

SUPREME COURT OF NIGERIA
24TH APRIL, 2007 SC. 270/2007
CORAM:- N. TOBI, D. MUSDAPHER,
W. S. N. ONNOGHEN, F. F. TABAI, I. T. MUHAMMAD,
P. O. ADEREMI, JJSC

DIM CHUKWUEMEKA ODUMEGWU PETITIONER/
OJUKWU APPELLANT

AND

1. ALHAJI UMARU MUSA YAR'ADUA
2. DR. GOODLUCK JONATHAN
3. INDEPENDENT NATIONAL RESPONDENTS
- ELECTORAL COMMISSION (INEC)
4. THE CHAIRMAN, INDEPENDENT
- NATIONAL ELECTORAL COMMISSION
5. PEOPLE'S DEMOCRATIC PARTY (PDP)

ELECTION PETITIONS - Preliminary objection - Propriety of - If a respondent feels strongly that the petition is patently unsustainable - He may raise it - And the tribunal has the jurisdiction to entertain it (H1)

PLEADINGS - Motion to strike out - Determination of - What to consider - The Court must restrict itself to facts in the particular pleading - Without recourse to the opponent's pleading - As rightly done by Court of Appeal (H2)

ELECTION PETITIONS - Grounds - Complaints - Whether known to law - A careful reading of grounds 2 & 3 together with their particulars - Shows complaints as falling within the grounds in s. 145 (a) - (b) of the Act (H3)

ELECTIONS - Pleadings - Averments - Sufficiency of - A petitioner challenging an election on grounds of noncompliance - Must not only plead facts of noncompliance - But also that it substantially affected the result (H4)

ELECTION PETITIONS - Electoral Act 2006, ss. 145 & 146 - Inten-

tion of - It is to ensure that only petitions that on their faces - Disclose reasonable causes of action - Can go for trial (H5)

CONSTITUTIONAL LAW - Elected officers - Status of - S. 137 (1)(g), 1999 Constitution - They are not civil or public servants within the provision of the section - On the principle of *expressio unius* (H6)

FACTS

The petitioner/appellant petitioned the Court of Appeal in the court's original jurisdiction as the presidential election tribunal. The appellant was, by the petition, challenging the election of the 1st and 2nd respondents as president and vice president of the Federal Republic of Nigeria, respectively, during the April 2007 general elections. By various motions/notices of preliminary objection, the 1st and 2nd respondents, the 3rd and 4th respondents, and the 5th respondent respectively objected to the competence of the petition. They variously prayed the tribunal to strike out the petition.

The applications were consolidated and heard together with the consent of the parties. Eventually the applications were sustained and the petition struck out on the ground that, *inter alia*, it did not contain a complaint known to the Electoral Act and as such did not disclose a cause of action. Aggrieved, the appellant has brought this appeal against the ruling of the tribunal striking out the petition.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right to hold that grounds 2 and 3 of the petition do not conform with or relate to any of the 4 grounds set out in Section 145(1) of the Electoral Act 2006?

2. Whether the Court of Appeal was right to rely on Section 146 of the Electoral Act 2006 to strike out ground 1 of the petition after it had earlier held the said ground to be competent? And

3. Whether having held that ground 4 of the petition was competent, the Court of Appeal was right to consider its merit and struck it out?

4. Whether the approach adopted by the Court of Appeal in reaching its decision to strike out the petition has occasioned a miscarriage of justice?"

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HELD (Dismissing the appeal per ***TABAI JSC***, Oguntade, On-

noghen and Aderemi, JJSC dissenting)

Practice & Procedure - Preliminary objection - Propriety of

1. If a respondent in an election petition feels strongly that, on the face of it, the petition is patently unsustainable in the sense that it does not meet the requirements of the Electoral Act or the First Schedule to the Act or that it is lacking in materials to sustain it and therefore incompetent, he is at liberty to raise it and timeously too. And because it is an issue of jurisdiction which determination can be decisive of the whole litigation, the Election Tribunal or Court has the jurisdiction to entertain it. (p. 1034 B)

Motion to strike out - Determination of - What to consider

2. In *SHELL-BP PETROLEUM DEVELOPMENT CO. OF NIGERIA LTD. & ORS v M.S. ONASANYA* (1976) 6 SC 57 at 60 the Supreme Court stated:

In considering whether to strike out a pleading, the court must restrict itself to the facts in the particular pleading without having recourse to the facts in the opponent's pleading.

In this case the preliminary objections and their determination at the court below were restricted to the petition and the documents filed along with it. I hold in conclusion of this issue that the preliminary objections were properly raised and determined at the Court below. (p. 1035 E/G/H)

Grounds - Complaints - Whether known to law

3. There is force in the arguments of Mr. Ezike of counsel for the Appellant particularly having regard to the particulars of the said grounds 2 and 3. Looking at the two grounds in the abstract and without reference to their particulars one is tempted to conclude that they do not convey any complaint which falls within the grounds in Section 145(a)-(b) of the Electoral Act. They are vague. But a careful reading of the two grounds together with their particulars clearly shows that the Petitioner alleges a number of non-compliances and/or corrupt practices. No doubt the two grounds contain some assertions of non-compliances. (p. 1037 C)

Pleadings - Averments - Sufficiency of

4. The relevant portion of Section 146(1) must, of necessity, be read

in conjunction with Section 145(1)(b) of the Act. For the purpose of meeting the requirements of the combined provisions of Sections 145(1)(b) and 146(1) of the Electoral Act therefore, a petitioner who challenges the election of a respondent on the ground of non-compliance with the provisions of the Electoral Act must plead not just the fact of the alleged non-compliance, but must go a step further to plead that the non-compliance substantially affected the result of the election. (p. 1040 F)

Electoral Act 2006, ss. 145 & 146 - Intention of

5. The manifest intention of the totality of the provisions of Section 145(1)(d) and 146(1) of the Electoral Act and Paragraph 1(a)(b) and (c) of the Election Tribunal and Court Practice Directions is to ensure that only a petition which on its face and in the face of the accompanying written statement on oath discloses a reasonable cause of action that can go for trial. A petition which on the face of it is defective or which in the face of the written statements on oath discloses no reasonable cause of action should be struck out on the application of the Respondent. (p. 1041 G)

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Elected officers - Status of

6. Learned counsel for the 1st - 4th Respondents referred to these definitions in Section 318 of the Constitution and submitted that by excluding elected officers, like Governors and Deputy Governors from the list of persons “employed” in the civil or public service of a State, Governors and Deputy Governors are not civil or public servants within the provision of Section 137(1)(g) of the Constitution. I agree entirely with this submission, and to which the Appellant has no answer. I agree that the Latin *maxim* “*expressio unius est exclusion alterius*” applies to exclude Governors and Deputy Governors. (p. 1043 H)

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NOTABLE POINTS OF INTEREST

TOBI JSC

1. *Election petitions - Grounds - It is safer to copy from the Act*

A petitioner is required to question an election on any of the grounds in section 145(1) of the Act. He is expected to copy the section 145(1) grounds word for word. I think a petitioner can also use his own language to convey the exact meaning and purport of the subsec-

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tion. In the alternative situation, a petitioner cannot go outside the ambit of section 145(1) of the Act. In other words, he cannot add to or subtract from the provision of section 145(1). In order to be on the safer side, the ideal thing to do is to copy the appropriate ground or grounds as in the subsection. A petitioner who decides to use his own language has the freedom to do so, but he should realize that he is taking a big gamble, if not a big risk. (p. 1048 B)

2. Where facts are not pleaded there is nothing to prove

In our adjectival law, pleadings come before proof. Where facts are not pleaded, there is nothing for the party to prove. Accordingly as the appellant did not plead facts relating to section 146(1) of the Electoral Act, his petition does not go anywhere. (p. 1053 E)

3. Innovations outside the rule go to no avail

Counsel has the right to introduce innovations in procedure of courts where the rules are silent on a particular procedure to be adopted. Where the rules specifically provide for a procedure, innovations of counsel outside the specific rules will go to no avail. They rather destroy the case of the party. This is because the courts expect counsel to follow the procedure provided for in the rules. I see in this appeal such a situation. (p. 1054 E)

OGUNTADE JSC (DISSENTING)

4. S.146 (1) cannot excuse noncompliance with essential conditions

A close reading of section 146(1) above easily shows that the non-compliance with the Act which can be overlooked or forgiven is one which arises notwithstanding that the election "was conducted substantially in accordance with the principles of the Electoral Act." (p. 1066 G)

Where a petitioner's complaint is founded on non-compliance with an essential condition precedent to the conduct of the election, this cannot and ought not to be seen as a non-compliance which did not substantially affect the result of the election. (p. 1066 G)

5. The petitioner was driven away from the judgment seat unheard

In the nature of this case, it seems to me that the petitioner was muzzled and driven away from the judgment seat before he has aired his complaints.

Under the above Section 67(1) a ballot paper which does not conform with Section 45(1) of the Electoral Act is invalid and cannot be counted; and similarly under Section 147(2) above, it was open to the court below to hear the petition in order to determine whether or not the 1st and 2nd respondents were elected by a majority of valid votes cast at the election.” (p. 1069 A/E)

ONNOGHEN JSC (DISSENTING)

6. S. 146(1) cannot be used as a ground of preliminary objection
Section 146 (1) of the Electoral Act, 2006 relied upon by the lower court provides as follows:-

“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”.

From the above provisions, it is very clear and I hold the considered view that the section cannot be used as a ground of preliminary objection as it is clearly applicable after evidence has been called by the parties and the court is at the stage of determining the petition. (p. 1079 G)

7. Effect on the election results need not be proved in all cases of noncompliance

I do not agree that there is any duty on a petitioner in addition to pleading non-compliance with the principles of the Act to further plead that the non-compliance substantially affected the result of the election in every case of non-compliance as it is not every non-compliance that would affect the result of an election.

There are certain non-compliances that go to the root of an election in that they are absolute in the sense that once established the purported election is invalid and as such there would be no result to be substantially affected by the non-compliance. (p. 1080 C)

8. Unserialised ballot papers are not ballot papers

The Electoral Act, 2006 makes provisions for ballot papers and determines what a valid ballot paper is. In section 45(2) of the Act, a valid ballot paper must be printed in booklet form and serialized.

Where 'ballot papers' used in an election are alleged not to be serialized or in conformity with section 45(2) of the Act, they are in law, not ballot papers as they are invalid. (p. 1080 G)

9. The burden of proving non-substantial effect of noncompliance is on the respondent B

I hold the view that the duty to plead and prove that the non-compliance did not affect substantially the result of the election, where relevant, lies with the respondent as it would be the respondent that would lose since the non-compliance of the nature of non-serialization of ballot papers erodes the foundation of the electoral process leaving the election with no result recognized by law. (p. 1081 B) C

10. Appellant was denied fair hearing

In the instant case, the application of section 146 (1) of the Electoral Act, 2006 to the preliminary objections was *suo motu*. It is not the law that a court cannot raise an issue *suo motu* but that if the issue is necessary for the determination of the matter before it, the court must call on the parties or their counsel to address it on same before basing its decision on it. By not inviting counsel for the appellant to address it on that provision of the Act, the lower court denied the appellant of his right to fair hearing when it proceeded to base its decision on that provision thereby rendering the decision liable to be set aside. (p. 1081 E/G) E F

ADEREMI JSC (DISSENTING)

11. Preliminary objections of 1st, 2nd & 5th respondents are belated

The delivery of a statement of defence which has an equivalent in the Reply usually filed in opposition to petition, ipso facto indicates that the 1st, 2nd and 5th respondents in the instant matter have joined issues with (the petitioner) on the allegations of facts in the petition and have not admitted, as truth, the facts in the petition and have not admitted as truth the facts alleged. So, in law, the Notices of the Preliminary Objection filed by the 1st, 2nd and 5th respondents ought not to have been entertained. (p. 1110 A) G H

12. S.14(1) envisage a situation where trial has been concluded

The provisions of Section 145 (1) as set out above can only be in-

voked after evidence has been led. Indeed, the provisions envisage a situation where trial has been concluded. They are not and can never be available for invocation at the hearing of preliminary objection; it is only after evidence has been led in proof of the different averments in the processes filed by the parties. (1114 F)

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REPRESENTATION

J.C. Ezike, Esq., for the Appellant with him, Uche Onyeaguchi Esq., and Emeka Okoki Esq.

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D.D. Dodo, SAN and Mr. M.B. Adoke, SAN for the 1st and 2nd Respondents, with them Paulyn Abulimen Esq., Mrs. Ngozi Bon-Nwakama, Kauna Penzim Esq., Kalat Balogun Esq., O.I. Adeyemi Esq., I.N. Nwosu Esq., O.T. Akinyemi Esq., K.N. Azie (Miss) and A.A. Dodo Esq.

D

Mr. Okon Efut for the 3rd and 4th Respondents with him, Obaro Obut Esq., Peter Ofikwu Esq., Robin Umio Esq., Miss Rita Ograr and Miss Mavel Marga

Mr. A.C. Ozioko Esq., for the 5th Respondent with him, Mrs. S.I. Bamgbose, D.H. Bwala Esq., and I.E. Markus Esq.

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CASES REFERRED TO

NWOKORO v ONUMA (1990) 3 NWLR (Part 136) 22 at 33

ADEGOKE v ADIBI (1992) 5 N.W.L.R. (Part 242) 410

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JOWHOMU v EDOK-ETER MANDILAS LTD. (1986) 5 N.W.L.R. (Part 39) 1

ALAO v ASHTRU (1973) 11 SC 23

KUTI v BALOGUN (1978) 1 SC. 53 at 60

BARCLAYS BANK v CENTRAL BANK OF NIGERIA (1976) 1 ALL

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N.L.R. 409

NATIONAL BANK v SHOYOYE (1977) 5 SC 181 at 194

N.D.I.C. v C.B.N. (2002) N.W.L.R. (Part 766) 272 at 296

L.P.D.C. v CHIEF GANI FAWEHINMI (1985) 7 SC (Part 1) 178 at 262-263

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KOTOYE v C.B.N. (1989) 1 N.W.L.R. (Part 98) 419 at 448

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999, ss. 137 & 318

Electoral Act, 2006, ss. 46, 146 & 147

Electoral Tribunal and Court Practice Directions, 2007, Paragraph 4

LEAD JUDGMENT BY TABAI JSC

This is an appeal against the decision of the Court of Appeal dated 3rd September 2007 wherein the petition was struck out. The petition itself was dated and presented on the 22nd May, 2007. The grounds of the petition without their particulars are:

GROUND 1

The election in which the 1st and 2nd Respondent were declared winners was not conducted in compliance with the 1999 Constitution and the Electoral Act 2006.

GROUND 2

The election did not meet the minimal requirement of Electoral democracy and the law and the Electoral Act 2006.

GROUND 3

Rudimentary requirements of fairness and equal treatment provided by the Constitution and the Electoral Act were not extended to the Petitioner and to potential voters in Anambra, Imo, Abia, Enugu and Ebonyi States.

GROUND 4

The 1st and 2nd Respondents are not qualified to contest for election to the office of President and Vice President respectively because having been employed by the people of Katsina and Bayelsa States as their Chief Public Servants or Chief Executives they did not contrary to Section 137(g) of the 1999 Constitution resign or withdraw from their offices as executive governors at all prior to the said Presidential Election.

In paragraph 10 of the petition, the Petitioner further averred that the 3rd, 4th and 5th Respondents jointly and wrongfully cleared the 1st and 2nd Respondents for the said election to the offices of President, Vice President in Nigeria.

And in paragraph 11 of the Petition, the petitioner seeks the following reliefs:

1. A DECLARATION that by reason of the arbitrary failure of the 3rd Respondent to display copies of Voters List, publish Supplementary Voters' Register and in the manner and form commanded

by the Electoral Act 2006 the said Presidential Election is null and void for non-compliance with the minimal requirements of due process *sine qua non* and condition 7 precedent for the conduct of democratic election prescribed by law.

B 2. A DECLARATION that failure to conduct the said election at all in any place (no matter how remote or few the number of voters) is inimical to the concept and basis of equality under the law and violates the rights of the affected voters (guaranteed by the Constitution) that they be not discriminated against.

C 3. A DECLARATION that by the arbitrary manner the said election was conducted without regard to due process of the law in all or any part of the country, or at all, amounts to nullifying the franchise and sovereignty of the people of Nigeria as a whole.

D 4. A DECLARATION that the manner and form of the conduct of the said election was a usurpation of the franchise and sovereignty of the people.

5. A DECLARATION that the 1st and 2nd Respondents were not qualified for election to the office of President and Vice President respectively or at all.

E 6. AN ORDER nullifying and invalidating the return of Musa Yar'Adua and Goodluck Jonathan, the 1st and 2nd Respondents herein as President and vice President elect respectively

F 7. AN ORDER nullifying the said election and commanding the 3rd Defendant to conduct another election for the office of President of Nigeria in the manner and form prescribed by law but without the 4th Respondent as its Chairman.

8. AN ORDER of injunction commanding the 4th Respondent to cease and desist from running the affairs of the 3rd Respondent.

G 9. A DECLARATION that the declaration of the 1st and 2nd Respondents as winners of the said election is invalid, unconstitutional null and void.

H In keeping with the requirements of the Practice Directions the petition was accompanied by a written Statement on Oath of one Dr. Paul Dike.

By a motion dated 1st August, 2007 and filed on the 3rd of August 2007, the 1st and 2nd Respondents also prayed the Court below for an order dismissing and/or striking out the petition on the grounds *inter alia*:

(i) That the petition is defective and in clear breach of the express provisions of the Electoral Act 2006.

(ii) That some of the petitioner's prayers do not flow from the petition.

(iii) That the petition is not properly constituted as persons or institutions who are proper necessary or desirable parties and whose presence are required for a just determination of the petition have not been made parties. B

Also by a Notice of Preliminary Objection dated and filed on the 3rd August 2007 the 3rd and 4th Respondents prayed the Court of an order dismissing the petition. The grounds for the objection, are stated to be that: C

(1) The Petitioner has not disclosed any reasonable cause of action against the Respondents, the petition having failed woefully to disclose any constitutional disqualification against the 1st and 2nd Respondents who have not been shown to be disqualified to contest election into the office of President and Vice President respectively. D

(2) The petition has not disclosed any reasonable cause of action against the Respondents as the grounds 1, 2 and 3 of the petition and the particulars there under as constituted have not shown that the election was not conducted substantially in accordance with the principles of this Act or that the non-compliance affected substantially the result of the election as envisaged under the provisions of Section 145(1) of the Electoral Act 2006. E

(3) The petition is a gross abuse of the process of the Court F

(4) The Honourable Court lacks the jurisdiction and or vires to entertain the petition as constituted.

Written addresses were submitted for and against the two applications. And with the consent of the parties both applications were consolidated and heard together. G

By its ruling on the 3rd September, 2007 both applications were sustained and the petition struck out. As I said earlier, this appeal is against that ruling. The parties have through their counsel filed and exchanged their briefs of argument. The Appellant's Brief of Argument was prepared by James C. Ezike and same was filed on the 5/11/07. He also prepared the Appellant's Reply Brief to the 3rd and 4th Respondents' Brief of Argument and it was dated and filed on the 18/12/07. Mr. James Ezike filed yet another Appellant's Reply H

Brief to the 1st and 2nd Respondents' Brief of Argument and it was filed on the 17/1/08. The 1st and 2nd Respondents' Brief of Argument was settled by Chief Wole Olanipekun, SAN and same was filed on the 17/12/07. The joint brief of the 3rd and 4th Respondent was settled by Kanu G. Agabi, SAN and it was filed on the 28/11/07. J. K.

B Gadzama, SAN prepared the 5th Respondent's Brief of Argument. This was filed on the 13/5/08.

In the Appellant's Brief of Argument Mr. Ejike submitted four issues for determination. Chief Wole Olanipekun, SAN submitted three issues for determination in the 1st and 2nd Respondents Brief of Argument. On behalf of the 3rd and 4th Respondents Kanu G. Agabi, SAN proposed five issues for determination. While Chief Gadzama, SAN submitted only a single issue for determination in the 5th Respondent's Brief.

D After a careful examination of the issues for determination formulated by the parties, I am of the view that the four issues identified by the Appellant will very well and effectually determine the appeal. The issues are:

E 2 1. Whether the Court of Appeal was right to hold that grounds 2 and 3 of the petition do not conform with or relate to any of the 4 grounds set out in Section 145(1) of the Electoral Act 2006?

2. Whether the Court of Appeal was right to rely on Section 146 of the Electoral Act 2006 to strike out ground 1 of the petition after it had earlier held the said ground to be competent? and

F 3. Whether having held that ground 4 of the petition was competent, the Court of Appeal was right to consider its merit and struck it out?

G 4. Whether the approach adopted by the Court of Appeal in reaching its decision to strike out the petition has occasioned a miscarriage of justice?

H On the 2nd of February 2009 when this appeal was heard learned counsel for the parties in addition to adopting the arguments in their briefs also made some oral submissions. The substance of the arguments for the parties is as follows.

On the 1st issue for determination Mr. Ezike referred to the averments in grounds 2 and 3 of the petition and their particulars, and the provisions of Section 145(1) of the Electoral Act 2006 and submitted that the two grounds embody sufficient averments com-

plaining about the violation of provisions of the Constitution and Sections 47 and 48 of the Electoral Act 2006. It was his submission that a ground of a petition which alleges that there was a return of a candidate when there was no election in some regions or places is a ground within the meaning of Section 145(1) of the Electoral Act. Learned counsel further submitted that in view of the matters averred in the two grounds, they conform with Section 145(1)(b) of the Electoral Act

With respect to the 2nd issue for determination, learned counsel referred to the finding by the lower Court at page 249 of the record to the effect that grounds 1 and 4 of the petition conform with Section 145 (1)(b) and 145(1)(a) of the Electoral Act respectively it was wrong for it to strike out the petition at that stage for the Petitioner's failure to plead and prove that the non-compliance affected the result of the election, pursuant to the provisions of Section 146 of the Act. Counsel argued that it was not yet ripe for the Appellant to prove or establish under Section 146 of the Electoral Act that the alleged non-compliance substantially affected the result, contending that it is at the trial of the petition brought pursuant to Section 145(1)(b) for non-compliance with the provisions of the Act, that the Court or Tribunal may under Section 146 decide not to invalidate the election if it finds that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not substantially affect the result of the election. On this issue the submission is that the Court of Appeal was clearly wrong to rely on Section 146 of the Act to strike out the petition.

For the 3rd issue learned counsel for the Appellant submitted that the Court of Appeal having found that ground 4 of the petition was in conformity with Section 145(1)(a) of the Electoral Act coupled with the fact that none of the Respondents raised the issue of the distinction between public officers and elected officers, it was wrong for the Court to *suo motu* raise and determine the issue at that stage of the proceedings. Having raised the issue *suo motu* the Court had a duty to invite the views of the parties, especially the Appellant before its decision on it, counsel argued. He relied on *NWOKORO v ONUMA* (1990) 3 NWLR (Part 136) 22 at 33; *ADEGOKE v ADIBI* (1992) 5 N.W.L.R. (Part 242) 410; *JOWHOMU v EDOK-ETER MANDILAS LTD.* (1986) 5 N.W.L.R. (Part 39) 1; *ALAO v ASHTRU*

(1973) 11 SC 23; KUTI v BALOGUN (1978) 1 SC. 53 at 60.

On the 4th issue, counsel argued that it cannot be addressed at the preliminary stage. Learned counsel referred to the case of COOKEY v FOMBO (2005) 15 N.W.L.R. (Part 947) 182 which the 3rd and 4th Respondents cited at the Court below and submitted that the mere fact that the case is weak was no ground for striking it out. Learned counsel noted that the Court below merely adopted the two biased issues formulated by the 3rd and 4th Respondents without considering the petitioner's submission and argued that the prejudice in the decision was a *fiat accompli* - thus terminating the petition without hearing the petitioner and in clear breach of the rules of natural justice. In support of his argument counsel cited BARCLAYS BANK v CENTRAL BANK OF NIGERIA (1976) 1 ALL N.L.R. 409; NATIONAL BANK v SHOYOYE (1977) 5 SC 181 at 194; N.D.I.C. v C.B.N. (2002) N.W.L.R. (Part 766) 272 at 296; L.P.D.C. v CHIEF GANI FAWEHINMI (1985) 7 SC (Part 1) 178 at 262-263 and KOTOYE v C.B.N. (1989) 1 N.W.L.R. (Part 98) 419 at 448.

The substance of the address of Senior Counsel for the 1st and 2nd Respondents is as follows. With respect to the Appellants 4th issue, learned Senior Counsel argued that by virtue of the provisions of Sections 145(1) 9(a)-(d), 147(3) paragraphs 9(5) and 49 of the 1st Schedule to the Electoral Act, 2006 the 1st - 4th Respondents were at liberty to raise the preliminary objections as to the competence of the petition and the court below was right to strike out or dismiss the petition in limine. Reliance was placed on FELIX NWABOCHA v WOKOCHA GIFT & ANOR (1998) 12 N.W.L.R. (Part 579) 522. It was submitted that when a statute prescribes a particular mode of bringing a process, that method and no other must be adopted, and the petition having been filed in complete disregard of the provisions of the Electoral Act, 2006 is fundamentally and incurably defective and therefore that the Lower Court was right in the manner it proceeded to determine it in limine. Counsel relied, for these submissions, on MADUKOLU v NKEMDILIM (1962) 2 S.C.N. L.R. 341; MUDIAGA ERHUEH v INEC (1999) 12 N.W.L.R. (Part 630) 288; RIME v INEC (2002) 6 N.W.L.R. (Part 920) 59 NUHU SANI IBRAHIM v INEC & ORS (1999) 8 N.W.L.R. (Part 614) 352, MUHAMMADU BUHARI v ALHAJI MOHAMMED DIKKO YUSUF

(2003) 4 N.W.L.R. (Part 842) 446. On the 2nd issue formulated by the Appellant, learned Senior Counsel referred to grounds 2 and 3 of the petition and submitted that the said grounds do not conform or relate to any of the grounds set out in Section 145(1)(a)-(d) of the Electoral Act and are therefore incompetent and were liable to be struck out. Reliance was placed on *A.N.P.P. v INEC* (2004) 7 N.W.L.R. (Part 871) 31. It was argued that both grounds 2 and 3 without their particulars are alien and totally strange to the 4 grounds in Section 145(1) (a)-(d) of the Electoral Act 2006. It was contended that the two grounds were therefore incompetent and rightly struck out. Breach of Constitution, the law or unstated part of the Electoral Act 2006 per se is not a competent ground for an election petition, learned Senior Counsel submitted. In support of this submission *OBASANJO v YUSUF* (2004) 9 N.W.L.R. (Part 877) 144 and *BUHARI v OBASANJO* (supra) were cited.

With respect to the issue of whether the Court of Appeal was right to rely on Section 146(1) of the Electoral Act 2006, to strike out the petition learned Senior Counsel submitted that by virtue of the provisions of Section 146(1) of the Electoral Act and Section 137(g) of the Constitution the court below was right to strike out grounds 1 and 4 of the Petition. It was submitted that even if grounds 1 and 4 fall within the grounds under section 145(1) of the Electoral Act, they do not disclose any reasonable cause of action and were therefore liable to be struck out and were rightly struck out. By virtue of the provisions of Sections 145(1) and 146(1) and paragraph 4(1)(d) of the First Schedule to the Act, the petitioner had a duty to plead facts that the alleged corrupt practices and non-compliances, if proved, substantially affected the result of the election, learned senior counsel argued. It was argued that the petition was bereft of facts which the petitioner was enjoined by paragraph 4(l)(d) of the 1st Scheduled to give and that no reasonable cause of action was made out therein.

On the question of whether the Court of Appeal was right to strike out ground 4 of the Petition by placing reliance on Section 137(g) of the Constitution, it was the submission of the 1st and 2nd Respondents that the petition disclosed no reasonable cause of action against them, contending that the word "Election" is not synonymous with "Appointment" and/or "Employment". It was further sub-

mitted that by the provisions of Sections 137(g) and 318 of the Constitution the 1st and 2nd Respondents were not persons in the public service of a State. Learned counsel referred to the definition of “employees in the public service of a State and the category of persons falling within the definition and submitted that by operation of the *latin maxim “expression unius est exclusion alterius”* the exclusion of elected officers like governors of a state show that they are not employees in the public service of a State within the provision to make them liable to be disqualified under Section 137(g) of the Constitution. For this submission reliance was placed on P.D.P. v INEC (1999) 11 N.W.L.R. (Part 626) 200; BUHARI v DIKKO YUSUF (2003) 14 NWLR (Part.841) 446; OBUNYIYA v OKUDU (1979) 6-9 SC. 32; HALIBURY’S LAWS OF ENGLAND 4th EDITION paragraph 876. In conclusion it was argued that the Court of Appeal rightly struck D out ground 4 for disclosing no reasonable cause of action.

The submission of Kanu G. Agabi, (CON) SAN in the 3rd and 4th Respondents' Brief is substantially to the same effect as the submissions for the 1st and 2nd Respondent. It was his contention that the petition did not disclose a reasonable cause of action and was E therefore incompetent and which issue of incompetence was rightly and timeously raised by the Respondents and determined by the Court of Appeal. He relied on YUSUF v AKINDIPE (2000) 8 N.W.L.R. (Part 669) 376 at 387. With respect to the latin maxim “*expression unius est exclusion alterius*” counsel cited ELUWA v O.S.I.E.C. (2006) F 18 N.W.L.R. (Part 1012) 544 at 568 - 569. For the meaning of a reasonable cause of action counsel relied on LASISI FADARE & ORS v ATTORNEY-GENERAL OF OYO STATE (1982) 4 SC 1 at 7, ADIMORA v AJUFO (1988) 3 N.W.L.R. (Part 80) 1 at 17; OSHOBOJA G v AMUDA (1992) 6 N.W.L.R. (Part 250) 690 at 702, DANTATA v MOHAMMED (2000) 5 SC 1 at 16- 17. He urged in conclusion that the appeal be dismissed.

The address of Chief Gadzama, S.A.N. is substantially to the same affect as those of the 1st - 4th Respondents. In addition he H referred to provisions of the Election Tribunal and Court Practice Directions 2007, and paragraphs of the accompanying written statement on oath of the only witness and submitted that there cannot be a convincing evidence to sustain the petition. It was his further submission that the evidence was essentially hearsay and thus inadmis-

sible evidence. He too urged that the appeal be dismissed.

In the Appellant's Reply Brief to the Brief of the 1st and 2nd Respondents, the Appellant maintained that the petition contained the requisite allegations of fact which constituted the Respondents' breaches of the Constitution and the Electoral Act 2006 and that same was therefore competent. It was wrong, he argued, for the Court of Appeal to invoke Section 146(1) of the Act to terminate the petition at the preliminary stage. It was his submission that Section 146(1) of the Act deals with weight of evidence and could only have been invoked after evidence at the trial. In support of this submission, the Appellant cited *BUHARI v OBASANJO* (2005) 13 N.W.L.R. (Part 941) 1 at 182 and *AJUMALE v YADUAT* (No.2) (1991) 5 SCNJ 178 at 187. It was his further submission that it is only after evidence has been taken that the Court can consider the applicability of Section 146 of the Electoral Act. Secondly, he submitted, the alleged insufficiency of facts is not a ground for striking out a petition. With respect to the 4th issue the Appellant reiterated his earlier argument that Governors and Deputy Governors though elected are persons employed in the "*public service*" of their states within the meaning of the 1999 Constitution.

In his Reply Brief to the brief of the 3rd and 4th Respondents the Appellant referred to the 2nd and 3rd grounds of the petition and argued that the said grounds read together with their particulars adequately complain about non-compliance with the provisions of the Electoral Act. It was his contention that reading the said two grounds without their particulars was mischievous and diversionary. With respect to the 4th issue the Appellant referred to *NWOSU v IMO STATE ENVIRONMENTAL SANITATION AUTHORITY* (1990) 4 SCNJ 97 at 119 and *NWAOGUGU v THE PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA & ORS.* All F.W.L.R. 115 at 116 to contend that the 1st and 2nd Respondents were "Public Servants" within the meaning of the Constitution.

Let me now deliberate on the various issues raised in this appeal starting with the Appellant's 4th issue. The issue is whether the 1st -4th Respondents were right to challenge the competence of the petition by way of the Preliminary objections before actual trial of the petition took place? *A fortiori* whether the Court below had the jurisdiction to entertain the applications at the stage it did to terminate the

petition? I am inclined to answer the above questions in the affirmative. First of all Section 147(3) of the Electoral Act 2006 provides:

Subject to the provision of subsection (2) of Section 149 of this Act, on the motion of a respondent in an election petition, the Election Tribunal or the Court, as the case may be, may strike out an election petition on the ground that it is not in accordance with the provisions of this Part of this Act or the provisions of the first Schedule of this Act."

If a respondent in an election petition feels strongly that, on the face of it, the petition is patently unsustainable in the sense that it does not meet the requirements of the Electoral Act or the First Schedule to the Act or that it is lacking in materials to sustain it and therefore incompetent, he is at liberty to raise it and timeously too. And because it is an issue of jurisdiction which determination can be decisive of the whole litigation, the Election Tribunal or Court has the jurisdiction to entertain it.

In this case the issue was raised by reference only to the petition and the documents filed along with it and without any reference to evidence. All the arguments were premised on the contents of the petition and the accompanying witness statement on oath.

I am farther more persuaded by the contention of the 1st and 2nd Respondents that paragraph 49 of the First Schedule to the Electoral Act 2006 is another authority for the preliminary objections raised and determined at the Lower Court. Section 49 provides:

49(1) Non-compliance with any of the provisions of this Schedule or with a rule of practice for the time being operative, except otherwise stated or implied, shall not render any proceeding void unless the Tribunal or Court so directs, but the proceeding may be set aside wholly or in part as irregular, or amended, or otherwise dealt with in such a manner and on such terms as the Tribunal or Court may deem fit and just.

(2) An application to set aside an election petition or a proceeding resulting therefrom for irregularity 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 proceeding after knowledge of the defect.

(3) An application to set aside an election petition or a proceeding pertaining thereto shall show clearly the legal grounds on

which the application is based.

(4) *An election petition shall not be defeated by an objection as to form if it is possible at the time the objection is raised to remedy the defect either by way of amendment or as may be directed by the Tribunal or Court*

(5) *An objection challenging the regularity or competence of an election petition shall be heard and determined before any further steps in the proceedings if the objection is brought immediately the defect on the face of the election petition is noticed.*

It is clear from the above that the enabling authority for the two consolidated applications is the combined provisions of Section 147(3) of the Electoral Act and paragraph 49 of the first Schedule to the Electoral Act. The two applications were filed timeously, they having been filed on the 3rd of August 2007 before the Respondents/Applicants took the further steps of filing their Replies to the Petition on the same day. And each application or preliminary objection clearly stated the legal grounds on which it was based. And in keeping with the settled principle of law and the specific provisions of paragraph 49(5) of the First Schedule the Electoral Act the lower court had a duty to hear and determine the two applications before any further steps in the proceedings. For the various principles on preliminary objections and the court's jurisdiction to entertain same. See *JANG v INEC* (2004) 12 N.W.L.R. (Part 886) 46 at 83; *AKINBIU v MILITARY GOVERNOR ONDO STATE* (1990) 3 N.W.L.R. (Part 140) 525 at 531. **In SHELL-BP PETROLEUM DEVELOPMENT CO. OF NIGERIA LTD. & ORS v M.S. ONASANYA (1976) 6 SC 57 at 60 the Supreme Court stated:**

"It is not disputed that this action is founded on contract. The Plaintiff must therefore give sufficient particulars in his pleading to enable the contract to be identified. This he has failed to do. On a proper construction of Order 32 Rule 19, in considering whether to strike out a pleading, the court must restrict itself to the facts in the particular pleading without having recourse to the facts in the opponent's pleading. In our view, there can be no question that as the statement of claim in this case now stands, it discloses no cause of action and ought to have been struck out under Order 32 Rule 19 by the learned trial judge."

In this case the preliminary objections and their deter-

mination at the court below were restricted to the petition and the documents filed along with it. I hold in conclusion of this issue that the preliminary objections were properly raised and determined at the Court below.

This issue is therefore resolved against the Appellant.

- B The next issue is whether the Court of Appeal was right to hold that grounds 2 and 3 of the petition do not conform with or relate to any of the four grounds of the petition? For a proper appreciation of the issue raised here, it is necessary to reproduce the said two grounds with their particulars.

C GROUND 2

The said election did not meet the minimal requirement of Electoral democracy and the law and the Electoral Act, 2006.

PARTICULARS

- D (a) Voting was not done in secret. For the first time in the history of elections in Nigeria no pooling booths were provided by the 3rd Respondent and the voters voted in public and also cast their votes in public.

- E (b) Military men were used by the Commander-in-Chief who like the 1st Respondent, belongs to the 4th and who was the campaigner-in-chief of the 1st Respondent to intimidate the electorate throughout Nigeria.

- F (c) The agents of the petitioner and other agents of other opposing Presidential Candidates were not allowed to witness the collation or counting of votes or the compilation of results.

GROUND 3

- G Rudimentary requirements of fairness and equal treatment provided by the Constitution and the Electoral Act were not extended to the Petitioner and to potential voters in Anambra, Imo, Abia, Enugu and Ebonyi States.

PARTICULARS

- H (a) Voting did not take place in more than 98% of the polling stations in the said States at all and the right to vote, the initial allocation of franchise to the potential voters in those states was lost as a result of the arbitrary and discriminatory conduct of the 3rd Respondent.

(b) Presidential Election has nationwide constituency and failure to give voters their right of franchise nullifies the entire election

because there is no divided sovereignty for the election of a President or at all.

(c) The 4th Respondent announced on air that elections for the office of President would in compliance with Sections 47 and 48 of the Act take place between 10 a.m. and 3 p.m. throughout Nigeria, but no voting took place in the said zone on the said date and zone except at night in less than 2% of the polling stations in the zone where the 5th Respondent's governorship candidates voted at the night in their homes. B

The Court below held that grounds 2 and 3 do not conform with or relate to any of the four grounds set out in Section 145(1) of the Electoral Act and were struck out. No reasons were given for this conclusion. The Appellant proffered sustained arguments to fault the finding of the court below. ***There is force in the arguments of Mr. Ezike of counsel for the Appellant particularly having regard to the particulars of the said grounds 2 and 3. Looking at the two grounds in the abstract and without reference to their particulars one is tempted to conclude that they do not convey any complaint which falls within the grounds in Section 145(a)-(b) of the Electoral Act. They are vague. But a careful reading of the two grounds together with their particulars clearly shows that the Petitioner alleges a number of non-compliances and/or corrupt practices. No doubt the two grounds contain some assertions of non-compliances.*** C
D
E

That however is not the end of the matter. The crucial question is whether the alleged non-compliances are of such a degree capable of sustaining the petition particularly in view of the written statement on oath of the sole witness in support of the petition. This question should, of necessity, be considered under the next issue of whether the Court of Appeal was right to rely on Section 146(1) of the Electoral act 2006 to strike out ground 1 of the petition. And corollarily, whether the Court of Appeal could very well have struck out grounds 2 and 3 of the petition by recourse to Section 146(1) of the Electoral Act 2006? F
G
H

For a comprehensible discourse of this issue it is pertinent to set out some relevant provisions of the Electoral Act, the First Schedule to the Act and the Election Tribunal and Court Practice Directions 2007. These are Sections 145(1) and 146(1) of the Electoral Act

2006. Paragraph 4(1)(a)-(d) of the First Schedule to the Electoral act and paragraph 4(1) (2) and (3) of the Election Tribunal and Court Practice Directions 2007 which are set out hereunder as follows :-
Section 145(1) of the Electoral Act says:

B *“An election may be questioned on any of the following grounds;*

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

C *(b) that the election was invalid by reason of corrupt practices or non-compliance with the provision of this Act.*

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

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

D Section 146(d) of the Act provides:

E *“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.”*

Paragraph 4(1) of the First Schedule to the Electoral Act 2006 comes within the Rules and Procedure for Election Petitions. The said Paragraph 4 states:

F *“4(1) An election petition under this Act shall:*

(a) specify the parties interested in the election petition;

(b) specify the right of the petitioner to present the election petition;

G *(c) State the holding of the election the scores of the candidates and the person returned as the winner of the election; and*

(d) state clearly the facts of the election petition and the ground or grounds on which the petition is based and the relief sought by the petitioner.”

H And paragraph 4 of the Election Tribunal And Court Practice Directions 2007 pertains to evidence at the hearing of a petition. Paragraph 4 says:

“4(1) Subject to any statutory provision or any provision of these paragraphs relating to evidence any fact required to be proved at the hearing of a petition shall be proved by written deposition and

oral examination of witnesses in open court.

(2) Documents which parties consented to at the pre-hearing session or other exhibits shall be tendered from the Bar or by the party where he is not represented by a legal practitioner.

(3) There shall be no oral examination of a witness during his evidence-in-chief except to lead the witness to adopt his written deposition and tender in evidence all disputed documents or other exhibits referred to in the depositions. B

It is clear from the above that the present petition questions the election of the 1st and 2nd Respondents on the grounds stipulated in Section 145(1)(a) and (b) of the Electoral Act 2006 that is, C

(a) that the 1st and 2nd Respondents whose election is being questioned were at the time of the election on the 21/4/07 not qualified to contest the election; and/or

(b) that their election was invalid by reason of corrupt practices or non-compliances with the provisions of the Electoral Act 2006. D

The present issue pertains to the second ground of non-compliance with the provisions of the Electoral Act. I wish to reiterate that the pertinent question is whether on the face of it, the petition contains such degree of non-compliances capable of sustaining the petition, particularly having regard to the written statement on oath of the sole witness in support of the petition. E

In its ruling at page 249 of the record the Court of Appeal per Raphael Chikwe Agbo (JCA) said:

“A party who founds his petition on the grounds of substantial non-compliance with the provisions of the Electoral Act must not only plead and prove substantial non-compliance but must also pursuant to the provisions of Section 146 of the Electoral Act plead and prove that the non-compliance substantially affected the result of the election. Non-compliance with the provisions of the Act without more is not sufficient to invalidate an election. See BUHARI v OBASANJO (2005) 2 NWLR (Part 910) 241, YUSUF v OBASANJO (2005) 18 N.W.L.R. (Part 956). It follows that where insufficient facts or none at all are pleaded to establish substantial effect of the non-compliance on the result of the election, no reasonable cause of action has been made out. I have carefully perused the petition and no where have I seen pleaded facts establishing the substantiality of the effect of the alleged non-compliance with the provisions of the Electoral Act on F G H

the result of the election. Ground 1 therefore cannot be sustained and it is hereby struck out."

The Appellant was at great pains to assert that the Court of Appeal erred when it struck out the petition at that preliminary stage and without taking evidence to determine it on the merit.

B In the first place it is conceded that the Court of Appeal slightly over-stepped its bounds when it spoke of the Petitioner's duty to plead and prove substantial non-compliance. The question of proof of substantial non-compliance that affected the result of the election did not arise for determination in the preliminary objections; that C question being one that can only arise after evidence at the trial. For the purpose of the two preliminary objections, the materials for consideration are only those contained in the petition and the accompanying written statement on oath.

D Barring the above remarks, I am inclined to agree with the Court below about the duty of the Petitioner/Appellant to plead not only non-compliance but also that the non-compliance substantially affected the result of the election. That, in my view, is the logical construction of Section 145(1)(b) and Section 146(1) of the Electoral Act. Section 145(1)(b) speaks simply of non-compliance without any qualification. But Section 146(1) of the Act provides specifically for the degree of non-compliance by reason of which an election can be invalidated. The provision is an amplification of the otherwise unspecified non-compliance in Section 145(1)(b) of the Act.

F It follows that ***the relevant portion of Section 146(1) must, of necessity, be read in conjunction with Section 145(1)(b) of the Act For the purpose of meeting the requirements of the combined provisions of Sections 145(1)(b) and 146(1) of the Electoral Act therefore, a petitioner who challenges the election of a respondent on the ground of non-compliance with the provisions of the Electoral Act must plead not just the fact of the alleged non-compliance, but must go a step further to plead that the non-compliance substantially affected the***
 G ***result of the election.***
 H

This in my view accords with common sense. It is inconceivable to suggest that the bare assertion of non-compliance in an election petition without more is sufficient pleading to sustain the petition. If that were so then practically every election petition would

succeed, in that, there is, in practical terms, no election without one form of non-compliance or the other. That obviously cannot be the purpose of the provisions of Section 145(1)(b) and 146(1) of the Electoral Act. I am firmly of the view that for the purpose of sustaining a petition on the allegation of non-compliance with the provisions of the Electoral Act there must be the assertion in the petition that the non-compliance substantially affected the result,. This was the view of the Court of Appeal in BUHARI v OBASANJO (2005) 2 N.W.L.R. (Part 910) 241 at 453 where the court per Mohammed J.C.A., as he then was, said:

“In the determination of the complaints of the petitions in their petition of general non-compliance with the provisions of the Electoral Act 2002 in the conduct of the election by the 3rd respondent, it is necessary to determine if the non-compliance was substantial and also whether the non-compliance had also substantially affected the result of the election.....”

In YUSUF v OBASANJO (2005) 18 N.W.L.R. (Part 756) the Court of Appeal per Salami J.C.A. at page 181 restated the principle when he declared:

“Further on this ground of the petition, an election shall not be invalidated merely for the reason that it was not conducted substantially in accordance with the provisions of the Electoral Act. It must be shown that the non-compliance had affected the result of the election. The petitioner must not only show non-compliance but must also demonstrate that the votes attracted or scored through the non-compliance affected the result of the election....”

Furthermore there is the innovation brought in by the Election Tribunal and Court Practice Directions 2007. Paragraphs 1(a)(b) and (c) thereof provides that an election petition shall be accompanied by (i) a list of witnesses intended to be called in proof of the petition (ii) written statements on oath of the witnesses and (iii) copies or list of every document to be relied on at the hearing. ***The manifest intention of the totality of the provisions of Section 145(1)(d) and 146(1) of the Electoral Act and Paragraph 1(a)(b) and (c) of the Election Tribunal and Court Practice Directions is to ensure that only a petition which on its face and in the face of the accompanying written statement on oath discloses a reasonable cause of action that can go for trial. A petition which***

on the face of it is defective or which in the face of the written statements on oath discloses no reasonable cause of action should be struck out on the application of the Respondent.

Now on the contents of the petition, I have carefully examined the grounds of the petition and the 28 paragraph written statement on oath of the sole witness, Dr. Paul Dike. The statement is, as it were, and by the provisions of paragraph 4(1) (2) and (3) of the Election Tribunal and Court Practice Directions 2007, the front loaded evidence-in-chief by which the petition is to be proved. In paragraphs 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17 and 18 of the said statement a number of allegations of non-compliance are made. These include non publication and display of voters register in Anambra, Abia, Ebonyi, Enugu and Imo States, non voting in the same states in the South East Zone of the country, non provision of polling booths, the petitioners inability to see the Resident Electoral Commissioner and the intimidating presence of soldiers in the streets. In paragraph 10 thereof the witness stated that he personally monitored the election by four named Local Government Areas of Anambra State and observed that no voting took place in any of them. This cannot be proof that there was no election in over 700 Local Governments of the country. There was no assertion in the said paragraphs that the alleged non-compliances substantially affected the result of the election. On the face of it, the petition is completely lacking in materials by which its ground of non-compliance with the provisions of Section 145(1)(b) of the Electoral Act can be proved. In so far as the allegations of non-compliances is concerned the petition is patently devoid of any substance and thus discloses no reasonable cause of action.

In the face of this manifest lack of substance with respect to the allegations of non-compliances, could the Court of Appeal have gone on to trial of that issue? I shall answer this question in the negative. The court below was perfectly in order to strike out ground 1 of the petition for non disclosure of any reasonable cause of action. And by extension the court below could, very well, have struck out grounds 2 and 3 of the petition since they are also grounds founded in non-compliance with the provisions of the Act.

With respect to ground 4 of the petition the Court of Appeal reasoned and concluded as follows:

"State Governors are by the provision of Section 176 to 180 of the Constitution of the Federal Republic of Nigeria 1999 elected by the people of their states. Blacks Law Dictionary 5th Edition defines "elected" in ordinary signification carries with it the idea of a vote, generally popular; sometimes more restricted and cannot be held the synonym of any other mode of filling a position." The word "employment" is not a synonym for the word "elected". There is no iota of law supporting that ground. It is premised on frivolity and disclose no reasonable cause of action and it is hereby struck out." B

I agree with the above reasoning and conclusion. The resolution of this issue can be found in the provisions of Section 137(1)(g) itself and the interpretation of Section 318 of the Constitution. Section 137(1)(g) of the Constitution provides: C

"A person shall not be qualified for election to the office of President if being a person employed in the civil or public service of the Federation or of any State, he has not resigned, withdrawn or retired from the employment at least thirty days before the date of the election."

In Section 318 of the Constitution "civil service of the Federation is defined to mean service of the Federation in a civil capacity as staff of the office of the President, the Vice President, a ministry or department of the Government of the Federation assigned with the responsibility for any business of the Government of the Federation. And the civil service of the State is defined to mean service of the Government of a State on a civil capacity as staff of the Office of the Governor, Deputy Governor or a ministry or department of Government of the State assigned with the responsibility for any business of the Government of the State. There are similar definitions of public service of a State. E

In all these definitions while persons employed in the civil or public service of the Federation or of a State include staff of the President, Vice President, Governors and Deputy Governors, they do not however include the President, Vice President, Governors and Deputy Governors. ***Learned counsel for the 1st - 4th Respondents referred to these definitions in Section 318 of the Constitution and submitted that by excluding elected officers, like Governors and Deputy Governors from the list of persons "employed" in the civil or public service of a State, Governors*** F

and Deputy Governors are not civil or public servants within the provision of Section 137(1)(g) of the Constitution. I agree entirely with this submission, and to which the Appellant has no answer. I agree that the latin maxim “*expressio unius est exclusion alterius* applies to exclude Governors and Deputy

B Governors. In like manner while persons employed in the civil or public service of the Federation and of a state include Clerk or other staff of the National Assembly, and State Assemblies, they do not include elected members of the National and State Assemblies.

C In view of the foregoing considerations it is my view that ground 4 of the petition disclosed no reasonable cause of action and same was rightly struck out for incompetence.

In conclusion. I hold that the petition as was constituted incompetent and was rightly struck out in the wake of the two preliminary objections. This appeal therefore fails and same is accordingly dismissed. I make no orders as to costs.

TOBI JSC

E The appellant as petitioner filed a presidential election petition at the Court of Appeal Presidential Election Tribunal, against the respondents. He asked for the following reliefs:

F “1. A declaration that by reasons of the arbitrary failure of the 3rd Respondent to display copies of the Voters List, publish Supplementary Voters List Register and in the manner and form commanded by the Electoral Act, 2006, the said Presidential Election is null and void for non-compliance with the minimal requirements of due process sine qua non and condition precedent for the conduct of democratic election prescribed by law.

G 2. A declaration that failure to conduct the said election at all in any place (no matter how remote or few the numbers of voters) is inimical to the concept and basis of equality under the law and violates the rights of the affected voters (guaranteed by the Constitution) that they be not discriminated against.

H 3. A declaration that by the arbitrary manner the said election was conducted without regard to due process of law in all or any part of the country, or at all, amounts to nullifying the franchise and sovereignty of the people of Nigeria as a whole.

4. *A declaration that the manner and form of the conduct of the said election was a usurpation of the franchise and sovereignty of the people.*

5. *A declaration that the 1st and 2nd Respondents were not qualified for election to the office of President and Vice President respectively, or at all.*

6. *An order nullifying and invalidating the return of Musa Yar'Adua and Goodluck Jonathan, the 1st and 2nd Respondents herein, as President elect and Vice President elect, respectively.*

7. *An order nullifying the said election and commanding the 3rd defendant to conduct another election for the office of President of Nigeria in the manner and form prescribed by law but without the 4th Respondent as its Chairman.*

8. *An order of injunction commanding the 4th Respondent to cease and desist from running the affairs of the 3rd Respondent.*

9. *A declaration that the declaration of the 1st and 2nd Respondents as winners of the said election is invalid, unconstitutional, null and void."*

Paragraph 9 of the petition contains the four grounds with particulars in Grounds 1 to 3 as follows:

"GROUND 1

The election in which the 1st and 2nd respondents were declared winners was not conducted in compliance with the 1999 Constitution and the Electoral Act 2006.

PARTICULARS

(a) *Copies of Voters List was never displayed.*

(b) *Supplementary Voters Lists Register was never published.*

(c) *The ballot papers for the said election were not numbered serially as commanded by law.*

(d) *Alternatively, if any Voters Register was never published within the stipulated time, but in any event, it was never displayed or published in the South East Zone of the country at all. Your petitioner will rely on the unanswered advertorial complaint of OHANEZE in the Vanguard Newspapers of April 12, 2007.*

GROUND 2

The said election did not meet the minimal requirement of Electoral democracy and the law and the Electoral Act, 2006.

PARTICULARS

(a) *Voting was not done in secret. For the first time in the history of elections in Nigeria no polling booths were provided by the 3rd respondent and the voters voted in public and also cast their votes in public.*

B (b) *Military men were used by the Commander-in-Chief who like the 1st respondent, belongs to the 4th respondent and who was the Campaigner-in-Chief of the 1st respondent, to intimidate the electorate throughout Nigeria.*

C (c) *The agents of the petitioner and other agents of other opposing presidential candidates were not allowed to witness the collation or counting of votes or the compilation or counting of votes or the compilation of results.*

D (d) *Your petitioner was not allowed by the 3rd respondent into the offices of the 3rd respondent in Anambra State to observe the compilation of results.*

GROUND 3

E *Rudimentary requirements of fairness and equal treatment provided by the Constitution and the Electoral Act were not extended to the Petitioner and to potential voters in Anambra, Imo, Abia, Enugu and Ebonyi States.*

PARTICULARS

F (a) *Voting did not take place in more than 98% of the polling stations in the said States at all and the right to vote, the initial allocation of the franchise to the potential voters in those States was lost as a result of the arbitrary and discriminatory conduct of the 3rd respondent.*

G (b) *Presidential election has nationwide constituency and failure to give any voters their right of franchise nullifies the entire election because there is no divided sovereignty for the election of a President or at all.*

H (c) *The 4th respondent announced on air that elections for the office of President would in compliance with sections 47 and 48 of the Act take place between 10 a.m. and 3 p.m. throughout Nigeria, but no voting took place in the said Zone on the said date and zone where the 5 respondent's governorship candidates "voted" at night in their homes.*

GROUND 4

The 1st and 2nd respondents are not qualified to contest for

election to the office of President and Vice President, respectively, because having been employed by the people of Katsina and Bayelsa States as their Chief Public Servants or Chief Executives they did not, contrary to section 137(g) of the 1999 Constitution, resign or withdraw from their offices as executive governors at all prior to the said presidential election.” B

Following a motion by 1st and 2nd respondents, the Court of Appeal struck out the petition. In his contribution. Ogebe, JCA (as he then was) said at page 251 of the Record:

“The four grounds challenging the presidential election contained in the petition are alien to section 145 of the Electoral Act, 2006. The petitioner confined himself almost entirely to complaints regarding the election in Anambra, Imo, Abia, Enugu and Ebonyi States. This has narrowed the petition to a small segment of the country which cannot possibly affect the result of the election in the remaining 31 States of the Federation of Nigeria and the Federal Capital. In other words, even if the petitioners’ complaints are genuine, they cannot possibly lead to the nullification of the entire presidential election in the whole country. In my opinion this petition is only of nuisance value, and it will be a colossal waste of judicial time and energy to hear it on the merit. It is completely incompetent.” C D E

Dissatisfied, the appellant has come to this court. He formulated four issues for determination. The 1st and 2nd respondents also formulated four issues for determination. The 3rd and 4th respondents formulated five issues for determination. The 5th respondent formulated one issue for determination. F

The crux of the case of the appellant is that the Court of Appeal was wrong in striking out the petition, having held that Grounds 1 and 4 are competent. Counsel submitted that the Court of Appeal was wrong in prejudging each and every ground of the petition at the interlocutory stage and adopted a stance at the beginning of its inquiry which made it impossible for it to be dispassionate in its task of adjudication. The crux of the submission of the three sets of respondents is that the Court of Appeal was right in striking out the petition in the light of the facts of the case before the court. H

As the appeal is on the four grounds, purportedly based on section 145 of the Electoral Act, 2006, I should produce here *verbatim et literatim* the provision of the subsection: By the subsection, an

election may be questioned on any of the following grounds:

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

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

B *(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.”

C A petitioner is required to question an election on any of the grounds in section 145(1) of the Act. He is expected to copy the section 145(1) grounds word for word. I think a petitioner can also use his own language to convey the exact meaning and purport of the subsection. In the alternative situation, a petitioner cannot go
D outside the ambit of section 145(1) of the Act. In other words, he cannot add to or subtract from the provision of section 145(1). In order to be on the safer side, the ideal thing to do is to copy the appropriate ground or grounds as in the subsection. A petitioner who decides to use his own language has the freedom to do so, but he
E should realize that he is taking a big gamble, if not a big risk.

I will examine the four grounds in the light of the above position of the law I have stated. I will take the grounds *seriatim*. I am in grave difficulty to agree with the Court of Appeal that “Ground 1 of the petition clearly conforms with section 145(1)(b) of the Electoral
F Act.” There are two legs in section 145(1)(b) of the Electoral Act. The Court of Appeal did not say which of the legs conform with the ground. It is certainly not the first leg which deals with corruption. Is it on the second leg which deals with non-compliance with the provisions of
G the Act? It looks to me that the second leg is closer to section 145(1)(b), but it is not in conformity with it. Section 145(1)(b) is clearly restricted to non-compliance with the Electoral Act and not non-compliance with the 1999 Constitution. By the addition of non-compliance with the 1999 Constitution, Ground 1, in my view, is speaking
H a different language from section 145(1)(b). A party has no legal right to expand the language or wordings of a statute. That is the exclusive function of the Legislature. The legal right of a party is to expatiate on a statute; not to expand it. By the addition of the words “the 1999 Constitution”, the appellant has expanded the provision of section

145(1)(b) of the Electoral Act. I am therefore, with the greatest respect, not with the Court of Appeal, that the ground is in conformity with section 145(1)(b) of the Electoral Act. A possible argument to rope in section 140(1) of the Electoral Act here will not hold water as section 140 of the Act is not the enabling section on grounds of filing an election petition; it is section 145. B

That takes me to Ground 2. With respect, I do not agree with the submission of counsel for the appellant on the ground. The wording of the ground is not only bogus but also vague, generic and nebulous. What does the appellant mean by minimal requirement of electoral democracy and the law and the Electoral Act? More importantly, what does the appellant mean by “electoral democracy”? C

Ground 3 is on rudimentary requirements of fairness and equal treatment provided by the Constitution and the Electoral Act. What does the appellant mean by rudimentary requirements of fairness and equal treatment? Are they grounds as provided in section 145(1) of the Act? In Alhaji Atiku Abubakar and others v. Alhaji Umaru Musa Yar'Adua and others, SC. 72/2008 delivered on 12th December, 2008 (Unreported), I held that equal protection requirement in the United States Constitution is not a ground for nullifying an election in section 145(1) of the Electoral Act, 2006. D

Ground 4, I agree with the Court of Appeal, is in conformity with section 145(1)(a) of the Electoral Act. It is the law that a single ground can sustain the petition if it has the legal capacity to sustain it. I will return to this later in the judgment. E

The next issue I should consider is whether the petitioner pleaded facts buttressing the grounds. I will take this essentially in the alternative, as it relates to Grounds 1, 2 and 3. This is because I have held that they did not conform with section 145(1) of the Electoral Act. I have held that Ground 4 conforms with section 145(1)(a) of the Electoral Act; the issue directly affects Ground 4 and therefore not taken in the alternative. The easiest way to provide an answer is to copy the petition here. After all, it is a short one. I will do so, jumping paragraphs 9 and 11 on Grounds and reliefs respectively which I quoted above; F

“PETITION.

1. Your Petitioner, Dim Chukwuemeka Odumegwu-Ojukwu was a presidential candidate under the platform of the political party

known as the *All Progressives Grand Alliance (APGA)* with the right to vote and be voted for in the presidential election held on the 21st of April, 2007.

2. Your Petitioner states that 1st respondent was the candidate sponsored by the 4th respondent and contested the said election on the aforementioned date and was wrongfully declared the winner of the said election by the 3rd respondent.

3. The 2nd respondent was the running mate of the 1st respondent for the said election.

4. Your petitioner further states that the election, the subject matter of this petition, was held on the 21st of April, 2007 and that the petitioner, Dim Chukwuemeka Odumegwu-Ojukwu and Umaru Musa Yar'Adua (the 1st respondent, amongst others) were candidates at the said election .

5. Your Petitioner says that the 3rd respondent is the body charged with the responsibility under the Constitution and the law to conduct the said elections under very clear provisions of the said Constitution and the Electoral Act 2006 and that it did conduct the said election in some parts of the country and places but not in all parts of the country and places.

6. Your Petitioner says that the 4th respondent was, by virtue of his office, the Chief Returning Officer of the said election and did wrongfully return the 1st respondent as the winner of the said election on or about the 23rd of April, 2007.

7. Your Petitioner further states that the 5th respondent is the political party that sponsored the 1st and 2nd respondents to the said presidential election of April 21st, 2007.

8. Your Petitioner states that at the end of the said election, the 4th respondent, as the Chief Returning Officer, returned the 1st respondent as having been elected and declared the following figures as votes won by the petitioner, the 1st respondent and others:

<u>PARTICULARS</u>		
<u>CANDIDATE</u>	<u>PARTY</u>	<u>NO.</u>
<u>OF VOTES</u>		
Umaru Musa Yar'Adua	PDP	
24,784,227	Maj. Gen. Muhammadu Buhari (Rtd)	GCFR
ANPP	6,607,419	
Alhaji Atiku Abubakar	AC	2,567,798

<i>Dr. Uzo Kalu</i> 608,511		<i>PPA</i>		
<i>Dim Chukwuemeka Odumegwu-Ojukwu</i> 155,947		<i>APGA</i>		
<i>Chief Christopher Pere Ajuwa</i> 89,511		<i>AD</i>		B
<i>Rev. Chris Okotie</i> 74,049		<i>FRESH</i>		
<i>Prof. Pat Utomi</i> 155,34			<i>ADC</i>	
<i>Dr. Brimmy Asekharuagbom Olaghere</i> 33,771		<i>NPC</i>		C
<i>Chief Ambrose Owuru</i>			28,518	
<i>Arthur Nwankwo</i>	<i>PMP</i>		24,164	
<i>Chief Osita Okeke</i>			22,592	D
<i>Sir Lawrence Famikinde Adedoyin</i> 22,459				
<i>Alhaji Aliyu Habu Fari</i>		<i>NDP</i>	21,974	
<i>Galtima Baboyi Liman</i>		<i>NNP</i>	21,665	
<i>Maxi Okwu</i>	<i>LPP</i>		14,027	E
<i>Chief Sunny Joseph Okogwu</i>		<i>RPN</i>	13,566	
<i>Dr. Ifeanyichukwu Godwin Nnaji</i> 11,705		<i>BNNP</i>		
<i>Dr. Osagie O. Obayuwana</i>		<i>NCP</i>	8,229	F
<i>Dr. Olapade Agoro</i>		<i>NAG</i>	5,692	
<i>Dr. Akpone Solomon</i> 5,666		<i>NMDP</i>		
<i>Prof. Isa Odidi</i>		<i>ND</i>	5,408	
<i>Mal. Aminu Garbarti Abubakar</i>		<i>NUP</i>	4,355	G
<i>Maj. Dr. Rev. Mojisola A. Adekunle-Obasanjo</i> 4,306 (Rtd)		<i>MMN</i>		

10. Your Petitioner avers that the 3rd, 4th and 5th respondents jointly and wrongfully cleared the 1st and 2nd respondents for the said election to the office of President in Nigeria."

Paragraphs 1, 2, 3, 5 and 7 deal with matters essentially of introductory nature which, in my view, do not touch the fulcrum of the dispute. Paragraph 1 introduces the appellant as the petitioner.

Paragraph 2 introduces the 1st respondent. Paragraph 3 introduces the 2nd respondent. Paragraph 5 introduces the 3rd respondent. Paragraph 7 introduces the 5th respondent. Paragraph 4 avers to the date of the election. Paragraph 6 avers that the 4th respondent as Chief Returning Officer in the election wrongfully returned the 1st respondent as the winner of the election. Paragraph 8 avers to the result of the election. Paragraph 10 avers that the 1st and 2nd respondents were wrongly cleared by the 3rd 4th and 5th respondents to contest the election. I have skipped paragraphs 9 and 11 on grounds and reliefs respectively because I had earlier stated them in the judgment.

And so I ask: where did the appellant plead facts vindicating the grounds for the nullification of the election? It is not my understanding of the law that a ground for nullification of an election is tantamount to pleading the facts. It is my understanding of the law that where a party states a ground for nullification of an election he has a legal duty to plead facts vindicating the ground.

That was the procedure adopted in the sister cases of Buhari v. INEC and others, SC 51/2008 and Alhaji Atiku Abubakar and Others v. Alhaji Yar'Adua and others, SC. 72/2008, delivered on 12th December, 2008. In Buhari, the appellant pleaded facts in respect of each of the grounds mentioned in paragraph 8 of the Petition. See paragraphs 8, 9 to 23 of the Petition in Volume 1, pages 5 to 42 of the Record of Proceedings. In Musa Yar'Adua, the appellants also pleaded facts in respect of each of the grounds mentioned in paragraph 15 of the Petition. See paragraph 16 to 23 of the Petition in Volume 1, pages 23 to 54 of the Record of Proceedings. The procedure adopted in the two case on pleading facts in respect of the grounds, is the one known to me. I do not know the one adopted in this appeal. Where did the appellant in this appeal plead the facts of the so-called grounds in his 11- paragraph Petition?

Of the 11 paragraphs, paragraphs 6 and 10 aver to wrongdoing by the 3rd , 4th and 5th respondents. In my humble view, the paragraphs are vague, nebulous and incapable of precise content, I expected the appellant to aver to facts which led to the wrongful return of the 1st respondent as winner of the election. I also expected the appellant to aver in paragraph 10 facts on the wrongful clearance of the 1st respondent by the 3rd, 4th and 5th respondents.

Facts are the fountain head of pleading as they are the basis of pleadings. That gives rise to the definition of pleadings as statements of fact. A party cannot lead evidence on a fact not pleaded. See *Okpala v. Iheme* (1989) 2 NWLR (Pt. 102) 208; *SPDCN Ltd. V. Nwawka* (2003) 6 NWLR (Pt. 815) 18. The primary function of pleadings is to define and delimit with clarity and precision the real matters in controversy between the parties upon which they prepare and present their respective cases and upon which the court will be called to adjudicate between them. See *Atolaabe v. Shorun* (1985) 4 SC (Pt. 1) 250. With the greatest respect to the appellant, I do not see the petition fulfilling that function. No, not at all.

Section 146 of the Electoral Act is the cynosure or cornerstone of election petition; which must be pleaded by the petitioner. All the two arms of the subsection must be pleaded by the petitioner if both are the basis of his petition, vide section 145 of the Act. The first arm of the subsection on principles of the Act has no independent life if the petitioner is urging the court to nullify the election based on the second arm of non-compliance affecting substantially the result of the election. In the context of the wordings of the two arms, the first arm is consumed by the second arm at the end of the petition and that explains why the courts place more importance to the second arm than the first arm. In other words, a petitioner can succeed if he pleads not only the first arm but also the second arms (if that is his case). That is only when the Court of Appeal can grant the reliefs in paragraph 11 of the petition if he proves the petition. In our adjectival law, pleadings come before proof. Where facts are not pleaded, there is nothing for the party to prove. Accordingly as the appellant did not plead facts relating to section 146(1) of the Electoral Act, his petition does not go anywhere.

I expected appellant to copy the grounds relevant to his case in section 145(1) of the Electoral Act. I have said this above. That was what the appellants did in the two sister cases. In *General Buhari v. Alhaji Umaru Musa Yar'Adua*, SC. 56/2008 delivered on 12th December, 2008 (Unreported), the appellant averred in paragraph 8 of the petition as follows:

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

(a) The 5th respondent Umaru 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.”

Similarly, in Alhaji Atiku Abubakar and others v. Alhaji Umaru Musa Yar'Adua and others, SC. 72/2008 delivered on 12th December, 2008 (Unreported) the appellant averred in paragraph 15 of the petition as follows:

“The grounds on which this petition is (sic) based are:

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

ALTERNATIVELY THAT

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

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

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

The Court of Appeal did not strike out the two petitions because the grounds accorded with the provisions of section 145(1) of the Electoral Act, 2006. The million naira question is this: why did the appellant in this appeal not follow the procedure adopted in the above two cases? Why did he abandon the provisions of section 145(1) of the Electoral Act 2006? That is the cause of the problem giving rise to this appeal; a most unwarranted one. I expected the appellant to follow the grounds in section 145(1) of the Act.

Counsel has the right to introduce innovations in procedure of courts where the rules are silent on a particular procedure to be adopted. Where the rules specifically provide for a procedure, innovations of counsel outside the specific rules will go to no avail. They rather destroy the case of the party. This is because the courts expect counsel to follow the procedure provided for in the rules. I see in this appeal such a situation. It is unfortunate that the appellant *willy nilly* abandoned the provision of section 145(1) of the Act. He cannot blame the Court of Appeal for striking out the petition. He has himself to blame.

The next point I should take is the legal essence of what is generally referred to as front loading in the Practice Direction. Complying with the Practice Direction, the appellant has averred to Writ-

ten Statement on oath by Dr. Paul Dike. It is a 28 - paragraph statement. The document to be relied on at the hearing is a Vanguard Newspaper of Thursday, 12th April, 2007.

Although I concede that technically the above is not tantamount to evidence at the trial, it is so at the end of the day. A petitioner is required to give evidence on the written statement and the documents sought to be relied upon at the trial. And so, I ask: where is the evidence to sustain the petition, assuming (without conceding) that the petition is competent.

What is the evidence relied upon by the appellant? Let me read paragraphs 14, 15, 21 and 25 of the Written Statement:

"14. The Petitioner's effort to vote on the said 21st April, 2007 failed because there was no voting in his ward or anywhere in the said zone. The petitioner told me, and I verily believe him, that he could not vote on the said day and that even when he went to 3 Local Government Areas around his Nnewi home, he could not see where any voting was taking place during day time.

15. The Petitioner also told me, and I verily believe him, that his effort to reach the Resident Electoral Commission failed as the said officer was sequestered and heavily guarded by troops who did not allow any person get near the office or home of the said officer. I was with the petitioner when he attempted in vain to reach the said officer in the afternoon of the 21st April, 2007.

21. That my friend Mr. Vincent Okoye, who registered as a voter at the Federal Capital Territory, Abuja, informed me and I verily believe him, that the ballot papers for the said Presidential Election in which he voted, were not serially numbered as prescribed by law. He told me this on the 22nd of April 2007.

25. The said Governor Musa Yar'Adua, the Executive Governor of Katsina State and Governor Goodluck Jonathan, the Executive Governor of Bayelsa State, never resigned their offices as Executive Governors of their respective States nor did they hand over the reigns of government to their Deputy Governors at all material times during the nomination stage of their presidential campaigns and at their presentation of themselves as candidates for the office of President of the Federal Republic of Nigeria in 21/4/2007 Presidential Election, or at all."

It is clear to me that paragraphs 14, 15 and 21 of the Written

Statement are hearsay evidence and therefore inadmissible. In paragraph 14, the petitioner told the witness of his inability to vote as well as three other Local Government Areas where no voting took place. Paragraph 15 is another story told the witness by the appellant on the efforts of the appellant to reach the Resident Electoral Commissioner. Paragraph 21 is also another story told the witness by his friend, Mr. Vincent Okoye. The only direct evidence is in paragraph 25 which does not contain much beyond the words of the paragraph.

The document relied upon is a Vanguard Newspaper. It is averred to by the witness in paragraph 7 of his Written Statement as follows:

“The socio-cultural Igbo Group known as Ohaneze, in an advertorial captioned ‘INEC VOTERS’ REGISTER AND 2007 ELECTION published in the Vanguard Newspaper of Thursday, the 12th of April 2007, complained of the 3rd respondent’s late preparations and its failure to display or publish the Voters’ Register in the said South East Zone.”

What is the evidential value of the newspaper report? I do not see any, and there is none in law.

Learned counsel for the appellant in his oral submission laid emphasis on the non-serialisation of ballot papers. Let me examine the issue. It is enumerated as around 1(c) at page 4 of the Record. It is averred to by the witness in paragraph 21 of the Written Statement. As indicated above, it amounts to hearsay evidence and therefore inadmissible. Assuming that the evidence is admissible, the majority decision of this court in *Buhari v. INEC*, *supra*, does not help the appellant. I am not even sure that the minority decision will help him because it was based on alleged admission that the ballot papers were not numbered serially. There is no such admission here by the respondents.

Ground 4 is on failure by the 1st and 2nd respondents to resign their appointments before contesting the election. Reacting to the ground, the Court of Appeal said at page 250 of the Record;

“State Governors are by the provisions of ss. 176 to 180 of the Constitution of the Federal Republic of Nigeria 1999 elected by the people of their respective States. They are not employed by the people of their States... There is no iota of law supporting that ground. It is premised on frivolity and discloses no reasonable cause of action and

it is hereby struck out."

I entirely agree with the Court of Appeal. I cannot put the position better. And so be it. More importantly, my learned brother, Tabai, JSC has, very adequately, treated the issue.

The final question is whether the Court of Appeal was right in striking out the petition? And that takes me to the reliefs sought by the respondents. The 1st and 2nd respondents asked the court to dismiss or strike out the petition on the ground that (i) it is defective and in clear breach of the express provision of the Electoral Act and (ii) some of the Petitioner's prayers do not flow from the petition. The 3rd and 4th respondents, in their preliminary objection, urged the court to dismiss the petition:

"The Petitioner has not disclosed any reasonable cause of action against the respondents, the petition having failed woefully to disclose any constitutional disqualification against the 1st and 2nd respondents who have not been shown to be disqualified to contest election into any office in Nigeria, particularly election into the office of President and Vice-President respectively."

There are three other grounds for the objection. I do not want to go to them. I am okay with the above. The above gives rise to an examination of what order a court can make if it comes to the conclusion that there is no cause of action before it. A prefatory exercise is the definition of cause of action. Black's Law Dictionary, 5th edition, defines cause of action at page 201 as follows:

"The fact or facts which give a person a right to judicial relief. The legal effect of an occurrence in terms of redress to a party to the occurrence. A situation or state of facts which would entitle party to sustain action and give him right to seek a judicial remedy in his behalf. Facts, or state of facts, to which law sought to be enforced against a person or thing applies. Facts which give rise to one or more relations of rights - duty between two or more persons. Failure to perform legal obligation to do, or refrain from performance of, some act. Matter for which action may be maintained. Unlawful violation or invasion of right. The right which a party has to institute a judicial proceeding."

In Central Bank v. Manesport S. A. and Others (1987) 1 NWLR (Pt. 18) 669, Nnaemeke-Agu, JCA (as he then was) described "cause of action" as a set of facts as distinct from the evidence averred in the

statement of claim which the plaintiff must prove to support his right to the judgment of the court.

In Bello and Others v. Attorney-General of Oyo State (1986) 5 NWLR (Pt. 45) 828, Karibi-Whyte, JSC said at page 876:

"The proposition that a plaintiff has no cause of action merely because the defence has a valid defence is clearly not acceptable. I think a cause of action is constituted by the bundle or aggregate of facts which the law will recognize as giving the plaintiff a substantive right to make a claim against the relief or remedy being sought. Thus the factual situation on which the plaintiff relies to support his claim must be recognized by the law as giving rise to a substantive right capable of being claimed or enforced against the defendant. In other words, the factual situation relied upon must constitute the essential ingredients of an enforceable right or claim. See Trower and Sons Ltd. V. Ripstein (1944) AC 254 at p. 263; Read v. Brown 22 BD 128; Cooke v. Gill (1873) LR 8 CP 107; Jackson v. Sp. Hall (1870) LR 5 CP 542. Concisely stated, any act on the part of the defendant which gives to the plaintiff his cause of action is a cause of action."

A cause of action consists of every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his claim for judgment. Thus the accrual of a cause of action is the event whereby a cause of action becomes complete so that the aggrieved party can begin and maintain his cause of action (Adimora v. Ajufo and Others (1988) 3 NWLR (Pt. 80) 1). A cause of action is the entire set of circumstances giving rise to enforceable claim. It is in effect, the fact or combination of facts which gives rise to a right to sue and it consists of two elements: (a) the wrongful act of the defendant which gives the plaintiff his cause of complaint and, (b) the consequent damage (Alhaji Ibrahim v. Osin (1988) 3 NWLR (Pt. 82) 257).

Where and when a court comes to the conclusion that a plaintiff has no cause of action, the court can strike out the action. The Court of Appeal rightly, in my view, struck out the petition based on the preliminary objection of the respondents. I entirely agree with Ogebe, JCA (as he then was) who described the petition as merely of nuisance value. It is in the light of the above and the more detailed reasons given by my learned brother, Tabai, JSC that I too dismiss the appeal. I also make no order as to costs.

MUSDAPHER JSC

I have read before now the judgment of my Lord Tabai, JSC delivered in this matter with which I entirely agree that the four grounds the petition are clearly in my view defective and are not in conformity with the provisions of the Electoral Act, 2006 and no reasonable cause of action can be discerned from the petition. I adopt the reasonings as mine and I have no problem in agreeing that the petition as constituted was incompetent and was rightly struck out by the Court of Appeal in the wake of the preliminary objection. This appeal therefore fails and is dismissed by me. I make no order as to costs.

OGUNTADE JSC (DISSENTING)

This is yet another appeal arising from the decision of the Court of Appeal, sitting as an Election Tribunal over petitions arising out of the Presidential Elections held in Nigeria on 21-04-07. The appellant was the candidate sponsored by a political party - All Progressives Grand Alliance (hereinafter abbreviated as APGA) at the said election in which the 1st and 2nd respondents of the 5th respondent's Party were declared the winners as President and Vice-President respectively by the 3rd and 4th respondents.

The appellant was dissatisfied with the declaration of results as made by the 3rd and 4th respondents. He filed an election petition before the court below. In the said petition, the appellants relied on four grounds and prayed that the said election be set aside. In paragraphs 9 and 10 of the said petition, the appellant pleaded thus:

"9. Your Petitioner's GROUNDS for bringing this Petition are as follows:

GROUND 1

The election in which the 1st and 2nd Respondents were Declared winners was not conducted in compliance with the 1999 Constitution and the electoral Acts 2006.

PARTICULARS

(a) Copies of Voters List was never displayed.

(b) *Supplementary Voters List Register was never published.*

(c) *The ballot papers for the said election were not numbered serially as commended by law.*

(d) *Alternatively, if any Voters Register was never published within the stipulated time, but in any event, it was never displayed or published in the South East Zone of the country at all. Your Petitioner will rely on the unanswered advertorial complaint of OHANEZE in the Vanguard Newspapers of April 12, 2007.*

GROUND 2

The said Election did not meet the minimal requirement of Electoral democracy and the law and the Electoral Act, 2006.

PARTICULARS

(a) *Voting was not done in secret. For the first time in the History of Elections in Nigeria no polling booths were provided by the 3rd Respondent and the voters voted in public and also cast their votes in public.*

(b) *Military men were used by the Commander-in-Chief who like the 1st Respondent, belongs to the 4th Respondent and who was the Campaigner-in-Chief of the 1st Respondent, to intimidate the electorate throughout Nigeria.*

(c) *The agents of the Petitioner and other agents of other opposing Presidential Candidates were not allowed to witness the collation or counting of votes or the compilation of results.*

(d) *Your Petitioner was not allowed by the 3rd Respondent into the offices of the 3rd Respondent in Anambra State to observe the compilation of results.*

GROUND 3

Rudimentary requirements of fairness and equal treatment provided by the Constitution and the Electoral were not extended to the Petitioner and to potential voters in Anambra, Imo, Abia, Enugu and Ebonyi States.

PARTICULARS

(a) *Voting did not take place in more than 98% of the polling stations in the said states at all and the right to vote, the initial allocation of the franchise to the potential voters in those states was lost as a result of the arbitrary and discriminatory conduct of the 3rd Respondent.*

(b) *Presidential Election has Nationwide Constituency and fail-*

ure to give any voters their right of franchise nullifies the entire election because there is no divided sovereignty for the election of a President or at all.

(c) The 4th Respondent announced on air that elections for the office of President would in compliance with sections 47 and 48 of the Act take place between 10 am and 3pm throughout Nigeria, but no voting took place in the said Zone on the said date and zone where the 5th Respondent's governorship candidates 'voted' at night in their homes.

GROUND 4

The 1st and 2nd Respondent are not qualified to contest for election to the office of President and Vice President, respectively, because having been employed by the people of Katsina and Bayelsa States as their Chief Public Servant or Chief Executives they did not, contrary to section 137(g) of the 1999 Constitution, resign or withdraw from their offices as executive governors at all prior to the said Presidential Election.

10. Your Petitioners avers that the 3rd, 4th and 5th Respondents jointly and wrongfully cleared the 1st and 2nd Respondents for the said Election to the Office of President in Nigeria."

The 5th respondent filed a Reply to the Petition on 2/8/07. However on 3/8/07, the 1st and 2nd respondents by their counsel brought an application praying for an order dismissing and or striking out the petition. The grounds relied upon for the prayer made on the application read:

"(i) That the petition is defective and in clear breach of the express provisions of the Electoral Act, 2006.

(ii) That some of the Petitioner's prayers do not flow from the petition.

(iii) That the petition is not properly constituted as persons or institutions who are proper, necessary or desirable parties and whose presence are required for a just determination of the petition have not been made parties."

In paragraphs 3(e) to (h) of the affidavit in support of the application; it was deposed thus:

"(e) That the grounds upon which a petitioner may bring or file a petition before the Honourable Election tribunal are clearly and unambiguously stated in the Electoral Act.

(f) *That no facts are stated to support the alleged grounds of the Petitioner as required by the Electoral Act.*

(g) *That the names of persons whose conduct is being complained of have been joined as parties to this petition.*

(h) *That some of the prayers of the Petitioner do not flow from the grounds of the petition."*

The 1st and 2nd respondents on the same date they filed their application to dismiss the petition filed - to the Petition joining issues on the matters of fact pleaded by the petitioners/appellant.

On 3/8/02, the 3rd and 4th respondents filed a notice of preliminary objection against the petition and prayed that the same be dismissed. The grounds relied upon were stated to be these:

"I. The Petitioner has not disclosed any reasonable cause of action against the Respondent, the Petition having failed woefully to disclose any constitutional disqualification against the 1st and 2nd Respondents who have not been shown to be disqualified to contest election into any office in Nigeria, particularly election into the office of President and Vice President respectively.

PARTICULARS OF GROUND

The Petition has not alleged and cannot be heard to say that the 1st or 2nd Respondent-

(a) is disqualified by any of the circumstances enumerated in Section 137(1) paragraphs (a), (b), (c), (d), (e), (f), (h), (i), or (j) of the Constitution of the Federal Republic of Nigeria, 1999; or

(b) is a person employed in the public service of the Federation or of any State.

II. The Petition has not disclosed any reasonable cause of action against the Respondents as the grounds 1, 2 and 3 of the petition and the particulars there-under as constituted have not shown that the election was not conducted substantially in accordance with principles of this Act or that non-compliance affected substantially the result of the election as envisaged under the provisions of Section 145(1) the Electoral Act, 2006.

PARTICULARS OF GROUND

(a) The Petition as constituted, even if conceded, challenges the election primarily in only five out of thirty six states of the Federation that is less than one seventh of all the states or a minority of the total votes cast.

(b) The States challenged even if conceded would not affect the majority of votes scored by the 1st Respondent or reduce the constitutional spread of one quarter of all the votes cast in two thirds of the States of the Federation.

(c) The Petition does not show that the irregularities complained of even if conceded have affected the outcome of the Presidential election substantially or that the returned of the 1st Respondent would not have been made. B

(d) The Petitioner has no allegation of non-substantial compliance on which to lead evidence in a full trial; and C

(e) The allegations in the Petition as constituted would have no material effect on the validity of the election as declared in favour of 1st Respondent.

III. The petition is a gross abuse of the process of the Court.

PARTICULARS OF GROUNDS D

(a) The Petition has been brought purposely to vex the Respondents.

(b) The Petition has been brought purposely to annoy the Respondents.

(c) The Petition has been brought purposely to irritate the Respondents E

(d) The Petition has been brought purposely to misuse process of this Honourable Court.

IV. The Honourable Court lacks the jurisdiction and or vires to entertain the petition as constituted. F

PARTICULARS OF GROUNDS

(a) The petition as constituted is grossly incompetent;

(b) The petition fails to state at all or state clearly the facts of the petition; G

(c) The petition is bereft of facts or major facts of the petition.

(d) The petition is an abuse of court process.

The parties before the court below filed written submissions for and against the application to strike out and the preliminary objections against the petition. On 3/9/07, the court below in its ruling acceded to the prayers by the respondents. It struck out the petition. Dissatisfied with the order striking out his petition, the petitioner (now appellant) has brought a final appeal before this court challenging the order striking out his petition. In the appellant's brief filed, the H

issues for determination in the appeal were stated to be these:

B *(1) Was the Court of Appeal right to hold that Grounds 2 and 3 of the petition do not conform or relate to any of the 4 grounds set out in section 145(1) of the Electoral Act and without considering the petitioner's submissions or examining the relevant provisions of the Electoral Act?*

(2) Was the Court of Appeal right to rely on section 146 of the Electoral Act, 2006 to strike out Ground 1 of the petition after holding that the said ground was competent?

C *(3) Having found that the said Ground 4 of the Petition was competent, was the Court of Appeal right to decide the said ground of the petition suo motu on its merit whereby it struck out the said ground of the petition?*

D *(4) Whether the approach adopted by the Court of Appeal in reaching its decision to strike out the petition has occasioned a miscarriage of justice.'*

I intend to consider all the four issues together. The court below at pages 249-250 of its ruling striking out the petition reasoned thus:

E *"Paragraph 4(1)(d) of the first schedule to the Electoral Act 2006 commands that an election petition shall state clearly the facts of the election petition and the ground or grounds on which the petition is based and the relief sought by the petitioner, while para-*
 F *graph 4(2) demands that the petition be divided into paragraphs each of which is CONFINED to a distinct issue or major facts of the election petition. The petition in the instant case has set out grounds of the petition and has in each ground tied and particularized facts under pinning or founding the said grounds. S. 145(1) of the Elec-*
 G *toral Act 2006 sets out and delimits the grounds upon which an election may be questioned. There are four grounds set out in the said section. Ground 1 of the petition clearly conforms with S. 145(1)(b) of the Electoral Act while ground 4 conforms with S. 145(1)(a) of the Electoral Act. Grounds 2 and 3 do not conform or relate to any of*
 H *the four grounds set out in S. 145(1) of the Electoral Act and are hereby struck out.*

But that is not the end of the matter. A party who founds his petition on the ground of substantial non compliance with the provisions of the Electoral Act must not only plead and prove substantial

non-compliance but must also pursuant to the provision of S. 146 of the Electoral Act plead and prove that the non-compliance substantially affected the result of the election. Non compliance with the provisions of the Act without more is not sufficient to invalidate an election. See Buhari v. Obasanjo [2005] 2 NWLR (Pt.910) 241; Yusuf v. Obasanjo [2005] 18 NWLR (Pt.956) 96. It follows that where insufficient facts or none at all are pleaded to establish substantial effect of the non-compliance on the result of the election, no reasonable cause of action has been made out. I have carefully perused the petition and no where have I seen pleaded facts establishing the substantiality of the effect of the alleged non-compliance with the provisions of the electoral Act on the result of the election. Ground 1 therefore cannot be sustained and it is hereby struck out.

Ground 4 of the petition challenges the qualification of the 1st and 2nd respondents to contest the April 21st, 2007 Presidential election on the basis that being employees in the public services of the Katsina and Bayelsa State Governments, both candidates ought to have resigned their appointments at least 30 days before the date of the election pursuant to the provision of S.137(g) of the 1999 Constitution. These respondents did not according to the petitioner resign from their jobs as executive Governors of the named states. State Governors are, by the provision of Ss. 176 to 180 of the Constitution of the Federal Republic of Nigeria 1999 elected by the peoples of their respective States. They are not employed by the people of their States. Blacks Law Dictionary 5th Ed. Defines 'elected' at page 464. It says 'The word 'elected' in ordinary signification, carries with it the idea of a vote, generally popular, sometimes more restricted, and cannot be held the synonym of any other mode of filling a position'. The word 'employment' is not a synonym for the word 'elected.' There is no iota of law supporting that ground. It is premised on frivolity and disclose no reasonable cause of action and it is hereby struck out."

Was the court below right in its views above? I think not. In trials conducted under the procedure which permits the filing of briefs, it is absolutely important to bear in mind that it is only in cases where the facts pleaded by the plaintiff or petitioner as in this case are deemed admitted and when so deemed would still establish the case made by the plaintiff or petitioner that the suit or petition could be struck out

on the ground that it discloses no reasonable cause of action.

Now section 145(1) of the Electoral Act, 2006 provides:

“(I) An election may be questioned on any of the following grounds:

- (a) that a person whose election is questioned was, at the time*
- B of the election, not qualified to control the election;*
- (b) that the election was invalid by reason of corrupt practices*
- or non-compliance with the provisions of this Act;*
- (c) that the respondent was not duly elected by majority of*
- C lawful votes cast at the election or*
- (d) that the petitioner or its candidate was validly nominated*
- but was unlawfully excluded from the election.”*

The court below, correctly in my view, came to the conclusion that Grounds 1 and 4 of the petition conformed with sections 145(1) D)(b) and 145(1)(a) above. The court surprisingly however still went on to strike out the petition on the ground that the petitioner did not ‘plead and prove’ that the substantial non-compliance complained of substantially affected the result of the election. The judicial authorities relied upon for that position are *Buhari v. Obasanjo* (2005) E 2 NWLR (Pt.910) 241 and *Yusuf v. Obasanjo* (2005) 18 NWLR (Pt.956) 96. This reasoning was anchored on Section 146(1) of the Electoral Act, 2006. The said Section 146(1) provides:

“(1) An election shall not be liable to be invalidated by reason

F 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.”

It is saddening in the extreme that Section 146(1) above, a G provision which was designed to ensure that minor infractions of the Electoral Act which could not in any event be expected to have an effect on the result of an election has been elevated by our courts into a ground for an accommodation of the most glaring failure to comply with the provisions of the Electoral Act. Let me say here once H more, that the legislature has in good faith done what is expected of it by incorporating into our Electoral Act a provision which is to be found in or read into the Electoral Laws of several other countries which place a premium democratic governance.

A close reading of section 146(1) above easily shows that the

non-compliance with the Act which can be overlooked or forgiven is one which arises notwithstanding that the election “was conducted substantially in accordance with the principles of the Electoral Act.

Where a petitioner’s complaint is founded on non-compliance with an essential condition precedent to the conduct of the election, this cannot and ought not to be seen as a non-compliance which did not substantially affect the result of the election. The argument that if all incidents of non-compliance are penalized by annulling the election, no election would survive a scrutinisation is in my view a weak excuse for the unwillingness to observe the provisions of the law. This is because there is in-built in section 146(1) a provision to excuse or forgive a non-compliance which does not substantially affect the result of the election. My view is that the preponderant majority of election petitions in Nigeria would fail in our courts even in the face of clear evidence of serious malpractices unless, a proper and correct interpretation is given to section 146(1).

Now in Ground 1 of the petition, the petitioner averred that the election was not conducted in compliance with the 1999 Constitution and the Electoral Act, 2006. The particulars given were stated thus:

- “(a) copies of the Voters List was (sic) never displayed.*
- (b) Supplementary voters List Register was never published.*
- (c) The ballot papers for the said election were not numbered serially as commended by law.*
- (e)*”

Sections 20 and 45 of the Electoral Act provide:

“20.(1) Subject to the provisions of section 17(1) of this Act, the Commission shall, by notice appoint a period of not less than 5 days and not exceeding 14 days, during which a copy of the voters’ register for each Local Government and Area Council or Ward shall be displayed for public scrutiny and during which period any objection or complaint in relation to the names omitted or included in the voters’ register or in relation to any necessary correction, shall be raised or filed.

(2) During the period of the display of the supplementary’ Voters’ list under this Act, any person may:

(a) raise an objection on the form prescribed by the Commission against the inclusion in the supplementary Voters’ register of the

name of a person on grounds that the person is not qualified to be registered as a voter in the State, Local Government and Area Council, Ward or Registration Area or that the name of a deceased person is included in the register; or

(b) make a claim on the form prescribed by the Commission that the name of a person Registered to vote has been omitted.

(3) Any objection or claim under subsection (2) of this section shall be addressed to the Resident Electoral Commissioner through the Electoral Officer in charge of the Local Government or Area Council.

*XX
XX
XX*

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."

Sections 20 and 45 above are the mandatory steps to be taken before the date of the election. They are imperative in their language. A petitioner who complains that these acts were not done as provided by the law is in fact saying that the election was invalidly conducted. This complaint by its very nature would not have anything to do with the result. On the other hand a person who complains about the late commencement of voting at an election or whose grouse is that sufficient ballot papers were not released for the election will bear the burden of showing that the non-compliance affected the result of the election. This is because in the nature of such complaint, the effect is always localized in which case it is necessary to show that such non-compliance affected the results of the election nationally.

A complaint premised on the invalidity of an election is not the same with one premised on some localized concurrences in the conduct of the election. In *Awolowo v. Shagari* 6-9 SC. 73, Obaseki JSC observed:

"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 the election invalid, must be so great as to amount

to a 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.”

It seems to me that an allegation that the ballot papers used for the Presidential election across the length and breadth of Nigeria is at least one that the court below ought to have allowed the petitioner to ventilate. Whether it would succeed or not is another matter. In the nature of this case, it seems to me that the petitioner was muzzled and driven away from the judgment seat before he has aired his complaints. Sections 67(1) and 147(1)(2) of the Electoral Act, 2006 provide;

“67.(1) Subject to subsection (21) of this section, a ballot paper, which does not bear the official mark, shall not be counted.

XXX
XXX

147.(1) Subject to subsection (2) of this section, if the Tribunal or the Court as the case may be, determines that a candidate who was returned as elected was not validly elected on any ground, the Tribunal or the Court shall nullify the election.

(2) If the Tribunal or the Court determines that a candidate who was returned as elected was not validly elected on the ground that he did not score the majority of valid votes cast at the election, the Election Tribunal or the Court, as the case may be, shall declare as elected the candidate who scored the highest number of valid votes cast at the election and satisfied the requirements of the Constitution and this Act.”

Under the above Section 67(1) a ballot paper which does not conform with section 45(1) of the Electoral Act is invalid and cannot be counted; and similarly under Section 147(2) above, it was open to the court below to hear the petition in order to determine whether or not the 1st and 2nd respondents were elected by a majority of Valid votes cast at the election.” An unserialised ballot paper is an invalid vote. If the court below had been careful in its approach, there was a clear chance that it would at least have granted the petitioner a hearing.

I am myself anxious that the problems arising from our April 21st, 2007 elections be consigned to history, but the truth of the

matter is that the ghosts of the afore-mentioned election will continue to hunt us. No dispute is settled unless it is well settled.

It is with respect that I express my inability to agree with the lead judgment by my learned brother Tabai J.S.C. It is my firm view that the court below should have heard this case fully and pronounced a judgment on the merit whichever way it went. I would therefore order that the case be heard *de novo* by a fresh panel of the Court of Appeal. I make no order as to costs.

C

ONNOGHEN JSC (DISSENTING)

On the 22nd day of May, 2007, the appellant presented an election petition NO. CA/A/EP/8/07 at the Court of Appeal, Abuja, sitting as the Presidential Election Tribunal, seeking the following reliefs :-

“ 1. *A DECLARATION that by reason of the arbitrary failure of the 3rd respondent to display copies of the Voters List, publish Supplementary Voters List Register and in the manner and form commended by the Electoral Act., 2006, the said Presidential Election is null and void for non-compliance with the minimal requirements of due process sine qua non and condition precedent for the conduct of democratic election prescribed by law.*

2. *A DECLARATION that failure to conduct the said election at all in any place (no matter how remote or few the numbers of voters) is inimical to the concept and basis of equality under the law and violates the rights of the affected voters, (guaranteed by the constitution) that they be not discriminated against.*

3. *A DECLARATION that by the arbitrary manner, the said election was conducted without regard to due process of law in all or any part of the country, or at all amounts to nullifying the franchise and sovereignty of the people of Nigeria as a whole,*

4. *A DECLARATION that the manner and form of the conduct of the said election was a usurpation of the franchise and sovereignty of the people.*

5. *A DECLARATION that the 1st and 2nd respondents were not qualified for election to the office of President and Vice President respectively or at all,*

6. *AN ORDER nullifying and invalidating the return of Musa*

Yar'Adua and Goodluck Jonathan, the 1st and 2nd respondents herein as President elect and Vice President elect, respectively.

7. *AN ORDER nullifying the said election and commanding the 3rd defendant to conduct another election for the office of President of Nigeria in the manner and form prescribed by law but without the 4th respondent as its chairman.* B

8. *AN ORDER of injunction commanding the 4th respondent to cease and desist from running the affairs of the 3rd respondent,*

9. *A DECLARATION that the declaration of the 1st and 2nd respondents as winners of the said election is invalid, unconstitutional, null and void".* C

The grounds on which the above reliefs are based/ claimed are four. These are as follows:-

GROUND 1

The election in which the 1st and 2nd respondents were declared winners was not conducted in compliance with the 1999 Constitution and the Electoral Acts, 2006.

PARTICULARS

(a) *Copies of Voters List was never displayed.*

(b) *Supplementary Voters List Register was never published.* E

(c) *The ballot papers for the said election were not numbered serially as commended by law.*

(d) *Alternatively, if any Voters Register was never published within the stipulated time, but in any event, it was never displayed or published in the South East Zone of the country at all. Your Petitioner will rely on the unanswered advertorial complaint of OHANEZE in the Vanguard Newspapers of April 12, 2007.* F

GROUND 2

The said Election did not meet the minimal requirement of Electoral democracy and the law and the Electoral Act, 2006. G

PARTICULARS

(a) *Voting was not done in secret. For the first time in the History of Elections in Nigeria no polling booths were provided by the 3rd Respondent and the voters voted in public and also cast their votes in public.* H

(b) *Military men were used by the Commander-in-Chief who like the 1st Respondent, belongs to the 4th Respondent and who was the Campaigner-in-Chief of the 1st Respondent to intimidate*

the electorate throughout Nigeria.

(c) The agents of the Petitioner and other agents of other opposing Presidential Candidates were not allowed to witness the collation or counting of votes or the compilation of results.

(d) Your Petitioner was not allowed by the 3rd Respondent into the offices of the 3rd Respondent in Anambra State to observe the compilation of results.

GROUND 3

Rudimentary requirements of fairness and equal treatment provided by the Constitution and the Electoral (sic) were not extended to the Petitioner and to potential voters in Anambra, Imo, Abia, Enugu and Ebonyi States.

PARTICULARS

(a) Voting did not take place in more than 98% of the polling stations in the said states at all and the right to vote, the initial allocation of the franchise to the potential voters in those states was lost as a result of the arbitrary and discriminatory conduct of the 3rd Respondent.

(b) Presidential Election has Nationwide Constituency and failure to give any voters their right of franchise nullifies the entire election because there is no divided sovereignty for the election of a President or at all.

(c) The 4th Respondent announced on air that elections for the office of President would in compliance with section 47 and 48 of the Act take place between 10 am and 3pm throughout Nigeria, but no voting took place in the said Zone on the said date and zone where the 5th Respondent's governorship candidates Voted' at night in their homes.

GROUND 4

The 1st and 2nd Respondents are not qualified to contest for election to the office of President and Vice President, respectively, because having been employed by the people of Katsina and Bayelsa States as their Chief Public Servant or Chief Executives they did not, contrary to section 137(g) of the 1999 Constitution, resign or withdraw from their offices as executive governors at all prior to the said Presidential Election."

Upon service of the petition together with other relevant processes, the respondents filed objections challenging the competence

of the petition particularly, whether it complied with the provisions of various sections of the Electoral Act, 2006. The grounds on which the 1st and 2nd respondents prayed for the striking out or dismissal of the petition are stated as follows:-

“(i) *That the petition is defective and in clear breach of the express provisions of the Electoral Act, 2006.* B

(ii) *That some of the petitioners prayers do not flow from the petition.*

(iii) *That the petition is not properly constituted as persons or institutions who are proper, necessary or desirable parties and whose presence are required for a just determination of the petition have not been made parties”.* C

On the other hand, learned senior counsel for the 3rd and 4th respondents filed a notice of preliminary objection on 3/8/07, the grounds of which are stated as follows:- D

“(I) *The petitioner has not disclosed any reasonable cause of action against the President, the petition having failed woefully to disclose any constitutional disqualification against the 1st and 2nd respondents who have not been shown to be disqualified to contest the election into any office in Nigeria, particularly election into the office of President and Vice President respectively.* E

PARTICULARS OF GROUND

The petition has not alleged and cannot be heard to say that the 1st and 2nd respondent: F

(a) *Is disqualified by any of the circumstances enumerated in section 137(1) paragraphs (a), (b), (c), (d), (e), (f), (h), (i) or (j) of the constitution of the Federal Republic of Nigeria, 1999; or*

(b) *Is a person employed in the public service of the Federation or of any state.* G

(II) *The petition has not disclosed any reasonable cause of action against the respondents as the grounds 1,2 and 3 of the petition and the particulars thereunder as constituted have not shown that the election was not conducted substantially in accordance with principles of this Act or that non compliance affected substantially the result of the election as envisaged under the provisions of section 145(1) the Electoral Act, 2006.* H

PARTICULARS OF GROUND

(a) *The petition as constituted, even if conceded, challenges*

the election primarily in only five out of thirty-six states of the Federation that is less than one seventh of all the states or a majority of the total votes cast.

B *(b) The states challenged even if conceded would not affect the majority of votes scored by the 1st respondent or reduce the constitutional spread of one quarter of all the votes cast in two thirds of the states of the Federation.*

C *(c) The petition does not show that the irregularities complained of even if conceded have affected the outcome of the Presidential Election substantially or that the returned of the 1st respondent would not have been made.*

(d) The petitioner has no allegation of non-substantial compliance on which to lead evidence in a full trial; and

D *(e) The allegations in the petition as constituted would have no material effect on the validity of the election as declared in favour of 1st respondent.*

(III) The petition is a gross abuse of the process of the court.

PARTICULARS OF GROUND

E *(a) The petition has been brought purposely to vex the respondents.*

(b) The petition has been brought purposely to annoy the respondent.

F *(c) The petition has been brought purposely to irritate the respondents.*

(d) The petition has been brought purposely to misuse process of this Honourable Court.

(IV) The Honourable Court lacks the jurisdiction and or vires to entertain the petition as constituted.

G **PARTICULARS OF GROUND**

(a) the petition as constituted is grossly incompetent;

(b) the petition fails to state at all or state clearly the facts of the petition;

(c) the petition is bereft of facts or major facts of the petition;

H *(d) the petition is an abuse of court process”.*

The grounds of objection to the petition by learned senior counsel for the 5th respondent, *Chief Joe Kyari-Gadzama, SAN* are:

“(i) Non-compliance by the petition to the provisions of section 145 of the Electoral Act, 2006,

(ii) *Non-joinder of persons or institutions who are proper if necessary for a just determination of the petition*".

In resolving the issues in the determination of the objections, the lower court held, at page 249, inter alia as follows:-

"The petition in the instant case has set out grounds of the petition and has in each ground tied and particularized facts under pinning or founding the said grounds. Section 145(1) of the Electoral Act, 2006 sets out and delimits the grounds upon which an election may be Questioned. There are four grounds set out in the said section. Ground 1 of the petition clearly conforms with section 145(1)(b) of the Electoral Act, 2006 while ground 4 conforms with section 145(1) (a) of the Electoral Act. Ground 2 and 3 do not conform or relate to any of the four grounds set out in section 145(1) of the Electoral Act, 2006 and are hereby struck out.... A party who founds his petition on the ground of substantial non-compliance with the provisions of the Electoral Act must not only plead and prove substantial non-compliance but must also pursuant to the provisions of section 146 of the Electoral Act plead and prove that the non-compliance substantially affected the result of the election. Non-compliance with the provisions of the Act without more is not sufficient to invalidate an election...."

I have carefully perused the petition and no where have I seen pleaded facts establishing the substantiality of the effect of the alleged non-compliance with the provisions of the Electoral Act on the result of the election. Ground 1 therefore cannot be sustained and it is hereby struck out...."

The court also struck out ground 4 and the petition itself for being incompetent.

The appeal of the appellant is based mainly on the passage G quoted supra.

In the appellant's brief of argument filed on the 5th day of November, 2007 by James C Ezike Esq., the following issues have been identified for the determination of the appeal.

"1. Was the Court of Appeal right to hold that grounds 2 and 3 of the petition do not conform or relate to "Any of the 4 grounds set out in section 145(1) of the Electoral Act" and without considering the petitioner's submissions or examining the relevant provisions of the Electoral Act?"

2. *Was the Court of Appeal right to rely on section 146 of the Electoral Act, 2006 to strike out ground 1 of the petition after holding that the said ground was competent?*

3. *Having found that the said 4th ground of the petition was competent, was the Court of Appeal right to decide the said ground of the petition suo motu on its merit whereby it struck out the said ground of the petition?*

4. *Whether the approach adopted by the Court of Appeal in reaching its decision to strike out the petition has occasioned a miscarriage of justice”.*

On the other hand, learned counsel for the 1st and 2nd respondents, Chief Wole Olanipekun, SAN, in the brief of argument filed on 17/12/07 submitted the following three issues for determination:

“7. *Whether the lower court was right to have considered and upheld the preliminary objections filed by the 1st, 2nd, 3rd and 4th respondents challenging the competence of the appellant’s petition filed in breach of relevant provisions of the Electoral Act, 2006 at the stage it did.*

2. *Whether the lower court was right to have held that Grounds 2 and 3 do not conform or relate to any of the grounds set out in section 145(1) of the Electoral Act, 2006 and proceeded to strike out the said grounds in consequence?*

3. *Whether the lower court was right to have placed reliance on section 146 of the Electoral Act, 2006 to strike out ground 1 of the petition and on section 137 (g) of the 1999 Constitution to strike out ground 4 in limine after it had initially held that the said grounds were properly before it ?*

While the learned senior counsel for the 3rd and 4th respondents, Kanu Agabi, Esq., SAN, submitted five issues for determination in the brief of argument filed on 28/11/07, the learned senior counsel for the 5th respondent, Chief J. K Gadzama, SAN, in his brief of argument filed on 13/5/08 submitted a single all embracing issue for determination, to wit:-

“Whether the court below was right to decide the petition as it did by way of the Preliminary Objection and application brought by the respondents and if this is answered in the negative whether the same occasioned a miscarriage of justice”.

It should be noted that there is no cross appeal against the findings by the lower court that grounds 1 and 4 of the petition conform with the requirements of section 145(1) of the Electoral Act, 2006. The aforesaid grounds deal with non-compliance with the provisions of the Electoral Act and non-qualification of the 1st and 2nd respondents to contest the presidential election in question. To me, I prefer the single issue formulated by learned senior counsel for the 5th respondent having regards to the facts and circumstances of the case - the grounds of the objections and the ruling thereon.

It is the submission of learned counsel for the appellant that contrary to the finding of the lower court that grounds 2 and 3 of the petition do not fall within the purview of section 145(1) of the Electoral Act, 2006, the said grounds conform with the said provisions of the Act as they question the election on various sections of the Constitution and the Electoral Act on the ground of non-compliance with the provisions of the Electoral Act, 2006 and the Constitution; that the lower court having found as a fact that grounds 1 and 4 are valid in law was in error when it proceeded to strike them out on the ground that appellant did not plead and prove facts establishing how the non-compliance substantially affected the result of the election when, at the stage the objection was raised and considered, no evidence was required as the objection was limited to the regularity or competence of the petition; that none of the respondents relied on section 146 of the Electoral Act, 2006 in raising the objections and that the lower court ought to have invited the views of the parties before placing reliance on the said section 146 of the Electoral Act, 2006 to strike out the petition, relying on the case of Kuti vs Balogun (1978) 1 S.C 56 at 60; that section 146 comes into play after evidence has been led by the parties and the tribunal is to determine the petition based on the evidence before it; that the onus is on the 3rd and 4th respondents to “establish” that the ballot papers were serially numbered by tendering them with their counter foils; that the lower court determined the substantive issues at the preliminary stage thereby causing miscarriage of justice to the appellant, relying on Williams vs Dawodu (1988) 4 NWLR (Pt.89) 189 and urged the court to allow the appeal.

On behalf of the 1st and 2nd respondents, it is submitted that grounds 2 and 3 of the petition do not fall under any of the grounds

stated in section 145(1) of the Electoral Act, 2006 and therefore incurably defective; that no clear facts were pleaded in support of the petition in breach of paragraph 4(1) of the First Schedule to the Electoral Act, 2006 nor any pleaded in support of ground 1 of the petition; that no fact was pleaded to prove that the non-compliance, B if any, substantially affected the results of the election and that the lower court was right in relying on section 146(1) of the Electoral Act, 2006 to strike out ground 1 of the petition; that ground 4 of the petition did not disclose any cause of action or reasonable cause of C action against the 1st and 2nd respondents and urged the court to dismiss the appeal.

On the part of the 3rd and 4th respondents, it is submitted that the issues raised by the 3rd and 4th respondents in their motion were fundamental issues of jurisdiction which can be raised at the D preliminary stage of the proceedings or at any time in the proceeding; that the lower court was right in striking out grounds 2 and 3 of the petition for non-compliance with section 145(1) of the Electoral Act, 2006 by relying on section 146(1) of the Electoral Act, 2006 and urged the court to dismiss the appeal.

E The arguments on behalf of the 5th respondent are very similar to those of the other respondents earlier reproduced in this judgment.

There is no doubt, whatsoever, that grounds 1 and 4 of the F petition comply with section 145(1) of the Electoral Act, 2006 as found by the lower court. I therefore agree with it. The grounds for questioning an election are as stated in section 145(1) of the Electoral Act, 2006, as follows:-

“145(1)

G *An election may be questioned on any of the following grounds,*

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

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

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

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

It is clear that while ground 4 of the petition complied with section 145(1) (a) of the Electoral Act, 2006 ground 1 is in conformity with section 145(1) (b) of the said Act. It should however be noted that any of the grounds mentioned in section 145(1) of the Electoral Act, 2006 can vitiate an election if sustained by the tribunal/court. B

In other words, a petitioner needs to plead and prove either or any of the grounds, not all of them. It follows therefore that in the instant case even if grounds 2 and 3 are said not to be in conformity with section 145(1) of the Act, which I do not concede as they clearly complain against non-compliance with certain provisions of the Act or Constitution and therefore come under the ground of non-compliance with the provisions of the Electoral Act, 2006, if the appellant can establish either ground 1 or 4 of the petition, the election would be vitiated. The lower court however went on to strike out the two valid grounds on the ground that the appellant did not *"plead and prove"* that the non-compliance affected the result of the election as required under the provisions of section 146(1) of the Electoral Act, 2006. That finding is the crux of the appeal having regards to the stage in the proceedings when the ruling was made and the circumstances giving rise to same. C D E

The substance of the appeal is therefore whether the lower court is right in holding that the appellant did not plead and prove facts to show that the non-compliance complained of substantially affected the result of the election. Or having regards to the nature of the non-compliance complained of particularly non-serialization and binding of ballot papers which the court considered a valid ground for challenging the election, there is the need to further plead and prove how the non-compliance affected substantially the result of the election. F G

There is no doubt that the appellant, in ground 1 of the petition pleaded non-compliance with the Electoral Act, and gave particulars in that the ballot papers used in the election were neither serialized nor bound in booklet form. The fact of non-serialization is also stated in paragraph 21 of the statement on oath of Dr. Paul Dike. H

Section 146 (1) of the Electoral Act, 2006 relied upon by the lower court provides as follows:-

"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”.

From the above provisions, it is very clear and I hold the considered view that the section cannot be used as a ground of preliminary objection as it is clearly applicable after evidence has been called by the parties and the court is at the stage of determining the petition. The section applies when the court or tribunal is evaluating the evidence before it on non-compliance with the provisions of the Act and after address by counsel; it cannot come into play before that as it is the duty of the court to be satisfied or for it to “appear” to the court that an 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. There must therefore be facts to prove the evidence of which is usually produced at the trial or hearing of the petition.

That apart, I do not agree that there is any duty on a petitioner in addition to pleading non-compliance with the principles of the Act to further plead that the non-compliance substantially affected the result of the election in every case of non-compliance as it is not every non-compliance that would affect the result of an election. There are certain non-compliances that go to the root of an election in that they are absolute in the sense that once established the purported election is invalid and as such there would be no result to be substantially affected by the non-compliance. For instance where an election is conducted with an invalid voters register can there be a result of an election to be substantially affected by the non-compliance? Obviously none as the purported election is null and void *ab initio*.

Secondly, voting is by ballot papers. It is the ballot papers cast in an election that is counted at the end of the election to determine the winner and loser(s) of the election, which is, the result of the election. The Electoral Act, 2006 makes provisions for ballot papers and determines what a valid ballot paper is. In section 45(2) of the Act, a valid ballot paper must be printed in booklet form and serialized. Where ‘ballot papers’ used in an election are alleged not to be serialized or in conformity with section 45(2) of the Act, they are in

law, not ballot papers as they are invalid.

Consequently any election conducted with invalid ballot papers is a nullity and you cannot expect any result to come out of such an election as, in law, you cannot have something out of nothing; that is in accord also with common sense. Section 67(1) of the Act provides clearly that an invalid ballot paper cast at an election is not to be counted as vote. In the instant case all the ballot papers used at the election in question are alleged to be invalid by reason of non-compliance with the Act. Where then is the result of the election to be affected substantially by the non-compliance? Obviously none!

That apart, I hold the view that the duty to plead and prove that the non-compliance did not affect substantially the result of the election, where relevant, lies with the respondent as it would be the respondent that would lose since the non-compliance of the nature of non-serialization of ballot papers erodes the foundation of the electoral process leaving the election with no result recognized by law.

Thirdly, can there be valid election where there is total failure to accredit voters at an election? I hold the considered view that once a petitioner is able to prove that there was no accreditation of voters in an election, that election is invalid *ab initio*.

Furthermore, it is settled law that the court does not decide the merit of a case at the interlocutory stage of the proceedings. Where the court errs and decides the substantive matter at the interlocutory stage, as in the instant case, the proper thing is to set aside the purported determination and remit the matter to the lower court for proper determination on the merit by a different panel.

In the instant case, the application of section 146 (1) of the Electoral Act, 2006 to the preliminary objections was *suo motu*. It is not the law that a court cannot raise an issue *suo motu* but that if the issue is necessary for the determination of the matter before it, the court must call on the parties or their counsel to address it on same before basing its decision on it. In the instant case, the lower court did not call on counsel for either party to address it on section 146(1) of the Electoral Act, 2006 when the objections were not based on the said section by the objectors. By not inviting counsel for the appellant to address it on that provision of the Act, the lower court denied the appellant of his right to fair hearing when it proceeded to base its decision on that provision thereby rendering the decision liable to be

set aside.

The electoral laws of this country, like every other law, are made to be obeyed for the benefit of all and sundry. That is why it is a matter of much concern that elections can be conducted in this country without valid ballot papers yet the non-compliance is held as not affecting substantially the result of the election. Or that a petitioner has failed to prove that the use of invalid ballot papers in the conduct of a presidential election has not affected substantially the result of the election. The question is: *which election?* There can be no valid election without the use of valid ballot papers. Where the ballot papers used are invalid, the election is invalid and therefore no result to be declared or to be affected substantially by the said non-compliance. What is invalid remains invalid or null and void.

It is for the above stated reasons that I find myself unable to agree with the lead judgment of my learned brother TABAI, JSC, which I have had the benefit of reading in draft.

It is my considered view that the appeal is meritorious and is allowed by me. I set aside the judgment of the lower court and remit the matter to that court for hearing and determination on the merit by another panel to be constituted by the President of the Court of Appeal.

I however make no order as to costs.

Appeal allowed.

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MUHAMMAD JSC

This appeal is as a result of election petition which was filed by the appellant herein as a petitioner before the Court of Appeal holden in Abuja sitting as a Presidential Election Petition Court, (I shall refer to that court or Election Tribunal simply as 'court below', for ease of reference in this judgment). The reliefs claimed by the petitioner against the respondents read as follows:-

"1. DECLARATION that by reason of the arbitrary failure of the 3rd respondent to display copies of the Voters List, publish supplementary Voters List Register and in the manner and form commanded by the Electoral Act, 2006, the said Presidential Election is null and void for non-compliance with the minimal requirements of due process sine qua non and condition precedent for the conduct of demo-

cratic election prescribed by law.

2. A DECLARATION that failure to conduct the said election at all in any place (no matter how remote or few the numbers of voters) is inimical to the concept and basis of equality under the law and violates the rights of the affected voter, (guaranteed by the Constitution) that they be not discriminated against. B

3. A DECLARATION that by the arbitrary manner the said election was conducted without regard to due process of law in all or any part of the country, or at all, amounts to nullifying the franchise and sovereignty of the people of Nigeria as a whole. C

4. A DECLARATION that the manner and form of the conduct of the said election was a usurpation of the franchise and sovereignty of the people.

5. A DECLARATION that the 1st and 2nd respondents were not qualified for Election to the office of President and Vice President D respectively, or at all.

6. AN ORDER nullifying and invalidating the return of Musa Yar'Adua and Goodluck Jonathan, the 1st and 2nd respondents herein, as President elect and Vice President elect, respectively.

7. AN ORDER nullifying the said election and commanding E the 3 defendant to conduct another election for the office of president of Nigeria in the manner and form prescribed by law, but without the 4th respondent as its Chairman.

8. AN ORDER of injunction commanding the 4th Respondent F to cease and desist from running the affairs of the 3rd respondent.

9. A DECLARATION that the declaration of the 1st and 2nd Respondents as winners of the said election is invalid, unconstitutional, null and void."

Upon service of the petition, the Law Firm of J. K. Gadzama & G Partners entered conditional-appearance (under protest) for the 1st, 2nd and 5th respondents. There was proof of service of the petition on the 3rd and 4th respondents. The petitioner filed a motion for judgment in default of defence on 5/7/07.

At the pre-hearing session held on 19/07/07, the chambers of H J, K. Gadzama & Partners applied orally to withdraw their appearance entered on behalf of the 1st and 2nd respondents. Dr. Izinyon, SAN, undertook to accept service on behalf of the 1st and 2nd respondents. The 3rd and 4th respondents got extension of time within

which to file their defence.

The 1st and 2nd respondents on the 3rd day of August, 2007 filed a motion praying the court below to dismiss and/or strike out the petition. One of the grounds upon which the motion was premised was that the petition was defective and in clear breach of the express provisions of the Electoral Act, 2006.

The 3rd and 4th respondents filed a Notice of Preliminary Objection seeking an order dismissing the petition on some grounds among which is that the petitioner has not disclosed any reasonable cause of action against the respondents, the petition having failed woefully to disclose any constitutional disqualification against the 1st and 2nd respondents who have not been shown to be disqualified to contest election into any office in Nigeria, particularly election into the office of President and Vice President respectively.

In reply to the points raised by the 1st and 2nd respondents in their motion of 3/8/07, the petitioner raised some preliminary issues as well.

In its Ruling, the court below found the preliminaries and the objection raised by the petitioner and the 1st and 2nd respondents respectively, to be of no moment and overruled same. It considered the application of the 1st and 2nd respondents on the merit and, at the end, it found the petition to be incompetent and it struck it out. This appeal stemmed from that ruling.

In his brief of argument before this court, learned counsel for the appellant set out four issues for determination. They read as follows:-

"1. Was the Court of Appeal right to hold that grounds 2 and 3 of the petition do not conform or relate to "any of the 4 grounds set out in section 145(1) of the Electoral Act" and without considering the petitioner's submissions or examining the relevant provisions of the Electoral Act?"

2. Was the Court of Appeal right to rely on section 146 of the Electoral Act, 2006 to strike out ground 1 of the petition after holding that the said ground was competent?"

3. Having found that the said 4th ground of the petition was competent, was the Court of Appeal right to decide the said ground of the petition suo motu on its merit whereby it struck out the said ground of the petition?"

4. *Whether the approach adopted by the Court of Appeal in reaching its decision to strike out the petition has occasioned a miscarriage of justice?"*

In their joint brief of argument, the 1st and 2nd respondents formulated the following issues:-

"1. *Whether the lower court was right to have considered and upheld the Preliminary Objections filed by the 1st, 2nd, 3rd and 4th respondents challenging the competence of the Appellant's Petition filed in breach of relevant provisions of the Electoral Act, 2006, at the stage it did.*" ^B

2. *Whether the Lower Court was right to have held that Grounds 2 and 3 do not conform or relate to any of the 4 grounds set out in Section 145(1) of the Electoral Act 2006 and Proceeded to strike out the said grounds in consequence?* ^C

3. *Whether the Lower Court was right to have placed reliance on Section 146 of the Electoral Act, 2006 to strike out ground 1 of the petition and on Section 137(g) of the 1999 Constitution to strike out ground 4 in limine after it had initially held that the said grounds were properly before it?"*

The 3rd and 4th respondents posed the following issues for determination:- ^E

"1. *Whether the preliminary objections raised by the respondents were of such nature as could be determined at the preliminary stage without the necessity of joining issues with the Petitioner on facts. (From Ground 1 of the Notice of Appeal).*" ^F

2. *Whether it was of any moment for the Lower Court to consider the affidavit in support of the applications of the 1st and 2nd respondents in the determination of their preliminary objection. (From Ground 2 of the Notice of Appeal)* ^G

3. *Whether the Lower Court was right to have struck out Grounds 2 and 3 of the petition for non-compliance with Section 145(1) of the Electoral Act, 2006. (From Ground 3 of the Notice of Appeal).*

4. *Whether the Lower Court was right in relying on section 146 of the Electoral Act, 2006 to hold that the Petitioner failed to show substantial non-compliance with the Electoral Act, sufficient to affect the result of the election. (From Ground 4 of the Notice of Appeal).* ^H

5. *Whether the Lower Court was right, at that stage of the proceedings, to consider the issue raised in Ground 4 of the petition relating to whether or not the 1st and 2nd respondents were public servants. (From Ground 5 of the Notice of Appeal)."*

The 5th respondent formulated one issue. It reads as follows:-

B *"Whether the Court below was right to decide the petition as it did by way of the preliminary objection and application brought by the respondents and if this is answered in the negative whether the same occasioned a miscarriage of justice."*

C After having studied the issues raised by each of the parties to this appeal, I find the issues of the appellant comprehensive enough to take care of all other issues raised by the respondents.

D Appellants issue No. 1 questions whether the court below was right to hold that Grounds 2 and 3 of the petition do not conform or relate to any of the four grounds set out in section 145(1) of the Electoral Act. This issue tallies with issues 2 and 3 of the 1st and 2nd and 3rd and 4th respondents issues respectively. I reproduce here-under grounds 2 and 3 of the appellant's petition.

"GROUNDS 2

E The said Election did not meet the minimal requirement of Electoral democracy and the law and the Electoral Act, 2006.

PARTICULARS

F a) "Voting was not done in secret. For the first time in the History of Elections in Nigeria no polling booths were provided by the 3rd respondent and the voters voted in public and also cast their votes in public.

G b) Military men were used by the Commander-in-chief who like the 1st respondent, belongs to the 4th respondent and who was the campaign-in-chief of the 1st Respondent, to intimidate the electorate(s) throughout Nigeria.

c) The agents of the petitioner and other agents of other opposing Presidential candidates were not allowed to witness the collation or counting of votes or the compilation of results,

H d) Your petitioner was not allowed by the 3rd Respondent into the offices of the 3rd respondent in Anambra state to observe the compilation of result.

GROUNDS 3

Rudimentary requirements of fairness and equal treatment pro-

vided by the Constitution and the Electoral (sic) were not extended to the Petitioner and to potential voters in Anambra, Imo, Abia, Enugu and Ebonyi States.

PARTICULARS

a) Voting did not take place in more than 98% of the polling stations in the said states at all and the right to vote, the initial allocation of the franchise to the potential voters in those states was lost as a result of the arbitrary and discriminatory conduct of the 3rd Respondent.

b) Presidential Election has Nationwide Constituency and failure to give any voters their right of franchise nullifies the entire election because there is no divided sovereignty for the election of a President or at all.

c) The 4th Respondent announced on air that elections for the office of President would in compliance with sections 47 and 48 of the Act take place between 10:00 a.m. and 3:00 p.m. throughout Nigeria, but no voting took place in the said zone on the said date and zone except at night In less than 2% of the polling stations in the zone where the 5th Respondent's governorship candidates "voted" at night in their homes."

Section 15(1) of the Electoral Act, 2006 provides as follows:

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

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

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

c) That the respondent was not 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

The holding of the court below being challenged vis-a-vis the above quoted grounds of the petition and section. 145(1) of the Electoral Act reads as follows:-

"The Petition in the instant case has set out grounds of the petition and has in each ground tied and particularized facts under pinning or founding the said grounds. S. 145(1) of the Electoral Act 2006 sets out and delimits the grounds upon which an election may

be questioned. There are four grounds set out in the said section. Ground 1 of the petition clearly conforms with S. 145(1)(b) of the Electoral Act while ground 4 conforms with S. 145(1)(a) of the Electoral Act. Ground 2 and 3 (sic) do not conform or relate to any of the four grounds set out in S. 145(1) of the Electoral Act and are hereby
 B *struck out”*

In his submission on issue one, learned counsel for the appellant argued that the petitioner in ground 2(a) of the petition complained that contrary to sections 53(1) and 53(4) of the Electoral Act
 C which guarantee that voting should be done in secret and the ballots cast in the open, there was no secrecy in the exercise of franchise throughout Nigeria during the said election as no polling booths were provided by the 3rd and 4th respondents with the result that both voting and casting of the ballot took place in public. With regard to
 D ground 2(b) of the said petition the complaint is that voters throughout Nigeria were intimidated by military men. In other words, the election was not “conducted in accordance with the principles of the Electoral Act” contrary to section 146(1) of the Act. Learned counsel cited the case of Buhari v. Obasanjo (2005) 2 NWLR (Pt.910) 241 at
 E p.441 to say that the “finding” by the PCA, Abdullahi has become part of our Judge - made law that the use of armed personnel in elections violates the principles of the Electoral Act. Learned counsel contended further that in grounds 2[c] and [d] of the petition the
 F petitioner complained that contrary to the right conferred on him and his polling agents by sections 4G(1) and (2) and 65 of the Act, neither the petitioner nor his agents could exercise the right of participating in and observing the counting and collation of votes throughout Nigeria because they were prevented from doing so. The 3rd
 G respondent, alleged the petitioner, did not allow of results in Anambra State, neither were they in a position to countersign the results or demand for a recount as provided under section 65 of the Act, As a result, the election was by virtue of section 145(b) of the Act rendered invalid by reason of non-compliance with the provisions of the
 H Act. Further, sections 43, 47, 48, 49 and 50 of the Act were not complied with as well.

On ground 3 of the petition, learned counsel for the appellant submitted that all the three particulars of the 3rd ground of the petition raise fundamental Constitutional issues that the fundamental con-

stitutional and Electoral Act requirements dealing with the franchise of the people of Anambra, Imo, Abia, Ebonyi and Enugu States were violated. This is because, according to the learned counsel for the appellant, voting did not take place at all in the said zone, which is a clear breach of section 48 of the Act. There was no breach of the peace or natural disaster and emergencies as contemplated by section 145(1) of the Act, Learned counsel argued further that there was a breach of section 132(4) of the Constitution which provided that in election for the office of the president, the whole federation shall be regarded as one Constituency, Submissions for the appellant were made on these points but the court below did not consider them. B
C

There are various submissions made by both learned counsel for the 1st and 2nd respondents and learned counsel for the 3rd and 4th respondents in respect of issue No.1, I tried to summarise their submission as follows that the lower court was in order when it held that the said grounds i.e. grounds 2 and 3 of the petition do not conform and were indeed alien to the statutory grounds provided by section 145(1) of the Electoral Act and the Constitution, that any challenge to the conduct or outcome of an election must be brought in accordance with the express and mandatory provisions of the Act. Each of the learned counsel for the respective respondents cited and relied on S.140(1) of the Act that the appellant grounds 2 and 3 which did not question any of the grounds stated in section 145(1)(a) - (d) of the Act were not initiated by due process of law thereby deprived the lower court of competence to entertain them. The cases of Madukolu. v. Nkemdilim (1962) 1 All NLR 587; Magaji v. Matari (2000) 5 SC 46 at 57 were cited. The court below, it was further argued, was right in its holding when it struck out grounds 2 and 3 of the petition. D
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Compliance, ordinarily, is an act of complying or acting in accordance with wishes, requests, commands, requirements, conditions or orders. It is an act of yielding or conformity with the requirements or order. Henry Campbell Black, puts it simply as an act of "*submission; obedience; conformance.*" H

Thus, where there is non-compliance, it postulates reversal of all such definitions. In the Electoral Act, section 145(1)(b) stipulates as a ground upon which an election can be questioned where non-

compliance with the provisions of the Act has been alleged.

The main contention of learned counsel for the appellant is that the election was not conducted in accordance with the principles of the Electoral Act, contrary to section 146 of the Act. In other words, there was non-compliance with the provisions of the Act. One may pose some questions at this juncture: (a) what is the nature of the non-compliance? (b) what is the effect, if any, of the non-compliance on the result of the election vis-a-vis the provisions of the Act? To answer these questions, it is pertinent for me to revisit grounds 2 and 3 as set out in the petition.

"GROUND 2

The said Election did not meet the minimal requirement of the Electoral democracy and the law and the Electoral Act, 2006.

This ground was accompanied by four particulars:

e) *Voting was not done in secret. For the first time In the History of Elections In Nigeria no polling booths were provided by the 3rd respondent and the voters voted in public and also cast their votes in public.*

f) *Military men were used by the Commander-in-chief who like the 1st respondent, belongs to the 4th respondent and who was the campaign-in-chief of the 1st Respondent to intimidate the electorate(s) throughout Nigeria.*

g) *The agents of the petitioner and other agents of other opposing Presidential candidates were not allowed to witness the collation or counting of votes or the compilation of results.*

h) *Your petitioner was not allowed by the 3rd Respondent into the offices of the 3rd respondent in Anambra state to observe the compilation of result,*

GROUND 3

Rudimentary requirements of fairness and equal treatment provided by the Constitution and the Electoral (sic) were not extended to the petitioner and no potential voters in Anambra, Imo, Abia, Enugu and Ebony States.

Three particulars accompanied this ground. They read as follows:-

a) *Voting did not take place in more than 98% of the polling stations in the said states at all and the right to vote, the initial allocation of the franchise to the potential voters in those states was lost as*

a result of the arbitrary and discriminatory conduct, of the 3rd Respondent.

b) Presidential Election has Nationwide Constituency and failure to give any voters their right of franchise nullifies the entire election because there is no divided sovereignty for the election of a President or at all. B

c) The 4th Respondent announced on air that elections for the office of President would in compliance with sections 47 and 48 of the Act take place between 10:00 am, and 3:00 p.m. throughout Nigeria, but no voting took place in the said zone on the said date and zone except at night in less than 2% of the polling stations in the zone where the 5th Respondent's governorship candidates "voted" at night in their homes," C

The court below found these grounds not in conformity/compliance with the grounds set out by section 145 of the Act. In other words, grounds 2 and 3 of the petition were incompetent and were struck out. That, in my view, was the right thing done by the court below. The court below did not bother itself to go into the merits of the 2 grounds as that would indeed amount to academic discourse which courts of law refrain from entertaining. See: Global Transport Oceanics S. A. & Anor v. Free Enterprises Nig. Ltd. 2001) 2 SCNJ. 224; Justice K, O. Anya v. Imo Concorde Hotels Ltd. & Ors (2002) 12 SCNJ 145. E

It is true that from the grounds set out by section 145 of the Act, (which I reproduced earlier), the expression "*meeting the minimal requirement of electoral democracy*", was never used in that section as a ground. Furthermore, "*rudimentary requirements of fairness and equal treatment*", as given by ground 3 of the petition, cannot trace its way to the grounds set out by section 145 of the Act. Thus, the two grounds are alien and totally strange and unknown to the clear and unambiguous grounds set out by section 145(1) of the Act. The failure of the two grounds to conform with the statutory provisions of the Act is fatal to their competence ab initio which makes them defective and liable to be struck out. The court below was perfectly in order when it brevi manu discountenanced the said grounds of appellant's petition, which, in my view, failed to give rise to any reasonable cause of action under the Act. They were not initiated by due process of law thereby depriving the court below of any compe- F G H

tence to entertain them. See: Madukolu v. Nkemdilim (supra); Magaji v. Matari (supra). Although election cases are sue generi; the general law is that procedures, or conditions provided by a statute within which a petition can be initiated, and except where the statute admits of exemptions, such procedures or conditions must be complied with in order to inject life into the petition. Thus, claims or petitions must be made within the dictates of the statutory procedures. Where grounds set out in an election petition are not in conformity with the provision of section 145 of the Act, those grounds are liable to be struck out for incompetence. This is because such ground(s) are the initiating processes which ab initio must be solid, valid and competent: The situation in this appeal is quite distinguishable from the situation where non-compliance with the provisions of the Act without more (where the proceedings have been commenced) may not be sufficient to invalidate an election. See generally: Buhari V. Obasanjo (2005) 2 WLR (pt 910) 241; Yusuf V. Obasanjo (2005) 18 NWLR (pt 956) 96.

On the issue of reliance by the court below on section 146 of the Act, to strike out grounds 1 & 4 of the petition, it is pertinent to quote once again the relevant part of the court below's ruling:-

"Section 145(1) of the Electoral Act 2006 sets out and delimits the grounds upon which an election may be questioned -Ground 1 of the petition clearly conform(s) with S. 145(1)(a) of the Electoral Act."

The argument of learned counsel for the appellant is that there is a finding by the court below that grounds 1 and 4 of the appellant's petition conformed with the provisions of section 145(1)(a) and (b) of the Electoral Act but yet it struck out the petition. The reason for striking out as submitted by learned counsel for the appellant was perverse and totally misconceived. It was wrong of the court below to demand that the appellant should plead, prove and establish anything in his petition in line with section 146 of the Act. Again none of the respondents relied on section 146 of the Act to challenge the competence of the petition for the good reason that the said section is inapplicable and even the Court of Appeal itself correctly found that it is section 145(1) that delimits the grounds upon which an election may be questioned. The Court of Appeal it was submitted further should have invited views of all the parties before placing

reliance on section 146 of the Act to strike out the petition. Learned counsel cited the case of Kuti v. Balogun (1978) 1 SC 56 at page 60. Learned counsel argued further that the Court of Appeal in its ruling did not refer to the all important requirement that the dominant substantial non-compliance under section 146 of the Act is non-compliance with the principles of the Act. He cited examples that ground 1 [a] [b] and [c] of the appellant's petition complained that copies of voters list were never displayed, that the supplementary voters list Register was never published and that the ballot papers for the election were not numbered serially as commanded by the Act. These violations were country wide. And, without doubt, learned counsel maintained, an election in which the above complaints obtained, had no integrity and was not even minimally in accordance with the principles of the Electoral Act. B C

Learned counsel for the appellant made further submissions D that the Court of Appeal cannot be right to say that the petitioner had not pleaded sufficient facts to establish the substantiality of the effect of the alleged non-compliance with the Electoral Act on the result of the Election under section 146 of the Act. Section 146 of the Act did not place any burden of pleading or pretrial proof on the petitioner or at all. It only deals with the evaluation of evidence after proof. Furthermore, with regard to ground 1(d) of the petition, the complaint is that the Revision of the Register did not take place in the 5 South Eastern States. This learned counsel argued, is a violation of various Constitutional provisions which cannot be subsumed under section 14b of the Act. Non-compliance with any Constitutional provisions is always and automatically substantial and renders the conduct complained of null and void. The case of Ogbonna v. A. G. Imo State (1992) 1 NWLR (Pt.220) 647; was cited. Equally, there was general non-compliance with the demands of Sections 10, 20, 21 and 45(2) of the Act and sections 2(1), 132(4), 132(5) and 134(2)(b) of the 1999 Constitution. On the state of pleadings the Onus of proof is on the 3rd and 4th respondents to 'establish' that they carried out their statutory functions. Learned counsel finally on this issue, submitted that the Court of Appeal was clearly wrong to rely on section 146 of the Act to strike out the petition and to prejudicially predetermine the petition, which it found to be competently before it and section 146 of the Act only comes into play at the trial. E F G H

Learned counsel for the 1st and 2nd respondents made his submissions on this issue in his issue three. He argued that on the state of our laws, the lower court was right to have relied on section 146[1] of the Electoral Act 2006 to strike out ground 1 of the petition and on section 137[g] of the 1999 Constitution to strike out
 B ground 4 in limine after it had held that both grounds fall under section 145(1)(a), [d] of the Act. He submitted further, that section 146[1] of the Act gives a court or Tribunal the discretion to strike out any petition questioning the validity of an election on grounds of
 C corrupt practices or non-compliance with the provisions of the Act if it appears to the Court or Tribunal 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. Furthermore, the appellant did not plead facts in his petition that
 D linked the 1st and 2nd respondents to any corrupt practices, irregularities and or non-compliance.

On the striking out of ground 4 of the petition, learned counsel for 1st and 2nd respondents submitted that based on the unequivocal and unambiguous provisions of section 137[g] of the 1999
 E Constitution the lower court was right when it agreed with the submission of counsel particularly that of the 3rd and 4th respondents that no reasonable cause of action was disclosed under this ground against the 1st and 2nd respondents. Submitted further is that the 1st
 F and 2nd respondents were not employed into the public services of their respective states as alleged by the appellant. Thus, no reasonable cause of action was disclosed against the 1st and 2nd respondents, Cases of Fadare v. A. G. Oyo State (1982) 4 SC 1; Okubule v. Oyagbola (1990) 4 NWLR (Pt.147) 723, among others, were cited
 G in support. This court is urged upon to resolve this issue in favour of the 1st and 2nd respondents.

It is the submission of learned SAN for the 3rd and 4th respondent that the lower court was in order to rely on section 146[1] of the Act to achieve a harmonious understanding and interpretation of
 H section 145[1][b] and the court below committed no error at all to have made reference to and relied on section 146[1] of the Act to strike out the petition.

Learned SAN for the 5th respondent in his submission on the issue of non-compliance with the Act stated that it is customary for a

court called upon to determine where any of the grounds of a petition is sustained whether evidence adduced for such grounds is capable of affecting the result of the election thereby proving that the election was conducted in non-compliance of the provisions of the Act. It is at that juncture that section 146 of the Act is called into play. Further, the discussion of section 146(1) of the Act by the Court without calling upon the parties to address it is not sufficient to vitiate the decision of the lower court. He argued that the petition did not disclose a reasonable cause of action. Learned counsel cited and relied on several authorities to buttress his submissions. He urged this court to dismiss the appeal.

Section 146(1) of the Electoral Act, 2006 provides as follows:-

“146(1) An Election shall not be liable to be invalidated by reason of non-compliance with 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.”
(underline supplied by me)

Section 137(g) of the Constitution of 1999, provides as follows:-

“137. A person shall not be qualified for election to the office of President if:

[g] being a person employed in the Civil or Public service of the Federation or of any state he has not resigned, withdrawn or retired from the employment at least thirty days before the date of the election” (underlining supplied by me)

Grounds 1 and 4 of appellant's petition read as follows:

“GROUND 1

The election in which the 1st and 2nd respondents were declared winners was not conducted in compliance with the 1999 Constitution and the Electoral Acts [sic] 2006.

PARTICULARS

- a) Copies of voters list was never displayed.*
- b) Supplementary voters list Register was never published.*
- c) The ballot papers for the said election were not numbered serially as commended by law.*
- d) Alternatively, if any voters Register was never published within the stipulated time, but in any event, it was never displayed or*

published in the South East Zone of the country at all. Your petitioner will rely on the unanswered advertorial complaint of OHANEZE in the Vanguard Newspapers of April, 12, 2007.

GROUND 4

The 1st and 2nd respondent [sic] are not qualified to contest for election to the office of President and Vice President, respectively, because having been employed by the people of Katsina and Bayelsa States as their Chief Public Servant (sic) or Chief Executives they did not, contrary to section 137[g] of the 1999 Constitution resign or withdraw from their offices as executive governors at all prior to the said Presidential Election."

In respect of the two grounds i.e. grounds 1 and 4 of appellant's petition as set out above, the court below, in its ruling, per Agbo, JCA, held as follows:-

"A party who founds his petition on the ground of substantial non-compliance with the provisions of the Electoral Act must not only plead and prove substantial non-compliance but must also pursuant to the provision of section 146 of the Electoral Act plead and prove that the non-compliance substantially affected the result of the election. Non-compliance with the provisions of the Act without more is not sufficient to invalidate an election. See: Buhari v. Obasanjo (2005) 2 NWLR (Pt. 910) 241; Yusuf v. Obasanjo (2005) 18 NWLR (Pt.956) 96. It follows that where insufficient facts or none at all are pleaded to establish substantial effect of the non-compliance on the result of the election, no reasonable cause of action has been made out. I have carefully perused the petition and no where have I seen pleaded facts establishing the substantiality of the effect of the alleged non-compliance with the provisions of the Electoral Act on the result of the election. Ground 1 therefore, cannot be sustained and it is hereby struck out.

Ground 4 of the petition challenges the qualification of the 1st and 2nd respondents to contest the April 2007 Presidential election on the basis that being employees in the public services of the Katsina and Bayelsa State Governments both candidates ought to have resigned their appointments at least 30 days before the date of the election pursuant to the provision of S.137[g] of the 1999 Constitution. These respondents did not according to the petitioner resign from their jobs as executives governors of the named states. State

Governors are, by the provision of Ss. 176 to 180 of the Constitution of the Federal Republic of Nigeria, 1999 elected by the peoples of their respective states. They are not employed by the people of their states there is no iota of law supporting that ground. It is premised on frivolity and disclose no reasonable cause of action and it is hereby struck out." B

I think the first thing I should do is to disabuse the mind of learned counsel for the appellant on the impression he held that there is a finding by the court below that both grounds 1 and 4 of the appellant's petition conformed with the provisions of section 145(1)(a) and (b) of the Act but yet it struck out these two grounds of the petition. Learned counsel should understand that compliance is completely a different thing and for that/those ground or grounds to give rise to a cause of action, the ground[s] must be accompanied by sufficient facts which reveal the substantiality of the non-compliance and the effect it has on the result of the election. Cause of action, of course must denote, in this matter, as well as in all civil matters, such facts that would be necessary for the petitioner/plaintiff to prove if traversed in order to support his right to the judgment of the court. This court, in the case of Egbue v. Araka (1988) 3 NWLR (Pt.84) 598 at p. 613 per Uwais, JSC (as he then was) defined a cause of action as follows: C D E

"It is settled that 'cause of action' means the fact or combination of facts which give rise to a right to sue. This right to sue consists of the wrongful act of the defendant which gives the plaintiff the right to complain and the damage consequent to the wrongful act," F

Many things are wrong with ground 1 of the petition: [i] there were no sufficient facts to ground the allegation of non-compliance with the Constitution and the Act, [ii] the facts stated therein were vaguely stated and in a general form. They were not direct and specific, [iii] they were limited to South - East Zone of the country whereas the federation of Nigeria stood as one Constituency in respect of a Presidential Election, [iv] whether the voters list both original and supplementary were not displayed all over the country or not so displayed only in these South - Eastern states, [v] no pleadings on the substantiality of the effect of the alleged non-compliance with the provisions of the Act. G H

Thus, by the scanty and imprecise facts in support of ground 1

of the petition, the appellant, as it appears to me, embarked on a wild goose-chase. Ground 1 of the petition contravenes the requirement of paragraph 4[1][d] of the First Schedule to the Act which provides:-

"4(1) *An election petition under this Act shall:- [d] state clearly the facts of the election petition and the ground or grounds on which the petition is based and the relief sought by the petitioner.*"

The petitioner is thus required as a matter of necessity to state in clear terms the facts giving rise to a ground or grounds upon which he based his petition. Anything short of that renders the ground or grounds ambiguous, vague and incomprehensive, capable of beclouding the mind of the respondent making him unable to understand what he is required to respond to. Where such a situation presents itself as in this appeal, the trial court has no alternative but to strike out such ground(s) or the petition/suit as the case may be. See: Emegokwue v. Okadigbo (1973) 4 SC 113; George v. Dominion Flour Mills Ltd. (1963) 1 All MLR 71; Buhari v. Obasanjo (supra); Yusuf v. Obasanjo (supra). Secondly, the facts given, especially in particular (d) of ground 1 were limited to a particular zone of the country. The country, it is judicially noted, is divided into six geographical zones. What happened in the remaining five zones? Is it the same set of facts that were obtainable in these zones or not? Can the allegation of non-compliance in the only zone particularized by the petitioner affect the substantiality of the election conducted in the five remaining zones? I think the requirements of the law on the petitioner to present more sufficient and clearer facts is no more in doubt having regard to paragraph 4(1) (d) of the First Schedule of the Act. Thirdly, where there is an allegation by a petitioner of non-compliance with the provisions of the Act, both law and common sense require that "*substantial non-compliance*" be pleaded. Nothing of that sort happened in the petition under consideration. A court of law has no business to consider unpleaded facts. Where such facts are raised only at address level or in a brief of argument or by oral adumbration, they give rise to no issue and must be discountenanced. The court below, in my view, did the right thing by striking out ground one of appellant's petition.

Ground 4 of appellant's petition which was also struck out by the court below is challenging the competence of the 1st and 2nd

respondents that they were not qualified to contest election to the offices of President and Vice President respectively as they were governors of their various states when the election was conducted. Section 137[g] of the Constitution provides:

"137. A person shall not be qualified for election to the office of President if:

[g] being a person employed in the Civil or Public service of the Federation or of any state he has not resigned, withdrawn or retired from the employment at least thirty days before the date of the election" (underlining supplied by me)

The words underlined above have the connotation and are being used, more often than not in relation to a seasoned public officer or servant who holds his position by virtue of appointment, employment or promotion through regular public services of the Federation, a State or a Local Government. Such a person is employed under the normal rules and practices of employment/appointment/promotion and not elected. Appointment/employment and election are different terminologies with different meanings, rules, regulations and practices. What an elected person to a position may enjoy in terms of benefits, privileges or be deprived of may not be the same as those benefits, privileges and prohibitions in a public service of the Federation, State or Local Government. The two, certainly are not the same. I think there is a little misunderstanding or confusion in the mind of learned counsel for the appellant when he took the word "employed" or "employment" as used in section 137(g) of the Constitution to refer to persons occupying positions created by the Constitution or any other law but for which election is the only legal way to put such a person in that office. Black's Law Dictionary (Seventh Edition) has defined the word election to be the process of selecting a person to occupy a position or office, usually a public office. An election guarantees that each voter has right to vote according to his conscience and that is why electoral laws, regulations, rules are principally designed to ensure that there is free and fair election.

For a person or a citizen to occupy the office of President of the Federation or his Vice, the Constitution has set out requirements which the person undergoing election processes must satisfy. Section 131 of the Constitution states:-

"131 A person shall be qualified for election to the office of

President if:-

a) *he is a citizen of Nigeria by birth;*

b) *he has attained the age of forty years;*

c) *he is a member of a political party and is sponsored by that political party; and*

B d) *he has been educated up to at least School Certificate level or its equivalent.*

(underlining supplied)

C These are the requirements or qualifications for the mean time an aspirant to the office of President must attain.

Section 137(1) provides what can disqualify a citizen from becoming the President and by necessary intendment, the Vice President-

D *"137(1) A person shall not be qualified for election to the office of President if:-*

a) *subject to the provisions of section 28 of this Constitution, he has voluntarily acquired the citizenship of a country other than Nigeria or, except in such cases as may be prescribed by the National Assembly, he has made a declaration of allegiance to such other country; or*

E b) *he has been elected to such office at any two previous elections; or*

F c) *under the law in any part of Nigeria, he is adjudged to be a lunatic or otherwise declared to be of unsound mind; or*

G d) *he is under a sentence of death imposed by any competent court of law or tribunal in Nigeria or a sentence of imprisonment or fine for any offence involving dishonesty or fraud (by whatever name called) or for any other offence, imposed on him by any court or tribunal or substituted by a competent authority for any other sentence imposed on him by such a court or tribunal; or*

H e) *within a period of less than ten years before the date of the election to the office of President he has been convicted and sentenced for an offence involving dishonesty or he has been found guilty of the contravention of the Code of Conduct; or*

f) *he is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in Nigeria or any other country; or*

g) *being a person employed in the civil or public service of the*

Federation or of any State, he has not resigned, withdrawn or retired from the employment at least thirty days before the date of the election; or

h) he is a member of any secret society; or

I) 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 Tribunals 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; or

I) he has presented a forged certificate to the Independent National Electoral Commission."

The section has not mentioned a serving Governor. Thus, section 137(1)(a) of the Constitution as encapsulated in ground 4 of the petition does not contemplate a State Governor whether serving or former. Holding public office at any level of Federal, State or Local Government services has clearly been defined by the interpretation section of the Constitution i.e. Section 318(1) of the Constitution, in the light of the above therefore, Ground 4 of the petition is not a proper ground challenging the qualification of the 1st and 2nd respondents. The court below was right in discountenancing it.

The allegation of miscarriage of justice labelled against the court below can hardly find a resting place in my judgment.

For these and the more detailed reasons ably proffered by my learned brother, Tabai JSC, I too find no merit in this appeal and I dismiss same. I abide by all the consequential orders made in the judgment of my brother, Tabai, including the order of no costs.

ADEREMI JSC (DISSENTING)

This is an appeal against the ruling of the Court of Appeal [holden at Abuja] sitting as the Presidential Election Petition Tribunal delivered on the 3rd day of September 2007, whereby the learned Justices of the Tribunal upheld the preliminary objections of the 1st and 2nd respondents and the 3rd and 4th respondents and, consequently struck out the Petition on the ground, according to the said Tribunal, that it was filed in breach of the provisions of the Electoral Act, 2006 and for failure to disclose any cause of action.

Briefly, the facts of the petition are as follows; - the appellant, who was the petitioner before the Tribunal, was one of the candidates in the Presidential Election, held on the 21st day of April, 2007. He contested the said election on the platform of the party known and called All Progressives Grand Alliance (APGA). Aggrieved by the return of the 1st and 2nd respondents as the winners of the said election by the 3rd and 4th respondents, the appellant, as petitioner, filed a petition. The respondents entered their respective appearances and later filed their respective Replies to the petition. The joint reply of the 1st and 2nd respondents was filed on the 3rd of August 2007, the 5th respondent filed its Reply on the 2nd of August 2007 while the joint reply of the 3rd and 4th respondents was filed on the 3rd August 2007. Notices of Preliminary Objections were filed by all the respondents. Suffice it to say that the petitioner also brought an application for leave to issue interrogatories to the respondents. That application is still pending. The application of the 1st and 2nd respondents sub-joined to their joint reply filed on the 3rd of August 2007 urged the court below sitting as a Presidential Election Petition Tribunal to dismiss or strike out the petition on the grounds that the petition was defective and filed in breach of the provisions of the Electoral Act, 2006 and that some of the petitioner's prayers did not flow from the petition. In their own Notice of Preliminary Objection filed on the 3rd of August 2007, the 3rd and 4th respondents challenged the competence of the court below to entertain the petition. Their grounds for so doing are that the petitioner has not disclosed any reasonable cause of action against the respondent, the petition, according to them, having failed to disclose any constitutional disqualification against the 1st and 2nd respondents; that grounds 1,2 and 3 of the petition and the particulars thereunder did not show that the election was not conducted substantially in accordance with the principles of the Act or that the alleged non-compliance affected substantially the result of the election in the manner contemplated by the provisions of Section 145 (1) of the Electoral Act, 2006.

The Preliminary Objections of the 1st , 2nd , 3rd and 4th respondents were challenged by the petitioner. However, a similar Preliminary Objection brought by the 5th respondent was only served in the court on the day the objections of the other respondents were

argued, the counsel for the 5th respondent merely associated himself with the submissions of the counsel for the 1st, 2nd, 3rd and 4th respondents while undertaking to be bound by the ruling of the court below on same. In a reserved ruling delivered on the 3rd of September 2007, the court below upheld the preliminary objections and went ahead to strike out the petition. In so doing, the court below had reasoned: -

“The petition in the instant case has set out grounds of the petition and has in each ground tied and particularised facts underpinning or founding the said grounds. Section 145 (1) of the Electoral Act 2006 sets out and delimits the grounds upon which an election may be questioned. There are four grounds set out in the said section. Ground 1 of the petition clearly conforms with Section 145 (1) of the Electoral Act while ground 4 conforms with Section 145 (1) (b) of the Electoral Act. Grounds 2 and 3 do not conform or relate to any of the four grounds set out in Section 145(1) of the Electoral Act and are hereby struck out. But that is not the end of the matter. A party who founds his petition on the ground of substantial non-compliance with the provisions of the Electoral Act must not only plead and prove substantial non-compliance but must also pursuant to the provisions of Section 146 of the Electoral Act plead and prove that the non-compliance substantially affected the result of the election. Non-compliance with the provisions of the Act without more is not sufficient to invalidate an election. See Buhari v. Obasanjo (2005) 2 NWLR (Pt.910) 241; Yusuf v. Obasanjo (2005) 18 NWLR [pt.956] 96. It follows that where insufficient facts or none at all are pleaded to establish substantial effect of the non-compliance on the result of the election; no reasonable cause of action has been made out. I have carefully perused the petition and no where have I seen pleaded facts establishing the substantiality of the effect of the alleged non-compliance with the provisions of the Electoral Act on the result of the election. Ground 1 therefore cannot be sustained and it is hereby struck out.

Ground 4 of the petition challenges the qualification of the 1st and 2nd respondents to contest the April 21st, 2007 Presidential Election on the basis that being employees in the public services of the Katsina and Bayelsa State Government, both candidates ought to have resigned their appointments at least 30 days before the date of

the election pursuant to the provisions of Section 557 (g) of the 1999 Constitution. These respondents did not according to the petitioner resign from their jobs as Executive Governors of the named States. State Governors are, by the provisions of Sections 176 and 180 of the Constitution of the Federal Republic of Nigeria 1999 elected by the (sic) peoples of their respective State. They are not employed by the people of their States.

There is no iota of law supporting that ground. It is premised on frivolity and disclose no reasonable cause of action and it is hereby struck out." (Underlining mine for emphasis)

Being dissatisfied with the said ruling of 3rd September, 2007 the petitioner appealed to this court by way of the Notice of Appeal dated and filed on 19th September, 2007. The said Notice contains five grounds of appeal. The appellant has distilled four issues therefrom for determination by this court. Set out in his brief of argument filed on the 5th November, 2007, they are in the following terms: -

"(1) Was the Court of Appeal right to hold that Grounds 2 and 3 of the petition do not conform or relate to 'Any of the 4 Grounds set out in Section 145 (1) of the Electoral Act' and without considering the petitioner's submissions or examining the relevant provisions of the Electoral Act?

(2) Was the Court of Appeal right to rely on Section 146 of the Electoral Act, 2006 to strike out Ground 1 of the petition after holding that the said ground was competent?

(3) Having found that the said Ground 4 of the petition was competent, was the Court of Appeal right to decide the said ground of the petition suo motu on its merit whereby it struck out the said ground of the petition?

(4) Whether the approach adopted by the Court of Appeal in reaching its decision to strike out the petition has occasioned a miscarriage of justice?"

On their part, the 1st and 2nd respondents raised three issues for determination and as contained in their joint brief of argument, they are as follows: -

"(1) Whether the lower court was right to have considered and upheld the preliminary objections filed by the 1st, 2nd, 3rd and 4th respondents challenging the competence of the appellant's petition filed in breach of relevant provisions of the Electoral Act, 2006,

at the stage it did.

(2) *Whether the lower court was right to have held that Grounds 2 and 3 do not conform or relate to any of the four grounds set out in Section 145 (1) of the Electoral Act, 2006 and proceeded to strike out the said grounds in consequence?*

(3) *Whether the lower court was right to have placed reliance on Section 146 of the Electoral Act, 2006 to strike out Ground 1 of the petition and on Section 137 (g) of the 1999 Constitution to strike out Ground 4 in limine after it had initially held that the said grounds were proper before it?"*

The 3rd and 4th respondents have also raised five issues for determination in this appeal. As contained in their joint brief of argument, they as follows:-

"(1) *Whether the preliminary objections raised by the respondents were of such a nature as could be determined at the preliminary stage without necessity of joining issues with the petitioner on facts?*

(2) *Whether it was of any moment for the lower court to consider the affidavit in support of the applications of the 1st and 2nd respondents in the determination of their preliminary objection?*

(3) *Whether the lower court was right to have struck out grounds 2 and 3 of the petition for non-compliance with Section 145 (1) of the Electoral Act, 2006?*

(4) *Whether the lower court was right in relying on Section 146 of the Electoral Act, 2006 to hold that the petitioner failed to show substantial non-compliance with the Electoral Act, sufficient to affect the result of the election?*

(5) *Whether the lower court was right, at that stage of the proceedings, to consider the issue raised in ground 4 of the petition relating to whether or not the 1st and 2nd respondents were public servants?"*

The 5th respondent identified only one issue for determination and as gleaned from its brief of argument deemed properly filed on the 13th of May 2008, it is as follows: -

"Whether the court below was right to decide the petition as it did by way of preliminary objection and application brought by the respondent and if this is answered in the negative; whether the same occasioned a miscarriage of justice?"

When this appeal came before us on the 2nd of February 2009 for argument, the learned counsel for the appellant adopted his client's brief filed on the 5th of November 2007, the reply brief filed on 18th December 2007, the reply brief filed on 17th January, 2008 and the reply brief filed on 6th June, 2008 and urged that the appeal be allowed. Mr. Dodo, Senior Counsel for the 1st and 2nd respondents also adopted his clients' brief filed on 17th December, 2007 and urged that the appeal be dismissed. Mr. Efut, learned counsel for the 3rd and 4th respondents accepted his clients' brief filed on the 28th of November 2007 and also urged that the appeal be dismissed. Finally, Mr. Ozioko, learned counsel for the 5th respondent adopted his client's brief deemed to have been properly, filed on 13th May, 2008 and also urged that the appeal be dismissed.

I have had a close study of all the issues raised by the parties and it seems to me clear that the central theme is, whether there is any compliance by the petitioner through his petition with the provisions of the Electoral Act 2006 and whether it was proper for the petition to be struck out at that stage of the proceedings?

The appellant, arguing his issues Nos. 1 and 2 in his brief, submitted that contrary to the rights conferred on him and his polling agents by Sections 46 (1) and (2) and 65 of the Electoral Act, they were prevented from exercising the right of participating in, and observing the counting and collation of votes throughout Nigeria, indeed, he said he was not allowed to observe the compilation of results in Anambra State; thus compromising the integrity of the whole election as they could not countersign the results or demand for a recount as provided for by Section 65 of the Act. It was further submitted that his complaints in Grounds 2 (c) and 2 (d) of his petition show that the provisions of the Act were not complied with by the respondents and therefore, by virtue of Section 145 (b) of the Act, the election was invalid by reason of non-compliance with the provisions of the Act. He further submitted that he averred through ground 3 of his petition that fundamental Constitutional and Electoral Act requirements dealing with the franchise of the people of Anambra, Imo, Abia, Ebonyi and Enugu States were violated in that they were denied the requirements of fairness and equal treatment guaranteed by the Constitution as voting did not take place there. It was his further submission that had the court below compared the contents of

the petition with the provisions of the Act, it would not have arrived at the decision it reached. The appellant again submitted that the court below, having, in his view, rightly held that Ground 1 of the petition conformed with Section 145 (1) (b) of the Act particularly when that court held that the challenge of the respondents to the petition was limited to its regularity and that no evidence was required at that stage but suddenly made a VOLTE FACE, and relying on the provisions of Section 146 of the Act, to say that the petitioner was bound to “plead and prove” and establish substantial non-compliance at that stage which according to the said court below, was not done and it therefore proceeded to strike out that ground. B
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He reviewed all the processes filed and submitted that sufficient materials to establish the substantiality of the effect of the non-compliance with the Electoral Act on the result of the election under Section 146 of the Act had been laid in the said processes, examples to them are (1) non displaying of National Register of Voters, (2) not numbering the ballot papers serially; these allegations they further argued shift the onus on the 3rd and 4th respondents. It was further argued that having found ground 4 of the petition to be competent, it was wrong for the court below to later proceed to determine it on the proceedings: they relied on the decisions in (1) WILLIAM V. DAWODU (1988) 4 NWLR (pt.89) 189, (2) L.D.D.C. V. FAWEHINMI (1985) 7 S.C. (pt.1) 178 and KOTOYE V. CBN (1989) 1 NWLR (pt.98) 419. They finally urged that the appeal be allowed and that an order that the petition be heard by another Panel of Justices of the court below be made. D
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In reply to the submissions of the appellant as set out supra, the 1st and 2nd respondents submitted that from the factual circumstances of the case and position of the law relating to Election Petitions which are generally SUI GENERIS, the court below was right in upholding the preliminary objections in that the petition was not founded on the provisions of Section 145 (1) of the Electoral Act 2006 while placing reliance on the decision in NWABOCHI V. WOKOCHA GIFT & AN. (1998) 12 NWLR (pt.579) 522. As regards grounds 2 and 3 of the petition, it is their (1st and 2nd respondents) that they do not conform with the provisions of Section 145 (1) of the Electoral Act, 2006 when read objectively. Taking on their issue No. 3, the 1st and 2nd respondents submitted that being questions G
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of law with which the court below was enjoined to take judicial notice of under Section 74 of the Evidence Act and adopting the arguments of the 3rd and 4th respondents on these two grounds, the court below was on a 'firma terra in striking out grounds 1 and 4 of the petition, reliance was placed on such decisions as (1) EMEGOKWUE V. OKADIGBO (1973) 4 S.C. 113, (2) GEORGE V. DOMINION FLOUR MILLS LTD. (1963) 1 ALL N.L.R. 7, (3) FADARE V. A-G OYO STATE (1982) 4 S.C. 1 and (4) OKUBULE V. OYAGBOLA (1990) 4 NWLR (pt.147) 723.

The 3rd and 4th respondents have argued, through their joint brief of arguments, that the point under consideration here, being one of jurisdiction is a fundamental and radical question of law that can be raised at anytime and that once raised it must be determined one way or the other. Therefore it is unnecessary to wait for pleadings to be exchanged and issues joined before raising and resolving the issue of jurisdiction. The court below, they therefore submitted, were not duty bound to consider the affidavit in support of the application of the 1st and 2nd respondents. On their issue No. 3 relating to grounds 2 and 3 of the petition, It was their submission that the court below having examined those grounds critically, rightly held that they were extraneous to the legally cognizable grounds, and to that extent, were invalid and liable to be struck out while relying on Section 145 of the Electoral Act. On their issue No.4 reproduced supra, it was their submission that the court below thoroughly examined the provisions of Sections 140 (1), 145 (1) and 146 of the Electoral Act, 2006 and paragraph 4 (1, 2, 3 and 6) of the First Schedule to the Electoral Act, 2006 while considering the challenge to the competence of the petition and rightly came to the conclusion that the petitioners failed to show substantial non-compliance with the Electoral Act sufficient to affect the result of the election - Sections 145 (1) (b) and 146 (1) of the Electoral Act, 2006 were rightly relied upon, they further submitted that the decisions in LASISI FADARE & ORS V. A-G OF OYO STATE (1982) 4 S.C. 1 and ADIMORA V. AJUFO (1988) 3 NWLR (PT.80) 1 were quoted in support. As to their issue No 5 which questions the right of the lower court to consider the issue raised in ground 4 of the petition relating to whether or not the 1st and 2nd respondents were public servants or not, it was their submission that there were sufficient materials placed be-

fore the lower court to dwell on and that court, they further submitted, came to the right conclusion by striking out the said ground 4.

I have carefully read through the briefs of the 5th respondent - Peoples Democratic Party - they are saying nothing different from what the 1st, 2nd, 3rd and 4th respondents had submitted in their joint respective briefs of argument. They submitted, relying on the decision of this court in *LASISI FADARE & ORS V. A-G OF OYO STATE* (supra), that before evidence is taken, a court of first instance, on the application of one of the parties, may set the case for hearing, as preliminary points, as done in the instant case, any points of law raised in the pleadings and examine whether they substantively dispose of the whole action and thereupon proceed to dismiss the suit. This procedure, according to the 5th respondent, was correctly adopted in the case at hand. Suffice it to say that the 1st, 2nd, 3rd, 4th and 5th respondents urged that the appeal be dismissed.

As I pointed out supra, it is the preliminary objections taken out by the 1st, 2nd, 3rd, 4th and 5th respondents challenging the competence of the appellant's petition as they contended that the petition is defective in that it did not disclose any cause of action known to the Constitution of the Federal Republic of Nigeria 1999 and/or the Electoral Act, 2006. The Election Petition of the petitioner/appellant was filed on the 22nd May 2007. The 1st and 2nd and the 5th respondents filed their Replies to the said Petition. However, sequel to the 1st and 2nd respondents filing their joint Reply to the Petition on the 3rd August 2007, they had filed a process on the 28th of May 2005 which they captioned "1st and 2nd Respondents' JOINT MEMORANDUM OF CONDITIONAL APPEARANCE". The 5th Respondent has also earlier filed a process on the 28th of May 2005 which they captioned 5TH RESPONDENT'S MEMORANDUM OF CONDITIONAL APPEARANCE" and thereafter went ahead to file its Reply to the Petition on the 2nd of August 2007. I have not found any Reply filed by the 3rd and 4th respondents to the said petition. An application for a Preliminary Objection is akin to a Demurrer Application. The whole basis of a DEMURRER is, in effect, to short circuit the action and by a preliminary point of law, to show that the action founded on the writ of summons or originating summons or even statement of claim cannot be maintained. Going by the well-known rules of court, once a person has pleaded, as in the instant

case with respect to the 1st, 2nd and 5th respondents who filed Replies to the Petition, the time for demurrer is passed. They cannot then under the Rules of Court seek to raise, by way of preliminary objection, what they should have done earlier under the rules of Court by demurrer. See TRUSTEES OF THE NIGERIAN RAILWAY CORPORATION PENSION FUND V. AINA (1970) 1 ALL N.L.R. 283. The delivery of a statement of defence which has an equivalent in the Reply usually filed in opposition; petition, ipso facto indicates that the 1st, 2nd and 5th respondents in the instant matter have joined issues with (the petitioner) on the allegations of facts in the petition and have not admitted, as truth, the facts in the petition and have not admitted as truth the facts alleged. See MOBIL V. I.A.L. 36 INC. (2000) 6 NWLR (pt.659) 146. So, in law, the Notices of the Preliminary Objection filed by the 1st, 2nd and 5th respondents ought not to have been entertained. The preliminary objection of the 3rd and 4th respondents are on a firma terra, they have not filed any process indicating joining of issues.

Notwithstanding what I have said immediately supra, I shall now proceed to deal with the appeal on its merit. The starting point shall be the reproduction of the contents of the Grounds for bringing the petition as set out in paragraph 9 of the petition filed on the 22nd of May 2007 thus: -

"Para (9) Your Petitioner's GROUNDS for bringing this petition are as follows: -

GROUND 1

The election in which the 1st and 2nd respondents were declared winners was not conducted in compliance with the 1999 Constitution and the Electoral Act, 2006.

PARTICULARS

(a) Copies of Voters List was (sic) never displayed

(b) Supplementary Voters List Register was never published

(c) The ballot papers for the said election were not numbered serially as commanded by law

(d) Alternatively, if any, Voters Register was never published, within the stipulated time, but in any event displayed or published in the South East zone of the country at all. Your Petitioner will rely on the unanswered advertorial complaint of OHANEZE in the Vanguard Newspapers of April 12, 2007.

GROUND 2

The said election did not meet the minimal requirement of Electoral Democracy and the law and the Electoral Act, 2006.

PARTICULARS

(a) Voting was not done in secret. For the first time in the history of elections in Nigeria no polling booths were provided by the 3rd respondent and the voters voted in public and also cast their votes in public.

(b) Military men were used by the Commander-In-Chief who like the 1st respondent belongs to the 4th respondent and who was the Campaigner-In-Chief of the 1st respondent to intimidate the electorate throughout Nigeria

(c) The agents of the petitioner and other agents of other opposing Presidential Candidates were not allowed to witness the collation or counting of votes or the compilation of results.

(d) Your petitioner was not allowed by the 3rd respondent into the offices of the 3rd respondent in Anambra State to observe the compilation of results.

GROUND 3

Rudimentary requirements of fairness and equal treatment provided by the Constitution and the Electoral Act were not extended to the petitioner and to potential voters in Anambra, Imo, Abia, Enugu and Ebonyi States.

PARTICULARS

(a) Voting did not take place in more than 98% of polling stations in the said States at all and the right to vote, the initial allocation of the franchise to the potential voters in those States was lost as a result of the arbitrary and discriminatory conduct of the 3rd respondents.

(b) Presidential Election has nationwide constituency and failure to give any voter their right of franchise nullifies the entire election because there is no divided sovereignty for the election of a President or at all

(c) The 4th respondent announced on air that elections for the Office of the President would in compliance with Sections 47 and 48 of the Act take place between 10 am and 3 pm throughout Nigeria, but no voting took place in the said zone on the said date and zone where the 5th respondent's governorship candidates 'voted' at night

in their homes.

GROUND 4

The 1st and 2nd respondents are not qualified to contest for election to the Offices of President and Vice President respectively, because having been employed by the people of Katsina and Bayelsa States as their Chief Public Servants or Chief Executives, they did not, contrary to Section 137 (g) of the 1999 Constitution resign or withdraw from their offices as Executive Governors at all prior to the said Presidential Election."

As I have said earlier in this judgment, the respondents' argument is that the court below was right in upholding the preliminary objection, since, according to them, the petition was not founded on the provisions of Section 145 (1) of the Electoral Act and therefore Grounds 2 and 3 supra were rightly struck out; Ground 4, they further submitted, was properly struck out since all the materials the petitioner/appellant had made available to enable him prove that the 1st and 2nd respondents were not qualified to contest the election were what they deposed to in the processes filed by him, the court below, they argued, was right in holding that those materials did not meet the requirement of the law. They justified the striking out of Ground 1 on the ground that the petitioner/appellant did not plead, prove and establish the non-compliance in accordance with the provisions of Section 146 of the Act.

It is a fundamental principle of the law relating to election in this country that no election and return at an election shall be questioned in any manner other than by a petition complaining of an undue election or undue return in accordance with the provisions of the Constitution and the Electoral Act; Section 140 (1) of the Electoral Act, 2006 makes this very clear. Election petition, though SUI GENERIS, the cardinal principle of law which says that he who asserts must prove, applies to election petitions. I bear in mind the fundamental principle of law enunciated by a plethora of court decisions the like of FADARE (supra) that a court, on the application of one of the parties to the suit, may set down for hearing points of law raised against the suit and critically examine arguments canvassed together with the law relied upon by both parties and see whether at that stage, before evidence is led, it would not be proper, according to law, to see whether the suit should not be terminated in limine.

Let me however say that at the stage of terminating the suit, in limine, following preliminary objection brought, it is only the averments or depositions pleaded or deposed to by the plaintiff or the petitioner that will be taken into consideration; of course, along with the law or laws cited by both parties in the course of argument. I say this because it is now well established that in considering whether a court has jurisdiction to entertain a suit or not, it is the plaintiffs or petitioner's statement of claim or petition that must be critically examined. However, where issues have been joined by the parties, interest of justice, which must always be paramount to the adjudicator, demands that the case must proceed to trial, thus affording both parties the opportunity to call evidence. B
C

I shall now proceed to examine Sections 46 (1) & (2), 145 (1) (b) and 146 of the Electoral Act, 2006. Section 46 (1) & (2) captioned "Format of Ballot Papers" reads: D

"(1) Each Political Party may by notice in writing addressed to the Electoral Officer of the Local Government or Area Council appoint a person (in this Act referred to as a Polling Agent) to attend at each polling unit in the Local Government or Area Council for which it has candidate and the notice shall set out the name and address of the polling agent and be given to the Electoral Officer at least 7 (seven) days before the date fixed for the election. PROVIDED that no person presently serving as Chairman or Member of a Local Government or Area Council, Commissioner of a State, Deputy Governor, or Governor of a State, Minister or any other person holding political office under any tier of Government and who has not resigned his appointment at least three (3) months before the election shall serve as a polling agent of any Political Party, either at the Polling Station or at any centre designated for collation of results of an election. E
F
G

(2) Notwithstanding the requirement of Sub-Section (1) of this section, a candidate shall not be precluded from doing any act or thing which he has appointed a polling agent to do on his behalf under this Act."

Section 46 (1) & (2) is very much self-explanatory. It makes provision for the appointment of agents to attend each polling unit, as a watch-dog where a political party has a candidate; it also states, under the PROVISIO, the category of people who cannot be appointed as polling agents. The provision goes farther in subsection (2), to say H

that the candidate himself is not precluded from doing anything which a polling agent can do on his behalf. Without any doubt in my mind, the above provisions envisage the calling of evidence during trial. A critical study of Ground 2 of the petition conforms, in all material respect, with the provisions of the aforesaid Section 46 of the Electoral Act. What more, particulars a, b, c and d of Ground 2 which are mere amplifications of the said ground cannot be established other than by calling evidence, it is either the candidate, in this case the petitioner/appellant or any of his agents who must give evidence in proof of the allegations therein contained. Ground 2 (b) alone which, for the purpose of emphasis, reads: -

"The said election did not meet the minimal requirement of Electoral democracy and the Electoral Act, 2006.

PARTICULAR (b)

D Military men were used by the Commander-in-Chief who like the 1st respondent belongs to the 4th respondent and who was the campaigner-in-chief of the 1st respondent to intimidate the electorate throughout Nigeria"

constitutes a very serious allegation which qualifies the petition for trial. In my respectful view, Ground 2 aforesaid is a competent ground which, alone, can sustain the petition.

Section 145 (1) of the Electoral Act provides: Sub-Section (1)

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

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

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

G (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."

The provisions of Section 145 (1) as set out above can only be invoked after evidence has been led. Indeed, the provisions envisage a situation where trial has been concluded. They are not and can never be available for invocation at the hearing of preliminary objection; it is only after evidence has been led in proof of the different averments in the processes filed by the parties. When Grounds 1 and

4 of the petition are read along with the provisions of Section 145 of the Electoral Act, 2006, it will be seen clearly that they conform with Section 145 (1) (b) and Section 145 (1) (a) of the Electoral Act, 2006 respectively. The court below was therefore right when it held in its ruling inter alia: -

“Ground 1 of the petition clearly conforms with Section 145 (1) (b) of the Electoral Act while ground 4 conforms with Section 145 (1) (a) of the Electoral Act”

This cannot but be so when, as I have earlier said, that 1st and 2nd respondents filed a joint Reply and the 5th respondent filed a separate Reply; thus clearly showing that they have joined issues with the petitioner/appellant. With the greatest respect, the court below therefore, in my view, suddenly engaged in a somersault which, any seat of justice must realise, would result into injustice, when it immediately after the above holding went ahead to hold, at the stage the proceedings reached, that the party must, pursuant to Section 146 of the Electoral Act plead and prove that the non-compliance substantially affected the result of the election. What I have observed is that the court below made too many findings on issues to be contested in the substantive trial. I should here say that it has now been firmly established that findings on issues to be contested in the substantive trial must not be made at the hearing of the interlocutory application such as the one at hand, much less determining the case. See WILLIAMS V. DAWODU (1988) 4 NWLR (pt.89) 189. Hearing of the petition had not commenced. Section 146 of the Electoral Act provides; -Sub-Section (1)

“An election shall 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 principles of this Act and that the non-compliance did not affect substantially the result of the election.” (Underlining mine for emphasis)

Reading the above provision very carefully, it is my view, that the invocation of same pre-supposes that the trial of the petition has been concluded. I have read Ground 3 very carefully; I cannot resist my coming to the conclusion that this ground also conforms with the provision of Section 145 (1) (b) of the Electoral Act, 2006. In any event, Grounds 1 and 4 are on a firma terra. They confer stamp of

competency on the petition such that it ought to be heard on its merits. I wish to digress a bit to make some remark?., The degree of civilization of any country that prides itself in upholding the rule of law as a way of life is often measured by several parameters, chief among which is the flexibility or otherwise of accessibility to court by its citizens.

Faced with the materials before us, I regret to say that to dismiss this appeal is to forever block the appellant from accessing justice. An uninhibited accessibility by a citizen to court of law to ventilate real or imagined grievance is a hallmark of determining the degree of civilization of a country. Let it be said that quest for justice is insatiable when it is realised that that great phenomenon called JUSTICE is not a one way traffic; not even a two-way traffic; I beg to say a court of law which is also a court of justice must always ensure that JUSTICE flowing out from its sanctuary which, of course, must be in accordance with the laws of the land, is not only for the plaintiff (the complainant) not even only for the defendant (the person complained against) but also for the larger society whose psyche is always affected, one way or the other, by any judicial pronouncement.

Back to the judgment, for all I have said above, I hereby resolve all the four issues raised by the appellant in his favour. The three issues jointly identified by the 1st and 2nd respondents are hereby resolved against them. Similarly, I resolve against the 3rd and 4th respondents jointly, the five issues they have formulated. In like manner, I resolve the only issue raised by the 5th respondent against it.

I have had the privilege of reading in advance, the lead judgment of my learned brother, Tabai JSC; I regret that I cannot bring myself to agree with his reasoning and conclusion. It is therefore my judgment that this appeal is ~~together~~ ^{together} and the 5th respondent separately allow it. Judgment of the court below is hereby set aside. In its place, I make an order remitting the petition back to the Court of Appeal for it to be tried by another panel of Justices of that court. I adjudge costs in favour of the appellant at N50,000.00 (fifty thousand naira) against each set of the 1st and 2nd respondents together,