (Pt. 990) 65 and *Dagaci of Dere v. Dagaci of Ebwa* (2006) 7 NWLR (Pt. 979) 382.

Another issue raised by the learned Senior Advocate e is on jurisdiction. He raised three questions. Since I have taken (b) on functus, officio, I will now take (a) and (c). In (a), learned Senior Advocate contended that the court was not competent to adjudicate on the mode of swearing the appellant’s witnesses deposition considering the mode of adoption of the depositions in the proceedings by an order of court after agreement.

***While conceding that by section 83 of the Evidence Act, the court is enjoined not to admit an affidavit which is proved to have been sworn before a person on, whose behalf the same is offered, or before his legal practitioners, learned Senior Advocate argued that that means an affidavit ought to be tendered as exhibit (which is admitted) and not a deposition which***

**is written testimony in lieu of oral testimony which is open to cross examination. He pointed out that the fundamental difference is that when a deponent of a deposition goes into the witness box to adopt the deposition as his or her testimony before the court, such a deponent is first sworn; and when that happens the deposition becomes the sworn oral testimony before the court thereby healing any defect in the swearing of the depositions with the deponent thereafter exposed to cross-examination. He submitted that the deposition does not thus become an exhibit before the court like a tendered document or affidavit in support of an application whose deponent is not exposed to a fresh oath or cross-examination. Section 83 of the Evidence Act, learned Senior Advocate argued, anticipates the later affidavit and not a procedural deposition which is normally re-sworn at the adoption and that it requires proof to decide on section 83.**

**I am in grave difficulty to agree with the submission of learned Senior Advocate. First, the first leg of his submission implies that an affidavit admitted as an exhibit is not open to cross-examination. This conclusion is drawn from his argument that the difference between an affidavit and a deposition which is a written testimony is that the latter is open to cross-examination.**

**That is not my understanding of the law.** A party is free to cross-examine on an affidavit admitted in evidence, particularly where there is a counter affidavit. Where there is no counter affidavit, then the deposition will be generally deemed to be correct. In the circumstances a blanket statement such as the one by counsel, cannot be correct.

**The second argument is on the swearing of the deponent. Again, I am not with him in the distinction.** In the first place, a person who swears to a written statement under paragraph 1(1)(b) of the Practice Directions or one who swears to an affidavit under the Evidence Act is known as a deponent; a person who testifies by deposition. Deposition simply means a statement of a witness made under oath out of court. **Although there could be difference between affidavit and deposition, it does not seem to**

**apply to the case.**

The third argument is the one on “healing any defect in the swearing of the positions...”. This is quite a new one to me. I know not no such adjectival law. Taking the argument further, it means that once a deponent takes oath, it automatically wipes out all the defects provided for in the Evidence Act, particularly in section 83. Although learned Senior Advocate did not specifically mention section 83, I know that that is where he is going. Unfortunately, learned ‘Senior Advocate did not cite the law which will perform the automatic medication like iodine to a wound or panadol to headache. There is no such balm to lessen the “pain” in section 83 not to talk of complete healing.

Learned Senior Advocate submitted that section 83 anticipates what he called the “later affidavit” and not a procedural deposition which is normally re-sworn at the adoption”. Unfortunately for the appellant, section 83 does not draw any such cleavage or dichotomy. What does learned Senior Advocate mean by the expression “procedural deposition”? Does this infer that there is substantive deposition? Depositions are all matters of procedures as they are adjectival in nature and content.

I should finally make the point that learned Senior Advocate did not refer to any authority, either by way of statute or case law to back up or justify his submission. I am not surprised because I do not know any. The submission has not the support either of section 83 of the Evidence Act or paragraph 1(1)(b) of the Practice Directions which provide for written statements on oath of witnesses. Accordingly, question (a) fails.

That takes me to question (c). It is that raising the issue by the respondent at that stage offended paragraph 49(2) of the First Schedule to the Electoral Act. The paragraph reads:

*“An application to set aside an election petition or a proceeding resulting therefrom for regularity or for being a nullity, shall not be allowed unless made within a reasonable time and when the party making the application has not taken any fresh step in the proceedings after knowledge of the defect.”*

Paragraph 49(2) contains two strong legs. They are: (i) The application to set aside the election petition or a proceeding should

be made within a reasonable time. (2) The party making the application must not take any fresh step in the proceedings after knowledge of the defect. I will take them seriatim.

Paragraph 49(2) does not understandably provide for a specific time in terms of months and days. The paragraph follows the usual draftsman's language of reasonable time. Reasonable time is one dictated by reason or one having reason. Reasonable time within the meaning of paragraph 49(2) is the time necessary and convenient to set aside an election petition or proceedings resulting therefrom. Although the words "necessary" and "convenient" seem subjective, it is my view that in the context of paragraph 49(2) they should be read from the angle of the objective test, that is, the test of a reasonable man. What a circle? It seems to go to square one!

The reasonable time in paragraph 49(2) can only be determined in the light of the facts of the case and from the point of view of a reasonable man. It cannot be determined outside the facts of the case. And who is that reasonable man? He is the reasonable man wearing the shoes of the applicant or respondent with or 'possessing a good reasonable faculty who acts sensibly, takes proper but not excessive precautions, does things without serious delay and weighs matters carefully but not over specifically. A reasonable man is neither perfect nor indifferent. See generally *Fumudoh v. Aboro* (1991) NWLR 9 (Pt. 214) 210; *Sodipo v. Lemminkamen OY* (1992) 8 NWLR (Pt. 258) 229; *Effiom v. State* (1995) 1 NWLR (Pt. 373) 507; *UBN Ltd, v. Oredein* (1992) 6 NWLR (Pt. 274) 355.

The next other strong leg of the sub-paragraph is not taking any fresh step in the proceedings. A fresh step is a new step, a step which is taken for the first time. A fresh step is a step which is happening for the first time.

***I should now relate the sub-paragraph to the factual situation. Learned Senior Advocate submitted that the issue could not be taken at the address stage. What stage could the respondents have taken the issue? Counsel did not provide an answer and I expected him to provide an answer.***

***The issue was raised in the course of the proceedings and the Court of Appeal overruled the respondents. The next available opportunity is at the end of the case when parties***

- gave their final addresses and that was what happened. Learned Senior Advocate submitted that paragraph 49(2) is sui generis in which case it acquires a special peculiarity and must be so applied. The fact that election petitions in their total content are sui generis does not mean that each section of the Act and the paragraphs of the Schedule to the Act are sui generis. That is not my understanding of the expression which latinism means “of its own kind and class”. I do not see any peculiarity in paragraph 49(2). It merely put in the form of a legislation the procedural rules of raising an objection timely and when the party raising the objection has not taken any fresh step in the proceedings. There is nothing peculiar in the sub-paragraph and I so hold.*** Parties in election petitions cannot hide under the expression to rake up a
- D defence where there is none. The whole concept of election petitions being sui generis, in my view, is to project the peculiarity of the petition in terms of the reliefs sought, the time element and the peculiar procedure adopted for the hearing of the petition and all that. The Practice Directions, 2007 is a classic example of referring to election petitions as sui generis. No single section of the Act or paragraph
- E of the Schedule to the Act can qualify for the latinism, sui generis. It is the total jurisprudence of election that is sui generis, not a section of the Act or schedule to the Act.
- F Learned Senior Advocate submitted that the matter of swearing of the depositions was not put as an issue before the court and therefore the Court of Appeal was not competent to adjudicate on it. I disagree. In a number of times, appellant filed motions to file written statements of witnesses, vide paragraph 1(1)(b) of the Practice
- G Directions. What gave rise to the decision of the Court of Appeal, resulting in Issue 9, is one such motion. That is the decision of the Court of Appeal where the court talked about agreement by the parties to admit the depositions. That apart, paragraphs 47 to 98 of Volume 1 of the Record contain depositions of witnesses of the ap-
- H pellant. These depositions, by paragraph 1(1)(b) of the Practice Directions, are joined to the petition and they will go a long way to prove the petition. This is clear from the language of the sub-paragraph which is as follows:

1(i) “*All petitions to be presented before the Tribunal or Court shall be accompanied by... (b) written statements on oaths of the witness...*”

The operative word is “accompanied”, which means coexist, or join. And what is more, learned Senior Advocate for the appellant, both in the Court of Appeal and in this court, has made copious references to the depositions in his final address and Brief. And so, I ask why the furore? Why did he use the deposition in so much detail and now submit that the matter of swearing of the depositions was not put as an issue?

A party pleads a court process which exists. A party does not plead a court process which does not exist. A party cannot plead facts which are not known to him at the time of settling the pleadings. How can the respondents anticipate the fact that the 19 witness depositions were sworn in violation of section 83 of the Evidence Act? Are the respondents God? Only God knows and sees the future. No human being can. In the light of the totality of the petition and the depositions of the statements of the witnesses of the petitioner, I hold the view that the issue fails. All the cases cited by counsel for the appellant in paragraphs 4.03C(iii) and 4.03C(iv) of the Brief are inapposite. Finally, as the issue of deposition of witnesses was copiously raised in the petition and the replies in the Court of Appeal and fully addressed on same before the court, it was not a fresh issue within the meaning of paragraph 49(2) of the First Schedule to the Act.

Although Issue 9 as formulated covers the merits of the Court of Appeal striking out 18 out of the 19 witnesses depositions, learned Senior Advocate was concerned with matters of objection on jurisdiction. I will now take the merits of the decision of the Court of Appeal. That takes me straight to section 83 of the Evidence Act. It reads:

*“An affidavit shall not be admitted which is proved to have been sworn before a person on whose behalf the same is offered, or before his legal practitioner, or before a partner or clerk of his legal practitioner.”*

The section provides for four instances where an affidavit will not be admitted. They are if sworn before (a) a person on whose behalf the same is offered; (b) his legal practitioner; (c.) a partner; (d)

a clerk of his legal practitioner.

**Section 19 of the Notaries Public Act Cap. N141, Laws of the Federation of Nigeria 2004 also provides as follows:**

***“No notary shall exercise any of his powers as a notary in any proceedings or matter in which he is interested.”***

**Although the Notaries Public Act does not specifically state the duties or functions of a notary as section 2(2) of the Act vaguely and lazily provides that a notary appointed by the Chief Justice of Nigeria shall perform the same duties and exercise the same functions as a notary in England, a notary in England performs the function of administering oaths and attest and certify by his hand and official seal some categories or classes of documents. As a matter of practice, notaries in Nigeria perform such functions.**

I must pause here to say that the wording of section 19 is not consistent with Republican Nigeria. It is disturbing that in the 21st century, after Nigeria attained republic status some forty-five years ago, our statutes are still relying on English Acts for salvation. It is hoped that the National Assembly will remove the provision and spell out the duties and functions of a notary public in Nigeria. It will not take the National Assembly so much effort and time to do so.

**The expression, “interest” in section 19 is professional interest. The professional interest in section 19, in my view, is involvement in the case in the sense of participation as counsel qua legal practitioner. And so, section 19 of the Public Act vindicates section 83 of the Evidence Act.**

**There is no dispute that Val I. Ikeonu is a legal practitioner. There is also no dispute that the depositions of 18 of the witnesses were sworn to before him. Only one was not sworn before him. The swearing of the depositions of the witnesses before Val I. Ikeonu violates both section 83 of the Evidence Act and section 19 of the Notary Public Act. I therefore agree entirely with the Court of Appeal that all the depositions made before Val I. Ikeonu, which were earlier admitted, were expunged from the record of the court.** The argument of learned Senior Advocate for the appellant that the depositions were admitted unconditionally is, with respect, neither here nor there. I have never



seen a situation where a court decides that documents are admitted unconditionally.

I take Issue 7 in the order presented by learned Senior Advocate for the appellant. It is in respect of the depositions of the witnesses who carried out inspection of election documents. The proceedings are at pages 2571 to 2573, Volume VI of the Record. B

***Learned Senior Advocate for the appellant has made so much weather of the Court of Appeal authorizing the appellant to file the depositions. In reply, all counsel for the respondents submitted that allowing the appellant to file the depositions is different from granting relief based on the documents. I entirely agree with them. Granting a party leave to file a court process does not mean that the court will grant the relief sought in the process if filed. It is to enable the party to file the process and argue it before the court for determination. At the point of filing a court process, the court is not in a position to know the merits of the process. After all, the court has not looked at the process and so cannot determine its legal strength. It is when the process is argued that the court is in a position to rule one way or the other. And so, counsel was not on a strong footing when he said at page 82 of the Brief that “no mention was made on the issue of whether the filing of the depositions had earlier been authorized by the court on 30/10/07 or not.” Why the storm? There is no need for it. No, not at all.*** C D E F

This is the scenario. On 19th November, 2007, Chief Ahamba of counsel for the petitioner moved a motion for leave to file depositions. He relied on the affidavit in support, two further affidavits and written submission and written reply. ‘Counsel for the 1st and 2nd respondents, Mr. Agabi, opposed the motion on the ground that the petition was incomplete on the showing of the petition. Counsel for the 4th and 5th respondents, Chief Olanipekun, also opposed the motion on the ground that the petitioner conceded that the motion was against the Practice Direction. H

The court ruled at pages 2572 and 2573 as follows

*“This application is for leave to file depositions of witnesses who carried out inspection of election documents, or in the alterna-*

tive to allow oral evidence of the witnesses.

I have listened to the arguments of counsel on all sides and it is my view that what is sought to be tendered as depositions of witnesses are actually an analysis of the election documents with the opinions and legal conclusions of the witnesses. These witnesses merely inspected the documents. They are not the makers and have no legal competence to comment on them. On the other hand, counsel on all sides are free to comment on the documents which were tendered from the bar to assist the court in their final addresses. This point was even conceded by Chief Olanipekun for the 1st and 2nd respondents. This application is unnecessary and has no support in the Practice Directions and it is accordingly refused.”

Learned Senior Advocate summarized the above ruling as follows in paragraph 4.04B(vii) of the Appellant’s Brief:

“(i) That the depositions contain conclusions and opinions of the witnesses deponents  
 (ii) that the witnesses were not makers of the documents inspected and have no legal competence to comment on them;  
 (iii) that all the documents subject-matter of the ‘depositions are already before the court, and did not require vive voce backup;  
 (iv) that counsel for any of the parties could comment on the documents thus rendering the depositions unnecessary, and  
 (v) that the application has no support in the Practice Direction.”

I am not quite sure that the Ruling contained (iii) above, although it could be inferred.

Learned Senior Advocate submitted as follows; (i) That the issue of the content of the depositions was premature as that would have had to be addressed when other evidence before the court are addressed, on deposition in a proceeding being only a written statement used in court in lieu of oral testimony; and it is only then a submission may be made as to whether any section of the Evidence Act was not complied with, (ii) that sections 86, 87 and 88 were dully complied with, assuming without conceding that the issue could be pressed at that stage, (iii) That there was no pretent on as to the making of the documents as the deponents merely inspected them with the authority of the court derived from section 159(1) of the

Electoral Act and sections 77(a) and 95(e) of the Evidence Act. (iv) That the documents were virtually all before the court when the court adjourned on 30/10/07 to enable the appellant file the depositions in issue, (v) The application did not need to have support in the Practice Directions to be granted as the Practice Directions, even if valid, cannot operate to whittle the appellant's right to fair hearing under section 36(1) of the Constitution or take away the benefit of the inspection statutorily enabled by section 159(1) of the Electoral Act. (vi) That it was preposterous to refuse the application on the ground that the depositions were not filed with the petition when it was clear and undisputed that the inspection was carried out three months after the filing of the petition, more so when the same court had earlier allowed the calling of additional witness by INEC and deemed the additional witness depositions filed on 17/08/07 are properly filed on the ground that it was necessary to allow a party to fully present his case and that the appellant was entitled to the same opportunity to fully ventilate his case.

Learned Senior Advocate for the 1st and 2nd respondents submitted that as the witnesses were neither the makers of the documents nor claimed special knowledge, the Court of Appeal was right in rejecting them. He argued that from the very character of the application, it was evident that the opinion sought to be volunteered did not relate to the conduct of the election as the election was over, the petition had been filed, the proceedings had commenced and the documents had been tendered and admitted. Referring to paragraph 6 of the affidavit in support of the motion, learned Senior Advocate argued that as the appellant conceded that the petition was incomplete the issues canvassed did not form part of the original petition and therefore new issues that cannot form part of the proceedings. He contended that the facts of "great relevance" deposed to in paragraph 15 of the affidavit in support which were not pleaded in the petition, cannot be part of the proceedings as the essence of the application was for amendment of the petition disguised as an application to file additional witness depositions.

Counsel submitted that section 159(1) of the Electoral Act envisages inspection before the petition is filed or during the pendency of the petition. He submitted that the documents were not deposi-

tions but comments and expressions of opinion on documents before the court.

Learned Senior Advocate for the 4th and 5th respondents, after narrating the scenario of the relevant proceedings, said that the respondents opposed the appellant's application because:

*"a. At the time the application was brought appellant had concluded tendering from the Bar all the documents which the deponents purportedly explained in their depositions;*

*b. One of the deponents Iwuamadi had adopted his deposition that was filed along with the petition and cross-examined;*

*c. The deponents were not the makers of the documents and legally speaking they do not possess any competence to comment on those documents;*

*d. The depositions were full of legal conclusions and opinions of the deponents;*

*e. That since those documents were already before the court counsel on both sides were at liberty to comment on the documents in their final addresses."*

Learned Senior Advocate submitted that even if the witnesses deposed that result sheets were not distributed in their depositions, it would amount to hearsay which is inadmissible in law. This is because they are not agents of the applicant linked to the particular polling unit and even if they can be linked to a particular polling or ward, their evidence or deposition is only limited to that particular unit or ward and cannot be a basis for generalisation that result sheets were not distributed throughout the Federation. He urged the court to resolve the issue against the appellant as he did not suffer any disadvantage by the refusal of the application dated 14th November, 2007.

While I agree with learned Senior Advocate for the appellant that section 159(1) of the Electoral Act provides for inspection of documents, I do not agree with him that the subsection is applicable to the case of the appellant in the circumstances. I am of the view that the subsection relates only to instituting and maintaining actions.

***Let me now take the Ruling of the Court of Appeal in the light of the submissions of counsel. Was the Ruling of the Court of Appeal premature? I think not. A court of law can rule on the admissibility or otherwise of a document by examining the***

**contents of the document in the light of the Evidence Act. If the contents of the document sought to be admitted are not in line with the Evidence Act in the sense that they violate a provision or provisions of the Act, the court is competent to reject it. That is the whole essence of admissibility or inadmissibility of documents tendered in court as exhibits. A court of law need not wait for the final stage when parties address the court. This is because our laws of procedure expect counsel tendering a document as an exhibit to present arguments in favour of the admissibility of the document. Although a court of law can reconsider its earlier decision on the admissibility or inadmissibility of the document at the stage of writing judgment, that is not the same thing as saying that the court must wait for other evidence before it to rule on the document tendered.**

In rejecting the documents, the Court of Appeal said in part:

*“I have listened to the argument of counsel on all sides and it is my view that what is sought to be tendered as depositions of witnesses are actually an analysis of the election documents with the opinion and legal conclusions of the witnesses.”*

Learned Senior Advocate for the appellant, in an apparent response to the above, submitted that the depositions complied with sections 86, 87 and 88 of the Evidence Act. Section 86 provides for the contents of affidavits. By the section, every affidavit used in the court shall contain only statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true. Section 87 provides that an affidavit shall not contain extraneous matter, by way of objection, or prayer, or legal argument or conclusion. By section 88, when a person deposes to his belief in any matter of fact, and his belief is derived from any source other than his own personal knowledge, he shall set forth explicitly the facts and circumstances forming the ground of his belief.

Did the depositions at pages 989 to 1434 of Volume 3 of the Record comply with the above three sections as claimed by learned Senior Advocate for the appellant? Answer to the question can only be found by examining some of the depositions. As they are legion,

I will take a few. It should be pointed out that the witnesses are Emmanuel Iwuamadi, Chikaodu Ogu, Ofoegbu Anyanwu and Ejike Elosiuba. For clarity of analysis, I state herein five each of the depositions sworn by each of the four witnesses.

B            Extract of Iwuamadi's Inspection Deposition

---

RIVERS STATE

1. The form EC8B for this ward is dated both 21/4/07 and 22/4/07. This is abnormal and I verily believe, nullified the ward as election could not have been held on both days. Entries in EC8A are inconsistent with entries in EC8B. This to the best of my knowledge is illegal.

D            2. I verily believe that the results above are fundamentally defective and show that there was no election in this ward, and all figures ascribed to parties are arbitrary.

E            3. The EC8B was observed to bear no date. I verily believe that this would not be so if the document was prepared on Election Day at the proper location. I verily believe that the document, not being dated has no electoral value the same being alien to the process.

F            4. I verily believe that the result in the EC8Bs for the three wards and the EC8A of unit 05 are fundamentally defective and should be deducted from votes in the EC8C. The registered voters in the four wards have a total of 25,457 out of 57,851 in the LGA. This, I verily believe is substantial enough to avoid the election in the LGA.

G            5. On examination of the EC8B of both wards, I observed that both purported results were undated and none has INEC stamp. Also no agent of any political party assigned any of them. I verily believe that these are fundamental irregularities the results being alien to the election.

H            Source: Record of Proceedings, Volume III, pages 991, 1001, 1014 and 1019.

            Extract of Ogu's Inspection Depositions

---

ANAMBRA STATE

1. I verily believe that since this LGA recorded 84,273 as hav-

ing voted, the excess of 10,253 amounts to over voting, which to the best of my knowledge voids the election in this LGA.

2. All the recorded scores in the EC8As in this ward were insistent with what was recorded in the EC8B for the ward. I verily believe that this is a fundamental irregularity which makes the EC8B inapplicable in any electoral process. B

3. I verily believe that these mutilated results have no electoral value whatsoever, and could not have emanated from a normal electoral process.

4. In these two wards, the entries in their EC8Bs are inconsistent with those in the Form EC8As for their various units. I verily believe that these results were not produced in a normal electoral process.. To the best of my knowledge, this inconsistency has invalidated the Form ECSBs for these wards, and they cannot be applicable in the election. D

5. I verily believe that the ECAs are alien to the election, and cannot form the basis of any EC8B for the ward, as the results were not obtained in a normal election.

Source. Record of Proceedings, Volume III, pages 1135, 1136, 1137, 1138 and 1139. E

Extract of Anyanwu's Inspection Depositions

---

#### ABIA STATE

1. One other observation that was common to almost all the LGAs I inspected is that there was no evidence of accreditation in any of them except in a few voting units scattered here and there in some wards in Bende LGA on their voters register. I verily believe there was no election anywhere in the State and that whatever votes were returned for Abia State on 21/4/07 were invalid. I also verily believe that all the registered voters on the State were thereby disenfranchised. F

2. I believe that the votes assigned to the parties in the EC8C are invalid and they should be expunged.

3. I believe that this EC8C was not the product of a normal electoral process and that the votes allegedly credited to the parties should be expunged from the EC8D. H

4. Not a single party agent signed the Form EC8C for the LG.

I believe the Collation Officer sat all alone and allocated figures to the parties as his prejudices led him. This, I believe, invalidates the EC8C for the entire Local Government and thus leaves the 67,074 registered voters disenfranchised.

B 5. Failure to affix an INEC stamp on an election result is a fundamental default which, I believe, vitiates the result. I verily believe the votes credited to the parties in the units of wards 1, 3, 5, 7, 9 and 10 referred to in subparagraph (e) hereto are invalid and the persons registered to vote in those units numbering about 3,751 in  
C total were thus disenfranchised.

Source; Record of Proceedings, Volume III, pages 1297, 1298, 1299, 1300 and 1302.

Extract of Elosuiba's Inspection Depositions

D ————— NASSARAWA STATE

1. I verily believe that in the absence of any voting exercise, arbitrary figures were entered to justify the loaded false figures of 8751 entered for PDP without in most cases, any entry for any other  
E party. The total number of registered voters thereby disenfranchised is 2,461 in the five units of registered voters in the Form EC8B for the uninspected seven units are inflated like the five inspected. The correct number of registered voters in the ward after deducting the padded 3,039 in the sample units is 8,813 and not the 11,852 re-  
F corded in the EC8B.

2. From the voters register of 5 units, I inspected out of 7, I observed that there was no Presidential election accreditation mark in those units, which I verily believe means that there was no election in those units. I obtained CTC of the voters register.

G 3. I verily believe that no genuine ANPP agent signed the EC8B as the handwriting of the agents on the document appears unusually similar.

H 4. In the EC8B I observed that in units 003, 004, 005, 006, 007 and 009 all the registered voters in the unit were recorded as having voted, and all such votes credited to PDP. I verily believe that the entries are unattainable and are arbitrary. I verily believe that the results in this ward were not obtained in a normal electoral process.

5. I inspected and obtained certified copies of voters' registers



for six out of the eight units in the ward. No Presidential election accreditation was done in any of them. No party agent signed. The only signature that appears in the agent column does not indicate the party to which the purported agent (O. Y. Freeman) belongs. I, verily believe that the result of this ward did not emanate from a normal electoral process. Number of registered voters affected is 3,360 out of 4,651 and is substantial enough to invalidate the result from the ward. B

Source: Record of Proceedings, Volume III, pages 1423, 1424, 14 25, 1426, 1427, 1432 and 1433. C

The above is a sample analysis of inspection depositions of Rivers, Anambra, Abia and Nassarawa States. The same analysis involved twenty inspection depositions made up of five depositions for each of the witnesses. ***It is clear to me that the twenty inspection depositions do not contain only facts within the knowledge of the witnesses or from information which they believed to be true, but also objections, prayers and legal arguments; thus offending section 87 of the Evidence Act*** D

***While some of the depositions accord with the provisions of section 86 of the Evidence Act, the above samples do not. I must say that there are quite a large number of such like depositions. I merely took the above as sample analysis. It is my view that the depositions which complied with section 86 of the Evidence Act cannot save the entire depositions, as they are drowned by those which violated section 87 of the Act. This is because a court of law is not competent to pick depositions in affidavit which are consistent with section 86 of the Evidence Act and ignore those which violate section 87 of the Act. The Court of Appeal was therefore right in rejecting the depositions.*** See generally Nneji v. Chukwu (1988) 3 NWLR (Pt. 81) 184; FMG v. Sani (No. 2) (1989) 4 NWLR (Pt. 117) 624; Abu v. Alele-Williams (1992) 5 NWLR (Pt. 241) 340; Nigerian LNG Limited v. African Development Insurance Co. Limited (1995) 8 NWLR (Pt. 416) 677; Eze v. Okolonji (1997) 7 NWLR (Pt. 513) 515; Finunion Ltd, v. MV Briz (1997) 10 NWLR (Pt.523) 95. E F G H

***That takes me to the second reason given in paragraph 4.04B(vii) (ii) at page 82 of Appellant's Brief. It is that the wit-***

**nesses were not the makers of the documents inspected and have no legal competence to comment on them. Although by section 91(2) of the Evidence Act, a document is admissible in evidence notwithstanding that the maker of the document is not available** (see *Igbodin v. Obiank* (1976) NMLR 212) **the subsection does not cover the point made by the Court of Appeal regarding the competence of the witnesses to comment on the document.** And here I should make the point that admissibility of a document in evidence is quite different and distinct from the weight to be attached to it. In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by the Evidence Act, regard must be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts. See section 92(1) of the Evidence Act.

Weight can hardly be attached to a document tendered in evidence by a witness who cannot or in a position to answer questions on the document. One such person the law identifies is the one who did not make the document. Such a person is adjudged in the eyes of the law as ignorant of the contents of the document. Although section 91(2) allows him to tender the document, the subsection does not deal with the issue of weight, which is dealt with in section 92. Weight in section 92 means weight of evidence, which is the balance or preponderance of evidence; the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other. See *Black's Law Dictionary*, 6th edition, page 1594. In view of the fact that cross-examination plays a vital role in the determination of the weight to be attached to a document under section 92, and a person who did not make the document is not in a position to answer questions on it, I see the point made by the Court of Appeal.

**I should consider one other point and it is whether they are experts in election or electoral matters within the meaning of section 57 of the Evidence Act? Mr. Iwuamadi is a fish**

**farmer. Mr. Ogu is a trader. Mr. Anyanwu is also a trader. Mr. Elosuiba is a businessman. In fairness to them, they did not claim to be experts and so they did not make the comments as experts. In the light of the above, I am in the company of the Court of Appeal when that court held that the witnesses had no legal competence to comment on the documents.** B

And that takes me to the third reason and it is that all the documents are before the court and that counsel on all sides are free to comment on them. I entirely agree with the Court of Appeal that as all the documents were tendered in evidence, parties were free to comment on them, including drawing inferences and conclusions at the address stage. **The function of a witness who is not an expert within the Evidence Act is to give evidence on the facts. He cannot make inference on the facts or parade before the court in the witness box opinions and legal arguments purportedly drawn from the facts. He must leave that to his counsel and the court to do so.** D

Messrs Iwumadu, Ogu, Anyanwu and Elosiuba, in my view, usurped the functions of Chief Ahamba and the Court of Appeal when they made the statements tabulated above. There is a clear division of functions in the adjudicatory process and courts of law jealously and zealously guide and guard the rules. As counsel have the freedom of our adjectival law to comment on the documents, no injustice was done to the appellant by refusing the witness inspection documents and I so hold. As I have already taken the fourth one, **I will go to the last one and it is that the application had no support in the Practice Directions.** F

**With the greatest respect, I am not with the Court of Appeal. I am rather with Learned Senior Advocate for the appellant. In the hierarchy of our jurisprudence, Practice Directions come last in terms of authority in the area of conflict. I do not think I sound clear. Let me make myself clearer. If there is a conflict between the Constitution and Practice Directions the former will prevail. This is too obvious to be mentioned. If there is a conflict between an enabling statute and Practice Directions, the former will also prevail. This is also an obvious one. Perhaps the less obvious one is where there** H

**is a conflict between enabling Rules of Court and Practice Direction. In my view, even here, the enabling rules of court will prevail. This is, because in certain cases Rules of Court empower the head of court to make Practice Directions. And so in the event of any conflict, the authority of the mother who gave birth to the child (putting it on the lighter side) should be recognized first as the first and foremost authority.**

In faulting the decision of the Court of Appeal, learned Senior Advocate for the appellant relied on the decision of the Court of Appeal in Abubakar v. Yar'Adua, CA/A/EP3/07 and that of this court in the same case of Abubakar v. Yar'Adua (2008) 4 NWLR (Pt. 618) 405 on the need to give parties full opportunity to ventilate their cases without due regard to technicalities.

It is elementary law that cases are decided on the basis of the facts presented before the court. Certainly the facts in Abubakar v. Yar'Adua, supra, which gave rise to the decision relied upon by learned Senior Advocate are not similar to those of this case. Although the earlier case dealt with the filing of list of witnesses and witnesses' statements, the facts are not the same, particularly in the light of the decision of the Court of Appeal that the depositions are "*an analysis of the election documents with the opinion and legal conclusions of the witnesses.*" Such was not the position in Abubakar v. Yar'Adua, CA/A/EP3/07. This is therefore not a good example of the cliché or axiom that what is good for the goose is also good for the gander.

Learned Senior Advocate for the 4th and 5th respondent raised an argument on hearsay. Apart from the very narrow area of the argument, as it relates only to result sheets, when the depositions cover larger areas, I do not see the necessity of taking the issue in the light of my decision. I will therefore not take it. I am not even quite sure that counsel is right.

There is one final point and it is in respect of Emmanuel Iwuamadu. He had earlier adopted his deposition filed along with the petition in his capacity as State Collation Supervising Agent of Imo State. This is at pages 85 to 88 of volume 1 of the Record of Appeal. And so by the application of learned Senior Advocate for the appellant, Emmanuel Iwuamadi was to give evidence in the matter the second time. The procedure known to me is that if a party

wants a witness who had earlier testified in court to give further evidences, an application is made before the court to that effect. With leave of the court, the witness is recalled to give further evidence. Was that procedure followed? If not, why not? Did the Practice Directions prohibit the procedure? If not why was the procedure not followed? Can a witness who had earlier given evidence in court appear before the court to give evidence without leave of the court? I leave the matter. I will not pursue it. B

I go to Issue 8 on the depositions of the 4th and 5th respondents. As learned Senior Advocate dropped the complaint against the depositions on behalf of the 1st and 2nd respondents, I will take only the submissions in respect of the 4th and 5th respondents. The crux of the submission of learned Senior Advocate on the depositions of the 4th and 5th respondents is that as they were sworn by letters of the alphabet and not by human beings, they are incompetent. He argued that deponents are human beings and not letters of the alphabet. On the other hand, the crux of the submission of learned Senior Advocate for the 4th and 5th respondents is that, as the appellant did not object to the procedure but rather acquiesced to it, he cannot complain now. That is the dispute. D E

At what point or stage in the proceedings did learned Senior Advocate raise the issue? I should go to the Record. It is at the point or stage of his address in the Court of Appeal. In paragraph 36.05E at page 2366 of the Record of Appeal, Volume VI, counsel said in his address: F

*“In any case the 5th and 6th Respondents case is not supported by a single legally sustainable deposition. This is because none of the depositions relates to any identifiable human being or any address since the depositions were sworn by alphabet. Under the Evidence Act this is not permissible. It is also not provided for in the Practice Directions 2007 in that the amendment which allowed deponents to use alphabet in lieu of name relates only to paragraph 1 of the Practice Directions 2007 which is on the petitioner only and is not in anyway connected with or referable to paragraph 2 thereof which is the paragraph that covers the respondent in an election petition. The depositions having been adopted by consent and order of court are, it is submitted legally and properly before the court. But* G H

*having so been adopted by counsel, it is submitted that none of them is a valid testimony utilizable in a judicial proceeding such as this. This is because a deposition is a written ‘testimony of a human being in lieu of oral testimony.’*

**It is clear from the above that counsel for the appellant did not raise any objection to the depositions when they were tendered. In the words of counsel, they were “adopted by consent and order of court.” Was it not too late in the day for learned Senior Advocate to urge this court “to resolve the issue in the negative and in favour of the petitioner and allow ground 11.” While issue of jurisdiction can be raised at any time in the proceedings, even on appeal in the Supreme Court, I do not think the issue raised is one of jurisdiction.**

**In *Chief Fawehinmi v. NBA (No. 1) (1989) 2 NWLR (Pt. 104) 409*, this court held that if an objection is not radical and does not go to the essence, like jurisdiction, as opposed to mere formal objection, then such an objection must be raised at the earliest opportunity; otherwise the party objecting, by failing to do so on time may be deemed to have accepted the state of things as it was and may otherwise be estopped by his conduct from raising the objection in a future date.**

In the more recent case of *Amaechi v. INEC* (2008) 5 NWLR (Pt. 1080) 227 where, like in this case, where documents were admitted in evidence as exhibits by counsel, Oguntade, JSC, said at page 313:

*“From the extract of the proceedings reproduced above, it is apparent that all the parties including INEC, Omehia and PDP agreed that exhibits A-F be put in evidence by consent. None of them afterwards disputed the contents of the said documents. The judgment of the trial High Court was based on the said exhibits A-F not on the admissions made by any of the parties. The parties had chosen to follow a procedure which was not the usual practice but which nevertheless satisfied the requirements of fair hearing. I do not therefore think that the submission of senior counsel for Omehia on the point is well founded.”*

This judgment hits the submission of learned Senior Advocate on the head. Like my learned brother, Oguntade, JSC, I am also of

the view that the submission of learned Senior Advocate for the appellant on the point is not well founded. I expected counsel to raise the objection right there when the documents were tendered. I also expected counsel to insist on a ruling. Although I concede that a document which is inadmissible but erroneously admitted can be expunged from the record at the stage of writing judgment, the appellant did not make the case well in this appeal. B

There is a more fundamental point and it is that the Practice Directions provide for the procedure. The Amendment to the Practice Directions dated 10th May, 2007 in paragraph 1(ii) allows the use of letters of the alphabet. As the amendment came into effect on 3rd April, 2007, it covers the issue here. In the light of the above, the issue is dead. C

There is another point and it is whether the Court of Appeal made direct use of the depositions in its judgment. I have gone through the judgment and I do not see where the court made direct use of the evidence in the depositions against the appellant. The Court of Appeal made copious use of the evidence adduced by the appellant and dismissed the appeal. If a court of law does not make use of evidence of witness, the evidence will be regarded as dead or moribund in the determination of the live issues in the matter. That is the way I will regard the depositions of the 4th and 5th respondents witnesses. As the Court of Appeal did not place probative value on the evidence, the issue is of no moment and I so hold. D E F

Learned Senior Advocate for the appellant argued Issues Nos. 2 and 6 together. I will take them separately. Issue 2 is on the decision of the Court of Appeal that the petitioner presented evidences on four States only.

On the issue, the Court of Appeal said in the concluding paragraph at page 2708, Volume II of the Record: G

*"In conclusion, this petition has been plagued by want of evidence in proof of virtually all the allegations contained therein. Even if I were to accept all the excluded evidence proffered by the Petitioner which evidence relates only to four States of the Federation, the Petitioner would still have been unable to establish this petition."* H

**From the above conclusion of the Court of Appeal I do not think there is really an issue in respect of whether the**

**evidence led by the appellant was in respect of only four States or not. I say this because by the conclusion, it is clear that even if the evidence on the four States is in favour of the appellant, the petition would have failed.**

B In analyzing the above conclusion, learned Senior Advocate said in paragraph 4.06A(i), pages 90 and 91 of the Brief of the Appellant:

*"In other words, the learned Justice had said: that the Petitioner had adduced no evidence to entitle him to judgment because*

C *(a) he had presented evidence from only four States out of 36, and that*

*(b) the said evidence from four States had been lawfully excluded and did not therefore form part of the evidence before the court. Put another way, that the Petitioner had brought no evidence, whatsoever in proof of his case!"*

D Learned Senior Advocate has omitted one vital point and it is that even if 'the evidence on the four States is in favour of the appellant, the petition would have failed. I have made the point above. **It is in respect of that conclusion that I am in agreement with learned Senior Advocate for the 1st and 2nd respondents that the conclusion was an obiter dictum. The law is trite that a**

E **ground of appeal cannot be based on an obiter dictum. A ground of appeal is based on a ratio decidendi. An orbiter dictum is, as a general principle of law, not binding on courts; F a ratio decidendi is.**

In the most unlikely event that I am wrong, I rely on the submission of learned Senior Advocate for the 1st and 2nd respondents in paragraph 6.21, pages 48 and 49 of the Brief. Let me copy the relevant portion here:

G *"But in the end, only twenty witnesses' depositions were filed. That translated to an average of less than 1 witness per State and the Federal Capital Territory. The twenty witness depositions filed by the appellant were only in respect of five States. These were Katsina, Abia, Imo, Plateau and Rivers States. The appellant did not challenge*

H *the conduct of the election in Plateau State and so the single witness deposition filed in respect of that State was unsupported by pleadings and went to no issue. The court below was quite right, therefore, when it held that the appellant offered evidence only in respect of*



*four States.”*

This is a very good one for the respondents and a very bad one for the appellant. I expected the appellant to reply to it in his Reply Brief. He did not. Facts, the saying goes, are sacred because they convey things that have actually happened or things that are accepted as being true. In the circumstances, the appellant was not in a position to dislodge the submission and I cannot blame him; rather I sympathise with the appellant. B

I will jump Issue 3. I will take it later. I will take Issue 6. Learned Senior Advocate dealt with it from page 94. Following the tendering of seven sets of Form EC25 from seven Local Government Areas in Rivers State, counsel for the respondents objected. The Court of Appeal ruled at page 2530 of Volume VI of the record: C

*“The petitioner has sought to tender some INEC documents and the respondents have objected to their admissibility on the ground that they were not pleaded. The law is that facts are to be pleaded not evidence. The facts pleaded by the petitioner in the petition have sufficiently laid the foundation for the admission of the document. It is amazing that even INEC is objecting to admissibility of its own certified documents. The objection of the respondents is overruled and the documents are admitted as Exhibits EP/25(e) 1-7.”* D E

It is the submission of learned Senior Advocate for the appellant that the above ruling given so very early in the proceeding covered all INEC certified documents tendered before the court, whether they were tendered by PW1 or from the Bar. Citing *Nnaji for v. Ukonu* (1985) 2 NWLR (Pt. 9) 686 at 706, learned Senior Advocate, contended that the Court of appeal cannot render nugatory by departing from same, the effect of its decision in a considered ruling in the same proceeding particularly where the objection thereafter raised relate to what has been overruled or what the respondents are estopped from raising. Counsel also relied on *Skenconsult Ltd. v. Ukey* (1981) NSCC 1; *Ogbuinyinya v. Okudo* (1979) 6-7 SC 32; *Balonwu v. Obi* (2007) 5 NWLR (Pt. 1028) 488. F G

Learned Senior Advocate submitted that the Court of Appeal was in error when acting on the objection raised by counsel to the respondents in their final address, it came to the conclusion that the document tendered were not covered by pleadings in the petition, H

and that the petitioner had presented evidence from only four States. Where documents are taken as read, the legal implication is that they speak from their lines and the contents are admitted as evidence before the court to be applied by the court, counsel contended. A document which may be proved by production under section 112 and 113(a) of the Evidence Act, once produced from proper custody constitute documentary evidence utilizable per se by the court in the determination of the issues before the court, learned Senior Advocate argued. He referred to Ogbuinyinya v. Okudo, supra; Bijou v. Oshidarohwa (1992) 6 NWLR (Pt. 249) 463; Iweleqbu v. Ezeani (1999) 12 NWLR (Pt. 630) 266 and section 76 of the Evidence Act. On INEC certified documents, counsel relied on Nwobodo v. Onoh (1984) 1 SC 1.

Learned Senior Advocate for the 1st and 2nd respondents pointed out that the ruling of the Court of Appeal was in relation to a particular set of documents sought to be tendered by the appellant through one Emmanuel Iwuamadi. Counsel took time to reproduce the proceedings at page 2529, Volume VI of the record and contended that the ruling admitting the seven sets of documents could not relate to documents yet to be tendered or documents admitted or , rejected in the past.

Learned Senior Advocate explained the procedure where documents are admitted which ought not to be and when that happens, the court expunges them from its record and refuses to place any reliance upon them. When that happens the court is not reversing itself but rather is merely saying that the documents ought not to have been admitted in the first place. He contended that the submission of learned Senior Advocate for the appellant that the admission of a particular set of documents committed the court to admit other documents sought to be relied upon by the appellant, is strange. Counsel did not see the applicability of the cases cited by learned Senior Advocate for the appellant.

Learned Senior Advocate submitted that the appellant did not state the order of the Court of Appeal which he construed as overruling the order made on the 23rd October, 2007, admitting Exhibits EP2/5(e) 1-7. Learned Senior. Advocate for the 4th and 5th respondents dealt with the essence of pleadings in adjudication. He exam-

ined paragraphs 9B of the Petition and submitted that the appellant did not prove his case. I do not see any direct reply to Issue 6 of the Appellant's Brief which covers Ground 12 in Issue 5 of the 4th and 5th Respondent's Brief which also covers the same Ground 12.

I think I have enough in the Briefs of the appellant and the 1st and 2nd respondents to dispose of the issue. ***Ruling on the admissibility or otherwise of a document is a specific adjudicatory act or function of the trial court. The ruling is specific on the document or documents tendered for admission as exhibit or exhibits. The ruling is therefore tied to the particular document or documents and cannot in anyway affect any previous documents admitted or rejected or any future documents yet to be tendered before the court. This is a most elementary procedure and logic. Documents may be of the same make, content or quality. This does not mean that an earlier admission of similar document possessing the same make, content or quality means that the other documents yet to be tendered but have the same toga or status of the admitted or rejected documents are admitted. That cannot be law and it is not law. Documents in a case, to say on the lighter side, are not twins and the court cannot treat them as such. Even twins, at times and in most times, act differently and their parents treat them in their specific conduct displayed. Parents do not foist the conduct of one twin on the other. Why then documents?***

Learned Senior Advocate for the 1st and 2nd respondents made a very important point and it is that learned Senior Advocate did not state the order of Court of Appeal which he construed as overruling the order made on 23rd October, 2007. Let me make a confession here. After reading the submission of Learned Senior Advocate, I made some effort to locate the order overruling the 23rd October, 2007 but I could not place my hands on it. I have the impression that the overruling order is in the judgment. I was in some hurry. But is it the duty of the court to locate the order? Is it not the duty of the appellant to call the attention of the court to the overruling order? After all, the case is his and not the court's. As the whole basis of the issue is on the subsequent overruling, order, counsel owed his client a professional duty to call the attention of the court to that

order. As he failed to discharge that professional duty, this court cannot be of any help or assistance to the appellant. The issue fails,

I take Issue 10, which is on whether the Court of Appeal was right when it assumed jurisdiction to inquire into the propriety of Exhibit EP2/34. Learned Senior Advocate for the appellant submitted that as the parties to the dispute joined issue on the critical issue of the competence of the instituting authority to issue the White Paper indicting the 4th respondent, the Court of Appeal was 'bound under the law to make a pronouncement on that. He cited Balogun v. Labiran (1988) 3 NWLR (Pt. 80) 66. Relying on Woluchem v. Gudi (1981) 5 SC 291; Kate Ent. Ltd. v. Daewoo (1978) 4 SC 91 and section 22 of the Supreme Court Act, learned Senior Advocate urged the court to pronounce on the vital issue of competence of the Court of Appeal to determine the validity or otherwise of Exhibit EP2/34.

Learned Senior Advocate submitted that only High Court of Abia State and the Federal High Court of Abia State can exercise the jurisdiction to engage in a judicial review of an administrative act of a body set up by a competent authority, the Abia State Government, and not the Court of Appeal. He called the attention of the court to section 26 of the High Court Law of Eastern Nigeria 1963 applicable to Abia State, as amended by the High Court (Amendment) Law 1988 of Imo State, Order 43 Rule 1 of the High Court of Abia State (Civil Procedure) Rules and section 46(1) of the Constitution of the Federal Republic of Nigeria.

Counsel argued that the jurisdiction of the Court of Appeal under section 239(1) of the Constitution is limited to hearing and determining whether any person has been validly elected to the office of President or Vice President; whether the term has ended; or whether the office has become vacant. Citing Tukur v. Government of Gongola State (1989) 4 NWLR (Pt. 117) 517, counsel submitted that it is the function of the courts to expound their jurisdiction and not expand it.

Relying on Action Congress v. INEC, supra, and Amaechi v. INEC, supra, the Court of Appeal said at page 2683 of the Record:

*"Nowhere ex facie in the White Paper was it stated that the 5th and 6th respondents were indicted for fraud and embezzlement as*

*required by section 137(1)(i) of the Constitution to disqualify the 5th and 6th respondents. From the foregoing, the issue of disqualification is of no moment and it is resolved in favour of the respondents.”*

I agree with learned Senior Advocate for the appellant that the court did not deal with the issue of its competence to inquire into the validity of Exhibit EP2/34. I also agree with him that the Court of Appeal ought to have dealt with the issue of competence. He is also correct in urging this court to examine section 22 of the Supreme Court Act to resolve the issue. I will do just that.

Learned Senior Advocate cited section 26 of the High Court Law of Eastern Nigeria 1963 applicable to Abia State, as amended by the High Court (Amendment) Law, 1988 of Imo State and Order 43 Rule 1 of the High Court of Abia State (Civil Procedure) Rules and section 46(1) of the Constitution as authority for his submission.

What bothers me is: why is reference made to the High Court Law of Eastern Nigeria, 1963 and the High Court (Amendment) Law, 1988 of Imo State when Abia State has the High Court Law, Cap. 48, Laws of Abia State of Nigeria, 1991-2000? Are the two statutes cited by learned Senior Advocate not abrogated on the enactment by the 1999-2000 statutes of the State? Is there still any life in the two statutes cited by learned Senior Advocate except any provision therein repeated in the 1999-2000 Statutes of Abia State?

There is another aspect of the matter and it is the citation of Order 43 Rule 1 of the High Court (Civil Procedure) Rules of Abia State. While I agree that they are the current Rules, can Rules of Court vest jurisdiction in a court of law? Rules of court do not possess any legal capacity to vest jurisdiction in a court. That is never their function. The function belongs to the Constitution and statutes; not rules of court. I will therefore not examine the content of Order 43 Rule 1 of the High Court (Civil Procedure) Rules of Abia State.

As jurisdiction is vested in the High Court of Abia State by the Constitution and the High Court Law of the State, I will resolve the issue of jurisdiction by reference to the two laws, and here I use laws generally to cover the Constitution and the High Court Statute of Abia State.

In first place, I have thoroughly examined the 83 sections of the High Court of law of Abia State and I cannot find any section

providing for the submission of learned Senior Advocate that the High Court of Abia State is the court or better still, the only court to deal with judicial review of an administrative action. Perhaps he should have referred to the general provision of section 272(1) of the Constitution. It is a different matter altogether whether the subsection could have availed the appellant. I may return to this somewhere and somehow.

Learned Senior Advocate also referred to section 46(1) of the Constitution. The ipsissima verba of the subsection is as follows:

*“Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.”*

Why is the section 46(1) jurisdiction of the High Court of a State relevant? Does the matter involve fundamental rights for the jurisdiction of the High Court of a State to be invoked? Although learned Senior Advocate did not satisfy me in respect of the provision of the Constitution for his proposition, I have the feeling that section 272(1) of the Constitution will do it, as a court of first instance. Will the Court of Appeal sitting as a court of first instance not exercise the jurisdiction in relevant cases of judicial review of an administrative act? I am not quite confident on this. I will therefore not pursue it. I merely thought aloud. It is possible my thoughts are wrong.

***Let me take the one I am surer. I am in some difficulty to agree with learned Senior Advocate for the appellant that the setting up of the Commission was totally and fully an administrative act. I am of the view that it has some content of quasi-judicialism. I should take it further by saying that the findings of the Commission headed by a Judge of the High Court of Abia State are clearly judicial and therefore the appropriate courts of law, including the Court of Appeal, have jurisdiction and competence to inquire into the validity or otherwise of the findings of the Commission; relevantly Exhibit EP2/34.***

The appellant tendered Exhibit EP2/34. In a desperate effort to remove from the Record what the Court of Appeal said, counsel also submitted that as the instituting authority is not a party to the proceedings, the Court of Appeal was not competent to inquire into the exhibit. This is quite a smart one. Why did the appellant tender

the document when he knew that the instituting authority is not a party to the proceedings? Or a better question, did the appellant realise that the constituting authority is not a party to the proceedings, after his counsel tendered. This is rather too smart or clever, for my liking. Certainly the submission of learned Senior Advocate for the appellant is ridiculous and to no avail to the appellant. I am of the view that the Court of Appeal competently inquired into the validity or otherwise of Exhibit EP2/34. The appellant who tendered Exhibit EP2/34 cannot gag the Court of Appeal anyway. He cannot get the first as well as the last words in this issue. No. That will be unjust to the respondents. By the submission of counsel, the Court of Appeal is asked to look only into the case of the appellant and give him judgment without hearing the case of the respondents. As that is against the natural justice rule of *audi alteram partem*, the Court of Appeal did the proper thing.

And that takes me to the merits of Exhibit EP2/34. The exhibit, a White Paper, came out from the Report of a Commission of Inquiry which indicted the 4th and 5th respondents of corruption. The Commission of Inquiry was set up in anticipation and fulfillment of section 137(1)(i) of the Constitution of the Federal Republic of Nigeria, 1999. This is clearly stated at page 5 of Volume I of the Record as follows:

*“The Petitioners shall contend that as at 21st April, 2007, the date upon which the election was purportedly held, the 5th respondent was not competent to contest an election to the Presidency of the Federal Republic of Nigeria by virtue of section 137(1)(i) of the Constitution of the Federal Republic of Nigeria (hereinafter the Constitution) consequent upon which his election is void.”*

The subsection is in the following terms:

*“A person shall not be qualified for the election to the office of President if he has been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or an Administrative panel of Inquiry or a ‘tribunal set up under the Tribunals of Inquiry Act, a Tribunal of Inquiry Law or any other law by the Federal or State Government which indictment has been accepted by the Federal or State Government respectively.”*

By the above subsection, an indictment by a judicial Commis-

sion of Inquiry, or an Administrative Panel of Inquiry or by a Tribunal, is enough to disqualify a person from contesting election to the office of President. **A person so indicted has the constitutional right to seek redress in a competent court of law. In my humble view, a court of law of competent jurisdiction is in a position to order that the election to the office of President be deferred pending the determination of the case. This will certainly cause some hardship, not only to the candidates but also to Government.**

**That, I think, is the basis or rationale for the decisions learned Senior Advocate for the 1st and 2nd respondents cited in paragraph 5, pages 31 and 32 of the Brief. In order to avoid hardship to the other candidates and more importantly to the itinerary of Government in terms of scheduling the Presidential election, the proper time to challenge the qualification of a Presidential candidate should be after the conduct of the election and the announcement of result. This is what section 145(1) of the Electoral Act, 2006 provides. See *Obasanjo v. Yusuf* (2004) 9 NWLR (Pt. 877) 144. As correctly pointed out by learned Senior Advocate for the 1st and 2nd respondents, that is what the appellant did in this case as in the petition in paragraph 8(a) which reads:**

***“The grounds upon which this petition is brought are as follows:***

**(a) *The 5th Respondent Umaru Musa Yar’Adua was at the time of the election not qualified to contest the election.*”**

Is section 137(1)(i) a blanket provision enabling a Commission of Inquiry set up by a State Government to make inquiries in any part of the country, even outside the State? To be more specific, does the Commission of Inquiry Law of Abia State vest power on a Commission of Inquiry to inquire into activities of the 4th and 5th respondents? I made serious efforts to get hold of the Commission of Inquiry Law of Abia State but I could not succeed. All the Commission of Inquiry Laws I examined have a common uniform provision in section 1 and it is vesting power in the Governor of the State to “hold a Commission of Inquiry in the conduct of any officer in the public service of the State (name of the State...)”



That provision is consistent with the federal arrangement in the Constitution as provided for in section 4 of the 1999 Constitution. To be more specific, section 4(7) of the Constitution provides that the House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the matters enumerated in (a), (b) and (c). B

***By section 4(7), the Governor of Abia State can only set up a Commission of Inquiry in respect of public officers in Abia State. He has no constitutional competence to set up a Commission of Inquiry to inquire into activities of public servants in any other State. It is in this respect I agree with learned Senior Advocate when he pointed out that the 4th and 5th respondents had never been in the public service of Abia State. He correctly pointed out that at the material time they were Governors of Katsina and Bayelsa States respectively. How come the commission of Inquiry on them? The purported Commission of Inquiry set up by the Governor of Abia State attempts to destroy the federal arrangement in the Constitution. As the Governor had not the constitutional power to set up the Commission of Inquiry, the findings arising from the Inquiry as in Exhibit EP2/34 are a nullity and I so hold.*** C D E

The 4th and 6th respondents pointed out that a court of competent jurisdiction in Abia State set aside Exhibit EP2/34. That is how it should be. Unfortunately, learned Senior Advocate for the appellant did not call the attention of the Court to this. It is possible he forgot it. It is also possible that he thinks the court was in error in setting aside Exhibit EP2/34. Even in this regard, I expected counsel to so argue in the Brief. In the most unlikely event that I am wrong in my conclusion that Exhibit EP2/34 is a nullity, I will take some alternative areas. F G

There is also the aspect of fair hearing as provided for in section 36 and in particular the principle of audi alteram partem. See the Eternal Sacred Order of Cherubim and Seraphim v. Adewumi (1966) 2 ALR (comm) 85; Denloye v. Medical Practitioners Disciplinary Committee (1968) All NLR 306; Otapo v. Sunmonu (1987) 2 NWLR (Pt. 58) 587; Olaniyan v. University of Lagos (1985) 2 NWLR (Pt. 9) 599. It is an elementary principle of law that a party cannot be H

condemned for an offence or wrong unless he is heard or given an opportunity to be heard. There is no evidence that the 4th and 5th respondents were heard or given opportunity to be heard. I see the entire proceedings of the so-called Commission of Inquiry as a kangaroo arrangement or affair as it was entirely a sham legal proceeding in which the rights of 4th and 5th respondents were totally disregarded because of the bias of the Commission of Inquiry. What a shame!

Following the findings of the Commission of Inquiry, Exhibit EP2/34 purportedly indicted the 4th and 5th respondents of “having done their jobs contrary to the Laws, Rules, Principles and Regulations”. Learned Senior Advocate for the appellant urged the Court of Appeal to hold that as the 4th and 5th respondents were indicted pursuant to section 137(1)(i) of the Constitution, they were disqualified from holding public office. Counsel did not repeat the argument in this court. He merely dealt with the issue of incompetence on the part of the Court of Appeal to inquire into Exhibit EP2/34.

What is the legal content of the words “having done their jobs contrary to the Laws, Rules, Principles and Regulations?” Each of the four words is large in its legal content and therefore not capable of a precise and definite legal meaning. The jurisprudential definition of each of the four words is not easily fathomable not to talk of all of them put together in Exhibit EP2/34. What laws, rules, principles and regulations is Exhibit EP2/34 referring to? Are they the laws, rules, principles and regulations in Abia State or those of the Federation or better still those of Katsina and Bayelsa States? If they are of any of the States or the Federation mentioned above, what are the specific laws, rules, principles and regulations? The answer is that the alleged wrong doing on the part of the 4th and 5th respondents as having done their jobs contrary to the laws, rules, principles and regulations is vague, nebulous, abstract and not capable of any legal meaning and therefore cannot come within the provision of section 137(1)(i) of the Constitution.

**Section 137(1)(i) talks of indictment. An indictment is a written accusation preferred against a person charging him with an offence or offences before a court of law. In short, an indictment is an information or charge preferred by the State**

**against a person. In *Okotie-Eboh v. Manager* (2004) 18 NWLR (Pt. 905) 242, Pats-Acholonu, JSC, in search of the meaning of indictment, said at pages 287 and 288:**

*"The real issue is whether or not the decision of the election tribunal that the respondent voted twice in an election is an indictment within the meaning of the term indictment. Black's Law Dictionary defines the word indictment as an accusation in writing found and presented by a grand jury legally convoked and sworn to the court in which it is empanelled, charging that a person therein named has done some act or been guilty of some omission which by law is a public office punishable on indictment... On the other hand, Buntons Legal Thesaurus, 3rd Edition, defines it as 'accusation, complaint, associated with commission of a felony'. Words and Phrases Legally Defined defines it as 'a written accusation preferred 'before the Crown court signed by the proper officer of that court and charging one or more persons with the commission of one or a number of offences.' From these plethora of definitions, as stated above, **it needs hardly said that the term 'indictment' in the content it is used in the text to wit, section 66(1)(h) of the Constitution impresses me that the word embraces an allegation or committal of something in the nature of a felony, which act having been committed has occasioned the drafting of a charge with a view to prosecuting the person.**"*

**I entirely agree with Pats-Acholonu, JSC that an indictment involves an allegation or committal of a crime which necessitates the drafting of a charge.**

**That is the essence of section 137(1)(i) of the Constitution which provides specifically for the offence of embezzlement or fraud. The question is whether the Commission of Inquiry set up by the Governor of Abia State found the 4th and 5th respondents were not specifically found guilty of embezzlement or fraud? There is nothing in the words having done their job contrary to the Laws, Rules, Principles and Regulations to so suggest. In other words, the 4th and 5th respondents were not specifically found guilty of embezzlement and fraud and so Exhibit EP2/34 does not articulate or vindicate section 137(1)(i) of the Constitution, as it is clearly on its own and**

**therefore to no avail to the appellant.**

There is one final point and it is whether Exhibit EP2/34 in its large wording relates to crime and criminality? My answer is “No”. This is clear from Exhibit EP2/34 which reads in part as follows:

B *“That the following persons hereunder listed who were found to have done their jobs contrary to the laws, rules, principles and regulations be reprimanded, indicted and punished accordingly to the relevant laws.”*

C How will the 4th and 5th respondents be charged? Is there any offence in the Criminal Code of persons having done their jobs contrary to the laws, rules, principles and regulations”? I see from Exhibit EP2/34 the need for Nigerian Judges to maintain a very big distance from politics and politicians. Our Constitution forbids any mingling. As Judges, we must obey the Constitution. The two profes-

D sions do not meet and will never meet at all in our democracy in the discharge of their functions. While politics as a profession is fully and totally based on partiality, most of the time, judgeship as a profession is fully and totally based on impartiality, the opposite of partiality. Bias is the trade mark of politicians. Non-bias is the trade mark of the

E Judge. That again creates a scenario of superlatives in the realm of opposites. Therefore the expressions, “politician” and “Judge” are opposites, so to say, in their functional contents as above; though not in their ordinary dictionary meaning. Their waters never meet in the

F same way Rivers Niger and Benue meet at the Confluence near Lokoja. If they meet, the victim will be democracy most of the time. And that will be bad for sovereign Nigeria. And so Judges should, on no account, dance to the music played by politicians because that will completely destroy their role as independent umpires in the judicial pro-

G cess. Let no Judge flirt with politicians in the performance of their constitutional adjudicatory functions. When I say this, I must also say that I have nothing against politicians. They are our brothers and sisters in our homes. One can hardly find in any Nigerian community or family without them. There cannot be democracy without them

H and we need democracy; not despotism, oligarchy and totalitarianism. They are jolly good fellows. The only point I am making is that their professional tools are different from ours and the Nigerian Judge should know this before he finds himself or falls into a mirage where

he cannot retrace his steps to administer justice. That type of misfortune can fall on him if the National Judicial Council gets annoyed of his conduct. Ours are not theirs. Theirs are not ours. I will not say more. I will not say less too. So be it.

Let me now take the issue of evaluation of the evidence. I do not know the correct number of the issue. While the Issue is numbered as 2 at page 16 of the Brief of the appellant, it is numbered as 3 at page 90 of the Brief. It is likely to be Issue 3. That is not important. I will deal with the issue raised and it is that the Court of Appeal did not properly evaluate the evidence before it.

Evaluation of evidence for our purpose is the appraisal of oral evidence and the ascription of probative value to the evidence resulting in the finding of facts. As it is, the definition excludes documentary evidence. A trial Judge should take into consideration the following principles in the evaluation of evidence:

1. In the evaluation of evidence, the trial Judge should only be concerned with the issues joined by the parties, which are live in the sense that they will determine the merits of the case. In other words, the trial Judge should only take into consideration what he regards as the likely winning evidence and the likely losing evidence. Again, in other words, relevancy, the heart beat of the Law of Evidence (see Part II of the Evidence Act) is the goal of evaluation and the trial Judge must have it in view in his evaluation exercise.

2. The trial Judge can begin or commence with the evidence of any of the parties. That is, he can begin or commence from the evidence of the plaintiff or the defendant as he deems fit. Although, the general practice is to begin or commence with the evidence of the plaintiff, there is no hard and fast rule. It is a question of choice or style. The important thing is whether at the end of the day, the learned trial Judge gave equal and compassionate consideration to the evidence of both parties.

3. The trial Judge should give equal strength to the case of the parties in the evaluation exercise. He should not project the case of one of the parties more than the other. That will lead to the charge of bias or likelihood of bias, depending on the depth and impact of the evaluation as it relates to the party put at a disadvantage by the evaluation or who has suffered the discrimination.

4. The result of the evaluation should not leave an appellate court in doubt that the trial Judge heard the evidence before him to the last sentence and the last word.

B 5. The trial Judge in the course of the evaluation of evidence, takes into consideration evidence that violate the provisions of the Evidence Act and reject or expunge or jettison the evidence. One example is hearsay evidence. If the trial Judge wrongly admitted it at the trial, he can expunge or jettison it at the evaluation stage.

C 6. The trial Judge should take into consideration the demeanour of witnesses in the evaluation of evidence. Demeanour, which is outward or overt behaviour or manner of a witness, is the exclusive domain of the trial Judge. It includes all open habits and mannerisms of the witness. These ooze out from the body of the witness spontaneously and not tutored. Some of such body movements include a D spontaneous positive or negative reaction to a question; shouting at a particular moment or the opposite action of a pretentious mum conduct; movement of part of the body, particularly the hands and the sudden change in the face arising either from anger or happiness, the latter resulting in either a smile or laughter. Another is a sudden E remorse on the part of the witness, usually exhibited by refusal to look at the Judge or counsel, or others in the court, but a sudden drop of the face in the witness box. There are quite a number of behaviours in the determination of demeanour which cannot be ex- F hausted. I can stop with the above as the major conducts of witnesses. I should complete the picture by saying that as appellate judges are deprived of watching the demeanour of witnesses, trial Judges owe the administration of justice a big duty to arrive at the correct conclusion. Of course appellate Judges are not completely hopeless G or helpless. They can watch the evaluation of demeanour by the Judge in the cold records.

H 7. Ipso facto, there is not much in the trial Judge believing the evidence of one of the parties and disbelieving the evidence of the other party. There is everything in whether the belief or disbelief is borne out from the Record. I say this because in a number of judgments, trial Judges use the two expressions randomly. Inappropriate use of the two expressions may result in an appellate court holding that the findings are perverse. I will take the principles as they relate

to the appellate courts, anon. .

8. The trial Judge should take into consideration the totality of the evidence (inculpatory and exculpatory) before the court and not only aspects of the evidence. In other words, the trial Judge cannot pick evidence of some witnesses and ignore others.

After the evaluation of evidence, the final function of the trial court is to the totality of the evidence on an imaginary scale to see where and at what point the pendulum tilts. It is where the pendulum tilts in favour that has judgment. In other words, where the pendulum tilts in favour of the plaintiff, he has judgment. Where the pendulum tilts in favour of the defendant, the plaintiff's case is dismissed.

I think I can stop here. I do not want to pretend that the above principles I have stated are exhaustive. No. They are random principles that occurred to me. And that takes me to the principles which an appellate court should consider in the evaluation of evidence by the trial Judge:

1. Evaluation of trial evidence is the primary responsibility of the trial court and so an appellate court cannot interfere just for the asking by an appellant.

2. An appellate court will however evaluate the evidence before the court if the trial court fails to do so; and this is from the Record.

3. An appellate court will also evaluate the evidence before the court if the 'trial court failed to evaluate the evidence properly in the sense that the evaluation is perverse. And so, the evaluation of evidence, though the primary responsibility of the trial court, is not the exclusive preserve of that court. It becomes so only where the evaluation is borne out from the evidence before the court.

4. A perverse finding is a wrong, unreasonable or unacceptable finding, having due regard to the evidence before the court. A perverse finding is one not supported by the evidence before the court. It is a finding raised on a wrong assessment of the evidence before the court. A finding of fact based on exaggerated or bloated evidence on the part of the trial court could be perverse. So too finding of fact borne out from addition or subtraction from the evidence before the court.

Again, the above is not exhaustive. Again, they are random principles that occurred to me. In either the trial court or the appellate court, the pleadings play some role in the evaluation exercise. Both courts must be fully guided by the pleadings, which in this case are the petition and the replies. If a witness gives oral evidence on what is not pleaded in either the petition or the reply, the evidence will be of no probative value based on the principle of law that parties are bound by their pleadings.

If evidence is not led on a fact pleaded in either the petition or the reply, the fact will be deemed to have been abandoned unless the fact was admitted by the adverse party. This is because pleadings have no mouth to talk and need human being with mouth and sense to articulate them in court. This principle of law will not apply where the particular pleading is admitted.

I have taken the time to examine the position of the law because of the submission in the appellant's brief on the issue of evaluation, running from page 111 to 234 of the Brief. I will be guided by the above principles in considering the submissions of counsel on the issue. To that exercise, I now turn.

Learned Senior Advocate for the appellant submitted that it is because the court had totally neglected to evaluate all the evidence put before it by the petitioner in proof of his case that the court had come to the rather bizarre conclusion that the petitioner had presented no evidence upon which the court could found a decision in the petitioner's favour. Where a trial court fails to evaluate evidence before it before arriving at a finding of fact, the appellate court is in as good a position as the trial court to evaluate the evidence and arrive at a conclusion, learned Senior Advocate contended. Citing Woluchem v. Gudi (1981) 5 SC 291 and Kate Ent. Ltd. v. Daewoo (Nig) Ltd. (1985) 2 NWLR (Pt. 5) 116, learned counsel invited the court to evaluate what he called the plethora of uncontradicted evidence of apparent non-compliance with the provisions and principles of the Electoral Act.

Learned Senior Advocate dealt with the documents which were tendered as exhibits from the bar, including undated documents, presumption as to date, alteration of documents, proof of delivery of election documents and acts of non-compliance with the Electoral



Act. He also dealt with what he regarded as State to State identification of non-compliance and irregularities. He dealt with Abia, Rivers, Kwara, Plateau, Oyo, Benue, Jigawa, Bayelsa, Taraba, Imo, Katsina, Delta, Akwa Ibom, Osun, Kaduna, Ekiti, Kogi, Edo, Adamawa, Nasarawa, Gombe, Ebonyi, Niger, Cross River, Sokoto, Enugu, Kebbi, Anambra and Ogun States. Counsel attached Tables of Figures spanning from page 170 to page 231D of the Brief. B

Learned Senior Advocate for the 1st and 2nd respondents submitted that as there was no evidence adduced by the appellant in the case, the Court of Appeal had nothing in law to evaluate. He submitted in the alternative that whatever evidence there was to evaluate was properly evaluated. C

On the documents admitted as exhibits, learned Senior Advocate argued that as they were tendered through incompetent witnesses, they are inadmissible and therefore rightly expunged by the Court of Appeal. Counsel quoted extracts of the judgment of the Court of Appeal on evaluation of evidence. I do not want to take his submissions on corrupt practices as they are no more live issues in this appeal. D

Learned Senior Advocate for the 4th and 5th respondents pointed out that although the pleadings of the appellant did not cover all the States of the federation, appellant tendered exhibits that covered the States that were not pleaded. He also pointed out that the witnesses statements did not cover the States that were pleaded and that the documents tendered from the bar did not relate to any aspect of the pleadings of the petitioner/appellant. E F

Learned Senior Advocate submitted that as parties cannot with consent foist in the court inadmissible evidence, the Court of Appeal rightly expunged them. He also submitted that as the documents were not tendered by the makers, they were inadmissible in law. The Court of Appeal gave a background of the documents tendered by counsel of the parties at the hearing of the petition. The court said at page 2654, Volume VII, the last paragraph of the judgment: G

*“In line with the agreement of counsel, all documents pleaded in the petition and the respective replies of the respondents were tendered from the Bar, admitted in evidence and taken as read without prejudice to objections on admissibility respective opposing counsel H*

*could raise in their final addresses. This agreement was reduced into writing by the court and the recorded version accepted by all the parties."*

In the light of the above and the position of the case law (see B Agbi v. Oqbe (2006) 11 NWLR (Pt. 990) 65; Buhari v. Obasanjo (2006) 13 NWLR (Pt. 941) 1) the respondents rightly urged the Court of Appeal to expunge the documents and the Court of Appeal was right in expunging them. There is a clear dichotomy between admissibility of document and placing probative value on it. While admissibility is based on relevance, probative value depends not only on relevance but on proof. An evidence has probative value if it tends to prove an issue.

In my humble view, the documents were rightly expunged for the following reasons: First, the witnesses who tendered them were declared incompetent by the court and so the documents cannot stand in law. This is simple logic. If the pillars supporting a building collapse, the building itself will collapse because there is no more foundation or prop upon which the building will stand. Second, the witnesses who tendered the documents were not the makers and so cannot be cross-examined on the contents of the documents. As cross-examination plays a vital role in the truth searching process of evidence procured by examination in-chief it relates to authenticity or veracity of the witness, a court of law is entitled not to place probative value on evidence which does not pass the test of cross-examination. Third, ***the Court of Appeal rightly, in my view, held that proof of the allegation that result sheets were not delivered to the States and polling units, non counting of votes and announcement of scores of the polling units throughout the country as contained in paragraph 9B(iv) (a) and (b) cannot be established by looking at the documentary exhibits tendered. It can only be established by the direct evidence of those who observed the non-compliance.***

H ***The basic aim of tendering documents in bulk was to ensure the speedy hearing of election petitions and that is good because it facilitates the speedy hearing of the petition. But that does not ipso facto permit the court to attach probative value to documents that lack such value. At the end of the day***

**and the end of the day is the writing of judgment, the trial Judge will remove the chaff from the grain by scrupulously examining the documents to see whether they have the content of probative evidence. As the documents failed the test, the Court of Appeal, in my view, was right in expunging them,**

And that takes me to the evaluation of the evidence by the Court of Appeal. I do not agree with the submission of learned Senior Advocate that the Court of Appeal totally neglected to evaluate all the evidence before it. Although learned Senior Advocate did not pinpoint the specific evidence not evaluated, I will pinpoint some specific evidence that were evaluated by the court. And this I will do randomly.

On the issue of non-compliance in relation to paragraph 9B(iv)(a) of the petition with the Electoral Act, the Court of Appeal said at page 2701, Volume VII of the Record and I will quote the court in extenso:

*“Having identified the provisions of the law, the Electoral Act, and the guidelines not complied with, the question that arise is, what are the facts pleaded by the Petitioner to establish the non-compliance. The first fact is the non-display of voters register, not less than 60 days before the date of the election materials. Ballot papers were not bound in booklets and numbered serially, and that the time of the election was arbitrarily changed from 800 a.m. to 3.00 p.m., to 10.00 a.m. to 5.00 p.m. The late delivery of elections. Omission of result sheets, non-setting up of ward collation -centres and inconclusive collation at the National Collation Centre as result was announced after collation from only 13 States.*

*In paragraph 9B(iv) and (b), the Petitioner alleges that result sheets were not delivered to the States and polling units. He also alleges that there was no counting of votes and announcement of scores at the various polling unit throughout the country, except some few units in some States. The Petitioner led no evidence to establish this averment. Proof of this averment cannot be established by looking at the documentary exhibits tendered, see the case of LAWAL vs. UTC PLC (2005) 13 NWLR (Pt. 943) 601. It can only be established by the direct evidence of those who observed the non-compliance.*

*The Petitioner tendered result sheets not signed by his agent,*

*but led no evidence to establish why the agents did not sign the result sheets. The Petitioner made heavy weather about stamping and dating and countersigning in his written address. These irregularities were not pleaded, and, therefore, go to no issue...*"

B On non-compliance in relation to paragraph 9B(ii)(b) of the petition, the court said at page 2702, Volume VII, of the Record:

*"In, paragraph 9B(iii)(b), the petitioner alleged that while polls commenced at 10.00 a.m. in some places, it commenced at 5.00 p.m. in some others, and even 10.00 p.m, in others. There is in this paragraph not only a want of specificity of what happened where but there is no shred of evidence to establish the averment."*

C On non-compliance in relation to paragraph 9B(iii)(e) of the petition, the court said at page 2702, Volume VII, of the Record:

*"In paragraph 9B(iii)(e), the Petitioner alleged that a vast majority of polling units of the local government areas affected by a deliberate disenfranchisement of the electorate did not receive sensitive and non-sensitive materials until after 4.00 p.m. No shred of evidence was led in this regard. The listed States are found in paragraph 9B(iii)(i) of the petition, namely, Enugu, Ebonyi, Abia, Anambra, Imo, Ondo, Osun, Cross River, Edo, Benue, Bayelsa, Delta, Gombe, Niger, Taraba, Kogi, Katsina, Sokoto and Kaduna States"*

E On non-compliance in relation to paragraph 9B(ii)(i) of the petition, the court said at 2702, Volume VII, of the Record:

*"Paragraph 9B(iii)(i) list 19 States mentioned above and alleges that in these States, voting materials including sensitive and non-sensitive materials were delivered by the 1st respondent on the election day between 12 noon and 2.30 p.m. This was denied by the respondents. No piece of evidence was tendered by the Petitioner to prove this fact. The averment therefore goes to no issue."*

G On non-compliance in relation to paragraph 9B(v) of the petition, the court said at page 2702, Volume VII, of the record :

*"Finally, the petitioner averred in paragraph 9B(v) of the petition that the officers and staff of the 1st respondent who participated in the election did not affirm to the oath of loyalty and neutrality . Again, the petitioner led no evidence to establish this averment. The respondent denied this averment. There is no evidence led in proof of the averment"*

On voters register, the Court of Appeal said at page 2704, volume VII, of the record:

*“Learned counsel for the petitioner in an attempt to establish non display of voters register and non integration of same with the supplementary voters register; in his address drew a chart, Chart No. 1 at page 25 of his written address to page 29 showing irregular entries in the voters registers, from the following five States of Nasarawa, Kwara, Rivers, Imo and Taraba. With due respect to the learned senior counsel, the chart drawn has no relevance to the determination of the non display of voters register and non integration of the supplementary voters to the National voters registers. Irregularities shown on the voters’ registers are entirely different from the allegation on non display of the voters’ registers. One cannot be proof for the other. There is indeed no shred of evidence to substantiate the allegation.”*

On ballot papers, the Court of Appeal said at page 2704, Volume VII, of the Record:

*“The Petitioner in paragraph 9B(ii)(a) and (b) pleaded that contrary to s.45(2) of the Electoral Act, the ballot papers were not numbered serially and not bound in booklets.*

*In their reply, the 1st and 2nd respondents pleaded that the bundles containing the ballot papers were serialized for audit purposes. These in effect is an admission that the ballot papers were not numbered serially and bound in booklets. Section 5(2) of the Electoral Act provides that the ballot papers shall be numbered serially and bound in booklets. This averment therefore, is considered proven and constitutes a non compliance with the provisions of the Electoral Act.”*

On Forms EC25, EC40C, EC40E, the Court of Appeal said at pages 2705 and 2706, Volume VII, of the Record”

*“I have looked at the exhibits before me, particularly, Forms EC25, EC40C, EC40E, which are tendered In their hundreds. Form EC25 is electoral material receipt, form EC40C is ballot paper account and verification statement, Form EC40E is the tendered ballot statement. The exhibited forms do show that the ballot papers were indeed not numbered serially. They have however, shown the number of ballot papers issued by the relevant electoral officers to each*

*polling unit, and the numbers tendered in these polling units. The Petitioner led no evidence to show that any of these entries relating to the number of ballot papers issued at the polling units, and the number of ballot papers tendered in those units are false. This the Petitioners agents at the polling units could easily have ascertained. It is therefore not correct that the Petitioner could not maintain an audit trail, simply because the ballot papers were not serially numbered.”*

The above are random examples of the evaluation of the evidence by the Court of Appeal. Can the appellant really say that the evidence was not evaluated in the light of the above? While he can say that most of the conclusions arising from the evaluation were not in his favour, he cannot say that there was no evaluation. I see that there was an evaluation in his favour.

I think this is an appropriate place to consider the issue of non-serialisation of ballot papers. It is apparently a vexed one in this appeal. Because of the different dimensions to the issue and the interpretation given to the pleadings of the 1st and 2nd respondents by the Court of Appeal, I shall start with the pleadings relating to the issue.

The appellant averred in paragraphs 9B(ii) of the Petition as follows;

*“9B(ii)(a) Your Petitioners state that section 45(2) of the Act provides that ballot papers shall be bound in booklets and numbered serially. Pursuant to this the manuals for Elective Officials, 2007 provided for the entry of the serial numbers of ballot papers and the quantity of the ballot received for each election in form EC 40C for purpose of verification and authentication. Your petitioners state that on 21st April, 2007, the 1st and 2nd respondents, in conjunction and collusion with the 3rd and 4th respondents conducted the presidential election without compliance with section 45(2) of the Act, and in the process assigned more than Twenty Four Million unverified and unverifiable vote to the 5th respondent, in that there are no booklet counterfoils to show the number of ballot papers actually printed by ‘the 1st respondent or were actually used at the purported election. Ballot papers are always printed with counterfoil and serial numbers which are Features usually included to establish an audit trail. This fact is well known to the respondents. The petitioners state that the 1st and 2nd respondents failed to print the Presidential ballot*

*papers with serial numbers and in booklet form as part of the grand plot to install the 5th respondent as the President of Nigeria at all cost including arbitrarily assigning figures with the hope that the figures would be unverifiable.*

*9(ii)(b) Your Petitioners state that the ballot papers used at the election are invalid the same not being cognizable under the Act under which the election was conducted, whether by express provision or its principles, and shall contend that the voting at the election having been illegally conducted with illegal ballot papers, the quantity of which could not be verified was consequentially invalid.”*

In reply to the above, the 1st and 2nd respondents averred as follows

*“12. The Respondents deny the averments in paragraph 9B(ii)(a) of the Petition as untrue. The ballot papers issued for and used in Presidential Election throughout the Federation were regular and were in accordance with the Electoral Act. If any such ballot paper did not have serial number or counterfoil or were not in book form (all of which are not admitted) any such irregularity, omission or error did not affect either the conduct or the results of the Presidential Election which was conducted substantially in accordance with the Electoral Act, as the bundles containing the ballot papers were serialized for audit purposes and 4th respondent, having by directives to its agents, taken strict measures for ensuring that only accredited voters were issued with ballot papers and the number of votes cast did not exceed the number of ballot papers duly issued at each polling station.*

*13. In answer to paragraph 9(ii)(b) of the Petition the respondents state that the ballot papers used at the election were valid and accorded in every respect with the Act...”*

In reply to the paragraph 9B(iii) of the Petition, the 4th and 5th respondent averred as follows: ...

*“17. The respondents deny paragraph 9B(ii) of the petition and aver that the ballot papers used for the election of 21st April, 2007 were produced under the best security cover and they met the requirements of the Electoral Act, especially section 452) of the Act.*

*18. The respondents deny paragraph 9(ii)(b) of the petition and state that the ballot papers used for the election were legal, law-*

*ful and valid.”*

Reacting to the averment of the 1st and 2nd respondents, the Court of Appeal said at page 2704, Volume 7, of the Record:

*“In their reply, the 1st and 2nd respondents, pleaded that the bundles containing the ballot papers were serialized for audit purposes. These in effect is an admission that the ballot papers were not numbered serially and bound in booklets. Section 45(2) of the Electoral Act provides that the ballot papers shall be numbered serially and bound in booklets. This averment therefore, is considered proven and constitutes a non-compliance with the provisions of the Electoral Act.”*

What is admitted, I ask the Court of Appeal? ***In considering whether an averment in a paragraph is admitted, the court must consider the totality of the paragraph and not words in isolation or in quarantine. This is the only way to procure the intention of the party. Paragraph 12 of the Reply of the 1st and 2nd respondents unequivocally denied paragraph 9B(ii) of the Petition. The paragraph did not stop there. It went further to aver that the ballot papers used in the election throughout the Federation were regular and were in accordance with the Electoral Act. The paragraph further averred that if any such ballot paper did not have serial number or counterfoil or were not in book form (which were not admitted) any such irregularity, omission or error did not affect either the conduct or the results of the election which was conducted substantially in accordance with the Electoral Act, as the bundles containing the ballot papers were serialized for audit purposes. It is clear to me that the words “audit purposes” do not have an independent life in the paragraph, as it is parasitic to or on the basic denial of paragraph 9B(ii) of the Petition. The Court of Appeal, with the greatest respect, was wrong in relying on the two expressions to come to the conclusion that there was admission by the 1st and 2nd respondents. In the law of pleadings, admission must be unequivocal; not speculative or based on conjecture. The adverse party admitting must leave the court in no doubt as to the fact admitted.*** In my view, the intentment of paragraph 12 is a clear denial of the averment in paragraph



9B(ii) of the Petition. I therefore part ways with the Court of Appeal on this issue.

As the paragraph was denied by the respondents, the burden was on the appellant to prove the averment. Did the appellant prove it? That is the next consideration. Let me be more specific here. In paragraph 9B(ii) of the Petition, the appellant averred that 1st and 2nd respondents in conjunction and collusion with the 3rd and 4th respondents assigned more than twenty-four million unverified and unverifiable votes to the 5th respondent. Did the appellant prove this in evidence? If so, where is the evidence? The appellant did not specifically make reference to where the averment was proved.

I want to make another point. As the averment in paragraph 9 of the petition affects 1st and 2nd respondents on the one hand and the 3rd and 4th respondents on the other, admission to be valid, must be made by the above two sets of respondents. This is because an admission by one set of respondents cannot bind the other set.

Let me take the reverse position, in the alternative. Assuming that the Court of Appeal was right in holding that the averment in paragraph 12 of the 1st and 2nd respondents that the ballot papers were serialized for audit purposes is an admission, is that not the contention and desire of the appellant? Is it not the case of the appellant that the ballot papers that resulted in the victory of the 4th and 5th respondents could not be audited because of non-serialisation? What are we really saying? Can the appellant eat his cake and still have it intact in his hands? That is both factual and legal impossibility.

How can this court come to the conclusion without proof that the alleged non-serialisation of ballot papers substantially affected the result of the election? This court lacks the competence or jurisdiction to do so. After all, this is not one of the matters that this court can take judicial notice within the provision of section 74 of the Evidence Act. For this court to so hold will be like a person making an attempt or an effort to jump over a fence when it is not close to it.

There is yet another point. It is in respect of the fact that non-serialisation, if it had benefits and advantages, was not exclusive to the respondents. I do not see any proof by the appellant that the respondents had benefits or advantages over and above the appellant on the alleged non-serialisation of the ballot papers. I do not also

see that the non-serialisation favoured the respondents and disfavoured the appellant. Above all, the appellants did not tender even a copy of the unserialised ballot paper. Where is then the evidence in proof? I ask this question because I do not agree with the Court of Appeal that there was an admission on the part of the respondents.

Assuming that there was an admission, the appellant had a duty to prove that the non-compliance substantially affected the result of the election. I do not see any proof.

The final question that I should consider or address in this judgment is whether the appellant proved his case as deposed to in his petition. By way of recapitulation, I answer the question as follows:

1. On 21st April, 2007, Chief M. I. Ahamba, SAN for the appellant indicated that he would call 150 witnesses (see page 46, Volume I of Record) but he finally ended up with 19. Although cases are not won by a village or community of witnesses, where are the remaining 131 depositions of witnesses? Should the appellant be taken as making a great play in this important matter of calling evidence and if so, can he say in reality that he proved his case?

2. In an election petition challenging the conduct of the election throughout the length and breath of a vast country like Nigeria, are 19 witnesses adequate to prove the case of the appellant, even when it is conceded once again that a case is not won by calling a village or community of witnesses?

3. Out of the 19 witness depositions, 18 were rejected by the Court of Appeal. Were the 18 rejected not designed to prove the case of the appellant, and if so, can the appellant say in reality that he proved his case?

4. By paragraph 3, only one witness was left to give evidence, Mr. Bernard Nimfa Bamfa of Plateau State. It is contended by the 4th and 5th respondents that the evidence of the witness was not pleaded. Assuming that the evidence was duly pleaded and the Court of Appeal accepted it as correct, can the appellant say in reality that he proved his case with only one witness in an election of this dimension and magnitude?

5. In the election petition, the appellant withdrew all the allegations of crime including corruption and the paragraphs were duly

struck out. Did the withdrawal and subsequent striking out of the paragraphs on crime help in proving the case of the appellant? If so in what way?

6. In paragraph 16 of the witness statement of the appellant, General Muhammadu Buhari, he averred as follows:

“Statutorily, I have agents in every State of the Federation and these agents gave me the information which I verily believe, that apart from a few States like Lagos, Rivers, Kano, Zamfara, Borno, Kaduna, Sokoto and Kaduna(sic), polling materials did not arrive the State headquarters of the 1st respondent of the remaining States before noon on election day, and in many cases, arrived at 2.30-3.00 p.m.’

Learned Senior Advocate for the 4th and 5th respondents pointed out that agent of the petitioner from any of the States in respect of which he made allegations bordering on non-compliance with the Electoral Act, 2006 deposed to any witnesses’ statements.

Learned Senior Advocate for the appellant did not provide any answer. An agent is the representative of the candidate in the polling station. He sees all the activities. He hears every talk in the station. He also sees all actions and inactions in the station. Any evidence given by a person who was not present at the polling units or polling booth like the appellant is certainly hearsay. And here, I so regard paragraph 16 of the witness statement or deposition of the appellant. After all, he was not there. He was given the information by the agents. The million naira question is why did these agents not make statements as witnesses? In my view, agents are in the most vantage point to give evidence of wrong doing in a polling unit or polling booth. Can the appellant say in reality that he proved his case without calling any agent?

7. In paragraph 14 of the witness statement of the appellant, he averred in part as follows:

*“I verily believe that the ballot papers used for the conduct of the Presidential elections were illegal and not cognizable under the Electoral Act, 2006”*

Again, learned Senior Advocate for the 4th and 5th respondents pointed out that no single ballot paper was tendered before the Court of Appeal. Again, learned counsel for the appellant did not

provide any answer. How can the Court of Appeal or this court determine the illegality of the ballot papers without seeing one in court? I am not even quite sure that the paragraph can stand in the face of section 87 of the Evidence Act. Can the appellant say in reality that he proved his case?

B 8. It is averred in paragraph 7 of the petition that the scores of 6,607,408 votes and 24,784,227 votes for the appellant and the 4th respondent respectively were unlawfully assigned to them by the 1st respondent. Did the appellant lead evidence to disentitle or deny the C 4th and 5th respondent 3 of the winning votes of 24,784,227? That is the legal essence of section 146(1) of the Electoral Act. Did the appellant lead evidence in the Court of Appeal drowning the winning votes? Can the appellant say in reality that he proved his case?

D 9. Above all, the appellant urged this court to discountenance the Practice Directions which he used copiously at the trial in the Court of Appeal. If this court accepts that submission, will the petition not be struck out, having been based so much on the Practice Directions that he urges this court to discountenance. And can he then say in reality that he proved his case, if that happened? This is another E very bad one against the appellant.

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

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

election. Proving an election petition or proof of an election petition is not as easy as the Englishman finding coffee on his breakfast table and seeping it with pleasure; particularly in the light of section 146(1) of the Electoral Act. A petitioner has a difficult though not impossible task.

In my view, the most important complaint in an election petition is the disenfranchisement of eligible voters who reported within the statutory time to cast their votes but could not for reasons of violation of the Electoral Act. If there is evidence that despite all the non-compliance with the Electoral Act, the result of the election was not affected substantially, the petition must fail. In other words, Election Tribunal, must, as a matter of law, dismiss the petition; and that accords with section 146(1) of the Electoral Act. This point vindicates paragraph 8 above. Section 146(1) is a friend of a respondent, a real friend which the respondent finds most useful at the greatest hour of need. And so the 4th and 5th respondents and by extension, all the respondents find in section 146(1) the greatest friendship in this appeal.

Learned Senior Advocate for the 1st and 2nd respondents, reacting to the swearing of the witness statements before a notary public, contended that apart from Val I. Ikeonu, who ought to know the duties and limitations of his office, the appellant, a former Head of State, must be presumed to know the law. Counsel argued that if both the appellant and his counsel deliberately violated the law that they know or presumed to know, they could not hope that a court which is appointed to enforce the law could regard their conduct by admitting evidence produced in violation of the law.

Although the issue is not that important, I want to make the point that a person cannot be presumed to know the law merely because he was a former Head of State. He should, in addition, be a lawyer, to know the law. The appellant did not pretend that he knows the law and that was why he hired counsel to do the case; and rightly went to sleep, hoping that all will be done correctly. It is sad, very sad indeed that counsel, the expert of the law, did not consider section 83 of the Evidence Act in this matter involving a very simple and elementary procedure. Rather than seeing any fault on the appellant (and I do not see any) I am in full sympathy with him because he was

materially denied the opportunity to prove his case. It beats me hollow and hands down that counsel did not relate the procedure to section 83 of the Evidence Act. ***Courts of law do not give judgments according to public opinion or to reflect public opinion unless such opinion represents or presents the state of the law. This is because the Judge's clientele is the law and the law only and alone.***

***The Court of Appeal cannot collect evidence from the market overt; for example from the Balogun market, Lagos; Dugbe market, Ibadan; main market, jos; Central market, Kaduna; Central market (former Gwari market), Minna; Wuse market, Abuja. On the contrary, the Court of Appeal, has to wait for evidence, as the court did, in the court building duly constituted as a court qua adjudicatory body. Courts of law being legal and sacred institutions do not go on a frolic or on a journey to collect inculpatory or exculpatory evidence. On the contrary, they deal only with evidence before them which are procedurally built on arid legalism. For the avoidance of doubt, I am not saying by this judgment that all was well with the conduct of the Presidential Election conducted in 2007. What I am saying is that there was no evidence before the Court of Appeal to dislodge section 146(1) of the Electoral Act.***

***It is sad that so much has been said in the newspapers of this country on the case. The new technology of internet reporting has added to the comments, some of them doubting our integrity to do justice according to law. I regard them as blackmail and I will not succumb to blackmail.*** I swore on that

eventful day as a High Court Judge to do justice to all manner of persons without fear or favour. . I have, never departed from that oath and I will not, God helping. It is too late in the day to do so. Nigeria is a country where suspicion of wrong doing is the past time of the citizens. Nigerians should realise that some public officers should be trusted to do the right thing. Why not the Judges!

Nigeria is one vast and huge country made up of so many diversities in terms of tribes, cultures, sociology, anthropology and above all, quite a number (some large, some small). These diversi-

ties, coupled with the usual aggressiveness of Nigerians arising particularly from the do or die behaviour in politics; there must be irregularities. Courts of law must therefore take the irregularities for granted unless they are of such compelling proportion or magnitude as to “*affect substantially the result of the election.*” This may appear to the ordinary Nigerian mind as a stupid statement but that is the law as provided in section 146(1) of the Electoral Act and there is nothing anybody can do about it, as long as the Legislature keeps it in the Electoral Act. The subsection is like the rock of Gibraltar, solidly standing behind and for a respondent to an election petition. I am not saying that a Presidential Election can never succeed in the light of section 146(1). No. It can if the petitioner discharges the burden the subsection places on him. B

The way politics in this country is played frightens me every dawning day. It is a fight to finish affair. Nobody accepts defeat at the polls. The Judges must be the final bus stop. And when they come to the Judges and the Judges in their professional minds give judgment, they call them all sorts of names. To the party who wins the case, the Judiciary is the best place and real common hope of the common man. To the party who loses, the Judiciary is bad. Even when a party loses a case because of serious blunder of counsel, it is the Judge who is blamed. Why? While I know as a matter of fact that in every case, the Judge makes an additional enemy, if I use the word unguardedly, I must say that the Judge does not regard the person as his enemy. C

The Judge who has given judgment in the light of the law, should not be castigated in the way it is done in this country. That is a primitive conduct and I condemn it. It is a conduct that does not help the promotion of the administration of justice. It is rather a conduct that is likely to affect adversely the administration of justice in this country. D

I feel very strongly that Nigerian Judges should be allowed to perform their judicial functions to the best of their ability. I should also say that no amount of bad name calling will deter Nigerian Judges from performing their constitutional functions of deciding cases between two or more competing parties. Somebody must be trusted in doing the correct thing. Why not the Nigerian Judge? E

F

G

H

**KUTIGI CJN**

The Petitioner herein, General Muhammadu Buhari, contested with others, the Presidential Election held throughout the country on 21st April, 2007. At the end of the election Umaru Musa Yar'Adua, the 4th Respondent herein, was returned elected having scored a total number of twenty-four million, seven hundred and eighty four thousand and two hundred and twenty seven (24,784,227) votes as against six million, six hundred and seven thousand, four hundred (6,607,400) votes scored by the Petitioner.

Being aggrieved by the result of the election, the Petitioner filed a 27-paragraph petition at the Court of Appeal, holden at Abuja. He prayed the Court to nullify the election on the grounds that -

*“8(a) The 5th Respondent Umaru Musa Yar'Adua was at the time of the election not qualified to contest the election.*

*(b) The election was invalid by reason of non compliance with the provisions of the Electoral Act, 2006.*

*(c) The election was invalid by reason of corrupt practices.”*

In compliance with the Election Tribunal and Court Practice Directions, 2007 (or simply called Practice Directions 2007) issue by The President of the Court of Appeal for expeditious hearing of election petitions, the Petitioner filed along with his Petition a list of witnesses' depositions on oath and the list of exhibits to be tendered at the trial. The Respondents also jointly or severally filed their replies to the Petition with the lists of their witnesses' depositions on oath and lists of exhibits.

At the trial of the Petition only one witness, Mr. Emmanuel Iwuamadi, testified physically in court for the petitioners. He adopted his written depositions and was cross-examined for the Respondents. Thereafter it was agreed by counsel on both sides that the written depositions of all witnesses should be taken as adopted without the need for cross-examination or physical appearance of witnesses in court. It was also agreed that all documents pleaded in the Petition and Replies be tendered from the Bar and be admitted in evidence without prejudice to objection on grounds of admissibility in final addresses.

A reading through the Petition will show that the Petitioner's



complaints are either on non-compliance with the provisions of the Electoral Act or complaints of acts of corrupt practices and abuse of executive power. The Petitioner adopted and relied on written depositions and bundles of documents tendered from the Bar in evidence to establish his Petition. The Respondents who opposed the Petition in their individual or joint Replies also adopted and relied on their written depositions and exhibits tendered at the trial. B

At the end of the trial counsel submitted written addresses in which issues for resolution were identified. The Court adopted the issues formulated by counsel for the Petitioner as follows -

*"1. Whether the 4th Respondent was at the time of the election qualified to contest the election. C*

*2. Whether there were acts of non-compliance with the provisions of the Electoral Act, 2006 in the conduct of the elections which rendered or were capable of rendering the election invalid. D*

*3. Whether there were corrupt practices manifest in the conduct of election which rendered or were capable of rendering the election invalid.*

*4. Whether the petitioner is entitled to the reliefs sought in the Petition." E*

It is pertinent to state here that counsel for the Petitioner had in his written and oral address withdrawn all pleaded facts bordering on Criminal conduct and criminal allegations, thus settling on civil pleadings only.

The Court of Appeal carefully considered all the above issues and resolved each of them against the Petitioner. The judgment concluded on page 4741 of Volume 11 of the Records as follows - F

*"In conclusion this Petition has been plagued by want of evidence in proof of virtually all the allegations contained therein. Even G if I were to accept all the excluded evidence proffered by the Petitioner which evidence relates only to four States of the Federation, the Petitioner would still have been unable to establish this Petition. Accordingly, the Petition is hereby dismissed."*

Dissatisfied with the decision of the Court of Appeal the Petitioner has now appealed to this Court. Twenty (20) grounds of appeal were filed from which ten (10) issues have been distilled for determination by the Court. This is rather curious having shown above H

that only four issues were submitted for determination in the trial court. It is also pertinent to state here again that the Petitioner had only challenged the return of the 4th Respondent Alhaji Umar Musa Yar'Adua as President on three (3)' grounds only. And they are:-

- B (1) That the 4th Respondent was not qualified to contest the election;
- (2) That the election was invalid by reason of non-compliance with the provisions of Electoral Act, 2006; and
- (3) That the election was invalid by reason of corrupt practices.

C It is therefore common sense and proper that I should confine myself to the three grounds on which the election or return of the 4th Respondent was challenged by the Petitioner. It is settled that not every error or mistake committed by a judge results in allowing an appeal, or setting aside the judgment complained of. The issues will now be taken serially.

- D 1. Whether the 4th Respondent, Alhaji Umar Musa Yar'Adua, was at the time of the election qualified to contest the election
- E The Court of Appeal in its judgment has this to say amongst others -

*"The principal question to be determined in this issue is whether from the Contents of Exhibit EP2/34 (that is Government of Abia State White Paper) it can be determined that the 4th Respondent was not qualified to contest election to the office of the President of the Federal Republic of Nigeria, Exhibit EP2/34 purports to have indicted the 5th Respondent by the said White Paper "having done their jobs contrary to the laws, Rules, Principles and Regulations".*

.....

G Even if these judgments were not so, could Exhibit EP2/34 really be said to constitute an indictment for fraud and embezzlement as required by Section 137(1)(i) of the Constitution? The so-called indictment is at page 10 of the White Paper, and it reads - *"that the following persons hereunder listed who were found to have done their jobs contrary to the laws, rules, principles and regulations be reprimanded, indicted and punished accordingly to the relevant laws."*

H And thereafter, was listed the names of the 5th and 6th Respondents. Nowhere ex facie in the White Paper was it stated that

the 5th and 6th Respondents were indicted for fraud and embezzlement as required by Section 137(1)(i) of the Constitution to disqualify the 5th and 6th Respondents.

From the foregoing, the issue of disqualification is of no moment and it is resolved in favour of the Respondents.

I think the Court of Appeal was right. I agree with it. I must add that there is no appeal against the finding of the Court of Appeal on the issue. B

2. Whether there were acts of non-compliance with the provisions of the Electoral Act, 2006 in the conduct of the election which rendered the election invalid. C

The Petitioner in the Petition no doubt cited various acts of non-compliance with certain provisions of the Electoral Act, and the Manual and Guidelines made pursuant to the Act. The Court of Appeal examined each and everyone of alleged non-compliance and found that some of them were either not properly pleaded with facts or no evidence was led at the trial to establish them. I will not repeat them here. This is a case starved of evidence. I have shown above that only one witness physically testified in Court. The written depositions of his 19 witnesses and thousands of documents relied upon were caught by the provisions of Section 83 of the Evidence Act and Section, 19 of the Notaries Public Act which rendered them all inadmissible in evidence. The trial court rightly in my view expunged them from the record. D

The Court of Appeal however found in favour of the Petitioner that he had established non-compliance with the provision of Section 45(2) of the Electoral Act as follows - E

“The Petitioner in paragraph 9B(ii)(a) and (b) pleaded that contrary to Section 45(2) of the Electoral Act, the ballot papers were not numbered serially and not bound in booklets. In their reply, the 1st and 2nd Respondents pleaded that the bundles containing the ballot papers were serialized for audit purposes. This in effect is an admission that the ballot papers were not numbered serially and bound in booklets. Section 45(2) of the Electoral Act provides that the ballot papers shall be numbered serially and bound in booklets. This averment therefore, is considered proven and constitutes a non compliance with the provisions of the Electoral Act. F

.....  
 It is incumbent on the Petitioner pursuant to the provisions of Section 146 of the Electoral Act to establish that the non compliance established by him substantially affected the result of the election. This he has failed to do in the instant case. (HARUNA vs. MODIBBO (2004) 16 NWLR (Pt. 900) 487).

In BUHARI vs. OBASANJO (2005) 13 NWLR (Pt. 941) 1, Belgore JSC in interpreting this provision of Section 135(1) of the Electoral Act 2002, which is in pari material With Section 146(1) of the Electoral Act 2006, had this to say: "It is manifest that an election by virtue of Section 135(1) of the Act shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provisions of the Act. It must be shown clearly by evidence that the non-substantiality has affected the result of the election. Election and its victory is like soccer and goals scored. The Petitioner must not only show substantial non compliance but also the figures, i.e. votes that the compliance attracted or omitted. The elementary evidential burden of "the person asserting must prove" has not been derogated from by Section 135(1). The Petitioners must not only assert but must satisfy the Court that the non compliance has so affected the election results to justify nullification (See also AWOLOWO vs., ... NWLR (Pt.599) 360; AKINFOSILE vs. IJOSE (1960) SCNLR 447; and AJADI vs. AJIBOLA (2004) 16 NWLR (Pt. 898) 91).

It is clear from the above authorities that the onus of proof of the substantiality of the non compliance and the substantiality of the effect of the non compliance on the election result rests on the Petitioner. The Petitioner has in the instant case established the substantiality of the non compliance with Section 145(2) of the Electoral Act, but has failed to establish the substantiality of this non compliance on the result of the election. This issue is therefore resolved in favour of the Respondent.

I agree entirely with the Court of Appeal. That Court as well as this Court are bound by the decision in BUHARI vs. OBASANJO (supra) and others cited above, and we have no reason to depart from them or overrule them. They remain the law. And they must be followed.

3. That the election was invalid by reason of corrupt practices

This is the last and final ground for challenging the election.

As earlier stated the Petitioner in the Court of Appeal withdrew all pleaded facts and or allegations bordering on criminalities. All criminal allegations therefore failed and were rightly dismissed by the Court of Appeal. I agree and have nothing more to add.

All the three grounds on which the Petition was based therefore fail. The appeal also fails. It is for these reasons and those ably stated in the lead judgment of my learned brother Niki Tobi, JSC which I read before now, that I agree to dismiss the appeal. B

The appeal has no merit. It is hereby dismissed. Consequently C  
the 4th and 5th Respondents, Alhaji Musa Yar'Adua and Dr. Jonathan Goodluck, respectively remain President and Vice-President of the Federal Republic of Nigeria. There will be no order as to costs.

---

### KATSINA-ALU JSC

I have read before now, in draft, the judgment of my learned brother Niki Tobi JSC in this appeal. I completely agree with it.

Part IV of the Electoral Act, 2006 deals with procedure at election. Section 45(2) thereof provides as follows: E

*“The ballot papers shall be bound in booklets and numbered serially with differentiating colours for each office being contested.”*

At the hearing the petitioner sought to void the election on the ground that the ballot papers used in some states of the federation F  
were not serialized and for this reason alone the election should be invalidated relying on section 145(l)(b) of the Act which provides as follows:

*“An election may be questioned on any of the following grounds: G*

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

Without doubt the non-serialisation of the ballot papers whether in the entire country or some states of the federation, if proved would constitute an infraction or non-compliance with the provisions of the Electoral Act. However the law is clear that non observance of the rule or principles stated under the Act such as that in section 45(2) must be such that would amount to conducting an election in a man- H

ner contrary to the principle of an election by ballot and must be so grave as to satisfy the court that it did affect the result of the election: See Buhari v. Obasanjo (2005) 13 NWLR (Pt.941) 1 Sorunke v. Odebunmi (1960) SCNLR 414.

B In the case of Sorunke v. Odebunmi (supra) the Federal Supreme Court when considering when an election could be invalidated for non-compliance with the non-compliance with the provisions of the Electoral Act, the petitioners must prove not only that there was non compliance with the provisions of the Electoral Act but C that the non-compliance substantially affected the result of the election. In other words the petitioner has two burdens to prove:

- (i) that the non-compliance took place and
- (ii) that the non-compliance substantially affected the result of

the election

- D See: 1. Akinfosile v. Ijose (1960) SCNLR 447  
 2. Buhari v. Obasanjo (2005) 13 NWLR (Pt.941) 1  
 3. Awolowo v. Shagari( 1979)6-9 SC 5 I 1.

The petitioner could only succeed in this instance if he was able to prove that the failure to comply with section 45(2):

- E (i) disenfranchised a particular number of his voters.  
 (ii) the number of votes he would have secured but for this default.

(iii) how many voters were deceived by this omission and how F they would have affected the eventual outcome of the result. .

In the case of Buhari v. Obasanjo (supra) this court per Belgore JSC held:

*"It is manifest that an election by virtue of S. 135(1) of the Act shall not be invalidated by mere reason it was not conducted substantially in accordance with the provisions of the Act, it must be shown clearly by evidence that the non-substantiality has affected the result of the election. .... The elementary evidential burden of "The person asserting must prove" has not been derogated from provisions of the regulation governing it, cited with approval the following observations of Lord Coleridge in Woodward v. Sarsons LRC 733 at 751:*

*"If this proposition be closely examined, it will be found to be equivalent to this, that the non-observance of the rules or forms which*

*is to render an election invalid, must be so great as to amount to conducting of the election in a manner contrary to the principle of an election by ballot and must be so great as to satisfy the Tribunal that it did affect or might have affected the majority of the voters or in other words the result of the election.”*

The petitioner herein clearly failed to place facts to establish how the non-compliance substantially affected the result of the election. It must be stated clearly that it is only under the provision of section 146(1) that the Act stipulates when an election may be invalidated. It reads:

*“146(1) An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election Tribunal or court that the Election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election.”*

Following the above, the law as it stands requires the petitioner after establishing the substantial non-compliance occasioned by breach of section 45(1) and (2) of the Act, to go ahead and prove that the non-compliance affected the result of the election. It is clear from the decided authorities that before a petition can succeed on the ground of non-compliance with the provisions of the Electoral Act, the petitioners must prove not only that there was non-compliance with the provisions of the Electoral Act but the non-compliance substantially affected the result of the election. In other words the petitioner has two burdens to prove :

- (i) that the non-compliance took place and
- (ii) that the non-compliance substantially affected the result of the election.

See: 1. Akinfosile v. Ijose (1960) SCNLR 447

2. Buhari v. Obasanjo (2005) 13 NWLR (Pt.941) 1

3. Awolowo v. Shagari (1979) 6-9 S.C. 511.

The petitioner could only succeed in this instance if he was able to prove that the failure to comply with section 45(2):

- (i) disenfranchised a particular number of his voters.
- (ii) the number of votes he would have secured but for this default.
- (iii) how many votes were deceived by this omission and how

they would have affected the eventual the outcome of the result .

In the case of Buhari v. Obasanjo (supra) this court per Belgore. J.S.C. held:

B *"it is manifest that an election by virtue of S.135(1) of the Act shall not be invalidated by mere reason it was not conducted substantially in accordance with the provisions of the act, it must be shown clearly by evidence that the non-substantiality has affected the result of the election. The elementary evidential burden of "The person asserting must prove" has not been derogated from by S.135(1).*  
 C The Petitioners must not only assert but must satisfy the court that the non-compliance has so affected the election result, to justify nullification."

It must be pointed out that no facts relating to any of the above conditions were pleaded or proved by the petitioner. This failure is  
 D fatal to his cause in this respect and section 146(1) has cured any such default in favour of the 1st Respondent. I think it is particularly clear that it is to section 145(1) that the tribunal or court would turn if the questions raised in the election had to do with whether the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act. I dare say therefore that the  
 E breaches of section 45 of the electoral Act are not by themselves enough to invalidate the election as the complaint here did not question the election in accordance with section 145(l)(b) of the Act.

F As I indicated from the beginning of this judgment, I entirely agree with the judgment of my learned brother Niki Tobi JSC. Accordingly I also dismiss the appeal and abide by the order as to casts.

---

G **MUSDAPHER JSC**

The Independent National Electoral Commission, the first respondent herein organized and conducted the presidential Elections through out the country on the 21st day of April, 2007. On the 23rd day of April 2007, the second respondent, the Chief National  
 H Electoral Commissioner, Professor Maurice Iwu, announced the results of the presidential elections. At the end of which he declared the 4th respondent herein, Alhaji Umaru Musa Yar'adua sponsored by the People's Democratic Party, as the winner of the presidential



election. The appellant as the candidate at the elections, who was sponsored by All Nigeria Peoples Party, ANPP, was announced as scoring 6,605,291 votes, as against Alhaji Umaru Musa Yar'adua, who was said to have scored 24,638,063 votes. The appellant, General Muhammadu Buhari, felt unhappy with the declaration of the result together with his running mate Chief Edwin Ume-Ezeoke filed an election petition challenging the declaration of the said 4th respondent at the Court of Appeal. Chief Edwin Ume-Ezeoke, later withdrew from the petition and he was struck out. The Grounds upon which the petition was based were as follows:-

*“(a) The 4th respondent Umaru Musa Yar’adua was at the time of the election not qualified to contest the election.*

*(b) The election was invalid by reason of non-compliance with the provisions of the electoral Act, 2006.*

*(c) The election was invalid by reason of corrupt practices.*  
*The reliefs or orders sought by the appellant as per paragraph 27 of the petition were:-*

*“(i) That the 4th respondent was not qualified to contest the presidential elections of 21st April, 2007 consequent upon which his election together with the 5th respondent as president and Vice President respectively is void.*

*(ii) That the election to the Office of the President of the Federal Republic of Nigeria conducted on the 1st April, 2007 is invalid and therefore cancelled.*

*(iii) That the 3rd respondent is guilty of gross misconduct for, without any just or probable cause, involving the military in purely civil matter; the conduct of the election contrary to the powers conferred on his office by Section 217 of the Constitution of the Federal Republic of Nigeria.*

*(iv) The first respondent conducts another election for the office of the President of the Federal Republic of Nigeria between the remaining 22 (Twenty two) candidates within 3 months.*

*(v) That the 2nd respondent in the person of Professor Maurice Iwu be disqualified from participation in the conduct of any future elections in the Federal Republic of Nigeria.*

*(vi) That the President of the Senate -takes over the duties of the President of the Federal Republic of Nigeria in accordance with*

*section 146 of the Constitution pending the conduct of another election. ”*

Issues were joined by all the parties and after all the preliminary matters, the matter proceeded to trial before the Court of Appeal, The Court on the 26/2/2008 dismissed the petition. The Court held in concluding part of the judgment, see from page 2707 of volume VII of the printed record:-

*“On allegation of corrupt practices in the petition, I do not deem it necessary to go into it because the petitioner has withdrawn all pleaded facts bordering on criminal conduct in paragraph 36.05C of his written address found at page 583 thereof wherein he expressly stated that he has severed his case from criminal allegations and settled on civil aspect only. This severance is also reiterated in the oral address by his counsel before the court. Ground 9C of the Petition fails and is hereby dismissed. That also disposes of all the allegation against the 3rd respondent, the Inspector General of Police. The case against the Inspector General of Police is hereby dismissed.*

*In conclusion this petition has been plagued by want of evidence in proof of virtually all the allegations contained therein. Even if I were to accept all the excluded evidence proffered by the petitioner which evidence relates only to four states of the Federation, the petitioner would still have been unable to establish this petition. ”*

The appellant felt unhappy with the decision of the Court below and has now appealed to this court on 20 grounds of, appeal. It should be mentioned at this stage that the appellant has not appealed against the specific finding of the Court below on his abandonment and the eventual dismissal of criminal allegations as contained under ground 8(c) and particularly paragraph 9C (i) - 9C - 10 see pages 13 - 17 of the petition] of the grounds of the petition. Thus the trial court found no proof was offered on the two remaining grounds of the petition i.e the issue of the disqualification of Alhaji Umaru Musa Yar'adua to contest the presidential elections and secondly, the issue of whether the election was invalid by reason of non-compliance with the provisions of the Electoral Act 2006.

Now, in his brief for the appellant, the learned counsel has identified and submitted to the court for the determination of the appeal 10 issues:-

“ 1. Whether the Court of Appeal was right when it held that the petitioner presented evidence on four states only.

2. Whether on a proper evaluation of the Evidence adduced in this petition, the petitioner was not entitled to judgment.

3. On who does section 146(1) of the Electoral Act place the onus of proof of the effect of established substantial non-compliance with the provisions of the Act on the result of an election conducted under the Electoral Act 2006, the petitioner or the respondents. B

4. Whether the Court of Appeal properly placed the onus of proof of the effect of established substantial non-compliance with the provisions of the Electoral Act on the petitioner. C

5. Whether the power of the president of the Court of Appeal under any Section of the Nigerian Constitution including sections 248 and 245 extends to the power to issue Practice Directions to the court in its original jurisdiction under section 239 (1) of the Constitution. D

6. Whether the court below has the competence to reverse itself on its ruling on 23/10/2007 on the averments of the petitioners’ pleadings.

7. Whether the court below was right on the 19/11/2007 it rejected the petitioners inspection witnesses depositions already filed before it. E

8. Whether the Court of Appeal was right when it failed to declare the depositions jointly filed by the 1st and 2nd respondents and those jointly filed by the 4th and 5th respondents respectively as incompetent despite being inapplicable to the proceedings. F

9. Whether the Court of Appeal was right in striking out 18 out of the 19 witness depositions filed with the petition after adopting the depositions unconditionally by order of court on 19/11/2007. G

10. Whether the Court of Appeal was right when it assumed jurisdiction to inquire into the propriety of exhibit EP2/34.” H

I have read before now, the judgment of my Lord Niki Tobi, JSC just delivered in this matter. In the aforesaid judgment, his lordship has comprehensively and meticulously dealt with all the above issues raised by the appellant. As they are mostly concerned with the issues of the proof of the two remaining allegations of (1) the non-qualification of the Alhaji Umaru Musa Yar’adua to contest the presi-

dential elections and (2) on the non-compliance with the provisions of the Electoral Act, 2006 in the conduct of the presidential elections, I entirely agree that the appellant, has woefully failed to establish by credible evidence the allegations. The Court of Appeal is correct in my view when it held at page 2708 vol. 11 of the; Record of Proceedings thus:-

*"In conclusion, this petition has been plagued by want of evidence in proof of virtually all the allegations contained therein. Even if I were to accept all the excluded evidence proffered by the petitioner which evidence relates only to four States of the Federation, the petitioner would still have been unable to establish this petition."*

The Learned Counsel for the 1st and 2nd respondents in paragraph 6.21 page 48 of his brief hit the nail right on the head when he submitted:-

*"But in the end, only twenty witnesses depositions were filed. That translated to an average of less than one witness per state and the Federal Capital Territory. The twenty witness depositions filed by the appellant were only in respect of five states. There were Katsina, Abia, Imo, Plateau and Rivers States. The appellant did not challenge the conduct of the election in Plateau State and so the single witness deposition filed in respect of that state was unsupported by pleadings and went to no issue, The court below was quite right, therefore, when it held that the offered evidence only in respect of four states."*

I respectfully agree that the appellant led no credible evidence to establish that the conduct of the presidential election held through out Nigeria on the 21/4/2007 was not done substantially in accordance with the provisions of the Electoral Acts. Although, it is true that no election can be 100% perfect that is why the law provides and recognizes that minor infractions with the provisions of the Act which do not in any material particular affect the result of the election would be condoned.

So even if all the depositions of the twenty witnesses were admissible and adopted as evidence, the appellant might have proved some irregularities in the conduct of the elections, at most in 4 states only out of 36 states of the Federation. Even if all the votes cast for the 4th respondent in the four States were deducted from the total, it would have no effect on the overall result of the election. See RUFFLE

VS. ROGERS (1982) QB 1220. It is for the court to make up its mind on the evidence as a whole whether there was a substantial compliance with the law as to elections or whether the act or omission affected the result see RE KENSINGTON NORTH PARLIAMENTARY ELECTION (1960) 2 ALL ER 150 at 153.

In the instant case, the petitioner attempted to lead evidence to show some irregularity in a few states which could not really affect the result of the election, the trial court is correct in my view to have condoned the irregularities, even assuming that they were proved as required by law.

As regards the issue of the ballot papers used in the presidential election not conforming to the provisions of the Electoral Act 2006, the Court of Appeal sitting as the trial court stated at page 2704 Vol. VII thus:-

*"In their reply, the 1st and 2nd respondents pleaded that the bundles containing the ballot papers were, serialized for audit purposes. These in effect is an admission that the ballot papers were not numbered serially and bound in booklets. Section 45(2) of the Electoral Act provides that the ballot papers shall be numbered serially and bound in booklets. This averment therefore, is considered proven and constitutes a non-compliance with the provisions of the Electoral Act."*

Now, it is common ground that ballot papers used for the presidential elections were not numbered serially nor were the ballot papers in booklet forms. This is clearly contrary to the provisions of section 45 (2) of the Electoral Act. Now, section 146 (1) of the Electoral Act 2006 provides:-

*"146(1) - An election shall not be liable to be invalidated by reason of non-compliance with the provisions of the Act if it appears to the Election Tribunal or Court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election."*

Now, the fundamental question is what is the effect of the presidential election conducted with ballot papers not numbered serially nor in booklet forms. Is that sufficient to vitiate the election? To put it another way, is the fact that the ballot papers used for the presidential election were not serially numbered nor in booklet form affected

the result of the election. To answer these questions, it is necessary to examine closely the provisions of section 146 (1) of the Electoral Act, 2006 recited above. In my view, the mere fact that there were irregularities or failure to strictly adhere to the provisions of the Act is not sufficient to avoid the election. In order to avoid the election it must be shown that:-

- (1) That the irregularities or failures constitute a substantial departure from the principles of the Act and that;
- (2) The irregularities or failures have substantially affected the results of the election.

From the foregoing it is clear that for any Court or Tribunal to proceed to invalidate an election the conditions set out above must be met. It follows therefore that in a situation where the irregularities do not constitute a substantial departure from the principles of Act, and had not been shown to have affected the result of the election the court or tribunal has no power to invalidate the election. Even in situations where the court considers that the proven irregularities constitute a non compliance, the court still has to be satisfied that the non-compliance has affected the result of the election before the election can be nullified.

Substantial compliance in this situation means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a Court or tribunal should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. The doctrine of substantial compliance permit the overlooking of technical failure that does not amount or constitute a substantial deviation from the intendment of the statute. See *LONDON AND CLYDESDALE ESTATE VS. ABERDEEN DISTRICT COUNCIL* [1980] 1 WLR 182. The question of what constitutes a material departure from a statutory requirement, or the question of whether requirements have been satisfied inevitably raises the question of degree,

In the instant case, the Failure of INEC to Fully observe the requirements of section 45 of the Electoral Act, by ensuring that the ballot papers were bound in booklets with differentiating colours for each office being contested, the key question is whether such failure constitutes a material departure from the principles of the Act or

whether the requirements therein have been sufficiently complied with in the light of the purposes for which the requirements were imposed. The relevance and consequences of failure to comply with the requirements may lie in its usefulness to accurately determine the purposes for which the conditions were set out. It appears to me that the requirement to provide the ballot papers in the Form and manner prescribed by Act was to prevent fraud, forgery and to ensure that the voters were not misled, and to provide an orderly record that could easily be ascertained. In my view, and considering the paucity of the evidence to the contrary, the election was conducted substantially with ballot papers which were an essential and material element necessary to enable voters to make a choice between candidates. The failure of serialization and putting the ballot papers in book form does not go to the root of the election as the election was clearly conducted with the ballot paper unserialized and not in book form.

Apart from this, it is also necessary as shown above, that this irregularity must be shown to have affected the result. In my view, the court below was right when it held: at page 2706 - 2707 of Vol. VII as follows:-

It is incumbent on the petitioner pursuant to the provisions of section 146 of the Electoral Act to establish that the non compliance established by him substantially affected the result of the election. This he has failed to do in the instant Case. In *HARUNA VS. MODIBBO* (2004) 16 NWLR (Pt.900) 487, this court held that where a petitioner makes non-compliance with the Electoral Act, the foundation of his complain, he is fixed with a heavy burden to prove before the court by cogent and compelling evidence that the non-compliance is of such a nature as to affect the result of the election. Show and satisfy the Court that the non-compliance substantially affected the result of the election to his disadvantage. Also in *BUHARI VS. OBASANJO* (2005) 13 NWLR (Pt 941) 1 *BELGORE JSC* in interpreting this provision of section 135(1) of the Electoral Act 2002, which is in pari materia with section 146 (1) of the Electoral Act 2006 had this to say” :-

*“It is manifest that an election by virtue of section 135 (1) of the Act shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provisions of the Act. It*

*must be shown clearly by evidence that the non compliance substantially has affected the result of the election. Election and its victory is like soccer and goals scored. The petitioner must not only show substantial non-compliance but also the figures, i.e votes that the compliance attracted or omitted. The elementary evidential burden of "the person asserting must prove" has not been derogated from Section 135 (1). The petitioners must not only assert but must satisfy the court that the non compliance has also affected the election results to justify nullification. See AWOLowo VS. SHAGARI (1979) 6-9 SC 51, ITUTE VS. INEC (1999) 4 NWLR (Pt. 599) 360, AKINFOSILE VS. IJOSE (1960) SCNLR 447 and AJADI VS. AJIBOLA (2004) 16 NWLR (Pt. 898) 91."*

In this connection see also SORUNKE VS. ODEBUNMI (1960) SCNLR 414 in which Case the observations of LORD COLERIDGE in the Case of WOODWARD VS. SARSONS LRC 733 at 737 was referred to:- ‘

*"If this proposition be closely examined it will be found to be equivalent to this, that the non observance of the rules or forms which is to render election invalid, must be so great as to satisfy the Tribunal that it did affect or might have affected the majority of the voters or in other words, the result of the election."*

In this connection the court below also held at page 2706 of the printed record :-

*"I have looked at exhibits before me, particularly, forms EC 25, EC 40C, EC 40E, which are tendered in their hundreds. Form EC 25 is electoral material receipt, form EC 40C is the ballot paper account and the verification statement, form EC 40e is the tendered ballot statement. The exhibited forms do show that the ballot papers were indeed not numbered serially, they have however, shown the number of ballot papers issued by the relevant electoral officers to each polling unit. "The petitioner led no evidence to show that any of these entries relating to the number of ballot papers issued at the polling units, and the number of ballot papers tendered in those units are false xxxxxxxxxx xx."*

Out of the catalogue of allegations of non-compliance with the electoral Act pleaded, only this issue of the non-numbering of the ballot papers was taken as proved by the admission of the respon-



dents and there was no evidence whatever of how the election result was affected by this non-material infraction to avoid the election. It is not correct as alleged by the petitioner under paragraph 9B(ii) that it was impossible to verify the quantity of the ballot papers received and used during the presidential election. As shown above the respondents were able to establish a proper statement of account of the ballot papers received in each unit of the polling stations and an account of what was not used. B

It must be emphasized that the petitioner appellant has abandoned all his claims that the presidential election was conducted by corrupt practices and criminal conduct such as rigging, staffing of ballot boxes etc. He has also failed to establish by credible evidence the issues of non-qualification of the 4th respondent and all the complaints of non-compliance except the issues of the ballot papers which was admitted and therefore required no proof. The only legitimate complaint in my view is the issue of the non-numbering of the ballot papers and the failure to bind the ballot papers in booklets. It is not that the election was conducted without ballot papers, It is only that the ballot papers did not conform to the requirement of Section 45 of the Electoral Act. D E

As shown above, Section 146(1) of the Electoral Act has been designed to save an election even when there is failure to meet the requirements of the provisions of Electoral Act one hundred percent. In construing the provisions of the Electoral Act a certain amount of common sense must be applied see BARNES VS. JARRIS 11953] 1. W.L.R. 64Q the provision of section 146 (1) is a special provision and is normally interpreted as taking away the effect of a general provision. The latin maxim SPECIALIA GENERALIBUS. DEROGANT is opt in this connection. Sec SCHRODER VS. MAJOR G (1989) 2 NWLR (Pt 101) 1 at 13.

Section 146 (1) of the Electoral Act, 2006 has not been put there in vain sec U.T.C (NIG) LTD VS. POMOTEI & OTHERS (1989) 2 NWLR (Pt.103) 244 at 303.

It is the duty of the court while interpreting a statutory provision to seek out the intention of the legislature or the law maker and give effect to it. Every statute must be construed according to its intentment and tenor. The primary concern of the court is the ascer- H

tainment of the intention of the legislature see *OJOKOLOBO VS. ALAMU* (1987) 3 NWLR (Pt 61) 377 at 402 if the words are clear and explicit the court must give effect to it.

Accordingly, in my view, the mere fact that the ballot papers were not numbered nor bound in booklets did not really make the ballot papers used at the election invalid. Section 146 (1) clearly apply, to save the election in situations such as this. I think it will be ridiculous, merely because the colour of the ballot papers, (which is required to be different under section 45) is blue instead of being white is sufficient to invalidate the ballot papers so as to render the entire election void. It is very clear to me that mere infraction with the provisions of the statute in this case, the ballot papers, not being one hundred percent in conformity with the provisions of section 45 of the Electoral Act, is not sufficient to render the election void, section 146 (1) of the Electoral Act is meant to cure such defects.

In my view, the issue of “substantiality of non-compliance” does not exist in the Electoral Act, there can only be compliance or non-compliance period! The only relevance of substantiality is when it is proved that the non-compliance substantially affects the result of the election. In the instant case it has not been suggested, shown, proved or established. The mere fact that there is irregularity with the form of the ballot papers is not enough.

It is for the above and the fuller reasons contained in the judgment of my lord Tobi JSC that I too, dismiss the appeal. I make no order as to costs.

---

### **OGUNTADE JSC (DISSENTING)**

On the 21st of April, 2007, the Presidential Election was conducted in Nigeria to elect a successor to Chief Olusegun Obasanjo, whose term of office as President of the Federal Republic of Nigeria was to expire on 29-05-07. The appellant, General Muhammadu Buhari was the candidate of the All Nigeria People’s Party (hereinafter referred to as ‘the A.N.P.P.’) in the said election. The 5th and 6th respondents in this appeal Alhaji Umar Musa Yar’Adua and Dr. Jonathan Goodluck were the Presidential and Vice-Presidential candidates respectively of the People’s Democratic Party (hereinafter re-

ferred to as ‘the PD.P.’) in the said election. There was a host of other candidates numbering 22. It is not necessary for the purpose of this judgment to set out the names of the other candidates. The elections were conducted as required under the Constitution of Nigeria 1999 by the 1st respondent Independent National Electoral Commission (hereinafter referred to as ‘INEC’) under the Chairmanship of the 2nd respondent Professor Maurice Iwu. At the conclusion of the election, the 5th respondent Alhaji Umaru Musa Yar’Adua was declared the winner with 24,784,227 votes. The appellant was the runner-up with 6,607,407 votes.

The appellant was dissatisfied with the declaration of the 5th respondent as the winner of the election. On 22-5-07, he filed a Petition against the declaration made by INEC. He challenged the declaration on a number of grounds. The grounds are:

*“(a) The 5th Respondent Umaru Musa Yar’Adua was at the time of the election not qualified to contest the election.*

*(b) The election was invalid by reason of non-compliance with the provisions of the electoral Act, 2006.*

*(c) The election was invalid by reason of corrupt practices.”*

The parties duly filed the standard processes i.e. petitions and answers. The petition was heard by the Court of Appeal, Abuja sitting as an election tribunal as provided under Section 239 of the 1999 Constitution of Nigeria. On 26-2-2008, the Court of Appeal, Abuja (hereinafter referred to as the court below) in its judgment dismissed the appellant’s petition. The appellant was dissatisfied and has come before this Court on a final appeal. The appellant raised twenty grounds of appeal out of which were formulated ten issues for determination in the appeal. The issues identified as arising for determination are these:

*“2.01. Whether the Court of Appeal was right when it held that the petitioner presented evidence on four States only Ground 6.*

*2.02. Whether on a proper evaluation of the evidence adduced in this petition, the petitioner was not entitled to judgment. Grounds 1, 4, 5, 6, 13, 14, 15, 17, 18, 19 and 20.*

*2.03. On who does Section 14.6(1) of the Electoral Act place the onus of proof of the effect of established non-compliance with the provisions of the Act on the result of an election conducted under*

*the Electoral Act, 2006, the Petitioner or the Respondents? Ground 3.*

*2.04. Whether the Court of Appeal properly placed the onus of proof of the effect of established non-compliance with the provisions of the Electoral Act on the Petitioner. Ground 2.*

B *2.05. Whether the power of the President of the Court of appeal under any section of the Nigerian Constitution, including Sections 248 and 285 extends to the power to issue Practice Directions to the court in its original jurisdiction under Section 239(1) of the Constitution. Ground 9.*

C *2.06. Whether court below had the competence to reverse itself on its ruling on 23/10/07 on the averments in the Petitioner's pleadings. Ground 12.*

D *2.07. Whether the court below was right when on 19/11/07 it rejected the petitioner's inspection witness depositions already filed before it. Ground 16.*

E *2.08. Whether the Court of Appeal was right when it failed to declare the depositions jointly filed by the 1st and 2nd respondents and those jointly filed by the 4th and 5th Respondents respectively as incompetent despite being inapplicable to the proceedings. Ground 11.*

F *2.09 Whether the Court of Appeal was right in striking out 18 out of 19 witness depositions filed with the petition after adopting the depositions unconditionally by order of court on 19/11/07.*

*2.10. Whether the Court of Appeal was right when it assumed jurisdiction to inquire into the propriety of Exhibit EP2/34 (Ground 7)."*

G Some of the respondents also raised issues for determination of their own. However, none of them filed a cross-appeal. I am satisfied that the appellants' issues above flow from the twenty grounds of appeal raised by him. I intend to consider first, issues 2.03 and 2.04 above together. The two issues raise the question as to who of the parties in an Election petition bears the onus of proof pursuant to H Section 146(1) of the electoral Act 2006. The proper interpretation to be given to section 146(1) is not entirely free from controversy in the light of some of the previous decisions of this court and it is appropriate that I give a full consideration to the provision. The said



the election or that there was no such non-compliance.

It seems to me, that, given the fact that laws are made to be obeyed, it will be sufficient for a petitioner to lead evidence of non-compliance, and if such evidence is satisfactory, the petitioner should be entitled to judgment unless the respondent in its defence shows that there was no such non-compliance or that, if there was one, it did not affect the principles of the Electoral Act and in addition that it did not substantially affect the result of the election. To accept otherwise i.e. that it is the petitioner who should prove non-compliance and, still go further to prove its substantial effect on the result of the election, is in my view akin to approaching the matter on the basis or notion that laws are not primarily made to be obeyed. In my humble view, it is the person who has broken the law through non-compliance with the provisions of the law, who should in a state of remorse plead 'I am sorry this non-compliance occurred, but it has not compromised the principles of the Electoral Act; and the result of the election would still have been the same even if there was compliance with the provisions of the Act.

The court below at pages 2706 of its judgment observed:

*"It is incumbent on the petitioner pursuant to the provisions of Section 146 of the electoral Act to establish that the non-compliance established by him substantially affected the result of the election. This he has failed to do in the instant case. In Haruna v. Modibbo (2004) 16 NWLR (pt. 90) 487, this Court held that where a petitioner makes non-compliance with the Electoral Act, the foundation of his complaint, he is fixed with a heavy burden to prove before the court by cogent and compelling evidence that the non-compliance is of such a nature as to affect the result of the election. He must show and satisfy the Court that the non-compliance substantially affected the result of the election to his disadvantage. Also in Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) 1, Belgore, JSC in interpreting this provision of section 35(1) of the Electoral Act, 2002, had this to say:*

*'It is manifest that an election by virtue of section 135(1) of the Act shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provision of the Act. It must be shown clearly by evidence that the non compliance has substantially affected the result of the election. Election and its victory is (sic) like*

soccer and goals scored. *The petitioner must not only show substantial non compliance but also the figures, i.e. votes that the compliance attracted or omitted. The elementary evidential burden of the person asserting must prove has not been derogated from by section 135(1). The petitioner must not only assert but must satisfy the court that the non compliance has so affected the election results to justify nullification.* B

*See also Awolowo v. Shagari (1979) 6-9 SC. 51; Itute v. INEC (1999) 4 NWLR (Pt. 599) 360; Akinfosile v. Ijose (1960) SCNLR 447; and Ajadi v. Ajibola (2004) 16 NWLR (pt. 898) 91.*

*It is clear from the above authorities that the onus of proof of the substantiality of the non-compliance and the substantiality of the effect of the non-compliance on the election results rests on the petitioner. The petitioner has in the instant case established the substantiality of the non-compliance with section 145(2) (sic) of the Electoral Act, but has failed to establish the substantiality of this non compliance on the result of the election. This issue is therefore resolved in favour of the Respondent's (sic).* C

There is no doubt that the court below in its views above was following a line of reasoning which this Court has canvassed in some of its previous judgments. I do not think that this Court was right in those views. I think that this Court ought to revisit these decisions. It seems to me that the approach which accords with principle and logic is that charted by this Court in *Swem v. Dzungwe & Anor* [1966] NMLR 297 at 303 where Coker JSC said: E

*"it is clear therefore that where, from the facts found the Court was unable to say whether or not the non-compliance affected the result, once it is satisfied that there was non-compliance which might affect the result, an election petition will be allowed. In such a petition the petitioner postulates that the petitioner lost the election on account of noncompliance with the electoral Rules or Regulations or Statutes which was substantial enough to affect the result of the election. The reply of the respondent postulates, apart from technical bars and procedure and/or jurisdiction, that there was no non-compliance or that even if there was, the non-compliance did not affect the majority secured by the appellant. It follows clearly, therefore that if at the end of the case of the petitioner, a case of non-compli-* F

ance is established which may or may not affect the result of the election, and it is impossible for the Tribunal to say whether or not the results were affected by the non-compliance established. Unless there be evidence on behalf of the respondent that such a non-compliance as found could not and did not in fact affect the results of the election, the petition is entitled to succeed on the simple ground that civil cases are proved, by a preponderance of accepted evidence. We wish to point out that the case of *Akinfosile v. Ijose (supra)* was decked by its own facts and pleadings delivered therein. As already observed, once a petitioner established non-compliance and the court or other tribunal cannot say whether or not the results of the election could have been affected by such non-compliance, the election will be avoided.”

The above views of the Supreme Court in my respectful opinion accords with fairness and justice. A reasoning which saddles a petitioner with the burden of showing non-compliance with the provisions of the Electoral Act and at the same time showing the effect of the alleged non-compliance on the result of election would appear to be unduly favorable and lenient to the respondent who is the perpetrator of the disobedience to the law of the land. This reasoning if sustained in Nigeria, would encourage politicians and INEC to disobey the laws relating to elections without any qualms or remorse since at the end of the day, they are not penalized for such disobedience to the laws. I do hope that the time will come soon when this Court will have the opportunity to review the case law on the point. I now consider issue No. 2.02 which raises the question as to whether or not the appellant was entitled to judgment on the case he made before the court below. In this regard, I intend to consider the pleadings raised by the Petitioner as to an alleged non-compliance with the provisions of the Electoral Act, 2006. In paragraphs 9(B)(ii)(a) and (b) of his Petition, the Petitioner/Appellant averred:

“9B(ii) Section 45(2) of the Act

(a) Your Petitioners state that Section 45(2) of the Act provides that ballot papers shall be bound in booklets and numbered serially. Pursuant to this the manuals for *Elective Officials, 2007* provided for the entry of the serial numbers of ballot papers and the quantity of the ballot received for each election in form EC 40C for purpose of



verification and authentication. Your petitioners state that on 21st April, 2007, the 1st and 2nd Respondents, in conjunction and collusion with the 3rd and 4th Respondents conducted the Presidential election without compliance with section 45(2) of the Act, and in the process assigned more the Twenty Four Million unverified and unverifiable votes to the 5th Respondent, in that there are no booklet counterfoils to show the number of ballot papers actually printed by the 1st Respondent or were actually used at the purported election. Ballot papers are always printed with counterfoil and serial numbers which are features usually included to establish an audit trail. This fact is well known to the Respondents. The Petitioners state that the 1st and 2nd Respondent failed to print the Presidential ballot papers with serial numbers and in booklet form as part of the grand plot to install the 5th Respondent as the President of Nigeria at all cost including arbitrarily assigning figures with the hope that the figures would be unverifiable.

9(ii)(b) Your Petitioners state that the ballot papers used at the election are invalid the same not being cognizable under the Act under which the election was conducted, whether by express provision or its principles, and shall contend that the voting at the election having been illegally conducted with illegal ballot papers, the quantity of which could not be verified was consequentially, invalid.”

In paragraphs 17 and 18 of the Reply to the Petition filed by the 5th and 6th respondents, it was averred thus:

“17. The respondents deny paragraph 9B(ii) of the petition and aver that the ballot papers used for the election of 21st April, 2007 were produced under the best security cover and they met the requirements of the Electoral Act, especially section 45(2) of the Act.

18. The Respondents deny paragraph 9(ii)(b) of the petition and state that the ballot papers used for the election were legal, lawful and valid.”

The 1st and 2nd respondents who actually conducted the elections in paragraphs 12 and 13 of their Reply to the Petition pleaded thus:

“12. The Respondents deny the averment in paragraph 9B(ii)(a) of the Petition as untrue. The Ballot Papers issued for and used in Presidential Election throughout the Federation were regular and were

*in accordance with the Electoral Act. If any such Ballot Paper did not have serial number or counterfoil or were not in book form (all of which are not admitted) any such irregularity, omission or error did not affect either the conduct or the results of the Presidential Election which was conducted substantially in accordance with the Electoral Act, as the bundles, containing the Ballot papers were serialized for audit purposes and 4th Respondent, having by directives to its agents, taken strict measures for ensuring that only accredited voters were issued with ballot papers and the number of votes cast did not exceed the number of ballot papers duly issued at each polling station.*

*13. In answer to paragraph 9(ii)(b) of the Petition the Respondents state that the Ballot Papers used at the election were valid and accorded in every respect with the Act. Voting at the election was conducted in accordance with the law. The quantity of the Ballot Papers could be easily verified as the packages containing the Ballot Papers were serialized as earlier pleaded. Neither the electorate nor the parties were misled and no candidate could derive any advantage over the others in any way or manner and the election was conducted in substantial conformity with the law."*

*(underlining mine)*

When the above paragraphs of the pleadings of parties upon which the petition was tried are compared and contrasted, it becomes apparent that the respondents did not join issues with the petitioner/appellant on the averment that the ballot papers used for the 21st April, 2007 Presidential elections were not serialized and bound in booklets. The contention of the 1st and 2nd respondents was that the ballot papers were serialized for audit purposes. I do not understand the import of "serializing ballot papers for audit purposes" in answer to the averment that the ballot papers were not serialized as provided under section 45(2) of the Electoral Act. Clearly therefore, the pleading of the 1st and 2nd respondents on the serialization of the ballot papers used for the election was evasive. Order 26 rules 13 and 14(1) of the Federal High Court (Civil Procedure) Rules 2000 made applicable to Election Petitions by Electoral Act, 2006. First Schedule par. 50 provides:

*"13. It shall not be sufficient to deny generally the facts alleged by the statement of claim, but the defendant shall deal specially with*

*them, either admitting or denying the truth of each allegation of fact seriatim, as the truth for falsehood of each is within his knowledge, or (as the case may be) stating that he does not know whether any given allegation is true or false.*

*14(c) When a party denies all allegation of fact he shall not do so evasively, but shall answer the point of substance.”* B

Any averment pleaded by the plaintiff or a petitioner as in this case which is not denied by the defendant or respondent is deemed as admitted and there is no issue on the point to go to trial: Surely, the 1st and 2nd respondents who organized and supervised the 2007 C Presidential elections ought to know whether or not the ballot papers used for the elections were serialized and bound in booklets as required by section 45(2) of the Electoral Act. On the state of pleadings before the tribunal, the 1st and 2nd respondents had clearly admitted that the ballot papers used were not serialized and bound in booklets as required under Section 45(2) Electoral Act. The averment that the ballot papers were serialized for audit purposes is plainly evasive and mischievous. See *Lewis Peal v. Akhimian* [1976] 7 S.C. 157 and *Okechukwu Adimora v. Nnnanyelugo Ajufo & Ors.* [1988] 3 NWLR E (Part 80) I at 11.

The court below correctly appraised the pleadings when at page 2704 of Volume VII in its judgment it said:

*“The Petitioner in paragraph 9B(ii)(a) and (b) pleaded that contrary to S. 45(2) of the Electoral Act, the ballot papers were not numbered serially and not bound in booklets”* F

*In their reply, the 1st and 2nd Respondents pleaded that the bundles containing the ballot papers were serialized for audit purposes. These (sic) in effect is an admission that the ballot papers were not numbered serially and bound in booklets. This averment therefore is considered proven and constitutes non compliance with the provisions of the Electoral Act.”* G

(underlining mine)

At pages 2705 to 2706 of Vol. 7 still in its judgment, the court below then said: H

*“I have looked at the exhibits before me, particularly. Forms EC25, EC 40C, EC 40E, which are tendered in their hundreds. Form EC25 is electoral material receipt, Form EC 40C is ballot paper ac-*

- count and verification statement, Form EC 40E is the tendered ballot statement. The exhibited Forms do show that the ballot papers were indeed not numbered serially. They have however, shown the number of ballot papers issued by the relevant electoral officers to each polling unit, and the numbers tendered in these polling units. The
- B Petitioner led no evidence to show that any of these entries relating to the number of ballot papers issued at the polling units, and the number of ballot papers tendered in those units are false. This the Petitioners agents at the polling units could easily have ascertained.
- C It is therefore not correct that the Petitioner could not maintain an audit trail, simply because the ballot papers were not serially numbered. It is incumbent on the Petitioner pursuant to the provisions of Section 146 of the Electoral Act to establish that the non compliance established by him substantially affected the result of the election.
- D This he has failed to do in the instant case. In *Haruna v. Modibbo* (2004) 16 NWLR (Pt. 900) 487, this Court held that where a Petitioner makes non compliance with the Electoral Act, the foundation of his complaint, he is fixed with the heavy burden to prove before the Court by cogent and compelling evidence that the non compli-
- E ance is of such a nature as to affect the result of the election. He must show and satisfy the Court that the non compliance substantially affected the result of the election to his disadvantage.”

Let me say here that the finding of the tribunal that the ballot

F papers were not serialized and bound in booklets has not been appealed against by any of the Respondents, it is therefore binding on this court.

Now, was the court below right in its views that the appellant/

G petitioner did not prove that the fact that serialized and bound ballot papers were not used did affect substantially the result of the election? I think not.

It is expedient that I once again reproduce Section 146(1) upon which the court below relied in coming to its conclusion. In the consideration of issues 2.03 and 2.04 supra, I made the point that the

H law does not put the onus on a petitioner to show that an identified non compliance has substantially affected the result of the election. Similarly I made the point that some of the cases previously decided by this Court might have misled the court below. But that would not

be a justification for the error into which the court below fell.  
Sections 45(1) & (2) and 146(1) of the Electoral Act provide:

*“45(1) The commission shall prescribe the format of the ballot papers which shall include the symbol adopted by the Political party of the candidate and such other information as it may require.*

*(2) The ballot papers shall be bound in booklets and numbered serially with differentiating colours for each office being contested.*

*146(1) An election shall not be liable to be invalidated by reason of non compliance with the provisions of this Act if it appears to the Election tribunal or court that the election was conducted substantially in accordance with the principles of this Act and that the non compliance did not affect substantially the result of the election.”*

(Underlining mine)

Let me now break down section 146(1) for the purpose of analyzing it and giving it the due interpretation.

*“(a) an election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election tribunal or court..... ..”*

*(b) that the election was conducted substantially in accordance with the principles of this Act ...*

*(c) and that the non-compliance did not affect substantially the result of the election.”*

(underlining mine)

I am proceeding with this analysis even on the supposition that the onus was correctly placed on the petitioner/appellant to prove that the non-compliance identified substantially affected the result of the election. In the judgment of the court below, no consideration was given to the single most important clause under Section 146(1) which I had identified as (b) above. The court or tribunal before coming to a consideration of the question whether or not an identified non-compliance with the provisions of the Electoral Act affected substantially the result of the election must first identify the principles of the Electoral Act, 2006 in order to ascertain whether or not the elections were conducted in accordance with the principles of the Electoral Act. If the elections were not conducted in accordance with the principles of the Act, the stage could not be reached for a consid-

eration of whether or not the non-compliance affected substantially the result of the Election. The central and major purpose of Section 146(1) is that non-compliance with the principles of the Electoral Act ought not to be forgiven or overlooked.

B The court below made the grave error of not considering the most important element in the applicability of section 146(1). It is impermissible in the interpretation of statute to treat any of the clauses or provisions therein as superfluous or irrelevant. In *Tukur v. Govt. of Gongola State* [1989] 4 NWLR. (Part 117) 577 at 579, this Court C per Nnaemeka-Agu JSC observed:

*“Now it is the first principle of interpretation that the maker of any law, be it constitutional or other wise, does not use any words in vain. Nor does he indulge in tautology or in surplusage in the use of words: See Halsbury’s Laws of England (3rd Edn.) Vol. 36 para. D 583. See also Hill v. ‘William Hill (Park Lane) Ltd. [1949] A.C. 530, at p. 545-6.”*

I am therefore unable to treat the expression “that the election was conducted substantially in accordance with the principles of this Act” as a surplusage. I must construe and apply it.

E The Electoral Act 2006 did not specifically set out the principles of the Act. It seems obvious however that the principles of the Electoral Act are the fundamental elements of the law governing elections which must be seen as sacrosanct in a democratic system of F government. The question that follows is - what are these principles which Section 146(1) above regard as sacrosanct? A perusal of the totality of the provisions of the Act easily leads to the conclusion that these principles include (I) Inclusiveness. Inclusiveness is in the sense that all persons entitled to vote under the Nigerian 1999 Constitution G are not precluded from exercising the right to vote. This is why it is required under the Act that there should be registration of voters before the elections and why under sections 10 to 25 of the Electoral Act certain provisions are made concerning registration and as to H persons presenting themselves to vote. They must First be asked certain questions which are directed to confirming their eligibility to vote. The second is Transparency.

The necessity for transparency explains why it is required by Section 45(2) that ballot papers be serialized and bound in booklets.

This provision is no doubt a bold effort to eliminate the possibility of the ballot papers being substituted with some others. It ensures that ballot papers which are moved across the country from State to State and from polling unit to polling unit, would be monitored and accounted for during the elections and further for use in the event of a dispute after the election. Without ballot papers being serialized and bound in booklets as required by Section 45(2), it becomes possible to print fake ballot papers which can then be introduced into the ballot boxes fraudulently. When ballot papers are not serialized and bound, as required by law, the principle of transparency in the election is compromised and the elections no matter how otherwise properly conducted loses credibility. Another identifiable ‘principle’ of the Electoral Act 2006 is ‘Secrecy’ Indeed Section 53(1) thereof provides:

*“Voting at an election under this Act shall be by open secret ballot.”*

Now in Exhibit P2/A1 paragraph 1.3, the 1st and 2nd Respondents who conducted the elections stated the ingredients of a good and acceptable election as:

- “(a) Transparency and neutrality*
- (b) High Level of integrity*
- (c) Credibility, courage and dedication*
- (d) Respect for the secrecy of the vote, and*
- (e) Acting in accordance with the law.”*

It is to be borne in mind that Section 45(2) uses an imperative language that *“ballot papers shall be bound in booklets and numbered serially with differentiating colours for each office being contested.”*

The learned author of Maxwell on the Interpretation of Statutes 12th Edition at pages 322-333 writes:

*“When a statute imposes an obligation for breach of which civil action for damages will lie, this obligation may be either absolute or qualified. In the case of an absolute obligation, it will be no defence for the person bound by the obligation to say that he took all reasonable steps to fulfill it: if the obligation is not absolute, at least some of the defences which would be available in a negligence action will be open to the person sued. The question in every case depends on the*

wording of the Act. A provision which requires ‘reasonably practicable’ steps to be taken clearly imposes an obligation which is considerably less than absolute. So far as statutes which contain no such indication are concerned, the decisions show that duties imposed on employers in relation to their employees are more likely to be held to be absolute, while duties imposed on public bodies’ towards the community at large have more commonly been held to be qualified. *Stable J.* has said that: ‘An examination of the reported cases where the duty has been held to be absolute shows that, speaking broadly, they fall into one of two classes. The first class is statutes where certain means are directed to secure a particular end. Examples of this class can be found in the legislation designed to ensure the safety of persons working in mines and factories and the like where the statute directs that certain means to secure those ends must be adopted. In those cases, there is no obligation on the owner of the factory or the mine to carry on business, but, if he does so, the means which the statute enjoins for the safety of his workpeople must be observed, and the duty is absolute. The second class is where the statute enjoins the end but not the means. But this concerns criminal liability, which has been discussed earlier in this work. The corollary of *Stable J.*’s analysis of the cases is that where the statute prescribes both end and means, leaving little latitude to the person or persons subjected to the duty, that duty might reasonably be regarded as a qualified one.’

(Underlining mine)

In *Liverpool Borough Bank v. Turner* [1861] 30 L.j Ch. 379 at 380, Lord Campbell L.C said:

“No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of court of justice to try to get at the real intention of the legislature by carefully attending the whole scope of the statute to be construed.”

(Underlining mine)

It seems apparent that the intention of the legislature, given the language in which Sections 45(2) is couched is to eliminate the possibility of electoral fraud and ensure that the election process is transparent and credible, indeed, it seems to me that even without



the provisions of Section 45(2), it should have been clear to the 1st and 2nd respondents that in the event of an election dispute, it will be impossible to establish a trail of the ballot papers used unless such ballot papers were serialized.

It is important that at the conclusion of an election, an unbiased observer should be able to see that the election was free, fair, transparent and that no room had been deliberately left open for malpractices to occur. If deliberately or through inadvertence, those in charge of the elections had left room for any one to doubt the integrity of the processes in the elections, then it is my view that the fundamental principles of the election have been compromised. In an election, the heartbeat and the most sensitive document involved is the ballot paper. It is the engine room of the process. This explains why the Electoral Act, 2006 contains several provisions as to how they should be handled. This is also why Section 45(2) provides in mandatory language that a ballot paper shall be serialized and bound in booklets. The numbers on them represent the signature of INEC vouching for their authenticity. It is akin to a signature on a bank cheque. No bank would honour an unsigned cheque.

The inevitable conclusion I arrive at, is that the failure of the 1st and 2nd respondents to use serialized ballot papers bound in booklets is clearly a non-compliance which shows that the 2007 Presidential Elections were not conducted substantially in accordance with the principles of the Electoral Act, 2006.

The court below should have nullified the said elections for this reason. The court below went on to say that the petitioner/appellant did not show that the failure to use serialized ballot papers and have same bound in booklet substantially affected the result of the election. With respect to their Lordships of the court below, they were wrong in their view. They failed to bear in mind that the printing of serialized ballot papers and bound in booklets was an act to be performed before the elections were conducted. The said act therefore was a condition precedent to the holding of the elections. When a provision of the law requires an act to be performed before taking any further steps and that act is not performed, the further steps taken may amount in law to a nullity.

The reasoning of the court below would appear to be curious.

They proceeded on the basis that the elections conducted with ballot papers unauthorized by law was valid; and then turned round to ask the petitioners/appellants to prove that the same election was invalid for non-compliance. They unwittingly put the cart before the horse. That was a strange way to reason for a court. A court could not first assume that a disputed act was valid and then place on the plaintiff the onus of proving the invalidity of the same act when what was in dispute was the constitutive elements which would lead to a pronouncement of the validity of the Act.

Even on the supposition that the burden to prove that the failure to use the ballot papers which did not conform with the law did substantially affect the result of the election was on the petitioner/appellant, it is my firm view that the petitioner/appellant discharged the burden. A ballot paper not in conformity with Section 45(2) is prima facie an act of non-compliance. It is therefore an invalid ballot paper. Since it is the same invalid ballot paper that converts later in the process of an election into a vote, the resulting vote must also become an invalid vote. It was never the case of the respondents that the unserialized ballot papers were only used in some of the States in Nigeria. If that were their defence and the court below had found that this was truly the case, that would have placed on the court below the duty to determine what percentage of the votes cast at the election was valid or invalid. If the 4th and 5th respondents would still have won by a majority of the valid votes, the petition was liable to fail. But in this case, all the ballot papers used to cast votes for all the candidates in the election were invalid.

The result is that each of the candidates at the Presidential Elections 2007 scored zero or no votes. An invalid ballot paper cannot yield a valid vote. Clearly therefore, the petitioner/appellant in view succeeded in making the case that the non-compliance with Section 45(1) of the elections Act, 2007 substantially affected the result of the election. Let me reiterate very respectfully that the lower court erred by not coming to the conclusion that each of the candidates at the election scored zero as no valid votes were recorded for any of them.

I intend to consider issue No. 2.05 which raises the question whether any section of the 1999 Constitution of Nigeria including Sections 239(1), 248 and 285 confers on the President of the Court

of Appeal the power to issue Practice Directions on the election cases coming before the Court of Appeal. Sections 239, 248 and 2.85 of the Constitution provide:

*“239.(1) Subject to the provisions of this Constitution, the Court of Appeal shall, to the exclusion of any other “court of law in Nigeria, have original jurisdiction to hear and determine any question as to whether -*

*(a) any person has been validly elected to the office of President or Vice-President under this Constitution; or*

*(b) the term of office of the President or Vice-President has ceased; or*

*(c) the office of President or Vice-President has become vacant.*

*(2) In the hearing and determination of an election petition under paragraph (a) of subsection (1) of this section, the Court of Appeal shall be duly constituted if it consists of at least three Justices of the Court of Appeal.”*

*“248. Subject to the provisions of any Act of the National Assembly, the President of the Court of Appeal may make rules for regulating the practice and procedure of the Court of Appeal.”*

*“285.-(1) There shall be established for the Federation one or more election tribunals to be known as the National Assembly Election Tribunals which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether:*

*(a) any person has been validly elected as a member of the National Assembly;*

*(b) the term of office of any person under this Constitution, has ceased;*

*(c) the seat of a member of the Senate or a member of the House of Representatives has become vacant; and*

*(d) a question or petition brought before the election tribunal has been properly or improperly brought.*

*(2) There shall be established in each State of the Federation one or more election tribunals to be known as the Governorship and Legislative Houses Election Tribunals which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to*

the office of Governor or Deputy Governor or as a member of any legislative house.

(3) The composition of the National Assembly Election Tribunals, Governorship and Legislative Houses Election tribunals shall be as set out in the Sixth Schedule to this Constitution.

B (4) The quorum of an election tribunal established under this section shall be the Chairman and two other members.

Section 239 above vests in the Court of Appeal the original jurisdiction to hear and determine cases arising from elections to the offices of President or Vice-President of Nigeria. Section 248 vests in the President of the Court of Appeal the power to make Rules regulating the Practice and Procedure in the Court of Appeal. Section 285 grants the authority to set up election tribunals. It is apparent that none of the provisions of Sections 239, 248 and 285 of the D 1999 Constitution directly deals with the power of the President of the Court of Appeal to issue Practice Directions on the conduct of cases before the Court of Appeal sitting as an election tribunal. Paragraph 50 of the First Schedule to the Electoral Act 2006 provides: .

E *“50. Subject to the express provisions of this Act, the practice and procedure of the Tribunal or the Court in relation to an election petition shall be as nearly as possible, similar to the practice and procedure of the Federal High Court in the exercise of its civil jurisdiction, and the Civil Procedure Rules shall apply with such modifications as F may be necessary to render them applicable having regard to the provisions of this Act, as if the petitioner and the respondent were respectively the plaintiff and the defendant in an ordinary civil action.”*

For the purpose of the jurisdiction granted to the Court of G Appeal in the hearing of election matters the Rules of Court applicable are those of the ‘Federal High Court. Could not the President of the Court of Appeal’ who has the power, to create election tribunals and who is the head of the Court of Appeal make Practice Directions so that the jurisdiction granted to the tribunals including the H Court of Appeal would be exercised hitch-free and expeditiously? I am of the firm view that he has such power even if the relevant provisions of the Constitution do not specifically say so. This was the, question which the Supreme Court had to consider in *Unilag v. Agoro*

Suit No. SC.32/1984 decided on 30-11-84 (Unreported). Oputa J.S.C. in the case observed:

*“It should, I think, be common ground that the aim of a practice direction is to regulate the practice and procedure of the Court.’ Thus the Appeal Committee of the House of Lords in England issues directions regulating the practice and procedure of the House as the Practice Master does for the Queen’s Bench Division. In other words, someone or some authority is always charged with the responsibility of regulating the practice and procedure in the various courts. Rules of Court, like the Supreme Court Rules, are also made ‘for regulating the practice and procedure of the courts’. Thus from a purely functional angle, Rules of Court and Practice Directions are designed to achieve the same object and attain the same objective. Section 216 of the 1979 Constitution uses the expression ‘may make rules of regulating practice and procedure’. It is my humble view that once it is established that the aim or object of any rule made by the C.J.N. is for regulating the practice and procedure of the Supreme Court, the C.J.N. automatically derives the power to make such a rule from Section 216 is expressed in general terms. It does not discriminate between Rules of Court, strictly speaking and other rules regulating practice and procedure like practice directions. It comprehends both.*

*From yet another angle it ought to be common ground that Rules of Court have greater authority and stand on a much higher pedestal than mere Practice Directions. Logically therefore, the admitted power to make the other obviously lower.*

*The greater includes the less. In the final result, I therefore hold that under Section 216 of the 1979 Nigerian Constitution, the C.J.N. has constitutional competence to issue Practice Direction ‘subject to the provisions of any Act of the National Assembly’ or in the present day parlance, a Decree. We have not been referred to any Act of the National Assembly or any Decree limiting or delimiting the powers granted to the C.J.N. by Section 216 of the Constitution. His (C.J.N.’s) issuance of the Practice Directions, the subject matter of this application was therefore not ultra vires his constitutional power and void but infra vires those powers and valid.”*

In the same vein Bello J.S.C. (as he then was) observed:

*“However, different consideration prevails under the 1979 Con-*

*stitution which by section 216 confers the power for regulating the practice and procedure of the Supreme Court on the Chief Justice only. I think the provisions of section 216 should be broadly construed within the principle enunciated in Nafiu Rabi v. The State (1980) 8-11 S.C. 130 and. Adesanya v. President of Nigeria (1981) 5 S. C. 112 as conferring on the Chief Justice not only the power to make rules but also the power to issue directions which are incidental to the making of the rules. Section 10(2) of the Interpretation Act 1964 permits such broad construction. Accordingly, I construe the power to make, rules under section 216, which provides:*

*'216. Subject to the provisions of any Act of the National Assembly or Decree the Chief Justice of Nigeria may make rules for regulating the practice and procedure of the Supreme Court.'*

*Includes the power to give and issue directions as to the mode of complying with or operating the rules made thereunder. My conclusion on the first question is that the Chief Justice has the power under Section 216 of the Constitution to give and issue practice directions."*

The position of this Court, as decided in *Unilag v. Aigoro* (supra) is that the power to make Practice Directions is one to be inferred from the grant of the power to make Rules. If paragraph 50 of the First Schedule of the Electoral Act make the Rules of the Federal High Court applicable in election matters, it is to be inferred that the President of the Court of Appeal who sets up elections tribunals and heads the Court of Appeal has the power well regulated and adapted to meet the peculiar problems arising from election petitions. There is in particular the special necessity to ensure that the election petitions are expeditiously disposed of with minimal problems. The Petitioner/Appellant has not raised any issue as to how the exercise by the President of the Court of Appeal to make Practice Directions has adversely affected him or hindered his constitutional right to a fair hearing of his petition. I therefore do not see the need to explore the matter further. It is sufficient to say that the President of the Court of appeal, in the exercise of his power to make Practice Directions may not give any directions which derogates from the validity and effect of any other Law or the Constitution of Nigeria.

In the final conclusion, this appeal succeeds. I hold the view

that the failure of the 1st and 2nd respondents to comply with Section 45(2) of the Electoral Act which is that ballot papers be serialized and bound in booklets for the purpose of the Presidential elections held on 21-4-07, is so grave that the said elections ought to be nullified. In coming to this conclusion, I have advised myself fully that all courts in Nigeria have the duty to enforce our laws dealing with elections in order to ensure transparency, credibility and fairness in all elections in Nigeria. I annul the Presidential elections in Nigeria held on 21-4-08 and order that fresh elections be conducted within 90 days from today.

I make no order as to costs.

### **MUKHTAR JSC (DISSENTING)**

This is an appeal against the decision of the Court of Appeal sitting as Court of first instance in the Petition on the Presidential Election that was held on 21st of April, 2007. The Petition was filed in the Court at Abuja on 22nd May 2007, and the 1st and 2nd Respondents filed their Reply on 10th September, 2007. In the Petition are the following salient averments and grounds ;-

*"7 And your Petitioners state that the figures stated above were unlawfully assigned to the candidates by the 2nd Respondent acting on behalf of the 1st Respondent as the said figures did not arise out of an election duly conducted, or figures duly collated under the Electoral Act and in accordance thereto. Your Petitioners state that the Presidential election of 21st April, 2007 was invalid by reasons of non-compliance, corrupt practices, violence and various malpractices as shall be shown hereunder. GROUND'S UPON WHICH THE PETITION IS BROUGHT*

#### **8. GROUND'S**

*The grounds upon which this petition is brought are as follows:-*

- a. The 5th Respondent Umaru Musa Yar'adua was at the time of the election not qualified to contest the election,*
- b. The election was invalid by reason of non-compliance with the provisions of the Electoral Act, 2006,*
- c. The election was invalid by reason of corrupt practices."*

The reliefs sought by the Petitioners/Appellants are as follows:-

*"27. The Petitioners consequent upon paragraph 26 supra pray the Honourable Court of Appeal to make the following orders: -*

*(i) That the 5th Respondent was not qualified to contest the Presidential election of 21st April, 2007 consequent upon which his election together with the 6th Respondent as President and Vice -*  
 B *President respectively is void.*

*(ii) That the election to the office of President of the Federal Republic of Nigeria conducted on the 21st April, 2007 is invalid and therefore cancelled.*

C *(iii) That the 3rd Respondent is guilty of gross misconduct for, without any just or probable cause, involving the military in a purely civil matter; the conduct of election, contrary to the powers conferred on his office by section 217 of the constitution of the Federal Republic of Nigeria*

D *(iv) That the 1st Respondent conducts another election, for the office of the President of the Federal Republic of Nigeria between the remaining 22 (Twenty-two) Candidates within three (3) months.*

*(v) That the 2nd Respondent in the person of Professor Maurice Iwu be disqualified from Participation in the conduct of any future*  
 E *elections in the Federal Republic of Nigeria.*

*(vi) That the President of the Senate takes over the duties of the President of the Federal Republic of Nigeria in accordance with section 146 of the Constitution pending the conduct of another election."*

F All the Respondents filed their various replies to the Petition.

In compliance with the Practice Direction of the Court there was frontloading of evidence and documents, and witnesses testified. All Learned Counsel addressed the court viva voce. The evidence and  
 G the addresses were duly evaluated and considered respectively by the lower court. At the end of the day the Petition was dismissed. The Petitioner was aggrieved by the decision and has appealed to this court on 20 grounds of appeal. All Learned Counsel, most of them Senior Advocates of Nigeria exchanged briefs of argument. These  
 H briefs of argument together with Appellant's reply brief were adopted at the hearing of the appeal. The Learned Senior Advocates in addition proffered oral argument in the course of the hearing. The following issues for determination were raised in the appellants' brief of



argument:-

*"1. Whether the Court of Appeal was right when it held that the petitioner presented evidence on four states only.*

*2. Whether on a proper evaluation of the evidence adduced in this petition, the petitioner was not entitled to judgment.*

*3. On who does Section 146 (1) of the Electoral Act place the onus of proof of the effect of established substantial non-compliance with the provisions of the Act on the result of an election conducted under the Electoral Act 2006, the petitioner or the Respondents?* <sup>B</sup>

*4. Whether the Court of Appeal properly placed the onus of proof of the effect of established substantial non-compliance with the provisions of the Electoral Act on the petitioner.*

*5. Whether the power of the President of the Court of Appeal under any section of the Nigerian Constitution including sections 248 and 285 extends to the power to issue Practice Directions to the court in its original jurisdiction under section 239(1) of the Constitution.* <sup>D</sup>

*6. Whether the court below had the competence to reverse itself on its ruling on 23/10/07 on the averments in the Petitioners' pleadings.*

*7. Whether the court below was right when on 19/11/07 it rejected the petitioner's inspection witness depositions already filed before it.* <sup>E</sup>

*8. Whether the Court of Appeal was right when it failed to declare the depositions jointly filed by the 1st and 2nd respondents and those jointly filed by the 4th and 5th respondents respectively as incompetent despite being inapplicable to the proceeding.* <sup>F</sup>

*9. Whether the Court of Appeal was right in striking out 18 out of 19 witness depositions filed with the petition after adopting the depositions unconditionally by order of court on 19/11/07.* <sup>G</sup>

*10. Whether the Court of Appeal was right when it assumed jurisdiction to inquire into the propriety of Exhibit EP2/34".*

The issues raised in the 1st and 2nd Respondents' brief of argument are in pari materia with the above reproduced issues in the Appellant's brief of argument. In the 4th and 5th Respondents' brief of argument are the following issues for determination: <sup>H</sup>

*"i. Whether the court below was not perfectly right when it held that Appellant was unable to establish act of non-compliance*

*with the provisions of the Electoral Act, 2006, capable of rendering invalid or void the Presidential Election held on 21st April, 2007.....*

B *ii. Whether the court below was not right when it pronounced as incompetent the depositions of the Appellant's witnesses which were established to have been sworn before Val Ikeonu. Esq, who is one of the Appellant's counsel.*

C *iii. Whether or not Appellant's petition did not suffer from paucity of evidence, as rightly held by the lower court, leading to, its dismissal.....*

*iv. Was the 5th Respondent disqualified from contesting the Presidential Election as claimed by the Appellant?.....*

D *v. Upon a critical and deep appraisal of the Appellant's petition as couched, whether the lower court was not right by holding that the Appellant failed to plead sufficient facts in support of paragraphs 9B (iii) (a) and 9B (iii) (h) of the petition.....*

E *vi. Going by the provisions of the 1999 Constitution, whether the court below was not right when it held that the President of the Court of Appeal has both constitutional and statutory powers to make Practice Directions to govern election petition.....*

F *vii. Considering the fact that Appellant failed to lead any evidence regarding the non display of Voters' Register and its effect, whether the court below was not in order when it held that it was a non issue.....*

G *viii. Whether the court below was not right when in its ruling of 19/11/07 it rejected the depositions of Appellant's witness who claimed to have inspected INEC documents at the INEC Headquarters when the documents sought to be tendered had already been tendered from the Bar by the Appellant's counsel.....*

H *ix. Considering the provisions of paragraph 1 (ii) of the Election Tribunal and Court Practice Amendment Directions 2007 which governs presentation of election petitions before the court below, whether or not the 4th and 5th Respondents' witnesses statements attached to their Reply are competent....."*

In the brief of argument filed on behalf of the 3rd Respondent, a single issue was formulated, and the issue is :-

*"Whether the Supreme Court can hear and determine this*

*appeal when the notice and grounds of appeal does not relate or pertain to the 3rd Respondent and after the appellant had severed his case from criminal allegations, withdrawn all pleaded facts bordering on criminal conducts and Ground 9c of his petition dismissed by the lower court.”*

The 4th and 5th Respondents raised preliminary objection in their brief of argument, which contains the following grounds:-

*“(i) Two separate Petitions were filed at the Court below, that is, Petition No. CA/A/EP/2/07 filed by General Muhammadu Buhari and Petition No. CA/A/EP/3/07 filed by Alhaji Atiku Abubakar,*

*(ii) The above two Petitions were consolidated by the court below and tried together but despite their consolidation, the two Petitions retained their separate identities and thus separate judgment were delivered in respect of the two Petitions.*

*(iii) The Appellant in Petition No. CA/A/EP/2/07 has suo motu (vi) consolidated his appeal with that of Alhaji Atiku Abubakar.*

*(iv) Most of the particulars subscribed to the Grounds of Appeal are either argumentative, narrative, unwieldy or prolix. Specifically, particulars of Ground 1 are basically narrative, unwieldy and/or prolix, while particulars subscribed to Grounds 2, 3, 4, 7, 14 and 19 are argumentative.*

*(v) Grounds 5, 8, 10, 11, 13 and 17 are vague and are therefore not cognizable by this Honourable court.*

*(vi) Grounds 15 and 16 as couched constitute an abuse of court process and/or do not arise from the proceedings of the lower court as there is no evidential substratum or minutes of the lower court to support them,*

*(vii) Arising from (iv), (v), (vi) supra, Respondents will pray the court to strike out Grounds 1, 2, 3, 4, 7, 8, 10, 11, 13, 14, 15, 16, 17 and 19 for being incompetent. Afortiori, the Respondents will further pray that the Brief of Argument already predicated on the incompetent Grounds of Appeal and/or issues for determination distilled from the said grounds be struck out. The distilled issues are also altogether incompetent.”*

I will deal with the Notice of Preliminary objection before proceeding with the appeal proper. The argument proffered by learned Senior Advocate, Chief Wole Olanipekun in respect of grounds i, ii,

and iii supra, is that the two appeals filed by General Mohammadu Buhari and Alhaji Atiku Abubakar are distinct and independent of each other until they are consolidated by this court either suo motu or on the application of counsel. He placed reliance on the case of Balonwu v, Ikpeazu 13 NWLR part 947 page 479. It is Learned Senior Counsel's contention that since there is no order of this court consolidating the appeals, this appeal is incompetent and ought to be struck out. In his reply to the argument of Learned Senior Counsel, the Learned Senior Advocate for the appellant Chief Ahamba in their appellants' reply brief of argument submitted that the respondents' submission is misconceived and false. The Learned Senior Advocate further contended that there was no consolidation of any two appeals, as there was appeal against the judgment in CA/A/EP/03/07 pending at the time the Notice of Appeal against the judgment in CA/A/EP/02/08 was filed.

It is a fact that originally the Appellants' notice of appeal bore two parties i.e. the Appellant and the Respondents in this appeal. In addition, a careful perusal of the Notices of Appeal of the two appeals involving the two sets of Appellants reveal that the Notice of Appeal against the judgment in CA/A/EP/07 was filed on 7/3/2008, whilst the Notice of Appeal against the judgment in CA/A/EP/03/07 was filed on 18/3/2008. Clearly, the latter appeal was not in existence when the Notice of Appeal in respect of this instant appeal was filed. As there was only a single appeal in existence as at the time the instant appeal against the judgment in CA/A/EP/02/07 was filed, wherein then lies the consolidation? There was definitely no consolidation, as it was not feasible. This ground of objection is misconceived, so it is overruled.

The learned Senior Counsel, Chief Wole Olanipekun in arguing ground iv supra has submitted that the proper place of narrations and arguments is not in the Grounds of Appeal but in the brief of argument or argument proffered at the hearing of the appeal to establish the complaints against the judgment. According to him the particulars of the grounds of appeal should not as in this case be independent complaint against the judgment of the lower tribunal. He placed reliance on the case of Globe Fishing Industries Ltd. V. Coker 1990 7 NWLR part 1 and 2 page 265. It is learned Counsel's

contention that a thorough perusal of grounds 1, 2, 3, 4, 7, 14 and 19 clearly shows that they are basically narrative, unwieldy, prolix and argumentative, and should not be countenanced, and in support of this contention he referred to the case of *Adah v. Adah* 2001 NWLR part 705 page 1 in reply the learned Senior Counsel says the appellant has submitted that none of the adjectives used for describing the grounds is applicable to any of the grounds. According to him what has been done in the grounds has been done as enjoined in the case of *Nuhu v. Ojele* 2003 18 NWLR part 852 page 251, most especially the excerpt that reads:-

*“Expatriate the ground by way of stating the particulars that, would define, elucidate or expound with clarity the nature of the exposition of what the appeal is all about.”*

The Learned Senior Counsel further argued that the grounds objected to did not fall foul of the explanatory judgment of this court in the *Globe Fishing Industries Ltd* case, supra relied upon by the Respondents. It is his submission that the grounds are competent. At this juncture I will look at the grounds serially, but I will not reproduce them, as doing so will involve a lot of time and space. It is my view that the said grounds 1, 2, 3, 4, 7, 14 and 19 being grounds of law had to be supported by particulars of the error or misdirection complained on, in compliance with order 8 Rule (2) of the Supreme Court Rules, and this the appellant did. I do not see anything unwieldy and argumentative about the grounds, nor do I consider them to be prolix and narrative. Infact they helped to elucidate the grouse of the appellants under each ground. As for the complaint on grounds 5,8, 10, 11, 13 and 17 being vague, they are not vague for I perfectly understand the contents, albeit where the Appellant are coming from and where they are going, so to speak. In addition grounds 15 and 16 are in my opinion valid and competent grounds, which should stand. The argument of the learned Senior Advocate in respect of these objections is not tenable. I therefore find all the grounds complained against competent, and refuse to strike them out as prayed. See the cases of *Stirling Civil Engineering Nig.) Ltd, v. Yahaya* 2005 11 NWLR part 933 page 181, *Aderounwu v. Olowu* 2000 4 NWLR part 652 page 253, and *Hambe v. Hueze* 2000 4 NWLR part 703 page 372. The same goes for the prayer on the related issues arising

from the said grounds of appeal and on the brief of argument. The notice of preliminary objection is in the circumstances overruled.

Now, to the appeal proper. After a close and serious perusal of the briefs of argument, and the record of proceedings, I am of the view that the issues in this appeal can be narrowed down to the issue of whether or not there was substantial non compliance with the Electoral Act of 2006, especially as it relates to the provision of Section 45 of same, and whether the provision of Section 146(1) of the said Act has been met. In the circumstance, some of the issues raised for determination will be discountenanced, while some that I consider to be necessary for the just determination of the appeal will be treated either wholly or partly.

In addition, I am of the view that the 3rd Respondent's brief of argument and the issue formulated therein should also be discountenanced, and I do so discountenance them, for the argument therein is not within the ambit of the issues I wish to embrace. I find it convenient to commence the treatment of the appeal with the argument covering issue (9) supra, of the Appellant. It is on record that the Court below in the early part of its judgment made the following statement:-

*"These documents were admitted by the court based on clear agreement by the parties that all documentary and material exhibits shall be admitted subject to the right of opposing parties to 'raise objections to the admission at a later stage. The Petitioner cannot, at this stage resile the agreement. More importantly, when a court erroneously admits a potentially inadmissible evidence the court can at any stage of the proceedings, expunge the inadmissible evidence from its record."*

According to the Learned Senior Advocate for the Appellants the learned Court treated the depositions filed in a proceeding as documentary materials tendered in a proceeding. The point was raised in the written address of the Respondents, and the Appellant's Counsel in this respect raised a jurisdictional question of whether the court had the competence at that stage to adjudicate on the question of the mode of swearing the Appellant witnesses depositions. It is the contention of the Learned Senior Counsel that whenever a jurisdictional question is raised in any proceeding, such question should first

be determined. The substance of the jurisdictional question was set out in the Appellant's brief of argument. I cannot see where this argument is taking us to, for whether the wrong word of 'admission' was wrongly used by the trial justice or there was any jurisdictional question (which I refuse to agree there was) the pertinent question to be asked and answered is, 'did the Petitioners/Appellants' witnesses swear to the affidavit evidence in accordance to the dictate of the law i.e the Evidence Act, Cap 112 Laws of the Federation of Nigeria 1990? The heavy weather made of the stage at which the objections to the depositions were made or the agreement to admit the depositions and its effect is of no material and relevant consequence. Once the provision of a law has been contravened, most especially on the admissibility of evidence, a Judge is at liberty to deal with such contravention and find on it, at any stage of the proceedings before him, unless of course there is a way it can be cured, and a party takes steps to cure it. In this case the Appellant could have taken steps to cure and save the situation, but they did not. The law in question is Section 83 of the Evidence Act, supra, the provision of which I will reproduce hereunder. I will however reproduce the provisions of Section 78 and 79, of the Evidence Act, which generally deal with affidavits first. I find it important to reproduce the later provisions first, for it will make for easy understanding of the purport of the significance of the former provision, in relation to the argument proffered by the Learned Senior Advocate and within its context. Sections 78 and 79 supra are provisions that deal with affidavits in general, be it for the purpose of using them as witnesses depositions in court or as exhibits, They read:-

*"78. A court may in any civil proceeding make an order at any stage of such proceeding directing that specified facts may be proved at the trial by affidavit with or without the attendance of the deponent for cross-examination notwithstanding that a party desires his attendance for cross-examination and that he can be produced for that purpose;*

*79. Before an affidavit is used in the court for any purpose, the original shall be filed in the court, and the original or an office copy shall alone be recognized for any purpose in the court."*

*(Underlining is mine)*

*As can be seen from the above provisions, depositions contained in an affidavit can be used as evidence in a court of law, and they can be used for any other purpose, albeit as exhibits.*

B Then the provisions that follow go on to deal with the forms of an affidavit and its content. By virtue of Section 83 of the Evidence Act *supra*. “An affidavit shall not be admitted which is proved to have been sworn before a person on whose behalf the same is offered, or before his legal practitioner, or before a partner or clerk of his legal practitioner.” (Underlining is mine)

C Perhaps I should also reproduce the meaning of the word ‘admit’ at this juncture. The Shorter Oxford English Dictionary defines the word *inter alia* thus:-

*“To allow to enter, let in, receive; to acknowledge, as lawful, etc....”*

D The above definition clearly shows that the use of the word ‘admit’ in section 83 of the Evidence Law *supra* is wide and could accommodate the act of receiving or acknowledging of anything, be it documents. The energy dissipated on this issue is so unnecessary, so much that I will say it was tantamount to being described as so much ado about nothing. I would have thought the Learned Senior Counsel would apply the same amount of energy on the issue in his oral presentation, but happily he saw the wisdom of not repeating the same mistake in his oral argument.

F It is my view that the Learned Justice was correct when he held the following in the judgment:-

*“In the instant case the court is satisfied that the depositions were not sworn before a person duly authorized to administer such in the circumstance.....”*

G *Consequently, all the depositions made before Val. I. Ikeonu of counsel and Notary Public are inadmissible in evidence and they are hereby expunged from the record of the court”.*

H My answer to the question of a the validity of the affidavits i.e whether they were sworn to in accordance with the provision of the Evidence Act *supra* is in the negative, and that being the position the learned trial court was right to have rejected the 18 witnesses depositions filed by the petitioners and objected to. Within the context of this argument it is not limited to say, what is intended to be used as



exhibits.

It is settled law that an affidavit that is bereft of the requirements of the law it is expected to meet, (most especially not a mere defect in the format that can be admitted with the leave of court) will not be accommodated, (because, as it is in this case the error is fundamental) but must be rejected, and if already admitted must be expunged. B

In the light of the above discussions I resolve issue (9) in the Appellants' brief of argument, and dismiss ground (10) to which it is related. I have not deemed it necessary to refer to the argument canvassed by the Learned Senior Counsel for the Respondents under this issue, because the treatment of it will suffice with the above. C

The next issue I want to deal with is issue (8) *supra*, which also deals with depositions. The Learned Senior Counsel had included the 1st and 2nd Respondents in his complain in issue (8), but, later dropped the complaint almost immediately after raising the issue, and before commencing the argument in the Appellant's brief of argument. I am at a loss as to why he included the complaint in the issue in the first place, The appellant attacked the depositions of the 4th and 5th Respondents on the ground that they were not sworn to by human beings, and so offended the provisions of Section 90 of the Evidence Act *supra*. According to Learned Senior Counsel without human deponents they are no affidavits cognizable either under the Evidence Act, Federal High Court (Civil Procedure) Rules or even the Practice Direction 2007. The Learned Senior Counsel referred to the Practice Direction of 2007, and its amendment which came into force on 10th May 2007, which excludes the 4th and 5th Respondents. He submitted that the maxim *expressio unius exclusio alterum* applies to exclude the 4th and 5th Respondents therefrom. They are thus not evidence or testimony of any identified or identifiable person upon which any court or tribunal may act or ascribe probative value. Learned Senior Counsel further submitted that the depositions though validly adopted by order of court and consent of Petitioner are not affidavits in law; and ought to have been so declared by the lower court. D  
E  
F  
G  
H

The Learned Senior Advocate, Chief Wole Olanipekun of counsel for the 4th and 5th Respondents in arguing this issue in their brief

of argument posited that the position of the law is that however bad or irregular a procedure might be, once the opposing party did not object or has acquiesced to it, or was a party to the said procedure, that party cannot later complain about that proceeding in which he actively participated. He placed reliance on the cases of *Noibi v. Fikolati* 1987 1 NWLR part 52 page 619, Honourable Rotimi Chibuike Amaechi v. INEC & Ors 2008 5 NWLR part 1080 page 227, and *Awojugbagbe Light Industries v. Chinukwe* 1995 4 NWLR part 390 page 379.

C By virtue of the provision of Section 90 of the Evidence Act:-  
*"90. The following provisions shall be observed by persons before whom affidavits are taken:- .*

(a).....

D (b) shall be in the first person, and divided into convenient paragraphs numbered consecutively; ....."

I agree with the Learned Senior Advocate for the Appellant that none of the above provisions were complied with.

E It is essential that the provisions of the Evidence Act supra be complied with as is discussed above. I am in agreement that the Practice Direction amendment was for the purpose of speedy disposal of cases and the protection of witnesses, but the amendment did not apply to the Respondents, within the context of this argument.

F Worthy of note is the fact that both Senior Counsel in their argument in relation to this issue vis a vis their argument under issue (9) supra in their respective briefs of argument are at par. What applies to the goose, I say must apply to the gander. In my view ground (ii) of appeal, to which this issue is married succeeds, and it is allowed. The issue is resolved in favour of the Appellants.

G Issue 5 in the Appellant's brief of argument is the next issue I will deal with now. The Appellant is under this issue quarreling with the power of the President of the Court of Appeal to issue the Practice Direction, which the lower court said is derived from Sections 248 and 285 of the Constitution of the Federal Republic of Nigeria  
H 1999. The Learned Senior Advocate has argued that Order 19 Rule 7 of the Court of Appeal Rules refers to the rules of the Court of Appeal which according to him is applicable to proceedings in its appellate jurisdiction only and as such the court below was wrong

when it stated that the making of Practice Directions by the said President extended to Presidential Election Petition proceedings Reliance was placed on the case of *Ladoja v. INEC* 2007 7 SC 99. The Learned Senior Counsel further argued that the court below applied its own mind into the interpretation of the two sections of the Constitution supra rather than construing the intention of the legislature. He referred to the cases of *Obi v. INEC* 2007 NWLR part 1046 page 565 and *Oviawe v. IRB Ltd* 1993 3 NWLR part 492 page 126, and paragraph 50 of the First schedule to the Electoral Act. B

The Learned Senior Advocate for the 1st and 2nd Respondents has submitted that the ground of appeal from which this issue arises is not tenable or competent since its only objective seems to be to employ the power and jurisdiction of this court to determine an academic or hypothetical question. He placed reliance on the case of *State v. Azeez* 2008 4 SC 188. According to the Senior Counsel where a party had consented to a procedure adopted at the trial and infact suffered no injustice, as in the instant appeal, it is no longer open to him, on appeal, to say that the procedure was wrong. A party is not entitled to approbate and reprobate at the same time. Reliance was placed on the case of *Awuse v. Odili* 2005 16 NWLR part 952 page 416. According to Learned Senior Counsel it is apparent that makers of the Constitution intended that the Court of Appeal, while exercising its jurisdiction under Section 239(1) of the Constitution should retain its identity as envisaged by Section 237(1) of the Constitution. F It is beyond dispute that the Court of Appeal has both original and appellate jurisdiction. The Learned Senior Counsel also submitted that if this court upholds the submission that the Practice Direction is unconstitutional then the inevitable conclusion must be that the Petition was incompetent ab initio. G

The Learned Senior Advocate in arguing this issue has relied upon many authorities to counter the argument of the Appellants. See *Haruna v. Modibbo* 2004 16 NWLR part 900 page 487, *Owuru v. Awuse* 2004 All FWLR part 211 page 1429, and *U.A.C v. Macfoy*, etc. Some are on the interpretation of statutes. First, I will reproduce the provisions of the Constitution supra that relates to this discussion. H They read as follows:-

*“239(1) Subject to the provisions of this Constitution, the Court*

*of Appeal shall, to the exclusion of many other court of law in Nigeria have original jurisdiction to hear and determine any question as to whether:*

*(a) any person has been validly elected to office of the president or Vice-president under this constitution.....*

B *285 Subject to the provisions of any Act of the National Assembly, the President of the Court of Appeal may make rules for regulating the practice and procedure of the Court of Appeal.*

C *285(3) The composition of the National Assembly Election Tribunal, Governorship and Legislative House Tribunals shall be as set out in the sixth schedule to this constitution”*

The first provision supra has clearly and in no uncertain term vest original jurisdiction on the Court of Appeal to hear and determine election Petitions that question the validity of the election of a President or a Vice President. It is the Court of Appeal and it alone that can hear such cases, and the President of the Court of Appeal is the head of that Court. That being the position he has been vested with powers to make rules that govern the Practice and Procedure of the Court by Section 248 of the same Constitution supra. This said provision in giving the power to the President did not limit this power to the court sitting in its appellate jurisdiction. It merely says the Practice and Procedure of the Court of Appeal. . It is a general provision and I will not hesitate to say that the provision extends to the court sitting in its original jurisdiction as is stipulated in Section 239 supra, of the Constitution as well as in its appellate jurisdiction as by Section 285 of the Constitution supra. The power to make the rules from which the Practice Direction derived its origin is therefore not alien to proceedings where the court sits in original jurisdiction as Learned Senior Counsel for the appellants is wont to believe. The Practice Direction is backed by the Constitution and so it is within the ambit of the provisions of the Constitution and not outside it, To say that it is unconstitutional is to go out of the provisions and import extraneous matters into it, which the law prohibits. The law is settled that statutes must be given correct and literal interpretation within the ambit of their provisions. To go outside it and import extraneous matters into it will be frowned on by the court.

Moreover Order 19 Rule 7, which was an offshoot of Section

248 of the Constitution *supra* confirms the powers of the President of the Court of Appeal to make a Practice Direction, and this is not hampered by any restriction as to the level of the jurisdiction. This rule reads:-

*“The President may at any time, by notice declare a practice of the Court as a practice direction, and whenever the declaration, was made, such declaration shall be regarded as part of these rules.”* B

In the light of the above exposition I am in tandem with the Court below when it held thus:-

*“The combined reading of Sections 248 and 285(3) of the Constitution empowers the President of the Court of Appeal to make Rules and Regulations for the Practice and Procedure to be followed by the Court of appeal, not appeals, but also in the exercise of its original jurisdiction under Section 239 of the Constitution.”* C

It is very interesting that the Learned Senior Advocate for the Appellant will pursue this issue of constitutionality so vigorously from the court below to this court. It is as though he is oblivious of the consequence of the issue, if it succeeds. Success may eventually lead to the proceedings in the court below being declared null and void, and when this happens where will this lead the Petitioners/Appellant to? With due respect, the pit I would say. Sometimes it is wise to leave or ignore some points, no matter how strongly a Counsel feels about them, and stay away from harms way, as that may be the safe part to take. E

For the foregoing reasoning I answer issue (5) in the affirmative Ground (9) of appeal to which it is married fails, and I hereby dismiss it. F

Finally, I will deal with issues (3) and (4) in the Appellants’ brief of argument, which I consider to be the most pertinent and important of all the issues, and I will start with issue (4). In fact I will focus only on the complaint in paragraph 9 of the Petition. G

It is a fact that the court below held that the petitioner had established the non compliance with the provisions of Section 45(2) of the Electoral Act *supra*. The Learned Senior Advocate for the Appellant is however of the view that the lower court erroneously placed the onus on the Petitioner to prove the effect of the substantial non-compliance of the election. According to Learned Senior Counsel H

proof of non compliance with Section 45(2) of the Electoral Act is tantamount to proof of a fundamental illegality which renders the entire process void as no vote would remain if the illegal paper are discounted. He further Submitted that where the process is void the attendant result is equally void and no more needs to be proved. B He placed reliance on the case of Morgan v. Simpson 1975 1 QB 151.

The learned Senior Advocate for the 1st and 2nd Respondents in their brief of argument replied that they denied all the allegations contained in the Petition, insisting that the election was conducted in substantial compliance with the Electoral Act supra. According to the Learned Senior Counsel, lapses were due to the exigencies of conducting the elections in a vast country such as Nigeria. They denied that the ballot papers were invalid, and referred D to paragraphs 12, and 13, as well as paragraphs 15, 16, 17, and 18 of their reply to the Petition. The Learned Senior Counsel further contended that as vague as the pleadings were, no evidence was led in proof. According to him having regard to the provisions of Section E 23 of the Interpretation Act, 2004 the onus was upon the appellant to prove that the non-serialization of the ballot papers was calculated to mislead or that the difference between a serialized and non-serialized ballot paper was not material. This section reads:-

*“where a form is prescribed by an enactment, a form which F differs from the prescribed form shall not be invalid for the purposes of the enactment by reason only of the difference if the difference is not in a material particular and it not calculated to mislead.”*

Chief Olanipekun, Learned Senior Counsel for the 4th and 5th Respondents in reply submitted that a Petitioner that makes non-compliance with the Electoral Act the basis of his petition must not G only establish such non-compliance, he must bring forth credible, convincing and unassailable evidence of the non-compliance, and the decisive effect it would have had on the outcome of the election. I will come to this latter part of the submission later on in this judgment. H

In his Finding on non compliance with the provision of Section 45(2) of the Electoral Act supra, Fabiyi J.C.A. held thus:-

*“The petitioner has in the instant case established the substan-*

*tiality of non compliance with Section 145 (2) (sic) of the Electoral Act, but has failed to establish the substantiality, of this non compliance on the result of the election."*

Quite clearly the court below was satisfied that part of the numerous allegations stated in the petition were proved i.e. the non-compliance with the provision of Section 45(2) of the Electoral Act <sup>B</sup> supra. I am also satisfied that the court below had no problem in accepting that the Petitioners/Appellants proved their case in as far as the issue of non-serialization of ballot papers was concerned. Its problem was with the failure of the Appellant to establish that the non-compliance affected the result of the election. This is borne by the <sup>C</sup> following extract of the judgment:-

*"The Petitioner led no evidence to show that any of these entries relating to the number of ballot papers issued at the polling units, and the number of ballot papers tendered in those units are false. <sup>D</sup> This the Petitioners agents at the polling units could easily have ascertained. It is therefore not correct that the petitioner could not maintain an audit trail, simply because the ballot papers were not serially numbered. It is incumbent on the Petitioner pursuant to the provisions of Section 46 of the Electoral Act to establish that the non-compliance established by him substantially affected the result of the <sup>E</sup> election."*

It is elementary law that the party who asserts some facts must prove them. So says Section 135 of the Evidence Act supra. When a <sup>F</sup> party initiates an action pleadings are usually ordered and exchanged, and evidence follow.

However, pleading come before evidence, and in that succession one must be considered before the other when a party files its <sup>G</sup> pleading and then adduce evidence in its support. It is the duty of a Judge to peruse the pleading and then the evidence adduced to ensure that they are within the periphery of the averments in the pleading. Where the evidence is outside the pleading, the evidence is <sup>H</sup> discountenanced as non issue. When the evidence has pleading to back it up then the evidence is evaluated. There is however a principle of law that dispenses with evidence. Where averments in pleading are not challenged or denied then it becomes a different ballgame, as in that circumstance the party asserting does not require to adduce evi-

dence in support of the averments in the pleading. In law, it is said that the opponent has admitted the facts in the pleading. See *Ezemba v. Ibeneme* 2004 14 NWLR part 894 page 617, and *Edokpolo & Co. Ltd v. Sem-Edo Wire Ind- Ltd* 1989 4 NWLR part 116 page 473.

B The relevant averments to this very discussion are in paragraph 9B(ii) of the Petition. They read:-

“9B.(ii) Section 45 (2) of the Act

(a) Your Petitioners state that Section 45(2) of the Act provides that ballot papers shall be bound in booklets and numbered serially. Pursuant to this the manuals for Elective Officials, 2007 provided for the entry of the serial numbers of ballot papers and the quantity of the ballot received for each election, in form EC 40C for purpose of verification and authentication. Your petitioners state that on 21st April, 2007, the 1st and 2nd Respondents, in conjunction and collusion with the 3rd and 4th Respondents conducted the Presidential election without compliance with section 45(2) of the Act, and in the process assigned more than Twenty Four Million unverified and unverifiable votes to the 5th Respondent, in that there are no booklet counterfoils to show the number of ballots papers actually printed by the 1st Respondent or were actually used at the purported election. Ballot papers are always printed with counterfoil and serial numbers which are features usually included to establish an audit trail. This fact is well known to the Respondents. The Petitioners state that the 1st and 2nd Respondents failed to print the Presidential ballot papers with serial numbers and in booklet form as part of the grand plot to install the 5th Respondent as the President of Nigeria at all cost including arbitrarily assigning figures with the hope that the figures would be unverifiable.

G 9(ii)(b) Your Petitioners state that the ballot papers used at the election are invalid the same not being cognizable under the Act under which the election was conducted, whether by express provision or its principles, and shall contend that the voting at the election having been illegally conducted with illegal ballot papers, the quantity of which could not be verified was consequentially, invalid.”

H Contrary to the submissions of the Learned Senior Counsel for the 1st and 2nd Respondents, I do not see that the averment is vague. It is explicit, and informative and so I refuse to agree that it is



vague. Then what was the reply of the 1st and 2nd Respondents? This can be found in paragraph 16 of their reply on page 473 of the printed record of proceedings. They read:-

“16 The Respondents state in answer to paragraph 9B(ii)(a) of the petition that due to the late arrival of the judgment of the Court of Appeal upholding the candidacy of Alhaji Atiku Abubakar, the printing of the Presidential Ballot papers were rushed in a matter of days and this might have been responsible for some of the complaints now made. But this did not in any way affect the votes or the election which was otherwise conducted in substantial compliance with the Electoral Act.

17. The Respondents took measures to ensure the security of the ballot papers. The Respondents had to print about 60,000,000 ballot papers within two days in South Africa and have them transported to Nigeria and distributed to 120,000 polling units in Nigeria for the election. Prior to the decision by the Supreme Court in the Atiku Abubakar case, the Respondents had printed all the ballot papers for the Presidential election and, but for that decision, the problems now complained of by the Petitioner would not have arisen.

(Underlining is mine)

There is no gain saying that the above were admission of facts by the 1st and 2nd respondents who are the ones actually concerned with the allegation in the Petitioners’ averment. They admitted there were non serialization of the ballot papers, even though they laced the admissions with excuses and justifications. In my view the excuses and justifications are camouflage to hide their omissions and non-compliance, and so they are inconsequential as far as the complaints are concerned, what is of significance is that they have not denied that the ballot papers were not serialized. Then the 4th and 5th Respondents in their reply averred thus:-

*“17. The respondents deny paragraph 9B(ii) of the petition and aver that the ballot papers used for the election of 21st April, 2007 were produced under the best security cover and they met the requirements of the Electoral Act especially Section 45(2) of the Act.”*

This is in fact what I will call vague, averment. The complaint raised in paragraph 9B(ii) is that the ballot papers were not serialized, and rather than meet the averment headlong, and either deny the

non-serialization or admit the allegation, it was evasive, and pleaded compliance with the said Section 45(2) of the Act. That brings me to the provision. What does it stipulate? It stipulates thus;-

B “45(2) The ballot papers shall be bound in booklets and numbered serially with differentiating colours for each office being contested.”

C The above provision is very clear and the mandatory effect of it is palpable. When the word ‘shall’ is used in a statute it connotes the intendment of the legislator that what is contained therein must be done or complied with. It does not give room for manoeuvre of some sort, or evasiveness. Whatever the provision requires to be done must be done, and it is not at all negotiable. In interpreting the word ‘shall’ as used in enactments, Uwais C.J.N. in the case of Captain E.C.C. Amadi v. Nigerian National Petroleum Corporation 2000 10 D NWLR part 674 page 76 reiterated the interpretation in earlier authorities thus

E “It is settled that the word ‘shall’ when used in an enactment is capable of bearing many meanings. It may be implying a mandate or direction or giving permission. See *Ifezue v. Mbadugha*, (1984) 1 SCNLR 427 at page 456-7. In this present case we are concerned with whether it has been used in a mandatory sense or directory sense. If used in a mandatory sense then the action to be taken must obey or fulfill the mandate exactly; but if used in a directory sense then the action to be taken is to obey or fulfill the directive substantially. See *Woodward v. Sersons* 1875 L.R. 10 C.P. 733 at page 746; *Pope v. Clarke* 1953, *Julius v. Lord Bishop of Oxford* (1880) 5 A.C. (H.L.) 215 at page 222 and 235 and *State v. Ilori* (1983) 1 SCNL 94 at page 110.....”

G It is my opinion that the word ‘shall’ in the present case involves obligation. That is in fact why I find it difficult to understand why after making these provisions (Section 45(2)) in this case using the word ‘shall’ there was a volt face to make the provisions in Section 146 of the Electoral Act.

H There is nothing about the circumstances under which ballot papers should be made, it merely concentrates on the form it should be and its contents. This last averment, even though it contained a denial, cannot be said to have traversed the allegation. It is a cardinal

principle of law that replies to allegations or claims must be categorical and meet the averments of claim/allegations headlong with proper traverse. Allegations that are material, essential, and of great importance should be specifically traversed, and not confined to a general or evasive denial. See the cases of Wallersteiner v. Moir 1974 1 WLR. 99, Lewis and Peat v. Akhimien 1976 7 SC. 157; Olale v. Ekwelendu 1989 4 NWLR part 115 page 326, and Okonkwo v. C.C.B. (Nig.) PLC 2003 8 NWLR part 822 page 347. Where the above principles of law on pleading are not met, then the other party is deemed to have admitted the Petitioner/Plaintiffs' pleading. I refer to paragraph 36 of Halsbury's Laws of England fourth Edition Resissue Volume 30 (i), which states the followings:-

*"Any allegation and fact made by a party in his pleading is deemed to be admitted by the other party unless he traverses it in his pleading or unless an automatic joinder of issue operates as a denial of it....."*

It is trite law that a party who admits a fact in a statement of Claim/Petition in its Statement of Defence/Reply is bound by its admission, and in that respect it is also trite that a fact that is admitted needs not to be proved by the party making claims. See the cases of Seismograph Services (Nig.) Ltd v. Eyuafe 1976 9 - 10 SC page. 135, Ezemba v. Ibeneme 2004 4 NWLR part 894 page 617, Akpan v. Umoh 1999 11 NWLR part 627, and Economides v. Thomopulos. Ltd 1956 FSC page 7. As can be seen in paragraph (8) of the 1st and 2nd Respondents' reply, reproduced above, there was an admission of the non serialization, of the ballot papers and consequently the non compliance complained of in paragraph 9(ii) in the Appellant's petition. The Appellant in view of the above principle of law, were not bound to adduce evidence in proof of the said averment.

Perhaps I should ask a pertinent question at this juncture. The question is, if the 1st and 2nd Respondents were working under pressure because of time constraint, why didn't they include serialization in the ballot papers when they were placing the order from South Africa? If South Africa was able to print the ballot papers and send them within a span of a very short time of 2 days, then why was the printing of serial numbers on them so difficult or impossible? It is, I believe the same process of the production that will entail the print-

ing of serial numbers. The reason for this omission is not tenable, and does not portray transparency; and fairness, as is the principle of the election. Transparency should have been the watch word of the commission in all the election processes. I agree that, because of the inclusion of another Presidential Candidate in the Presidential race (courtesy of this Court's judgment) the Respondents were faced with certain predicaments, but that is not to say that such fundamental requirements should have been ignored. That exigency, I believe should not have prevented the Respondents from complying with this very important provision of Section 45(2) supra. How can an election be described as free and fair when its most important component was fraught with incurable infractions? I cannot and will not be swayed by the excuse of shortage of time. The serialization could have been done the same time the ballot papers were being printed. Still on page 35, paragraph 36 of Halsbury's Laws of England supra, the Authors described traverse thus:-

*"A traverse may be made either by a denial or by a statement of non-admission, and either expressly or by necessary implication. Every allegation of fact made in a Statement of Claim or Counter Claim which the party on whom it is served does not intend to admit must be "specifically traversed by him in his defence or defence to counter claim, as the case may be, and a general denial of these allegations, or a general statement of non-admission of them, is not a sufficient traverse of them."*

In the case of Wallersteiner v, Moir supra there was an allegation of fraud and dishonesty in a statement of defence, for which the plaintiff in his defence to the alleged fraud and dishonesty did not refer to the particulars of the fraud and dishonesty, but merely pleaded thus;

*"The plaintiff denies that the plaintiff has been guilty of fraud, dishonesty, malfeasance, or breach of trust, as alleged in paragraph 103 of the amended counter-claim or at all."*

In his judgment Lord Denning M, R. in dealing with the pleading held that there was no good defence as far as the above traverse was concerned. His judgment inter alia states:-

*"That was no good as a defence. The master did not give leave for it to be served R. S. C. Ord. 18, Rule 13(3) states expressly that a*

*general denial is not a sufficient traverse. The counter claim stood without every counter claim. So under R.S.C. Ord 19 Rule 7, Mr. Moir was entitled to judgment."*

I am fortified by the above. It is my view that the 4th and 5th Respondents' paragraph (17) supra did not specifically deny the veracity of the averment in paragraph 9(B)(ii) of the Appellants Petition, Although the 4th and 5th Respondents' Learned Senior Counsel had referred to the case of Boniface Anyika & Co. (Nig.) Ltd, v. Uzor 2006 15 NWLR part 1003 page 560 on pleadings not constituting evidence, under another issue, that is in cases where there is no admission, as in the instant case.

In the light of the above discussion, I am in tandem with the Court below when it held that the Appellants had established non compliance with Section 45(2) of the Electoral Act supra. But then the court below did not stop there it proceeded to find that the contravention of the provision of Section 45(2) was not substantial enough to substantially affect the result of the election. This was in consonance with the provision of Section 146 of the Electoral Act supra,

What keeps agitating my mind is that while the Electoral Act clearly sets out certain acts or omissions that constitute non-compliance, (some of which are mandatory) but another provision of the same law attaches some conditions that may disqualify them from being consequential. How then does one assess or determine the substantiality of non-compliance alleged and proved as it relates to the result of an election? I mean Section 45(2) specifically says that ballot papers shall be bound in booklets and numbered serially etc, but the failure to do so was not treated with the seriousness it deserves. A ballot paper is to my mind the pivot of an election result. It is a fundamental requirement of an election. The success or failure of a candidate depends on the number of the ballot papers cast for him by the electorate. In other words without the ballot papers it will not be possible to categorically determine which of the candidates in a particular election was more popular and more acceptable to the people than the others in term of who scored the highest votes. It is the ballot papers that are collated and counted that determine this and lead to the declaration of the winner. So how can it be said that this stage of the election process is not the most important stage of

the exercise? It is in fact the climax of the whole process. I refuse to agree otherwise. The omission to serialize the ballot papers was definitely a substantial non-compliance that needs to be critically looked at. Without non serialization how do you determine what ballot papers were sent to where? Besides, doesn't the non-serialization make the counting and collation rather uncertain? Me think so. If the other non-compliances could be waived aside with the hands, because they were not proved, this should not be so with this particular non-compliance. The contravention was serious, as it went to the very foundation of the result of the election, the following observations of the court below in its judgment, notwithstanding,.. They read:-

*"They have however, shown the number of ballot papers issued by the relevant electoral officers to each polling unit, and The numbers tendered in these polling units. The Petitioner led no evidence to show that any of these entries relating to the number of ballot papers issued at the polling units, and the number of ballot papers tendered in those units are false. This the Petitioners' agents at the polling units could easily have ascertained."*

Now, to the purport of the provision of Section 146(1) of the Electoral Act supra. This provision reads:-

*"146(1) An election shall not be liable to be invalidated by reason of non compliance with the provisions of the Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principle of this Act and that the non compliance did not affect substantially the result of the election."*

The Learned Senior Advocate for the Appellant has interpreted the above provision to mean that non compliance with provisions of the Electoral Act will only not invalidate an election on two conditions.

- (a) If the tribunal or court is satisfied that the action was conducted substantially in accordance with the principles of the Electoral Act, and;
- (b) If the Tribunal is satisfied that the non compliance did not affect substantially the result of the election.

The Learned Senior Advocate in interpreting the word 'principle' in the act drew solace from the cases of Imiere v. Salami 1989 2 NWLR part page 131, and Na'bature v. Mahuta 1992 9 NWLR

part 263, page 85. In the former case the word was explained thus:-

*“The principle of the Decree is to ensure a free and fair election. All the requirements prescribed in the Decree and the schedule are to achieve that objective.”*

The Learned Senior Counsel referred to the Manual for Election Officials 2007, which identified the following as what would make an election credible and its outcome acceptable:-

- (a) Transparency and neutrality
- (b) High level of integrity
- (c) Credibility, courage and dedication
- (d) Respect for the secrecy of the vote.
- (e) Acting in accordance with the law.

It is the contention of the Learned Senior Counsel that there is nothing in the supra provision of Section 146 that require a Petitioner to prove that an established non-compliance also affected the result of an election. According to the Learned Senior Counsel it is the duty of the court to discern whose responsibility it should be to satisfy the tribunal or court that a challenged election was conducted in accordance with the principles of Electoral Act, and that the established non compliance did not affect the result of the election. The Learned Senior Counsel further submitted that common sense would place the onus to satisfy the court on the party who asserted that the election was properly conducted, and who would loose if the court is not satisfied. Reliance was placed on the case of *Swem v. Dzungwe & Anor* 1966 NWLR 297. He also argued that when a Court accepts that the non-compliance exists, that court has accepted that the non-compliance is capable of affecting the election and/or the result substantially.

The Learned Senior Advocate, Mr. Kanu Agabi for the 1st and 2nd Respondents is of the view that the onus of proving the substantiality of the effect on the outcome of the election has been settled in the case of *Buhari v. Obasanjo* 2005 23 NSCQR page 442, and *Haruna v. Modibbo* 2004 16 NWLR part 900 page 487. This same stance is the one taken by the Learned Senior Advocate, Chief Olanipekun, for the 4th and 5th Respondents in their brief of argument. He has urged the court to discountenance the decision in the case of *Swem v. Dzungwe* supra, which according to him is no longer a judicial

precedent of any relevance of who has the burden of proving whether, or not an established non-compliance with the Electoral Act substantially affected the result of the election conducted under the act.

B It is a fact that the Buhari v. Obasanjo's case supra placed the onus of proving alleged non compliances in the case affecting the election on the Appellant, in spite of the decision in Swem v. Dzungwe supra.

C Again I will commence the treatment of this issue on effect of the established non compliance with the reproduction of the relevant paragraph in the Petition. In paragraph 9(ii)(b) of the Petition the Petitioners made the following averment:-

D *"9(ii)(b) Your Petitioners state that the ballot papers used at the election are invalid the same not being cognisable under the Act under which the election was conducted, whether by express provision or its principles, and shall contend that the voting at the election having been illegally conducted with illegal ballot papers, the quantity of which could not be verified was consequentially, invalid."*

The 4th and 5th Respondents answered the above averment thus:-

E *"18 The Respondents deny paragraph 9(ii)b of the petition and state that the ballot papers used for the election were legal, lawful and valid".*

F The 1st and 2nd Respondents, whom the allegations supra affected directly, answered the Appellants/Petitioners' averment as follows:-

G *"18 The Respondents state in answer to paragraph 9(ii)b) that the ballot papers were not invalid and that the voting at the election was not illegally conducted. In spite of their not being serially numbered, the number of ballot papers can be verified and ascertained from the packages which were serialized, as each package contained an equal number of ballot papers. In this and other related matters the Respondents had a discretion which discretion they exercised fairly and judiciously in the public and national interest".*

H I will again invoke the principles of pleadings which I have already dealt with above to the purport of these averments. I apply the arguments on the substantiality of the non-compliance to the present discussion of the non compliance affecting the result of the election.



The answer given by the Respondents to the allegation did not adequately controvert or traverse the allegations in paragraph 9(ii)b of the Petition, that the election was conducted with illegal ballot papers, the quantity of which could not be verified, and consequently the election was invalid. I rely on all the authorities on reply and admissions which I have referred to above. With this, I am satisfied that the Appellant did prove that the non compliance affected substantially the result of the elections as is required by Section 146(1) of the Electoral Act supra. I have deliberately underlined the word result to re-emphasise my stance that ballot papers are the most vital component of an election result, and it is these ballot papers that are collated and counted to determine the winner or loser of an election. When these ballot papers are not legal, then election will to my mind come to naught, for that is the basis of the election and the result. The whole process of election right from the beginning to the end must be seen to be transparently executed, without any ulterior motive whatsoever. In this wise, I resolve issues (3) and (4) in favour of the Appellants.

The end result of this appeal is that the appeal succeeds in part. I hereby declare that the election purportedly conducted by the 1st and 2nd Respondents on 21st April 2007 for the Presidency of Nigeria is invalid and I hereby set it aside. It is also ordered that the 1st Respondent conducts another election for the office of the President of the Federal Republic of Nigeria.

### **ONNOGHEN JSC (DISSENTING)**

This is an appeal against the judgment of the Court of Appeal, holden at Abuja, (sitting as the Presidential Election Tribunal) in petition NO.CA/A/EP/2/07 delivered on the 26th day of February, 2008 in which the court dismissed the petition of the appellant against the return of the 4th and 5th respondents as the President and Vice President respectively of the Federal Republic of Nigeria following the presidential election held on the 21st day of April, 2007.

The appellant was not satisfied with the return and declaration of the 4th respondent, as the winner of the said election and consequently filed an election petition in the court praying the court to

nullify the election on the following grounds:-

*“(i) The 5th respondent Umaru Musa Yar’adua was at the time of the election was not qualified to contest the election.*

*(ii) The election was invalid by reason of non-compliance with the provisions of the Electoral Act, 2006.*

B *(iii) The election was invalid by reason of corrupt practices. “*

There were therefore only three grounds on which the appellant relied to urge the lower court to nullify the election/return and declaration of the present 4th respondent as the President of the C Federal Republic of Nigeria viz, non-qualification of the 4th respondent to contest for the post of President of the Federal Republic of Nigeria; non-compliance with the provisions of the Electoral Act 2006, and corrupt practices before or at the election. By reasons of the above grounds the appellant prayed the court for the following D reliefs:-

*“(i) That the 5th respondent was not qualified to contest the presidential election of 21st April, 2007, consequently upon which his election together with the 6th respondent as President and Vice President respectively is void.*

E *(ii) That the election to the office of President of the Federal Republic of Nigeria conducted on the 21st April, 2007 is invalid and therefore cancelled.*

*(iii) That the 3rd respondent is guilty of gross misconduct for F without any just or probable cause, involving the military in a purely civil matter, the conduct of election, contrary to the powers conferred on his office by section 217 of the Constitution of the Federal Republic of Nigeria.*

*(iv) The 1st respondent conducts another election for the of G fice of the President of the Federal Republic of Nigeria between the remaining 22 (twenty-two) candidates within (3) three months.*

*(v) That the 2nd respondent in the person of Professor Maurice Iwu be disqualified from participation in the conduct of any future elections in the Federal of Republic of Nigeria. “*

H The facts pleaded in support of the allegation of non-compliance with the provisions of the Electoral Act, 2006 are as contained in paragraphs 9B, 9B (i)(a), 9B(i)(b), 9B(i)(c), 9B(ii)(a), 9B(w)(b), iii) (a), 9B(m)(b), 9B(iv)(a)(b)(c) (d) and (e), 9B(v) and 9B (vi) while

the sections of the Electoral Act, 2006 allegedly not complied with are stated to be sections 20,21,45 (2), 48, 49(i), 63, 64 and 75.

In respect of corrupt practices the relevant paragraphs are 9C(i), 9C(ii), 9C(iii), 9C(iv), 9C(v), 9C(vi), 9C(vii) 9C(viii) and 9C(ix) of the petition.

On non-qualification see paragraph 9(2) of the petition. B

The issues submitted to the lower court for determination by the Learned Senior Counsel for the appellant are as follows:-

*“(i) Whether the 5th respondent was at the time of the election qualified to contest the election.*

*“(ii) Whether there were acts of non-compliance with the provisions of the Electoral Act, 2006 in the conduct of the election which rendered or were capable of rendering the election invalid.* C

*“(iii) Whether there were corrupt practices manifest in the conduct of election which rendered or were capable of rendering the election invalid.*

*“(iv) Whether the petitioner is entitled to the reliefs sought in the petition.”*

It should be noted that the Learned Senior Counsel for the appellant later withdrew or severed the allegations of crime/corruption pleaded in the petition thereby rendering Issue 3 a non-issue. E

With respect to Issue 1, the lower court held thus at page 2683:

*“From the foregoing, the issue of disqualification is of no moment and it is resolved in favour of the respondents.”*

On Issue 2 dealing with non-compliance with the provisions of the Electoral Act, 2006, the court held at page 2707 of the record as follows:- F

*“The petitioner has in the instant case established the substantiality of the non-compliance with section 145 (2) (sic) of the Electoral Act, but has failed to establish the substantiality of this non-compliance on the result of the election. This issue is therefore resolved in favour of the respondents.”*

Having resolved the two main issues against the appellant, the lower court concluded at page 2708 of the record inter alia as follows. H

*“... this petition has been plagued by want of evidence in proof of virtually all the allegations contained therein. Even if I were to*

*accept all the excluded evidence proffered by the petitioner which evidence relates only to 4 (four) states of the Federation, the petitioner would still have been unable to establish this petition. Accordingly, the petition is hereby dismissed. “*

B The present appeal is against the above findings/holdings by the lower court and the issues for determination, as formulated by the Learned Senior Counsel for the appellant, Chief M. I Ahamba, SAN at pages 16 to 18 of the appellant’s brief of argument filed on the 28th day of April, 2008 and adopted in argument of the appeal are stated as follows:-

C “2.01 Whether the Court of Appeal was right when it held that the petitioner presented evidence on 4 (four) states only. Ground 6

D 2.02 Whether on a proper evaluation of the evidence adduced in this petition, the petitioner was not entitled to judgment. Grounds 1,4,5,6,13,14,15,17,18,19 and 20.

E 2.03 On who does section 146(1) of the Electoral Act place the onus of proof of the effect of established substantial non-compliance with the provisions of the Act on the result of an election conducted, under the Electoral Act, 2006, the petitioner or the respondent? Grounds 3.

2.04 Whether the Court of Appeal properly placed the onus of proof of the effect of established substantial non-compliance with the provisions of the Electoral Act on the petitioner. Ground 2.

F 2.05 Whether the power of the President of the Court of Appeal under any section of the Nigerian Constitution including section 248, and 285 extends to the power to issue Practice Directions to the court in its original jurisdiction under section 239 (1) of the Constitution. Ground 9.

G 2.06 Whether the court below had the competence to reverse itself on the ruling on 23/10/07 on the averment in the petitioners pleadings. Ground 12.

H “2.07 Whether the court below was right when on 19/11/07 it rejected the petitioner’s inspection witness depositions already filed before it. Ground 16.

2.08 Whether the Court of Appeal was right when it failed to declare the depositions jointly filed by the 1st and 2nd respondents and those jointly filed by the 4th and 5th respondents respectively as

*incompetent despite being inapplicable to the proceeding; Ground 11.*

*2.09 Whether the Court of Appeal was right in striking out 18 out of 19 witness depositions filed with the petition after adopting the depositions unconditionally by order of court on 19/11/07. Ground 10.* B

*2.10 Whether the Court of Appeal was right when it assumed jurisdiction to inquire into the propriety of exhibit EP2/34. Ground 7."*

In arguing the appeal, the Learned Senior Counsel for the C appellant argued Issues 2.03 and 2.04 together. The Learned Senior Counsel referred to the relevant passage in the judgment of the lower court dealing with the matter and section 146(1) of the Electoral Act, 2006 and submitted that the need to satisfy the tribunal that the election was conducted substantially in accordance with the principles D of the Electoral Act and the need to satisfy the tribunal that the non-compliance did not affect the result of the election is for the purpose of saving, not annulling the election; that it would amount to standing the law on its head to imagine that the legislature intended that the burden of establishing both the non-compliance and the effect of E the non-compliance on the result of the election be placed on the petitioner who had pleaded that an election was invalid as required by section 145 (1) (b) of the Electoral Act, 2006; that the burden is F on the person who asserted that the election was properly conducted, and who would lose if the court is not satisfied, to establish same, relying on sections 135 (1) and 136 of the Evidence Act; that the decisions in *Akinfosile vs Ijose* (1960) SCNLR 447 upon which this court relied to decide *Awolowo vs Shagari* (1979) 6 - 9 S.C 51 and G which have been followed in interpreting section 146 (1) of the Electoral Act, 2006 was confined to the "*facts and pleading delivered therein*" as decided by this court in *Swem vs Dzungwe* (1966) NMLR 297 at 303, per COKER; JSC which is now the extant case law on the issue and that such cases like *Awolowo vs Shagari*; *Buhari vs Obasanjo Haruna vs Modibo*, etc " to the extent that they are rooted H in *Akinfosile vs Ijose*, or the reasoning in that judgment in the interpretation of section 146 (I) of the Electoral Act, 2006 are per incuriam" and urged the court to so hold. The Learned Senior Counsel

then invited the court to depart from the interpretation of the equivalent provisions to section 146(1) of the Electoral Act, 2006 as contained in *Awolowo vs Shagari*, and *Buhari vs Obasanjo* as both were rooted in *Akinfosile vs Ijose*; that “*proof of non-compliance with section 45(2) of the Electoral Act is tantamount to proof of a fundamental illegality which render the entire process void as no vote would remain if the illegal papers are discounted*” and urged the court to resolve the two issues in favour of the appellants.

Learned Senior Counsel for the 1st and 2nd respondents, KANU AGABI ESQ, SAN in the brief of argument filed on 25/6/08 treated the issues as his issue 3.09 which he formulated thus:

*“Whether the onus was on the petitioner or on the respondents to prove that the election was not conducted in accordance with the provisions of the Electoral Act, 2006 having particular regard to the provisions of section 146(1) of the Electoral Act; and if the onus was on the petitioners whether that onus was discharged in the instant case, (Grounds 2 and 3)*

After referring to the provisions of section 146(1) of the Electoral Act, 2006 the Learned Senior Advocate submitted that the presumption or assumption that the election has been conducted substantially in accordance with the provisions of the Act is implicit in the said section 146(1); that the onus is therefore on whoever seeks to, rebut the presumption that the election has been conducted, in substantial compliance with the principles of the Act to prove his assertion, and, the nature and extent of the non-compliance; that the appellant must show not only that there has been non-compliance but that it has affected substantially the result of the election, relying on the case of *Buhari vs Obasanjo* (2005) 23 NSCQR 575 at 576; that the contention of the learned sillk for the appellant that the court should depart from its earlier decision is misconceived as the court does not depart from its earlier decision merely because it is unfavourable to a party; that the appellant has not shown any good grounds for the departure.

The Learned Senior Counsel for the 4th and 5th respondents, Chief Wole Olanipekun, SAN submitted that there is a presumption in favour of any result declared by INEC to be genuine, legal and authentic and that the burden of proving otherwise rests squarely on

the person who challenges the result declared by INEC (the appellant in this case), relying on Buhari vs Obasanjo (2005) 13 NWLR (Pt.941) 1 at 122; that current decisions of the courts are against the stands taken in Swem v. Dzungwe which made the earlier decision no longer relevant on the issue as to who has the burden of proving whether or not an established non-compliance substantially affected the result of the election; that the appellant must not only establish non-compliance but must also show by evidence how non-compliance affected the election, relying on Buhari vs Obasanjo supra.

Section 146 (1) of the Electoral Act, 2006, the interpretation of which constitutes the bone of contention in the issues under consideration, provides as follows:-

*“146 (1) - An election shall not be liable to be invalidated by reason of non-compliance with the provisions of the Act if It appears to the Election Tribunal or Court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election.”*

It must be noted that section 145 (1) (b) makes non-compliance with the provisions of the Electoral Act, 2006 a ground for challenging an election by way of election petition. It provides inter alia thus:-

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

When one takes the two provisions together, it is very clear that a petitioner who makes non-compliance with the provisions of the Electoral Act, 2006 a ground of challenging an election has the onus of proving the assertion as it is settled law that he who alleges must prove. It is the duty of the petitioners to produce credible evidence of non compliance to enable them succeed. However, section 146 (1) of the same Act comes in to say that it is not every non-compliance with the provisions of the Act that will lead to invalidation of an election result; that for non-compliance to attain that result, it must be apparent to the tribunal or court that the said non-compliance substantially affected the result of the election.

The word “appears” as used in section 146 (1), of the Electoral Act, 2006 has not been defined anywhere in the Act. However, at page 88 of Webster’s New Twentieth Century Dictionary Un-

abridged, Second Edition, the word “appear” is defined inter alia, thus:

*“to become visible to the apprehension of the mind, to be obvious to be known, as a subject of observation or comprehension; to become manifest; to be clear or made clear by evidence.”*

B The question is: Who is to produce the evidence that would make it clear to the Tribunal or Court that the non-compliance substantially affected the result of the election? The appellant says that it is the respondents while the respondents contend that it is the appellant. Both parties have cited decisions of this court in support of their contending positions. My reaction is simply that it is settled law that he who alleges the positive or affirmative must prove and not the other way round. A petitioner like the appellant - who alleges non-compliance which substantially affects the result of an election bears D the burden of proving same since without that he cannot succeed. The way section 146 (1) is couched places the burden (if any) of proving a negative on the respondents - that “the non-compliance did not affect substantially the result’ of the election”. It is therefore in the best interest of a petitioner who relies on the ground of non-compliance to go further to establish how the non-compliance affects E substantially the result of the election by the evidence he produces. Without that, the petition must fail. It is after that the respondent becomes bound ‘to adduce evidence in rebuttal.

F That is clearly the position of this court in the Buhari vs Obasanjo’s case supra, which was cited and relied upon by the lower court and I hold the view that the interpretation is right.

The next questions is whether the substantial non-compliance as found by the lower court affected substantially the result of the G election. The lower court had found that;

*“The petitioner has in the instant case established the substantiality of the non-compliance with section 145 (2) (sic) of the Electoral Act, bid has failed to establish the substantiality of this non-compliance on the result of the election.”*

H I had already held that the burden of proving non-compliance and the substantiality of the non-compliance on the result of the election lies on the petitioner/appellant. Has he discharged that onus? I hold the view that he has. There are non-compliances that go straight



to the fundamentals of an election thereby affecting condition precedents for the holding of an election while others may just affect the result of the election where one had been validly held. In other words, some non-compliance may render an 'election' void in which case there is no result of the election to substantially affected by the non-compliance while others may substantially affect the result of an election validly conducted. B

For instance, if the non-compliance with the provisions of the Electoral Act complained of have to do with the validity of the voters register used at the election which non-compliance is found proved, C will that alone not be enough to invalidate the election without the requirement of the further prove of how the non-compliance affected substantially the result of the election when in law there could not have been an election in the first place as no election can take place without a valid voters register. D

In my view two things are crucial and fundamental to the holding of an election. These are Voters Register and Ballot Papers. It is common knowledge that the two are the targets of election riggers, if not properly handled. Sections 10 and 11 of the Electoral Act deal with 'National Register of Voters and Voters' Registration while section 45 and 67 deal with the format of ballot papers. E

Section 45 provides thus:

*"(i) The commission shall prescribe the format of the ballot papers which shall include the symbol adopted by the political party of the candidate and such other information as it may require. F*

*(ii) The ballot papers shall be bound in booklets and numbered serially with differentiating colours for each office being contested"*

It is failure to comply with subsection 2 of section 45 that the lower court found to constitute substantial non-compliance with the provisions of the Electoral Act. There is no cross appeal on that crucial finding/holding. That being the case, the respondents are deemed to have accepted the said finding as valid and proper and it is settled law that under the circumstance the parties and this court are bound by the said finding and as such this court is without vires or jurisdiction to reverse or disagree with same not being a busy body. I therefore agree with the lower court that the non-compliance with the H

provisions of section 45 (2) of the Electoral Act, 2006 constitutes substantial non-compliance but I do not agree that the substantial non-compliance so found is not enough to affect the result of the election because in the first place, you cannot conduct an election properly so called without valid ballot papers. By holding that there was substantial non-compliance with section 45(2) supra it tantamounts to holding that the election that was conducted on the 21st day of April, 2007 was done without valid ballot papers which to me, with the greatest respect, amounts to a nullity. The situation being as found by the lower court it follows that there was no election known to law the result of which could have been substantially affected by the non-compliance as the non-compliance in this case is of the nature that invalidated the election. To hold otherwise amounts to giving licence to those who conduct our elections to continue to do whatever they like including creating loopholes for the rigging of our elections thereby continuing to deny our electoral process the credibility it deserves in the commity of democratic nations. How is one to know which ballot papers were sent to Sokoto, Katsina, Ebonyi etc when the ballot papers were not in booklet form and numbered serially? Even within the particular state where the ballot papers are sent for election how do we know if ballot papers meant for one local government area or ward are not diverted and used in another or even not used at all but stuffed into the ballot boxes and counted as votes. How can we determine a genuine ballot paper from a fake one when we agree that any paper can pass for a ballot paper and be used in an election and assume that such an act of non-compliance does not affect the result of the election'?

In this country we have four (4) years to prepare for elections yet the basic requirements still fall far short of expectations. INEC contends that the time was too short that is why the ballot papers were not serialized and bound in booklet form. That is no reason at all. The truth is that INEC had decided on its own that certain persons were disqualified from contesting the election and therefore printed the first ballot papers without reflecting their party logo thereon despite the fact that their decision to so disqualify the candidates was being challenged in the courts and eventually a decision one way or the other would be given. When the decision of the

Supreme Court finally came saying that INEC has no power to disqualify any candidate for any election less than a week to the presidential election, the decision is now being given as an excuse for printing new ballot papers, this time without serialization and contrary to law. If INEC had erred on the side of caution and printed the original ballot papers with the names and party logo of all the parties/candidates and the decision of this court had gone either way, particularly confirming the disqualification, what INEC would then have done would have been to simply blot out the name and logo of The political party of the disqualified candidate not to start all over again and commit an illegality using the decision of this court as an excuse. B  
C

Now section 67 also deals with ballot papers and this issue will be incomplete without reference to that provision. It reads:

*“67 (i) Subject to subsection (2) of this section a ballot paper, which does not bear the official mark, shall not be counted. D*

*(ii) If the returning officer is satisfied that a ballot paper which does not bear the official mark was from a book of ballot papers which was furnished to the Presiding Officer of the polling station in which the vote was cast for use at the election in question, he shall, notwithstanding the absence of the official mark, count that ballot paper. “ E*

It is very clear from the above provisions that the law intends that ballot papers which do not meet the requirements of the Act are not to be used in any election and when used contrary to the provisions, they are not to be counted as votes. The above is designed to ensure that the election conducted in accordance with the law will, enjoy credibility and will be free and fair. The section confirms the fundamentality of the provisions in section 45(2) of the Electoral Act, 2006. F  
G

Subsection (2) of section 67 clearly shows the importance of serializing and binding of the ballot papers by stating that ballot papers without official mark can only be counted as votes when/if the Returning Officer is satisfied that the said ballot papers came from a book of ballot papers supplied to the Presiding Officer of the polling station in question. How can the Returning Officer be satisfied in the circumstances if the ballot papers, as in this case, are not bound in H

booklet form nor numbered serially? How can he say with certainty that the ballot papers in question were actually supplied to the Presiding Officer of the particular polling station when the ballot papers, as in this case were neither bound in booklet nor numbered serially. It is with regard to the above considerations that I find myself unable to agree with the majority decision of my learned brothers on this issue in the appeal.

I therefore hold the considered view that there was sufficient evidence before the lower court with which it would have held that the substantial non-compliance it found as having been proved by the appellant substantially affected the result of the election and allowed the petition on that ground alone. The court not having done so, I hereby hold that the substantial non-compliance proved is of the nature that substantially affected the result of the election and set aside the decision of the lower court on that point.

The next issue treated by the Learned Senior Counsel for the appellant is whether the power of the President of the Court of Appeal under any section of the Constitution of the Federal Republic of Nigeria including sections 248 and 285 extends to the power to issue practice directions for the proceedings of the court in its original jurisdiction under section 239 (1) of the Constitution.

In arguing the issue Learned Senior Counsel submitted that neither section 239 (1) nor 285 of the 1999 Constitution made any reference either directly or by necessary implication to the President of Court of Appeal or making of any rules or practice direction for any court or tribunal; that paragraph 50 of the first schedule to the Electoral Act, 2006 limited the applicable Rules of Court to the Federal High Court (Civil Procedure) Rules which are the rules of a court for which the President of the Court of Appeal has no constitutional competence to make rules and urged the court to resolve the issue in favour of the appellant.

Referring to section 248 of the 1999 Constitution the Learned Senior Counsel for the 1st and 2nd respondents submitted that the President of the Court of Appeal has power to enact the Practice Directions - that the power is not limited to Practice. Directions to be used by that court in the exercise of its appellate jurisdiction but extends to the exercise of its original jurisdiction. The above position is

the same with that submitted by the Learned Senior Counsel for the 4th and 5th respondents both of who urged the court to resolve the issue against the appellant.

Section 237 of the Constitution of the Federal Republic of Nigeria, 1999 (hereinafter referred to as the 1999 Constitution) established the Court of Appeal which by the provisions of section 239 thereof is clothed with original jurisdiction, to the exclusion of any other court of law in Nigeria, to hear and determine any question as to whether any person has been validly elected to the office of the President or Vice President, under the constitution or the term of office of such an elected President or Vice President has ceased.

In addition to the original jurisdiction so conferred on the court, section 240 of the said 1999 Constitution conferred appellate jurisdiction on the Court of Appeal, to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the courts designate in that section.

It is therefore clear that the Court of Appeal by constitutional arrangement exercises two jurisdictions - one original and the other - appellate. To exercise the jurisdiction so conferred, the Court of Appeal, like every other court needs Rules of Court to regulate its activities which takes us to section 248 of the said 1999 Constitution which provides thus:

*“Subject to the provisions of any Act of the National Assembly, the President of Court of Appeal may make rules for regulating the practice and procedure of the Court of Appeal. “*

It should be noted that section 248 precedes sections 239 and 240 which conferred original and appellate jurisdictions on the Court of Appeal. It follows therefore that when section 248 of the 1999 Constitution conferred power on the President of the Court of Appeal to make rules to regulate the practice and procedure of the Court of Appeal, it means simply that the power so conferred extends to the practice and procedure of that court both in its original and appellate jurisdiction. It is settled law that the power to make rules regulating practice and procedure of any court of law including the Court of Appeal - includes the power to make or issue Practice Directions based on the said Rule of Practice and Procedure.

In the instant case, the Practice Directions in question relate to

the Practice and Procedure of the Court of Appeal in its original jurisdiction which I hold, with respect, the President of the Court of Appeal has the requisite vires to make/issue. To argue generally that the President of the Court of Appeal has no constitutional power to make the relevant Practice Directions without linking it to the relevant proceeding in which it was applied in this case, the Presidential Election Petition Tribunal, proceedings in the Court of Appeal, is to put before this court a hypothetical or academic issue for consideration which is frowned upon by the courts. It follows therefore that the answer to the life issue in relation to the proceedings in the appeal arising therefrom is in the positive - the President of the Court of Appeal has the constitutional power to issue/make the 2007 Practice Direction. See *Okereke vs Yar'adua (2008) 34.2 NSCQR 1370*.

Even if one is to consider the power to make Practice Directions in relation to the other Election Tribunals as established by section 285 of the 1999 Constitution, it has to be remembered that paragraph 50 of the Rules of Procedure for Election Petitions provides that:

*“Subject to the express provisions of this Act, the practice and procedure of the Tribunal or the court, in relation to an election petition shall be as nearly as possible, similar to the practice and procedure of the Federal High Court in the exercise of its civil jurisdiction, and the Civil Procedure Rules shall apply with such modifications as may be necessary to render them applicable having regard to the provisions of this Act, as if the petitioner and the respondent were respectively the plaintiff and the defendant in an ordinary civil action.”*

It is settled law that every head of court is empowered to make rules regulating the practice and procedure of the court including the Federal High Court (Civil Procedure) Rules. It is not in dispute that the “National Assembly, Governorship and the State House of Assembly Election Tribunals are constituted by the President of the Court of Appeal. It follows therefore under paragraph 50 supra, the president of the Court of Appeal has additional power to make or issue Practice Directions under the Federal High Court (Civil Procedure) Rules for the purpose of regulating the Practice and Procedure of the Election Tribunals.

It is therefore clear that in whichever way one looks at the issue, it must fail and it is accordingly resolved against the appellant. The next issue argued by the learned counsel for the appellant is whether the Court of Appeal was right in striking out 19 of 20 witness depositions filed with the petition after adopting the depositions unconditionally by order of court on 19/11/07. In arguing the issue Learned Senior Counsel conceded that under section 83 of the Evidence Act, the court is enjoined not to admit an affidavit which is proved to have been sworn before a person on whose behalf the same was offered, or before a partner or clerk of his legal practitioner but submitted that what is involved in this case are not affidavits but depositions which are written testimonies in lieu of oral testimonies; that the fact that the deposition were made before a legal practitioner for the appellant was not pleaded but arose under cross examination and that it consequently grounds to no issue; that since the court had earlier made an order unconditionally adopting the depositions on the 19/11/07, it was wrong for the court to have re-opened or overruled itself.

In his reply Learned Senior Counsel for the 1st and 2nd respondents as well as that for the 4th and 5th respondents submitted that evidence cannot be admitted unconditionally as, it has to meet the standard of admissibility neither can counsel contract with the court to admit evidence unconditionally; that the Practice Direction stipulates that evidence be submitted in the form of affidavits and that the affidavits tendered by the appellant did not meet the requirement of the law hence their being struck out; that where inadmissible evidence has been admitted, it is the duty of the court not to act on it - referring to and relying on *Onochie vs Odogwu* (2006) 25 NSCQR 387 at 402; that the law does not require, a party to plead his intention to object to the admissibility of a document/evidence to be placed before the court.

It is not in dispute that the depositions tendered admitted but later struck out were taken before the appellant's legal practitioner contrary to the provisions of section 83 of the Evidence Act.

Learned Senior Counsel for the appellant has submitted that the depositions were not affidavits and as such they do not come within the confine of section 83 of the Evidence Act. I do not agree

with that submission. A deposition is in the form of an affidavit evidence. It was to be sworn to before a commissioner for oaths. Paragraph 1 (1) (b) of the Election Tribunal and Court Practice Direction 2007 mandates all petitions to be accompanied by ‘*written statements on oath of the witnesses*’. While paragraph 1 (2) stipulates that:

*“Any petition which fails to comply with the sub-paragraph (1) of this paragraph shall not be accepted for filing by the secretary”.*

The commissioner for oath before whom the written statement can be taken for the oath to be administered may be acting under the Oaths Act or the Notaries Public Act. It follows that “*written statements on oath of the witnesses*” is nothing but an affidavit evidence deposited to by the maker before a commissioner for oath.

I have searched the law and have been unable to find any authority to support the contention of Learned Senior Counsel for the appellant that a document or evidence can be admitted unconditionally by a court of law upon agreement by the parties and the court, neither has the Learned Senior Counsel for, the appellant drawn the attention of this court, in both his briefs of argument and oral submission, to any/such authority. Rather, it is settled law that where an inadmissible evidence has been admitted, be it oral or documentary or real, it is the duty of the court not to act on it. The law on the point is absolute in that it admits of no exception as yet. In other words, it does not matter that the inadmissible evidence was admitted by consent of the parties/counsel or that the opposing party failed to make objection at the proper time. The duty is that of the court to ensure that cases are decided only on legal evidence and nothing more - see *Onochie v.s Odogwu* (2006) 25 NSCQR 387 at G 402.

It follows therefore that since the depositions did not meet the requirements of the law, they were inadmissible and when admitted the admission of the inadmissible evidence can be set aside by the court when it comes to writing the judgment or where it fails to do so, the duty to reject the evidence then falls on the appellate court. In the instant case, I hold that the lower court was right in striking out 19 out of the 20 witness depositions of the appellant as not being in conformity with the law and consequently resolve the issue against



the appellant.

On Issue NO.2.07 Learned Senior Counsel for the appellant submitted that the lower court was in error when it refused to regularize the appellants' inspection witness depositions already filed with leave of the court; that the court was in error when it held that the depositions were analysis of the election documents with the opinions and conclusions of the witnesses; that the issue of content of the depositions was premature at the stage of the application when it could have been raised after admission as evidence and the issue of weight to be attached thereto is raised; that the law allows oral evidence of what a person has seen or read; that the depositions could not have been filed with the petition as the order for inspection of the documents to which the depositions relate was made in the proceedings i.e after filing the petition; that the ruling amounted to a denial of fair hearing to the appellant.

On the other hand it is the contention of the senior counsel for the respondents that the documents on which the depositions were made having been admitted in court the depositions from the inspectors become irrelevant; that the depositions were, in fact commentaries on the documents allegedly inspected and were contrived by the appellant to fill in the gap created by the striking out of 19 out of 20 witness depositions thereby leaving the petition bereft of evidence; that evaluation of the documents already tendered remains the province of the court, not by depositions and urged the court to resolve the issue against the appellant.

There is no doubt at all that the documents on which the witness/inspectors depositions were sought to be tendered were already tendered and admitted from the bar and were therefore exhibits before the court. As exhibits they could be commented or addressed upon by both counsel leaving the court to evaluate same in its judgment. From the record, I agree with the lower court that what was being provided as witness depositions are actually commentaries/evaluation by the inspectors on/of the poll documents inspected. In rejecting the application, the lower court had these to say:

*"This application is for leave to file deposition of witness who carried out inspection of election documents or in the alternative to allow oral evidence of witnesses. I have listened to the arguments of*

*counsel on all sides and it is very (sic) view that what is sought to be tendered as depositions of witnesses are actually an analysis of the election documents with the opinions and legal conclusions of witnesses. These witnesses merely inspected the documents. They are not the makers and have no legal competence to comment on them. On the other hand, counsel on all sides are free to comment on the documents which were tendered from bar to assist the court in their final addresses.... This application is unnecessary and has no support in the Practice Directions and is accordingly refused”.*

I entirely agree with the reasoning and conclusion of the lower court on the matter. Learned Senior Counsel for the appellant has failed to satisfy this court that in exercising its discretion to refuse the application in question the court did not act judicially and or judiciously to warrant this court’s interference with the exercise of discretion by the lower court. In the circumstance the issue is resolved against the appellant.

On Issue 2.08 the Learned Senior Counsel for the appellant submitted that the depositions filed by the 4th and 5th respondents were not sworn by any human being and as such they are invalid or have no evidential value or weight, referring to section 90 (b) and (c) of the Evidence Act, that the Practice Direction 2007 did not authorize the parties to swear depositions with the identity of the defendant camouflaged by alphabets; that the Amended Practice Direction which came into force on 10th May, 2007 containing the direction relates to the petitioner only not the respondents; that it was only paragraph 1 of the original Practice Direction which relates to the petitioners that was amended while paragraph 2 relating to the respondent remained unamended and urge the court to resolve the matter in favour of the appellant.

In his reaction, the Learned Senior Counsel for the 4th and 5th respondents submitted that the law is clear that however bad or irregular a procedure might be, once the opposing party did not object or has acquiesced to it, and or was party to the procedure, he cannot later complain about that procedure in which he actively participated, relying on *Noibi vs. Jikolati* (1987) 1 NWLR (Pt. 52) 619; *Amechi vs INEC* (2008) 5 NWLR (Pt. 1080) 227; that the amendment does not apply only to the petitioner but also to the respondent

as both parties are equal before the law; that the amendment is aimed at protecting the prospective witness in an election petition proceedings from possible attack from adverse parties and urged the court to resolve the issue against the appellant.

Section 90 (b) and (c) of the Evidence Act provides, inter alia, B  
as follows

*"(b) It shall state full name, trade or profession, residence and nationality of the defendant.*

*(c) It shall be as the first person, and divided into convenient paragraph, numbered consecutively;..."* C

It is not disputed that none of the witness deposition of the 4th and 5th respondents complied with the above provisions of the law. The Learned Senior Counsel for the 4th and 5th respondents has argued that the said depositions are in accordance with the amended Practice Direction 2007. Learned Senior Counsel has also submitted D  
that a party who has acquiesced on irregular procedure adopted cannot be heard later to complain. I have to say that the complaint of the appellant is not about adoption of an irregular procedure but the competence of the affidavit evidence of the 4th and 5th respondents. E  
The question is simply whether depositions made contrary to the provisions of section 90 (b) and (c) can be said to be valid in the eyes of the law. It is the case of the 4th and 5th respondents that it is valid because it is authorized by the amended Practice Direction.

However, the question is whether an Act of the National Assembly F  
such as the provisions of the Evidence Act, can be amended by mere Practice Direction. It is trite law that Practice Directions are not statutes or enactments neither are they of equal legal status with the Rules of Court under which they are made or derive their validity and are therefore ancillary or subordinate or subject to. G

Therefore where there is a conflict between the Rules of Court and Practice Directions, the Rules must of necessity prevail as the Practice Direction cannot amend the Rules of Court, let alone an Act of the National Assembly. I hold the view that though the President of the Court of Appeal has the power to make Practice Directions, H  
the Practice Directions so made must be within the confines of the laws and not contrary to what the statutes provide; it cannot authorize what a statute, in this case, the Evidence Act, says should not be

done despite the best intentions. In the circumstance I hold the view that the witness depositions of the 4th and 5th respondents are incompetent as they offend the provisions of section 90 (b) and (c) of the Evidence Act and consequently resolved the issue in favour of the appellant.

B On the issue as to whether the lower court in exercising its jurisdiction under section 239(1) of the constitution had the competence to enquire into the validity or otherwise of Exhibit EP2/34 or the competence of the instituting authority which is not a party to the proceedings, the answer to that issue had been provided by this court C in the case of Action Congress vs INEC (2007) 12 NWLR (Pt.1048) 222 and Amaechi v. INEC (2008) 5 NWLR (Pt. 1080) 227 at 306-307, and had been adequately dealt with in the lead judgment. I do not intend to repeat them here. By the way is it not very funny that D the 4th and 5th respondents who were former Governors in Katsina and Bayelsa States respectively and have not been shown to have any relationship whatsoever with Abia State during the relevant period, are allegedly indicted by an alleged commission of inquiring set up by the then Abia State Government for allegedly doing their jobs E contrary to the law and white paper, Exhibit EP2/34, issued thereon. Exhibit EP2/34 is a big joke and clearly shows how political power can be abused. Exhibit EP2/34, the so called indictment reads, inter alia at page 10 thereof:-

F *“...that the following persons herein under listed who were found to have done their jobs contrary to the laws, rules, principles and regulations be reprimanded, indicted and punished accordingly to the relevant laws. “*

G The exhibit then listed the names of the 4th and 5th respondents. Can it be said, ex facie that the 4th and 5th respondents were indicted by the so called indictment for fraud and embezzlement as required by section 137 (1) (i) of the 1999 Constitution so as to disqualify them from contesting the posts of President and Vice-President respectively of the Federal Republic of Nigeria?

H The answer is obviously in the negative. The 4th and 5th respondents never worked for Abia State - they were Governors of Katsina and Bayelsa States. There is no evidence that they were ever summoned/invited to appear before any commission or Board of

Inquiry whose report gave birth to Abia State Government White Paper - Exhibit EP2/34. In short to put it rather mildly, Exhibit EP2/34 is merely an act of irresponsibility designed to score cheap political points and which should not be encouraged in any civilized political system like ours. It is the best example of how not to use political power in a civilized society. B

In conclusion, I hold the view that despite the resolution of many of the issues against the appellant, in view of the holding in respect of the issue of substantial non-compliance affecting substantially the result of the election, this appeal succeeds and is accordingly C allowed by me. I therefore set aside the judgment of the lower court delivered on the 26th day of February, 2008 dismissing the petition of the appellant and in its place enter judgment in favour of the appellant only to the extent that the Presidential election of 21st April, 2007 is invalid for non-compliance with the provisions of the Electoral Act, 2006 and consequently cancelled. It is hereby ordered that D a fresh Presidential Election in which valid ballot papers shall be used be held within three months of this order.

I make no order as to costs.

Appeal allowed. E

F

G

H