

COURT OF APPEAL
ENUGU DIVISION
11TH JULY, 2008. CA/E/EPT/19/2008, CA/E/EPT/19A/2008
CORAM:- O. O. ADEKEYE, A. A. JEGA, J. O. BADE,
I. M. M. SAULAWA, A. JAURO, JJCA

1. SULLIVAN IHEANACHO CHIME APPELLANTS
2. ONYEBUCHI SUNDAY

AND

1. BARR. OKEY EZE
2. SIR. S. N. C. NWAGU
3. LABOUR PARTY RESPONDENTS
4. PEOPLES DEMOCRATIC PARTY
5. INDEPENDENT NATIONAL ELECTORAL
COMMISSION (INEC) & 3,377 ORS.

AND

1. INDEPENDENT NATIONAL
ELECTORAL COMMISSION & ORS.
2. CHIEF NATIONAL
ELECTORAL COMMISSIONER APPELLANTS
3. RESIDENT ELECTORAL COMMISSIONER
4. ENUGU STATE RETURNING
OFFICER GUBERNATORIAL ELECTION & 3370 ORS.

AND

1. BARR. OKEY EZE
2. SIR S. N. C. NWAGU
3. LABOUR PARTY
4. SULLIVAN IHEANACHO CHIME RESPONDENTS
5. ONYEBUCHI SUNDAY
6. PEOPLES DEMOCRATIC PARTY
7. MAJOR GENERAL S. U. ATAWODI
(General Officer Commanding 82 Division,
Nigeria Army, Enugu)
8. THE COMMISSIONER OF POLICE, ENUGU STATE
9. THE NIGERIA POLICE FORCE
10. F. A. SONAIKE
(Director, State Security Service, Enugu State)
11. THE STATE SECURITY SERVICE
(CONSOLIDATED APPEAL)

EVIDENCE - Admissibility - Hearsay - Being evidence on facts relying on information by another - It is inadmissible - In that it offends the rule that oral evidence must be direct (H1)

APPEALS - Parties - Respondent status - Propriety - A party who lost as a respondent before the trial tribunal - Cannot come to an appellate court as a respondent (H2)

PRACTICE & PROCEDURE - Appeals - Parties - Misjoinder - Effect - Though it is an irregularity for PDP to be joined as a respondent in this appeal - It does not make the appeal incompetent (H3)

EVIDENCE - Exhibits - Of a party - As basis of appeal by adverse party - Once an exhibit is before the court as evidence - Either party has the right to appeal against it (H4)

EVIDENCE - Election petitions - Burden of proof - Effect of practice direction - Though the directions provide for front loading of document - They do not relieve a party who alleges a fact - From the burden of providing that fact (H5)

ELECTION PETITIONS - Non-voting - Proof - Effect of practice direction - The directions are not made to dispense with the quantum and quality of evidence - Required to prove non-voting in an election petition (H6)

ELECTION PETITIONS - Practice directions 2007 - Validity - It is apparent from the Electoral Act - That appropriate authority shall issue another practice and procedure to guide election tribunals - This accounts for the making of the practice direction (H7)

ELECTION PETITIONS - Practice directions 2007 - Promulgation - Appropriate authority - S. 285(3) of the 1999 Constitution - The president of the court of appeal is the appropriate authority - Being the one empowered to constitute the election petition tribunals (H8)

ELECTION PETITIONS - Practice direction 2007 - Hierarchy of laws - Status - Practice directions occupy the lowest level in the hierarchy

- After rules of court (H9)

ELECTION PETITIONS - Noncompliance - Allegation - Duty of tribunal - Where noncompliance is alleged - The tribunal's duty is to decide whether it is substantial enough - To invalidate the election (H10)

EVIDENCE - Documents - Exhibit P5 - Reliance upon by the tribunal - Propriety - As there was no oral evidence on the content of the exhibit - The findings of the tribunal thereon lack probative value - Being based merely on address of counsel (H11)

EVIDENCE - Documents - Exhibit P4 - Rejection of - Propriety - It was improper - For being public document under the Evidence Act - Certified true copies thereof may be tendered by anybody - Who has paid the necessary fees (H12)

ELECTIONS - Irregularity in election - Effect on result - Where the irregularities are neither the act of successful candidate - Nor linked to him - They cannot affect his election (H13)

RULES OF COURT - Application - Manner of - Substantial justice demands that in invoking rules of court - Even where the operative word is *shall* - Which is purely directory - Justice must be done (H14)

ELECTION PETITIONS - Evidence - Allotment of votes to PDP - Proof - The allegation of allotment of votes has to be established - But petitioners' evidence failed to establish same (H15)

EVIDENCE - Irregularities in election - Standard of proof - Where such include over-voting or allocation of votes - It should be proved beyond reasonable doubt - Because it is criminal in nature (H16)

EVIDENCE - Crime - Burden of proof - Whether it shifts - Where crime is alleged the burden is static - It remains on the prosecution or the claimant - Until it had been fully discharged (H17)

ELECTION PETITIONS - Nullification of election - By reason of lapses

by officials - Propriety - Election ought not to be nullified for such lapses - Without evidence of corrupt motives in such officials (H18)

ELECTIONS - Time - Mere shift in scheduled time - Whether a non-compliance - Such shift by the electoral body does not amount to noncompliance - Unless it has affected the result of the election (H19)

FACTS

The 1st set of appellants were the 1st and 2nd respondents respectively in an election petition filed by the 1st, 2nd and 3rd respondents of the 1st set of respondents herein. The petitioners by their petition challenged the result of the gubernatorial election of 14th April 2007 held in Enugu State which returned the 1st set of appellants as winners. Four grounds were stated by petitioners as the basis of their petition which included noncompliance with the Electoral Act and electoral irregularities. However, at the hearing, petitioners abandoned all other grounds except noncompliance and irregularities. It was not in dispute that election materials left late for the various polling booths. Indeed so late that the elections had to be rescheduled in some local government areas where it was not practicable to go on with the election in view of the time of the arrival of the materials. At other places, the voting period had to be extended till late in the evening to make up for the late arrival of the materials. At the pretrial session, the number of witnesses to be called by parties were streamlined to 25 for petitioners, 9 for the 1st set of appellants and 6 for INEC and its officials. This was notwithstanding that there were over 2,800 polling booths in the State. This streamlining of witnesses was in purported reliance on the provisions of the Election Tribunal and Court Practice Directions 2007 ("Practice Directions").

During trial, the effort of the 1st set of appellants to tender certified true copies of the election result sheets were turned down as the tribunal, in reliance on the provisions of the Practice Directions, held that it was not front loaded and as such was inadmissible. After hearing, the tribunal found for the petitioners and nullified the election, ordering fresh elections in its stead. Dissatisfied, the two sets of appellants each filed an appeal against the judgment of the tribunal. Among other things, it is the contention of appellants that the tribunal was wrong to hold that under the Practice Directions the burden

of proving that there was election now lay on the respondent to the petition. Counsel to 1st - 3rd respondents has filed a motion for leave to adduce further evidence at the appeal.

ISSUES FOR DETERMINATION

MOTION FOR FURTHER EVIDENCE:

“Whether this honourable court can grant the respondents’ prayer to rely on further evidence in support of its case and whether sufficient materials have been furnished before this court to exercise its discretion and grant the respondents/applicants’ prayer for leave to rely on further evidence in support of his case.”

SUBSTANTIVE APPEAL:

“(1) Whether the learned trial judges were right in holding that under the Election Tribunal and Court Practice Directions, 2007 (Practice Directions) the burden of proving that there was an election and that voting occurred lay with the respondents to the petition.”

(2) Whether the learned trial Judges were right in holding that the Practice Directions have displaced the principles enunciated in Ayogu v. Nnamani (2006) 8 NWLR (Pt.981) 160 at 187; Nnaji v. Agbo (2006) 2 EPR 867 at 860 as well as the other judicial authorities on the nature of quantum and quality of evidence required of a petitioner to prove allegation of non- voting in an election.

(3) Whether the learned trial Judges were right in holding that the onus of proving that there was an election and that voting occurred had shifted to the respondents in the petition.

(4) Whether the Election Tribunal and Court Practice Directions were validly made, and if so, whether they are superior to the provisions of the 1999 Constitution, the Electoral Act, 2006, the Federal High Court (Civil Procedure) Rules, 2000 and the other sources of law relating to the hearing and determination of elections.

(5) Whether the learned trial Judges were right in holding that the petitioners’ allegations of irregularities/non-compliance with the Electoral Act, 2006 and guidelines are not criminal in nature, and thus not required to be proved beyond reasonable doubt.

(6) Whether the learned trial Judges were right in relying on the analysis of exhibit P5 (1 -734) (exhibit P5 series) in the written address of the learned counsel to the petitioners/respondents in making a finding that there were irregularities and over-voting in the election when the same were not the petitioners’ case on their pleadings

and the purport of exhibit P5 series was not demonstrated in evidence.

(7) Whether the learned trial Judges were right when they held that police reports on the conduct of the election (exhibit P4 1-15) had no evidential value for the reasons that the makers thereof were not called as witnesses.

(8) Were the learned trial Judges right when they held that the test of substantiality as provided for in the Electoral Act, 2006 and enunciated in *Buhari & Anr. v. Obasanjo* (2005) 3 NWLR (Pt. 941) 1 does not apply to this case.

(9) Whether the learned trial Judges were right in holding that the appellants did not plead or lead evidence relating to the extension of the hours of poll on the days of the election.

(10) Whether the learned trial Judges were right in holding that departure of electoral materials from the premises of the Central Bank of Nigeria (CBN) behind schedule led to the disenfranchisement of a majority of the electorate in the election.

(11) Whether the learned trial Judges were right in relying on the Election Tribunal and the Court Practice Directions. 2007 (Practice Directions) to reject the result sheets, which the appellants sought to tender and rely upon in the trial of the petition.

(12) Was the petitioner/1st respondent entitled to judgment on the basis of the evidence he adduced before the learned trial Judges.-

(a) Whether on the pleadings and evidence canvassed at the hearing the petitioners have successfully established a case for the nullification of the election returns.

(b) Whether the tribunal properly addressed its mind to the appropriate standard of proof in the nature of the allegations made in the petition.

HELD (Unanimously allowing the appeal per **ADEKEYE JCA**)
EVIDENCE - Hearsay - Admissibility

1. The application is for leave of this court to enable the 1st - 3rd respondents adduce further evidence in the arguments of this appeal - which is a document - a Daily Trust Newspaper publication of 24th January, 2008 which the Chief Press Secretary of Professor Iwu, the Independent National Electoral Commission, Chairman, Dr. Andy

Ebeani, said his boss made that the governorship election in Enugu State was flawed.

The Chief Press Secretary did not disclose the source of the information to Professor Iwu. Did Professor Iwu make the statement out of his experience from what he witnessed directly at the polling booths in Enugu on the day of the election or from perusing a report sent to him on the conduct of the election at Enugu? Since the information did not come directly from Professor Iwu - it amounts to hearsay. Hearsay evidence is not admissible under the Evidence Act, being evidence on facts relying on information by another person. This offends against Section 77 of the Evidence Act, 2004 which stipulates that oral evidence must be direct. Hearsay evidences is inadmissible evidence which must be expunged from record. The application is consequently refused. (pp. 169 E/170 H/171 G)

APPEALS - Parties - Respondent - Propriety

2. In my understanding, this preliminary objection seeks to define a capacity in which the 4th respondent ought to appear in this appeal. In that where he cannot file an appeal, it is equally wrong to place him as a respondent. Ordinarily, being a party in the election, which lost as a respondent in the suit before the tribunal, he cannot come to an appellate court as a respondent. What then is the traditional role of a respondent in an appeal? The traditional role of a respondent in an appeal is to do everything to support the judgment appealed against. It is in recognition of this right that he is entitled by the rule of court to raise a contention by respondents' notice in order to hold the judgment. He is not supposed to attack the judgment except if he has an intention to cross-appeal.

In this appeal, PDP - the 4th respondent being a political party who participated in the Enugu Governorship election has no business pursuing this appeal as a respondent. He cannot be seen to be protecting or defending judgment, which is against him. The statutory role of the party is to be an appellant, which role he can play jointly with the Governor or Deputy Governor, its sponsored and nominated candidate or on its own by virtue of section 70 of the Electoral Act -being a body corporate who can sue and be sued. (pp. 175 D/176 E)

Appeals - Parties - Misjoinder - Effect

3. PDP maintaining a stand as a respondent is an irregularity in the form of the appeal, which can readily be amended by the court on application by the appellant, it does not make the appeal incompetent. (p. 176 G)

B

Exhibits - Of a party - As basis of appeal by adverse party

4. In the third leg of the preliminary objection, the learned senior counsel for the 1st - 3rd respondents contended that ground 11 is incompetent and should be struck out as no right enures to the appellants who did not tender the said exhibit P4 and the 1st - 3rd respondents who tendered same have not filed cross-appeal. A ground of appeal enures to a person when his personal rights have been infringed.

D I find this objection as not only interesting but surprising. The learned senior counsel has obviously failed to advert his mind to the fact that the basis of adducing evidence either oral or documentary is to aid the courts in attaining justice and to see that justice is manifestly done. Evidence is adduced not only to aid or boost the evidence of a particular party but to assist the administration of justice to see that justice is done on the basis of fairness to all parties. In as much as exhibit P4 series are before the court as part of documentary evidence in the petition, the appellants and respondents have all the right to appeal against them - it is a constitutional right. (p. 177 E/H)

F

Burden of proof - Effect of practice direction

5. The reasoning of the tribunal is very confusing and in my view amounts to contradiction in terms. Whereas in the Practice Directions G - what the lower tribunal has referred to as novel procedure or new dispensation has provided the procedure for calling of witnesses and tendering or front-loading of documents, it makes provision for the burden of proof which is, still predominantly the preserve of the Evidence Act.

H In proving that voting did not take place in the Enugu gubernatorial elections, the petitioner must lead positive and credible evidence on the alleged non-holding of the election in each of the polling booth that voting did not take place. The onus is on the petitioners to prove the allegation. The onus of proving that voting took

place may shift to the respondents in the petition if the petitioner has discharged the primary burden that is on them. In order words. I agree that the Practice Directions have not introduced the novel procedure, which relieves the petitioner, who alleges non-voting in an election, of the onus or burden of proving that voting did not take place. (p. 198 B/E) B

Non-voting - Proof - Effect of practice direction

6. I dare say that the principle laid down in the case of Ayogu v. Nnamani has not in the least changed by circumstance or transformed by any rules of procedure or substantive law. In the case of Ayogu v. Nnamani (2006) 8 NWLR (Pt.981) 160 my Lord, Justice Z. A. Bulkachuwa, JCA said at page 187: C

“In the instance case, the appellant who asserted before the lower tribunal that there were no voting materials no INEC officials to supervise the voting and that no voting in fact took place in at least 13 Local Government Areas out of the 17 Local Governments in Enugu State must prove so by calling at least a registered voter from each of the polling booths in each of the wards in the respective local governments to show that he could not vote in the said 19/4/03 at the said polling booths as there was no voting materials or INEC officials to preside over the voting. He must also establish by credible evidence how the lack of voting in these local Government areas affected the final results of the election to his disadvantage.” D E

I can add with certainty that Practice Directions is not made to dispense with the nature, quantum and quality of evidence required of a petitioner to prove non-voting in an election petition, neither can it detract from the principles laid down in Ayogu's case. F

In this case, the tribunal and parties streamlined 25 witnesses G to testify for 2,874 polling booths in 17 Local Governments. It is my conclusion on this issue that the consideration of the respondents' claim will not arise unless the petitioners has made out a case; as he who asserts must prove *Ei qui affirmat non ei qui negat incumbit probative* (Section 137(2) of the Evidence Act). One would be expected to succeed on the strength of his own and not on weakness of the defence. (pp. 199 H/200 F/ 201 B) H

ELECTION PETITIONS - Practice directions 2007 - Validity

7. It is apparent from the foregoing that besides the rules of practice for Election petitions as stipulated in the First Schedule to the Electoral Act, 2006, to be read conjunctively with sections 147(3), 151 and 164(3) of the Act, the appropriate authority shall issue another
 B practice and procedure to guide the Election Petition Tribunal and the Court of Appeal in the hearing of petition. The relevant law shall be subject to the First Schedule of the Electoral Act, 2006.

It is undoubtedly the intention of the lawmakers clearly expressed in Paragraph 50 of the First Schedule to the Electoral Act,
 C 2006, that the Practice Directions shall be as near as possible similar to the practice and procedure of the Federal High Court in the exercise of its civil jurisdiction.

The practice and procedure to be promulgated is not meant to
 D be another Federal High Court (Civil Procedure) Rules or a Federal High Court Practice Direction meant to be an aid in the dispatch of speedy trial in view of the fact that time is of essence in election petition matters. This accounts for the contents of the Election Tribunal and Court Practice Directions, 2007. The general intention of the
 E draftsman reflected in paragraph one, is to encourage and enforce front-loading, as a principle of our modern civil procedure system so that a defendant would have full knowledge and adequate notice of the cause of the plaintiff so as to avoid delays in trials and fulfill the objective of speedy administration of justice. (pp. 202 F/203 D)
 F

Practice directions - Promulgation - Appropriate authority

8. This takes me to who is competent to issue the Election Tribunal and Court Practice Directions, 2007? The learned counsel to the ap-
 G pellants submitted that the power purportedly exercised by the President Court of Appeal pursuant to Section 285 (3) of the Constitution is without legal backing hence unconstitutional, null and void, and that the power belongs to the Chief Judge of the Federal High Court.

The learned senior counsel for the respondents disagrees with
 H her. The learned senior counsel rested his opinion on the community reading of Section 285(3) of the 1999 Constitution. Sixth Schedule to the Constitution, paragraph 50 (d) of the First Schedule to the Electoral Act, 2006, that the President of the Court of Appeal can issue Practice Direction. I agree with this latter submission as the Presi-

dent of the Court of Appeal is vested with the power under the 1999 Constitution to constitute the panel of judges as chairman and members of the Election Petition Tribunal, with the Court of Appeal as its final appellate court in the Governorship and Legislative Houses Tribunal. He appoints the Chairman and members for the Presidential Election Petition Tribunal. The Court of Appeal has become the administrative headquarters for Election and Election related matters. By virtue of section 10(2) of the Interpretation Act, Cap. 192. Laws of the Federation of Nigeria -

“Any enactment which confers power to do any act shall be construed as also conferring all such other powers as are reasonably necessary to the doing of it.” (p. 203 H)

Practice direction 2007 - Hierarchy of laws - Status

9. I hold that the hierarchy of the laws down to the Practice Directions are as follows - 1999 Constitution, Statutes, First Schedule to the Electoral Act, 2006. Rules of court and finally Practice Directions in that order, Since Practice Directions does not have the authority of rules of court and they are less efficacious they cannot override any of the superior laws. (p. 204 G)

Noncompliance - Allegation - Duty of tribunal

10. In the case of *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1 at 231 Paragraph F-G the Supreme Court said that where an allegation is made that an election was invalid by reason of corrupt practices or non-compliance with the provision of the section 135(1) of the Electoral Act, 2002, which is in pari materia with section 146 (1) of the 1999 Constitution., the section vests on an election tribunal or court entertaining an election with the power to decide from the evidence tendered before it in such case whether an alleged non-compliance is substantial enough to invalidate the election. The emphasis is not on whether those acts of non-compliance are of criminal or civil nature - but on whether the election was conducted substantially in accordance with the principles of the Electoral Act, and that non-compliance did not substantially affect the result of the election.

I hold that there is overwhelming evidence that the voting materials left the Central Bank Enugu late - around 12 noon and got to local government areas late thereby leading to late voting. Elec-

tion had to be postponed in four local governments to the 28th of April, 2007. In spite of the acts of non-compliance, the petitioner still contended that the 899,007 registered voters voted for the 1st appellant out of 1,376,884. According to this calculation. 477,875 voters could not cast their votes. If that figure were to be added to that
 B of the 1st petitioner/respondent the 1st appellant would still have a lawful majority of 300,000 votes. In that scenario, it cannot be said that the non-compliance substantially affected the final results of the election. (pp. 205 E/206 E)

C ***Exhibit P5 - Reliance by the tribunal - Propriety***

11. There was no oral evidence of any witness on the contents of exhibit P5. The tribunal relied on its own observation about the documents. Exhibit P5, 734 Forms EC8A and EC8Cs are election result
 D sheets which emanate from the custody of INEC. Only INEC and not the 1st petitioner/respondent or his counsel is competent to give evidence on it and be cross-examined. The observation and findings of the tribunal lack any probative value for the purpose of this judgment. It is trite that address of counsel, however, brilliant cannot serve
 E as substitute for evidence. (p. 207 F)

Exhibit P4 - Rejection of - Propriety

12. The learned senior counsel for the appellants held that report
 F were public document by virtue of section 109 of the Evidence Act, and certified true copies of them may be tendered by any person who has paid the prescribed fees. The learned senior counsel emphasized that exhibit P5 series Forms EC8As and EC8Cs were admitted in evidence through PW24, who is not their maker but as public
 G documents, as they were made by presiding officers and collating officers. If the reports of the police had been admitted in evidence, the tribunal would have been privileged to see another aspect of what took place at the polling booths on the day of the election. Admitting exhibit P5 series while rejecting P4 series was perverse.

H The learned senior counsel for the respondents submitted that the court rejected the police reports in that they were not self-explanatory and the court would not have been able to make use of them without explanation by the maker. The reason for rejecting the police report to my mind is weak. It is trite that the issue of admissibil-

ity of a document and the weight to be attached to it are two separate and distinct issues. (p. 209 B)

Irregularity in election - Effect on result

13. In this appeal, the respondents before the tribunal complained about irregularities in allotting of votes to the 1st appellant and that there were no collation of results in places where there were voting due to non-availability of results sheets in places where be to the detriment and disadvantage of the contestants at the election. However, irregularities at an election which are neither the act of a candidate nor linked to him cannot affect his election.

The two hurdles to climb by the petitioner/respondent through adducing cogent evidence are as follows:

(1) Whether the irregularities particularly allotment of votes have been established.

(2) Whether the allotment of votes can be attributable to the appellants.

I cannot trace any evidence on printed record on which I can find the irregularity of allotment of votes established by the petitioner/respondent against the appellant in this case. (p. 210 C)

RULES OF COURT - Application - Manner of

14. Any court or tribunal must realize now that rules of procedure are important, as they are handmaids of justice. They are aids to the attainment of justice to oil the wheels of justice to enable them roll and revolve smoothly to take justice to its logical conclusion and ultimate destination. They, however, cease to be aids when they take over turning the courts and litigants into slaves to the rules, thereby leading to perpetration of injustice in the process. The dictates of substantial justice demands that in invoking the rules of court even where the operative word there is shall which is purely directory. Justice must be done. We have examined the documents sought to be tendered and determined the weight of, and the relevancy to the case and the interest of justice in the matter. After all in the application of the Practice Directions the provision of paragraph 4(8) of the Practice Directions, 2007 empowers the tribunal to grant leave in exceptional circumstances to receive in evidence documents which were not filed along with the petition in accordance with the Practice

Directions. Exceptional circumstance in paragraph 4(8) of the Practice Directions is synonymous with the interest of justice in paragraph 43(1) and (2) of the First Schedule to the Electoral Act, 2006. (p. 213 D)

B Evidence - Allotment of votes to PDP - Proof

15. Allotment of votes to PDP to my mind has to be established. Forms EC8As and EC8Cs tendered as P5 1-734 were tendered to this effect because their faces are full of irregularities. As between INEC and the petitioner the genuine results prepared by INEC officials - have to be shown to court and the traits of irregularity on them identified. Oral evidence has to be led to identify the irregularities or the justices of the tribunal or this court, if left to do that shall be engaged in investigation, which is not the duty of court. The duly of the court is to be an unbiased umpire. There was the compliant of over-balloting. I will quote from the judgment, which is based on the evidence of PW 24 - the 1st petitioner himself, who was said to have monitored the election in the local government areas from CBN office, said that “*there were no result sheets. That the buses that conveyed the materials took them to other places. That the votes were merely allotted to the 1st respondent.*” It was practically impossible to see what was happening at the other local government areas from the Central Bank. He derived the information from other sources and this amounts to hearsay evidence. It is trite that hearsay evidence is inadmissible in law. The bulk of the evidence of this witness PW 24 on the irregularities must be expunged from record as hearsay evidence. (p. 226 G)

G Irregularities in election - Standard of proof

16. This takes me to the burden and standard of proof in the allegations before the court on the catalogue of irregularities and non-compliance.

Any irregularities connected with ballot papers including allocation of votes, over-voting and cancellation of votes are in my view criminally tainted. They are acts borne out of deceit by the culprit. The act might be committed by someone or his agent on his behalf and without his knowledge. Any irregularities pertaining to an election must have been committed as offence for dereliction of duty by

INEC officers for which are covered by section 130 of the Electoral Act, 2006. The sanction is fine or imprisonment. Since the operative word used in the section is conviction - the offences are criminal in nature.

The burden of proof required in criminal matters or civil matters in which claims are founded on conduct bordering on crime differ from the burden which a claimant is proved on the balance of probabilities. In criminal matters or claims founded on criminal conduct, the allegation has to be proved beyond reasonable doubt. (pp. 228 E/229 B)

Crime - Burden of proof - Whether it shifts

17. In civil matters, the burden does shift. In the other situation the burden is static, ever remaining on the prosecution or the claimant as the case may be. In the instant case, the appeal is premised on the conduct of INEC officials that bordered on criminality. It was therefore incumbent on the respondents to prove their allegations beyond reasonable doubt. And the burden would not shift, it remained on the respondents to prove their allegations beyond reasonable doubt and the burden would not shift. It remained on them until it had been fully discharged. (p. 229 C)

Nullification of election - By reason of lapses by officials

18. Finally, an election ought not to be nullified by reasons of short-coming or lapses in the performance of duty of electoral officers without any evidence of corrupt motives by the electoral officials if the tribunal is satisfied that election was notwithstanding those really and in substance conducted under the electoral law and that the result of the election was not and could not have been affected by the lapses. (p. 230 D)

Mere shift in scheduled time - Whether a noncompliance

19. Another question to ask is whether in timing of the election and date amount to non-compliance under the Electoral Law and Guide-line or Manual? Sections 26 and 27(1) of the Electoral Act, 2006, INEC has the power to fix the date for election into any of our political post, and where a date has been appointed for the holding of an election, and reasons of breach of the peace shall or natural disasters,

or other emergencies, the commission may postpone the election and appoint another date for it.

By the combined reading of sections 27 and 47 (a) of the Electoral Act, 2006 the commission can alter or shift the time for voting when circumstance dictates. Where there is a shift of time the
B petitioner must adduce evidence that it has affected the result of the election. (p. 230 F)

NOTABLE POINTS OF INTEREST

C ADEKEYE JCA

1. Consolidated suits must still be determined separately

The appeals were by order of this court consolidated. I must remind myself that consolidation does not create a set of inseparable Siamese twins. Though by consolidation, all actions are tried and determined
D in the same proceedings - each remains a separate and distinct action. At the end of the proceedings, judgment should be given in respect of each suit. The court cannot and should not determine one suit and ignore the other. (p. 171 G)

E 2. Election petitions have distinct procedures

Election petitions are *sui generis*. They are in a unique and peculiar class of their own. They have distinct procedure from other civil proceedings. The right of access to court is as provided by the statute
F guiding the conduct of election so that parties are bound by the statute rather than by the ordinary civil procedure in respect of parties to litigate an action. (p. 175 G)

3. Streamlining of witnesses requires caution

G In applying the Practice Directions, the tribunal streamlined the witnesses so that only twenty witnesses gave evidence in respect of the pattern of voting on the 2,874 polling booths, and particularly the 300 polling booths where it was alleged that there was no voting on the two days of the election. This has dealt a heavy blow to the
H evidence of the petitioners in proving that there was no election in Enugu State. The evidence of the witnesses for the petitioners/respondents turned out to be substantially hearsay, as they got information from people who were in the field and not directly by themselves. The justice of this case demands that there must be evidence of voting at

each polling booth before the court. The aspect of streamlining of witnesses must be approached by the court in the hearing of cases with extra caution.

It has to be applied not generally but according to the merit of each case. The number of witnesses required to prove the case of a petitioner complaining about exclusion, will defer to that in a claim about having the majority of lawful votes or that complaining of non-qualification. The Practice Directions is an adjunct to the rules of court, the Federal High Court (Civil Procedure) Rules and the Court of Appeal Rules, It was issued to aid the tribunals and courts to administer justice with ease and dispatch. It is not meant to assist court to sacrifice justice in the altar of speed. It is not meant to overrule or override the substantive law in respect of procedure like the Evidence Act. A Practice Directions is not as potent; it is less efficacious than the substantive laws in the administration of our legal jurisprudence. (p. 215 B)

SAULAWA JCA

4. Oral evidence is needed to explain documentary evidence

There is a need to reiterate the fundamental principle, that a document cannot serve any useful purpose in the absence of an oral evidence explaining the essence thereof. The Supreme Court had about four decades ago aptly reiterated this fundamental principle in the case of *Brown Holding Coy Ltd. v. Bogoco* (1971) 1 All NLR 324 at 330 - 331 wherein it held, inter alia, as follows:

The Independent examination of exhibits by a court was considered in *Muhammadu Duriminiya v. Commissioner of Police* (1961) All NLR 70, which the court said this: The magistrate examined the books but apparently not in court - for records does (sic) not show that he observed or was shown any entries in court except the few we have mentioned and in examining them out of court, as appears from his judgment, he observed points which ought to have been brought out in court at the hearing but were not. In doing this, the magistrate was not trying the case, he was investigating it.

A fortiori, what the lower tribunal did in the instant case was that it had descended into the arena by unilaterally embarking on a voyage of discovery or investigation of exhibit P5 series. By virtue of the above authorities, it had no power to do so. (p. 238 G)

REPRESENTATION

Chief A. O. Mogboh, SAN (with him, Chief (Mrs.) A. J. Offiah, SAN; J. N. Edochie; P. M. B. Onyia; O. Agubuzu; C. J. Aneke; I. Okoli and I. Onuoma) - for the Appellant.

B

Mr. A. I. Ani (with him, E. C. Osimba; E. U. Okafor; V. Agunzu and H. N. Ani (Mrs.) (holding the brief of J. F. C. Okolo) - for the 2nd - 3,372nd Appellant in the Consolidated Appeal.

C

Dr. A. Izinyon, SAN (with him, R. Tarfa, SAN; H. Nganjuwa; A. J. Owonikoko; Mr. F. Mboye; C. S. Eweocha; T. Ajayi and B. N. Nebe) - for the 1st - 3rd Respondents.

D CASES REFERRED TO

Awuse v. Odili (2005) 16 NWLR (Pt. 952) 416

Ngige v. Obi (2006) 14 NWLR (Pt. 999) 1 at 197

Okonkwo v. Ngige (2006) 8 NWLR (Pt. 981) 119

Oneh v. Obi (1999) 7 NWLR (Pt. 611) 487 at 499

E Owie v. Ighiwi (2005) 5 NWLR (Pt. 917) 184 at 219

Abubakar v. Yar'adua (2008) 4 NWLR (Pt. 1078) 465

Onoyom v. Egari (1999) 5 NWLR (Pt. 603) 416 at 425

Ayogu v. Nnamani (2006) 8 NWLR (Pt. 981) 160 at 187

University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143

F Okoro v. Egbuoh (2006) 15 NWLR (Pt.1001) 1 at 17-19

Buhari v. Obasanjo (2005) 2 NWLR (Pt. 910) 241 at 435

Osafire v. Odi (No.1) (1990) 3 NWLR (Pt. 137) 130 at 406

Ogieva v. Igbiniedion (2004) 14 NWLR (Pt. 894) 467 at 486

G Okpanum v. S.G.E. (Nig.) Ltd. (1998) 7 NWLR (Pt. 559) 537-547

Odu'a Investment Co. Ltd. v. Talabi (1997) 10 NWLR (Pt. 523) 1 at 44-45

STATUTES & RULES REFERRED TO

H Constitution of the Federal Republic of Nigeria, 1999, ss. 146, 248, & 285

Court of Appeal Act, Cap 36, L. F. N, 2004, ss. 15

Electoral Act, 2002, ss. 13 & 164

Electoral Act, 2006, ss. 26, 27, 34, 47, 70, 103, 130, 136, 144, 146,

147 & 151

Evidence Act, Cap E14, L. F. N. 2004, ss. 77, 91 & 227

Evidence Act, Cap 112, L. F. N. 1990, ss. 109, 111, 112, & 137

Interpretation Act, Cap 92, L. F. N. 1990, s. 10

LEAD JUDGMENT BY ADEKEYE JCA

This is an appeal against the judgment of the Governorship/Legislative Houses Election Petition Tribunal, Enugu delivered on the 18th of January, 2008.

The appellants before this court. Barrister Sullivan I. Chime and Sunday Onyebuchi were 1st and 2nd respondents respectively before the Election Petition Tribunal in the petition No. NAGL/EPT/EN/GOV/43/2007 filed by the petitioners now 1st and 2nd respondents. The 3rd respondent - Labour Party was the party, which sponsored the 1st and 2nd respondents at the election. The 4th respondent - Peoples Democratic Party sponsored the appellants as its gubernatorial candidates in the election. The 5th – 3377th respondents - INEC and its officers conducted the election's of the 14th and 28th of April, 2007 held in Enugu State.

The 1st appellant contested the governorship election with candidates of sixteen various political parties. The election in Enugu State took place on two dates the 14th and the 28th of April, 2007. At the return of the polls on the 29th of April, 2007, the 1st appellant was declared winner of the election and was consequently returned by the 5th respondent - Independent National Electoral Commission, having scored 811,798 (Eight Hundred and eleven thousand, seven hundred and ninety eight) being the majority of lawful votes cast at the election. The figures declared on 29th of April, 2007 were the aggregate of the votes scored by the candidates on the 14th and 28th of April, 2007 elections. Election had to be re-scheduled by INEC to the 28th of April, 2007 in four Local Government Areas of Enugu State.

The 1st - 3rd respondents being dissatisfied with the return at the polls filed an election petition on the 26th of May, 2007 against the return of the 1st appellant as the winner of the election. In the petition before the lower tribunal, the 1st-3rd respondents averred that the grounds for the petition are as follows:

(1) Non-qualification.

(2) non-compliance with the provisions of the Electoral Act.

(3) Corrupt practices, violence, intimidation, irregularities which substantially affected the result of the election.

(4) That the 1st respondent now 1st appellant was not returned with a majority of lawful votes.

B The petition and all related processes are as contained at pages 1 - 499 of volume I of the record. Upon service of the petition on the parties, the appellants filed a reply in which they illustrated that the governorship election in Enugu State was conducted in substantial compliance with the provisions of the Electoral Act, 2006. The 5th, C 6th, 7th, 13th to the 3372nd equally filed their replies. Vide pages 18 -45 of the record.

At the pre-trial session, the number of witnesses to be called by all panics were whittled down as follows -

- D (a) The petitioners - 25 witnesses
(b) The 1st - 2nd respondents - 9 witnesses
(c) INEC and its officials - 6 witnesses.

An application made by INEC to increase the number of witnesses during trial was turned down by the tribunal.

E At the close of trial, the tribunal annulled the election of the appellants as Governor and Deputy Governor respectively of Enugu State and ordered a fresh election. Vide pages 600 - 617 of the record. Being aggrieved by the pronouncement in the judgment - appellants F have appealed to this court. The notice of appeal filed on 4/2/08 raised sixteen grounds of appeal. Two substantive appeals emanated from the judgment of the tribunal namely;

- (a) CA/E/EP/19/08 - *Barrister Sullivan Chime & Anor. v. Okey Ezea Ors.*
G (b) CA/E/EP/19A/08 - *Independent National Electoral Commission & Ors. v. Okey Ezea & Ors.*

On the 22/5/08, an application moved by the learned senior counsel for appellants Chief (Mrs.) Offiah, unopposed by the learned senior counsel for the 1st - 3rd respondents - Dr. Izinyon, Mr. Kalu, H counsel for INEC and Mr. Igwesi for the 6th respondent sought for the consolidation of the appeals on the grounds that -

(1) The aforesaid two appeals are against the same judgment and the issue raised therein are similar to each other and can be conveniently heard together.

(2) One set of record of appeal was compiled by the secretary of that lower tribunal for the two appeals. On the 27th of May, 2008, the senior learned counsel for the 1st - 3rd respondents in this appeal filed a motion on notice in the court, praying for reliefs as follows -

“(1) An order of court granting leave to the respondents/ applicants to adduce and rely on further evidence in support of this appeal to wit: the admission of the 5th and 6th respondents in a press statement issued by the said 5th and 6th respondents and contained in the Daily Trust Newspaper publication of 24th January, 2008 attached thereto as exhibit A.

(2) Pursuant to the grant of prayer (1) above, an order of this honourable court granting leave to the applicants to rely on the said additional evidence hereto as exhibit A in their argument in this appeal.

(3) And for such further orders as this honourable court may deem fit to make in the circumstance.”

The application was predicated on the undermentioned grounds:-

(a) The document sought to be relied upon was not available at the trial of the petition at the trial tribunal.

(b) The document sought to be relied upon could not have been then obtained with due diligence for use at the tribunal.

(c) The evidence is that if admitted would have an important effect on the whole case.

(d) There exist special circumstances to warrant the grant of this application.

(e) This honourable court has the discretion to grant the application.

In arguing the application, Dr. Izinyon, SAN learned senior counsel for the 1st-3rd respondents/applicants referred to the 13 paragraphs affidavit in support of the application with an annexure copy of the certified true copy of a Daily Trust Newspaper - as exhibit A.

The learned senior counsel for the appellants opposed the application by filing a counter-affidavit on the 3rd of May, 2008. For reason of time constraint in the hearing of the election petition appeals, parties were directed on the 22nd of May, 2008 to file written addresses in respect of the application to adduce and rely on further evidence which turned out to be contentious. The written address of

the parties and their affidavit evidence were considered for this application.

In the application, Dr. Izinyon identified a sole issue for determination as:

B *“Whether this honourable court can grant the respondents’ prayer to rely on further evidence in support of its case and whether sufficient materials have been furnished before this court to exercise its discretion and grant the respondents/applicants’ prayer for leave to rely on further evidence in support of his case.”*

C While he persuaded the court to exercise its discretion in favour of granting the application, he referred to the enabling statutes as section 15 of the Court of Appeal Act, 2004 and Order 4 rule 2 of the Court of Appeal Rules, 2007. He referred to the special grounds on which this court can grant the application as -

D (1) The evidence sought to be adduced must be such as could not have been with reasonable diligence obtained for use at trial.

(2) The evidence should be such if admitted it would have an important not necessarily crucial effect on the whole case.

E (3) The evidence must be such as apparently creditable in the sense that it is capable of being believed and it need not be incontrovertible.

The learned senior counsel made copious submission on the foregoing and support same with cases as follows: U.B.A Plc v. B. T. L Ind. Ltd. (2005) 10 NWLR (Pt.933) 356 at 370; Okpanum v. S.G.E. (Nig.) Ltd. (1998) 7 NWLR (Pt. 559) 537-547; Okoro v. Egbuoh (2006) 15 NWLR (Pt.1001) 1 at 17-19; Esangbedo v. The State (1989) 4 NWLR (Pt. 113) 57 at 67; Akambi v. Alao (1989) 3 NWLR (Pt. 108) 118 at 137138; Asaboro v. Aruwaji (1974) 4 SC Pg. 119; G Oneh v. Obi (1999) 7 NWLR (Pt. 611) 487 at 499; Ngige v. Obi (2006) 14 NWLR (Pt. 999) 1 at 102.

In her reply, senior learned counsel for the appellants Chief (Mrs.) Offiah raised issues for argument as follows -

H *“(1) Whether the application is competent as the type of evidence envisaged under Order 4 rule 2 of the Court of Appeal Rules, 2007 is not documentary evidence.*

(2) Whether the further evidence sought to be relied upon by the respondents is admissible in law?”

The learned senior counsel replied that further evidence

sought to be adduced is inadmissible being hearsay and it was made by an interested person when proceedings were pending.

“(3) Whether further evidence sought to be relied upon by the respondents/applicants is credible and of probative value.”

The learned senior counsel submitted that under section 91(3) of the Evidence Act, a statement made by a person interested at a time when the proceedings were pending or anticipated involving any dispute as to any fact which the statement might tend to establish is not admissible in evidence. This court will not grant leave to a person to lead evidence to adduce further evidence that is legally inadmissible.

“(4) Whether the respondents/applicants’ application is made in good faith.”

The learned senior counsel submitted that the application was not made in good faith but a ploy to bring the Newspaper report to the court’s attention to prejudice the minds of the learned Justices. The court is urged to dismiss the application. The learned senior counsel referred to cases for the entire submission: *Buhari v. Obasanjo* (2005) 2 NWLR (Pt. 910) 241 at 435; *Owie v. Ighiwi* (2005) 5 NWLR (Pt. 917) 184 at 219; *Emegokwue v. Okadigbo* (1973) 4 SC 113; *Orizu v. Anyaegbunam* (1978) 5 SC Pg. 21; *Ugoji v. Onukogu* (2005) 16 NWLR (Pt. 950) 97; *Okoro v. Egbuoh* (2006) 15 NWLR (Pt. 1001) 1.

The application is for leave of this court to enable the 1st - 3rd respondents adduce further evidence in the arguments of this appeal - which is a document - a Daily Trust Newspaper publication of 24th January, 2008 which the Chief Press Secretary of Professor Iwu, the Independent National Electoral Commission, Chairman, Dr. Andy Ebeani, said his boss made that the governorship election in Enugu State was flawed. The report was made by Samson Ojo of the Editorial Board of the Newspaper. The information conveyed in the said publication is only attributed to Professor Iwu by his Press Secretary - it was not uttered directly by Professor Iwu. The publication itself is attached to the application as exhibit A. I shall quote from the enabling statutes referred to by the applicant.

Section 15 of the Court of Appeal Act Cap. C36, Laws of the Federation of Nigeria, 2004 reads:

“The Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal....”

Order 4 rule 2 of the Court of Appeal Rules, 2007 reads:

“The court shall have power to receive further evidence on questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner as the court may direct, but, in the case of an appeal from a judgment after trial or hearing of any cause or matter on merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.”

It must be emphasized that the power to receive further evidence shall be exercised by court on special grounds. What will be considered as special grounds have been pronounced by the courts in numerous judgments. It is, however, noteworthy that the discretion to grant leave to adduce or rely on further evidence is sparingly exercised and will not be granted unless and until the applicant has furnished sufficient materials which will fit squarely into what will pass for special grounds or even compelling circumstance. Those grounds which the appellate courts have settled for in granting the application in hand includes -

(a) The evidence sought to be adduced must be such as could not have been with reasonable diligence obtained for use at the trial.

(b) The evidence should be such if admitted would have an important not necessarily crucial, effect on the whole case.

(c) The evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible.

(d) It is in the interest of justice in the case and not to only one of the parties that the evidence be admitted.

The Daily Trust Newspaper publication about the purported statement or comment of Professor Iwu was about the Enugu Governorship Election of the 14th and 28th of April, 2007. The Chief Press Secretary of Professor Iwu, Mr. Andy Ebeani alleged that Professor Iwu made the statement. ***The Chief Press Secretary did not disclose the source of the information to Professor Iwu. Did Professor Iwu make the statement out of his experience***

from what he witnessed directly at the polling booths in Enugu on the day of the election or from perusing a report sent to him on the conduct of the election at Enugu? Since the information did not come directly from Professor Iwu - it amounts to hearsay. Hearsay evidence is not admissible under the Evidence Act, being evidence on facts relying on information by another person. This offends against Section 77 of the Evidence Act, 2004 which stipulates that oral evidence must be direct. Hearsay evidences is inadmissible evidence which must be expunged from record. (See Buhari v. Obasanjo (2005) 2 NWLR (Pt. 910) 241 at 435; Ajadi v. Ajibola (2004) 16 NWLR (Pt. 898) 91.

Going through the records, admitting the publication will cause an embarrassment to the other parties particularly to INEC which has maintained the stand before the lower tribunal not only that there was an election but that it was conducted in accordance with the Electoral Act, 2006. The Chairman of INEC cannot be heard to say that there was no election at Enugu, months after the election. The statement will surely run contrary to public opinion. The evidence sought to be relied on must be in the interest of justice in the entire case and not to only one of the parties. It must be a document favourable to the interest of justice in the matter. On perusal of the contents of the publication, it is not only self defeating to INEC but an embarrassment that the publication can come from the horse-mouth but it amounts to a threat to the case of the appellants. The record is replete with evidence to support the case of the respondents rather than introducing further evidence where issue of its credibility is at stake. The document has no probative value. I will no longer belabour the issue as the mere fact that the publication is hearsay has knocked the bottom out of this application. ***The application is consequently refused.***

I shall proceed to consider the substantive appeal. The appeals were by order of this court consolidated. I must remind myself that consolidation does not create a set of inseparable Siamese twins. Though by consolidation, all actions are tried and determined in the same proceedings - each remains a separate and distinct action. At the end of the proceedings, judgment should be given in respect of each suit. The court cannot and should not determine one suit and ignore the other. See *Urne v. Ifediorah* (2001) 8 NWLR (Pt. 714) 35;

Balonwu v. Ikpeazu (2005) 13 NWLR (Pt. 942) 479; *Haruna v. Modibbo* (2004) 16 NWLR (Pt. 900) 487.

The Appeal No. CA/E/EP/19/2008. At the hearing of this appeal, the appellants relied on the appellants' brief filed on the 3rd of March, 2008, and the appellants' reply brief filed on 23/4/08. In the appellants' brief twelve issues were distilled for determination from the sixteen grounds of appeal filed as follows –

“(1) *Whether the learned trial judges were right in holding that under the Election Tribunal and Court Practice Directions, 2007 (Practice Directions) the burden of proving that there was an election and that voting occurred lay with the respondents to the petition.*

(2) *Whether the learned trial Judges were right in holding that the Practice Directions have displaced the principles enunciated in Ayogu v. Nnamani (2006) 8 NWLR (Pt.981) 160 at 187; Nnaji v. Agbo (2006) 2 EPR 867 at 860 as well as the other judicial authorities on the nature of quantum and quality of evidence required of a petitioner to prove allegation of non- voting in an election.*

(3) *Whether the learned trial Judges were right in holding that the onus of proving that there was an election and that voting occurred had shifted to the respondents in the petition.*

(4) *Whether the Election Tribunal and Court Practice Directions were validly made, and if so, whether they are superior to the provisions of the 1999 Constitution, the Electoral Act, 2006, the Federal High Court (Civil Procedure) Rules, 2000 and the other sources of law relating to the hearing and determination of elections.*

(5) *Whether the learned trial Judges were right in holding that the petitioners' allegations of irregularities/non-compliance with the Electoral Act, 2006 and guidelines are not criminal in nature, and thus not required to be proved beyond reasonable doubt.*

(6) *Whether the learned trial Judges were right in relying on the analysis of exhibit P5 (1 -734) (exhibit P5 series) in the written address of the learned counsel to the petitioners/respondents in making a finding that there were irregularities and over-voting in the election when the same were not the petitioners' case on their pleadings and the purport of exhibit P5 series was not demonstrated in evidence.*

(7) *Whether the learned trial Judges were right when they held that police reports on the conduct of the election (exhibit P4 1-15)*

had no evidential value for the reasons that the makers thereof were not called as witnesses.

(8) *Were the learned trial Judges right when they held that the test of substantiality as provided for in the Electoral Act, 2006 and enunciated in Buhari & Anr. v. Obasanjo (2005) 3 NWLR (Pt. 941) 1 does not apply to this case.* B

(9) *Whether the learned trial Judges were right in holding that the appellants did not plead or lead evidence relating to the extension of the hours of poll on the days of the election.*

(10) *Whether the learned trial Judges were right in holding C that departure of electoral materials from the premises of the Central Bank of Nigeria (CBN) behind schedule led to the disenfranchisement of a majority of the electorate in the election.*

(11) *Whether the learned trial Judges were right in relying on the Election Tribunal and the Court Practice Directions, 2007 (Practice Directions) to reject the result sheets, which the appellants sought to tender and rely upon in the trial of the petition.* D

(12) *Was the petitioner/1st respondent entitled to judgment on the basis of the evidence he adduced before the learned trial Judges.-* E

The appellants adopted and relied on the arguments and submission in the brief for the purpose of the appeal.

The 1st-3rd respondents adopted and relied on their joint brief filed on 7/3/08 on which they formulated issues for determination as follows - F

“(1) *On whom has the burden of proof that election/voting did not hold in most polling booths in Enugu State.*

(2) *Whether the learned Tribunal was bound to follow the decision of Ayogu v. Nnamani (2006) 8 NWLR (Pt.981) 160 at 194; Nnaji v. Agbo (2006) 2 EPR 890 on quantum of witnesses having regard to the Election Tribunal and Court Practice Directions, 2007.* G

(3) *Whether the learned trial Tribunal in the application of the provision of the Election Tribunal and Court Practice Directions, 2007 subordinated the provision of the Constitution of the Federal Republic of Nigeria 1999 the Federal High Court (Civil Procedure) Rules, 2000 and the Evidence Act to the said Practice Directions in the hearing and determination of the elections.* H

(4) *Whether the Election Tribunal and Court Practice Direc-*

tions was validly made by the President of the Court of Appeal.

(5) Whether the learned tribunal was right in holding that the petitioners' allegation of irregularities/non-compliance with the Electoral Act, 2006 and guidelines are not criminal in nature requiring proof beyond reasonable doubt.

B (6) Whether the learned tribunal properly evaluated the evidence including the exhibits before it, made inferences therein and came to the right conclusion.

C (7) Whether the learned Tribunal was right in its evaluation of what transpired at the Central Bank of Nigeria on the morning of 14/4/07.

(8) Whether the learned trial Tribunal in holding that supreme Court's case of *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1 was inapplicable to the facts of the petition having regards to the provisions of the Electoral Act, 2006 and the Election Tribunal and Court Practice Directions, 2007.

E (9) Whether the learned trial Tribunal was right when it rejected the result sheet tendered by the appellants at the stage of the proceedings, having regard to the Tribunal and Court Practice Directions, 2007.

(10) Whether 1st - 3rd respondents were entitled to judgment on the basis of the evidence adduced before the tribunal since both appellants and respondents presented the same issues in the appeal."

F I shall adopt the issues formulated by the appellants in resolving this appeal.

The 1st - 3rd respondents raised preliminary objection to the competency of the entire appeal on the following grounds -

G "(1) The 4th respondent to the appeal makes the appeal incompetent.

(2) Secondly, grounds 4 and 5 of the notice of appeal are incompetent and should be struck out.

(3) Ground 11 of the notice of appeal should be struck out."

H In arguing the ground of the objection, the respondents challenged the respondent - PDP who was a party who sponsored the appellants and who did not file an appeal being made a respondent in an appeal filed by its candidate. That it will be against public policy as the law recognizes only a sponsoring political party and not the candidate in the event of any success. He made reference to the case

of Amaechi v. Omehia & 2 Ors. (Unreported) SC/252/2007, now reported as *Amaechi v. I.N.E.C.* (2008) 5 NWLR (Pt. 1080) 227.

The learned senior counsel for the appellants replied with an observation that the respondents failed to proffer argument in support of the preliminary objection hence same should be deemed abandoned and consequently struck out. Further, the preliminary objection was not argued in court at the hearing of this appeal same should be seen as lacking in merit. The learned senior counsel further argued that the 1st - 3rd respondents misinterpreted the case of Rt. Hon. Rotimi Amaechi v. INEC & 2 Ors. (2008) Vol. 1 MJSC; (2008) 5 NWLR (Pt. 1080) 227. She made reference to Section 144 (1) and (2) of the Electoral Act, 2006 before concluding that a candidate in an election may be a petitioner or a respondent. The right of a candidate of a political party to present a petition is distinctly recognized from that of a party.

In my understanding, this preliminary objection seeks to define a capacity in which the 4th respondent ought to appear in this appeal. In that where he cannot file an appeal, it is equally wrong to place him as a respondent. Ordinarily, being a party in the election, which lost as a respondent in the suit before the tribunal, he cannot come to an appellate court as a respondent. What then is the traditional role of a respondent in an appeal? The traditional role of a respondent in an appeal is to do everything to support the judgment appealed against. It is in recognition of this right that he is entitled by the rule of court to raise a contention by respondents' notice in order to hold the judgment. He is not supposed to attack the judgment except if he has an intention to cross-appeal. See Cross River State Water Board v. Nugen Consulting Engineering Ltd & Ors. (2006) 13 NWLR (Pt. 998) 589.

Election petitions are *sui generis*. They are in a unique and peculiar class of their own. They have distinct procedure from other civil proceedings. The right of access to court is as provided by the statute guiding the conduct of election so that parties are bound by the statute rather than by the ordinary civil procedure in respect of parties to litigate an action.

In this appeal in hand, the capacity to sue in an election matter is specified by section 144(1) and (2) of the Electoral Act, 2006. This

section of the Electoral Act defines who are necessary parties to an election petition - that is those who are not only interested in the subject matter of the election petition but also in their absence, the proceedings cannot be fairly dealt with. See *PDP v. APP* (1999) 3 NWLR (Pt. 594) 238; *Ujam v. Nnamani* (2003) 1 FWLR (Pt. 191) 906; *Jidda v. Kachallah* (1999) 4 NWLR (Pt. 599) 426; *Biyyu v. Ibrahim* (2006) 8 NWLR (Pt. 981) 1.

It is the Electoral Act, 2006 that determines persons entitled to present petitions and the respondents to such petition as follows:

C By virtue of Section 144(1) of the Electoral Act, the person or persons who are competent to present an election petition are -

- (a) a candidate in the election and/or
- (b) a political party which participated in the election.

Section 144(2) of the Electoral Act, 2006 stipulates that people who D may be respondents to an election petition are -

- (a) The person whose election is complained of;
- (b) The electoral officer or a presiding officer, or a returning office or any other person who took part in the conduct of the election and whose conduct is complained of.

E ***In this appeal, PDP - the 4th respondent being a political party who participated in the Enugu Governorship election has no business pursuing this appeal as a respondent. He cannot be seen to be protecting or defending judgment, which is against him. The statutory role of the party is to be an appellant, which role he can play jointly with the Governor or Deputy Governor, its sponsored and nominated candidate or on its own by virtue of section 70 of the Electoral Act -being a body corporate who can sue and be sued.*** See *Okonkwo v. Ngige* (2006) 8 NWLR (Pt. 981) 119; *P.P.A. Saraki* (2007) 17 NWLR (Pt. 1064) 453; *Ngige v. Obi* (2006) 14 NWLR (Pt. 999) 1. ***PDP maintaining a stand as a respondent is an irregularity in the form of the appeal, which can readily be amended by the court on application by the appellant, it does not make the appeal incompetent.***

H Another leg of the objection is that grounds 4 and 5 of appeal in the notice did not attack the judgment of the tribunal; rather, it is based on academic and hypothetical circumstances. There is nowhere it is stated in the particulars of the grounds the error committed by the tribunal therein.

The learned senior counsel for the appellants replied that ground 4 of the grounds of appeal is complaining about the scope of the Practice Directions vis-a-vis the provisions of the 1999 Constitution. The grounds have arisen and flow directly from the judgment of the lower tribunal. Any complaint on this issue without a ground of appeal would have been hanging in the air. B

I must confirm that an appeal is a complaint against the decision of and a challenge to the validity of that decision. It is an invitation to the higher court to review the decision of a lower court by an aggrieved party, I have gleaned through grounds 4 and 5 of the notice of appeal subject of complaint. I cannot see anything academic or hypothetical in the argument of the appellants on the ground. The grounds flow from the judgment of the lower court in respect of the scope of the Election Tribunal and Court Practice Directions on the aspect of front loading of documents with reference to the cases of *Ayogu v. Nnamani* (2006) 8 NWLR (Pt. 981) 160 at 194 and *Nnaji v. Agbo* (2006) 2 EPR 867 at Pg. 890. It is for this court to decide whether the submission of any party on an issue in this appeal has become highly academic and hypothetical. C D

In the third leg of the preliminary objection, the learned senior counsel for the 1st - 3rd respondents contended that ground 11 is incompetent and should be struck out as no right enures to the appellants who did not tender the said exhibit P4 and the 1st - 3rd respondents who tendered same have not filed cross-appeal. A ground of appeal enures to a person when his personal rights have been infringed. E F

The appellants replied that the respondents relied heavily on exhibit P4 series in the respondents' brief; whereas courts are expected to consider and use all the documents tendered before it unless they are inadmissible. There is no justification for the contention of the learned senior counsel that a particular document tendered in court cannot be used by the opposing party and cannot be sustainable in the interest of justice. G

I find this objection as not only interesting but surprising. The learned senior counsel has obviously failed to advert his mind to the fact that the basis of adducing evidence either oral or documentary is to aid the courts in attaining justice and to see that justice is manifestly done. Evidence is adduced H

not only to aid or boost the evidence of a particular party but to assist the administration of justice to see that justice is done on the basis of fairness to all parties. In as much as exhibit P4 series are before the court as part of documentary evidence in the petition, the appellants and respondents have all the right to appeal against them - it is a constitutional right.

I rule that legs two and three of the preliminary objection are not sustainable, they are consequently overruled and struck out.

At this juncture, we can conveniently move on to consider the issues involved in the substantive appeal.

Issue No. One:

Whether the learned Judges were right in holding that under the Election Tribunal and Practice Directions 2007 “*Practice Directions*”, the burden of proving that there was an election and that voting occurred lay with the respondents to the petition.

On this issue, the appellants submitted that in the judgment of the tribunal, mention was made about the present novel procedure occasioned by the Election Tribunal and Court Practice Directions, 2007 where the burden of proving that there was an election and that voting occurred laid with the respondents. The appellants insisted that the new Practice Directions cannot change the position of the existing law in the Evidence Act, sections 135-139 that he who assert must prove. If petitioners asserted that voting did not take place in all or most polling booths in the Governorship election held in Enugu in the April, 2007 election, the onus is on the petitioner to prove the allegation of non voting. The appellants supported this submission with the case of *Awuse v. Odili* (2005) 16 NWLR (Pt. 952) 416; *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1.

The burden of proof can only shift after the petitioners have discharge their own. The Practice Directions did not introduce any novel provision that altered the existing law and the judicial authorities on whom the burden of proving that voting did not take place lay on and how such a burden could be satisfactorily discharged.

The Practice Directions expects both parties - petitioners and the respondents to front load whether by listing or attachment. The respondents replied that appellants misquoted the conclusion of the tribunal.

The tribunal had evaluated the evidence of the twenty-five

witnesses called and concluded that they cut across the 17 Local Government Areas, Enugu State by their evidence. The tribunal concluded that once the petitioner has been able to discharge the evidential burden on him by credible evidence, which is believed, the onus shift. The petitioners before the trial court abandoned other grounds of the petition except those of irregularities and non-compliance. The burden of proof is discharged once there is credible evidence before the court. The petitioners led evidence but what the appellant challenged was that only twenty-five witnesses testified and that the voters register was not tendered. The burden of proof is not static but shifts - with the evidence of the petitioners believed by the tribunal it has therefore shifted. The tribunal put the burden of backing up any allegation about the election with witnesses' statements and depositions. The tribunal did not say that the burden of proof now shift with application to prove that there was election as required by the Practice Directions. The major complaint is that of late arrival of voting materials as a result of which election was delayed. Vide pages 1 - 499 of Vol. I of the record. The facts and circumstances of this case are different from what was in *Ayogu v. Nnamani* and *Nnaji v. Agbo*. There was no voting in various polling booths in the State, as hours prescribed was not, adhered to and materials arrived at the seventeen Local Government -headquarters close to the end of the hours of poll. With the new Practice Directions, witnesses has to be streamlined. The mark of distinction from the cases of *Ayogu v. Nnamani* and *Nnaji v. Agbo* is that though election materials were delivered, no election was held as they were delivered late to the polling booths.

Issue No. Two:

"Whether the learned trial Judges were right in holding that the Practice Directions have displaced the principles enunciated in Ayogu v. Nnamani (2006) 8 NWLR (Pt. 981) 160 at 187 and Nnaji v. Agbo (2006) 2 EPK 867 at 890 as well as other judicial authorities, on the nature, quantum and quality of evidence required of a petitioner to prove allegation of non-voting in an election."

The appellants submitted that there is nothing in the Practice Directions to whittle down the nature, quantum and quality of evidence required of petitioners alleging non-voting in an election.

By virtue of the Electoral Act, 2006, the issue of whether a

voter cast his vote could be ascertained by examining the voters register to know whether the persons name was marked as having voted. The appellants made reference also to the case of *Onoyom v. Egari* (1999) 5 NWLR (Pt. 603) 416 at 425.

The petitioners pleaded that they would rely on the voters register to prove this allegation - they did not subpoena INEC to come and tender the register. The twenty-five witnesses that testified for the petitioners could not have given evidence as to voting in the 2,874 polling booths in Enugu State. It is not the law that to prove non-voting in the constituency or local government with numerous polling booths one witness will come and merely say that he could not vote at the election. The other polling booths in the constituency that the voter had nothing to do with would be an exercise in speculation, which no reasonable tribunal would rely on. There is nothing in the Practice Directions that could justify the view of the lower tribunal, that the under-mentioned cases have been overruled or overtaken by the Practice Directions as far as proof of non-voting in a constituency. See cases: *Ayogu v. Nnamani*; *Nnaji v. Agbo*; *Onoyom v. Egari*; *Remi v. Sunday*; *University of Lagos v. Aigoro* (1984) 11 SC 152 at 191; (1985) 1 NWLR (Pt.1) 143.

The appellants contended that streamlining of witnesses does not prevent making a prudent choice of witnesses and produce them to establish the petitioners' case. Witnesses have to be streamlined to prevent unnecessary duplication of evidence. The appellants still held to the view that the Practice Directions did not detract from the principle enunciated by the Court of Appeal in *Ayogu v. Nnamani*. By way of reply the 1st - 3rd respondents made reference to paragraph 3(8) (b) and 4(8) of the Practice Directions which empowered the tribunal to streamline witnesses so as to circumvent such situations of over populated witnesses in cases like *Ngige v. Obi* (2006) 14 NWLR (Pt. 999) 1 at 197. The evidence of a witness who was able to move round during the election to cover so many polling booths should be acceptable. It is not necessary to call witnesses polling booth by polling booth to prove non-voting. The 1st - 3rd respondents submitted that their twenty-five witnesses before the tribunal cut across all the allegations of non-voting in most polling areas in Enugu State.

Issue No. Three:

"Whether the learned trial Judges were right in holding that

the onus of proving that there was an election and that voting occurred had shifted to the respondents in the petition.”

The appellants referred to the 17 Local Government Areas, which constitute the constituency for purposes of the Governorship Election questioned. There were 2,874 polling booths in all. The twenty-five witnesses for the petitioners did not tender the voters registers used at the 2,874 polling booths where they contended that voting did not take place. The petitioners should have called one voter from each of the 2,874 polling booths. The scanty evidence from the petitioners did not justify that all the burden of proof had shifted as viewed by the tribunal. As a matter of fact, the petitioners failed to do what is required of them to shift the burden. It was alleged that no voting took place and forms EC8A for collation of result and Forms EC8C were tendered as exhibits P5 1-734, police reports and P4 1 - 15. The respondents stressed the impracticability to call 2,874 witnesses of those who did not vote or to produce the record of the result of each of the polling station in every local government where issues were joined. The issue of streamlining of witnesses means spreading the witnesses to cut across various issues instead of mere repetitive witnesses on one issue.

Issue No. Four:

“Whether, the Election Tribunal and Court Practice Directions, 2007 (Practice Directions) were validly made, and if so, whether they are superior to the provisions of the 1999 Constitution, the Electoral Act, 2006, the Federal High Court (Civil Procedure) Rules, 2000 and other sources of law relating to the hearing and determination of election petitions.”

The appellants contended that going by section 285(3) of the 1999 Constitution - the Sixth Schedule of the Constitution mentioned therein confers no powers on anybody to make Practice Directions. The provisions of section 285(3) and the Sixth Schedule is concerned exclusively with the empanelment of the Election Petition Tribunal but not with the making of the rules of procedure and the legislature did not provide for the making of such rules. That being the case, the power purportedly exercised by the President of the Court of Appeal pursuant to section 285(3) of the Constitution has no legal backing and hence unconstitutional, null, void and ineffectual. It is competent for the tribunal to interfere with such exercise of power made

inconsistent with the enabling statute. The appellants made reference to cases in support of this submission: *Osafire v. Odi (No.1)* (1990) 3 NWLR (Pt. 137) 130 at 406; *M.B.L v. Federal Minister of Finance* (1961) 2 SCNLR Pg. 222; *Nwosu v. Imo State Environmental Sanitation Agency* (1990) 2 NWLR (Pt. 135) 688; *Ogieva v. Igbinedion* B (2004) 14 NWLR (Pt. 894) 467 at 486.

The First Schedule by virtue of section 151 of the Electoral Act, 2006, provides for the rule of procedure to be adopted for election petitions and appeals arising there from. Paragraph 50 of the C First Schedule of the Electoral Act does not confer on anybody this power to make the Practice Directions. The President of the Court of Appeal is only conferred with power to make Practice Directions for the Court of Appeal and not for Election Petition Tribunal - by virtue of Order 7 rule 7 of the Court of Appeal Rules. The Practice Direc- D tions made by the Chief Judge of the Federal High Court for the court shall by virtue of the provision of paragraph 50 of the First Schedule to the Electoral Act be extended for the use at the Election Petition Tribunal. The Practice Directions is not applicable to the Governorship and Legislative Houses Election Tribunal but only to Presi- E dential Election Petitions as the Court of Appeal is the Tribunal for such petitions as by virtue of section 248 of the 1999 Constitution the President of the Court of Appeal is empowered to make rules regulating the practice and procedure of the Court of Appeal. This F power of the President of the Court of Appeal is confirmed by the decision in *Buhari v. INEC* (2008) 4 NWLR (Pt. 1078) 546. This Practice Directions for the Governorship and Legislative Houses Elec- tion Petition Tribunal lacks validity. Even if it can be argued that the Practice Directions was validly made, the provisions are no superior G to the provisions of the 1999 Constitution, the Electoral Act, the Evidence Act and the Federal High Court Rules, 2000. The Practice Directions was not mentioned in the Electoral Act, 2006 nor in the First Schedule to the Act, and also in the Federal High Court (Civil Procedure) Rules, 2000. The hierarchy of the rules applicable to the H lower tribunal is the First Schedule to the Electoral Act which is the major and overriding source followed by the Federal High Court (Civil Procedure) Rules and last the Practice Directions. In the area of evidence and admissibility of documents - the Evidence Act is the overriding law. While the Constitution as the overriding law of the

land overrides the practice Directions, so that the Practice Directions cannot detract from the fair hearing guaranteed by the Constitution as a fundamental right. The lower tribunal in the hearing of the petition elevated the Practice Direction above the First Schedule, the Federal High Court (Civil Procedure) Rules, 2000 and the 1999 Constitution. By relying on the Practice Directions, the tribunal contrary to paragraph 12 of the First Schedule on the filing of pleadings and contrary to the provisions of the Evidence Act, rejected the certified true copies of Forms EC8As, for Oji River Local Government and EC8Es which the appellants pleaded in their replies and sought to tender in support of their defence. Whereas documents tendered by the petitioners were admitted. The reason given for not admitting was that they were not tendered along with the replies in accordance with the Practice Directions. The tribunal also relied on the Practice Directions to shut out the evidence of 11 of the seventeen electoral officers who conducted and supervised the election in the seventeen Local Government Areas of the State. The lower tribunal elevated the Practice Directions over and above the Constitution of the land, which was wrong and consequently occasioned miscarriage of justice.

The respondents replied that by the combined effect of the First Schedule to the Electoral Act, 2006, and section 285(3) of the 1999 Constitution, the President of the Court of Appeal can make Practice Directions, which by virtue of Paragraph 50 of the First Schedule is supposed to be similar to the practice and procedure of the Federal High Court. The First Schedule did not vest the power on the Chief Judge of the Federal High Court while the provision of section 10 (2) of the Interpretation Act, Cap. 192, LFN comes handy as it states that –

“An enactment which confers power to do any act shall be construed as are reasonably necessary to enable that act to be done or are incidental of doing of it.”

The lower tribunal has not subordinated the Evidence Act to the Practice Directions as issue of admissibility of documents is subject only to the Evidence Act by virtue of section 227(1) and (2). Learned senior counsel settled for six electoral officer witnesses on behalf of INEC and not appellants. There is no steps taken by the tribunal that can amount to denial of fair hearing.

Issue No. Five:

“Whether the learned tribunal was right in holding that the petitioners, allegation of irregularities/non-compliance with the Electoral Act, 2006 and guidelines are not criminal in nature and thus not required to be proved beyond reasonable doubt?”

B The tribunal set out acts amounting to non-compliance and irregularities in the judgment at pages 610-611 in volume III of record as follows:

(1) No election in most places

C (2) Late arrival of electoral materials causing no voting or late voting

(3) None availability of result sheets

(4) Irregularity in allotment of votes to the appellants

(5) Non-collation of results in places where there were voting.

D The appellants submitted that whether non-compliance or irregularities referred to above have criminal content will depend on whether the acts or omission constituting the non-compliance or irregularities are forbidden by law and the punishment prescribed by statute.

E The Electoral Act provides sanctions for breach of statutory duties by the electoral officer *by* virtue of sections 130(1) and 130(5) of the Electoral Act, 2006. Any officer of INEC who commits any of the undermentioned -

(1) Fails to conduct an election where he is assigned to

F (2) Causes the material to arrive late such that no voting could take place, and/or voting would start late

(3) Fails to make the result sheets available

(4) Fails to collate the results

G has breached his official duty which amount to an offence under section 130(1) of the Electoral Act. It is therefore clear that the non-compliance and irregularities complained of by the tribunal are criminal offences within the contemplation of Electoral Act yet the lower tribunal held that they must be proved on preponderance of evidence.

H The appellants cited cases to show that the offence amount to crime and they must be proved beyond reasonable doubt. *Eruotor v. Ughumiakpor* (1999) 9 NWLR (Pt. 619) 460 at 465; *Onwuka Kalu v. Dr. Kalu Orji Johnson Uzor & 5 Ors.* (2006) 8 NWLR (Pt.981) 66 at 87; *Buhari v. Obasanjo* (2005) 13 NWLR (Pt.941) 1 at 187.

The respondents' learned senior counsel differed in his opinion and submitted that irregularities/non-compliance mentioned by the appellants are not criminal in nature and are to be proved on preponderance of evidence or balance of probability. He supported the foregoing contention with cases: *Omoboriowo v. Ajasin* (1984) 15 NSCC 81 at 85; (1984) 1 SCNLR 108; *Ezemba v. Ibeneme & Ors.* (2004) 14 NWLR (Pt. 894) 617; *Chief Onwuka Kalu v. Dr. Kalu Orji kalu* (2006) 8 NWLR (Pt. 981) 66 at 87; *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 981) 13 NWLR (Pt. 981) 1.

Issue No. Six:

Whether the learned trial judges were right in relying on the analysis of exhibit P5 (1-734) exhibit P5 series in the written address of the learned counsel to the petitioners/respondents in making a finding that there were irregularities and over-voting in the election, when the same were not the petitioners' case on the pleadings and the purport of the exhibit P5 series was not demonstrated in evidence.

It was the learned senior counsel in his address who led the learned trial judges to adopt his address as evidence on exhibit P5 but he did not tell the court in his evidence the use he intended to put of exhibit P5 in proof of his case as there was no averment in his pleadings to that effect. There was no evidence from any witness analyzing or stating the effect of exhibit P5 at the trial. The tribunal used the address of counsel and its own analysis/observation of the exhibits in coming to the conclusion that there was over-voting and that score are more than ballot papers. Parties and court are bound by pleading while address of counsel cannot be a substitute for evidence. Cases were cited: *Ajadi v. Ajibola & Or.* (2004) 16 NWLR (Pt. 898) 91-170; *Ngige v. Obi* (2006) 14 NWLR (Pt. 999) 1; *Muhammadu Buhari & Ors v. INEC & Ors.* (2008) 4 NWLR (Pt. 1078) 546; *Bornu Holding Company Ltd. v. Alhaji Hassan Bagoco* (1971) 1 All NLR 342; *Awuse v. Odili* (2005) 16 NWLR (Pt. 952) 416; *Salawu Yoye v. Olubode & 3 Ors.* (1974) 10 SC 209 at 215.

The learned senior counsel for the respondents submitted that the petitioners called twenty-five witnesses and tendered six documents exhibits P - P7. The 1st - 2nd respondents called 9 witnesses and INEC called six witnesses. The tribunal based their decision on watching the demeanour of witnesses and consideration of the ex-

hibits tendered. The respondents gave evidence of how late the electoral materials left the Central Bank, Enugu which affected distribution to all the Local Governments from where they were distributed to various centre. Though majority of witnesses who came to give evidence of the time and when materials were received, and when voting really took place, the time voting materials were received was between 2:30 pm. and 7:00 p.m. There were no voting in some areas as no voting materials were received. Some voters went home disappointed as voting materials did not reach them before it was dark. Police reports were examined the collation of result sheets. Police reports on the incidents at the election was tendered as exhibit P4 series and that of the collation of results forms as exhibit P5 series. The evidence was not rebutted by the respondents. Twenty-five witnesses gave evidence to reveal the evidence of non-compliance and irregularities in the elections held on the 14th and 28th of April, 2007 respectively in the 17 local governments. The total number of votes declared for the 1st appellant was on exhibit P5 forms EC8C collated results, from the 17 local government areas.

The respondents submitted that the petition displayed through cogent and documentary evidence over-balloting at polling stations in question had discharged the onus of establishing non-compliance and irregularity in respects of the exhibits tendered. The onus then shifts to the appellants to show that the non-compliance did not substantially affect the result. The irregularities and non-compliance affected the result of the election having regard to the votes purportedly scored by the petitioners and the 1st appellant in these eleven local government areas out of seventeen in Enugu State. The total number of votes declared for the 1st petitioner was 22,502 and for the 1st respondent 811,798 in 300 polling units, the votes affected are 1st petitioner- 1,435 and the 1st respondent - 97,496 votes. The respondents cited cases: *Dashe v. Bawa* (1989) 1 NEPLR 71; *Swem v. Dzungwe* (1966) NMLR 297; (1966) 1 SCNLR 111; *Terab v. Lawani* (1992) 3 NWLR (Pt. 231) 569; *Ireti v. Kingibe v. Isa Maina & Ors.* Unreported decision of the Court of Appeal Abuja in Suit No. CA/A/EP/131/2003.

Issue No. Seven:

“Whether the learned trial Judges were right when they held that that police reports on the conduct of the election exhibit P4 (1-

15) had no evidential value for the reason that the makers thereof were not called as witnesses?"

On page 615 vol. III of the record in the judgment of the tribunal, they refused to attach probative value to exhibits P4 1-15 police reports since the makers was not witnesses before the tribunal to be cross-examined on them - they were not accorded any probative value going by section 91 of the Evidence Act. Exhibits P4 1-15 are police reports stating that elections that took place in various polling booths were peaceful and conducted in substantial compliance with the Electoral Act. The reports were produced in court on subpoena and tendered through PW24. The documents showed that there was elections in the areas covered by the report and that the 1st appellant scored the highest number of votes in those area. The reports were issued by the police in the course of their duty and has become public document. They should be admitted evidence after being duly certified under section 111 and 112 of the Evidence Act. Exhibit P5 series - Election results forms in forms EC8As and EC8Cs were tendered and admitted in evidence through the same witness PW24 - the presiding and collation officers who made them were not called to give evidence. Non ascription of probative value to exhibit P4 series has occasioned a miscarriage of justice and perverse.

The respondents replied on this issue that one of the complaints was that voting time was not open for the period in compliance with the electoral law to enable the electorates cast their votes. The appellants only replied that voting started later than the time prescribed by INEC - they admitted 10a.m. to 6p.m. INEC gave the time of the voting as between 11. 30a.m. and 12.30 p.m. to 6 p.m. and that it was announced on the radio. The fact was pleaded but no evidence was led to support same. Most of appellants' nine witnesses did not say anything about shift of the polls. INEC also failed to establish shift of the polls. The nature of non-compliance here is sufficient to warrant the nullification of the election.

Issue No. Eight:

"Were the learned trial Judges right when they held that the test of substantiality was provided for in the Electoral Act, 2006 and enunciated in Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) 1 does not apply to this case."

The appellants submitted that the substantiality is in respect of conducting an election in accordance with the principles of the Electoral Act, and that non-compliance does not affect substantiality is a principle embodied in section 146(1) of the Electoral Act, 2006 does not admit of any distinction between situations where a petitioner admits that voting occurred, but was marred with irregularities and situations where a petitioner alleges that voting did not occur at all. There is also the issue of correctness of an election declared by the electoral commission, which is that an election was duly conducted until the contrary is proved by the petitioner. A petitioner cannot be heard to say that an election did not take place where results have been announced unless he can show by credible evidence that no voting actually occurred. The contention of substantiality was supported by cases: *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941)1; *Ayogu v. Namani* (2006) 8 NWLR (Pt.981) 160 at 187; *Biya v. Ibrahim* (2006) 8 NWLR (Pt. 981)1; *Buhari v. INEC* (2008) 4 NWLR (Pt. 1078) 546; *Abubakar v. Yar'adua* (2008) 4 NWLR (Pt. 1078) 538.

The appellants further held that the exception, the Tribunal below tried to read into the substantiality principle does not exist in law.

The respondents submitted that the case of the 1st-3rd respondents before the tribunal though hinged on non-compliance; irregularities was based on facts and circumstances totally different from those in *Buhari v. Obasanjo*. The non-compliance here was based on the election materials leaving Central Bank late, arriving at the local government areas late, time for voting late, no voting in some areas and electorates could no longer wait - majority were disenfranchised. These facts are dissimilar to the case of *Buhari v. Obasanjo* where delivery of non-delivery of electoral materials was not in issue. The tribunal was therefore right not to have followed the principles in *Buhari's case*. After evaluating the evidence in this case, the tribunal arrived at the conclusion that the election was not conducted in substantial compliance with the Electoral Act, 2006.

Issue No. Nine

Whether the learned trial judges were right in holding that the appellants did not plead or lead evidence relating to the extension of the hours of poll on the days of the election?

The appellants referred to the comment of the lower tribunal at pages 612. Vol. III of the record on the arrival of electoral material whereas voting was supposed to be held between 8:00a.m. to 3:00p.m. was the evidence of PW1 at page 85 vol. 11 of the record to the effect that voting started at 11. 30a.m. and not 8.00a.m. as was supposed to be. Closing was 6.00p.m. instead of 3.00p.m. that, B announcement to this effect was made on air. The lower tribunal failed to consider such evidence while nullifying the election of the 1st appellant. The tribunal held that not keeping to the official hours of voting according to the manual and on the authority of *Bassey v. Young* (2007) 3 EPR 456 at 465; (1963) 1 SCNLR 61 has led to C irregularity and non-compliance with the Electoral Act. The Electoral Act. 2006 section 47 contains no provision for the duration for voting, it leaves that at the discretion of INEC to fix the days and hours for the poll. D

By virtue of section 103 of the Electoral Act, the act of the commission becomes valid until declared invalid by a competent court of law. Further, another consideration is whether voters had the opportunity to vote and actually voted despite the variation of voting time. In this case, voters voted despite the variation in voting time. E The petitioners and their witnesses were not able to establish any number of voters who did not turn out at the polling booths but could not vote as a result of the change in the hours of poll. This requires evidence of what happened in polling booth by polling booth F not generalized evidence.

The effect of irregularity must be tied to such irregularities once the petitioner is unable to show the direct impact of the alleged irregularities on the results of the election the court cannot rely on insufficient evidence to nullify an election. The judgment of the lower G tribunal on this issue is perverse and as such must be set aside by this court.

The respondents submitted that the appellants admitted that voting started behind the time prescribed by INEC but it was widely H announced over the radio and further that INEC extended the time for voting. Pages 56-57 vol. II of the record. But INEC who was directly affected did not give evidence as alleged by the appellants.

In the deposition of the nine witnesses of the appellants, there was nothing about voting time or announcement to that effect. The

respondents submitted that facts pleaded without witnesses, deposition or evidence lead, goes to no issue and they are deemed abandoned. The respondents, cited cases: *Chia v. Uma* (1998) 7 NWLR (Pt. 556) 95 at 98; *Ifeta v. S.P.D.C. (Nig.) Ltd* (2006) 8 NWLR (Pt. 983) 585 at 600-601; *Yusuf v. Oyetunde* (1998) 12 NWLR (Pt. 579) 483 at 498

The reference to the facts elicited under cross-examination as stated in pages 42 and 43 of the brief should be disregarded as they are abandoned pleadings in view of the front-loaded system, as no evidence was led on it. The tribunal was right in holding that voting time was not adhered to. Legal guideline and manual is valid and must be complied with. Deposition of the fifteen witnesses for the respondents were examined, none of them gave evidence concerning the shift in voting period. The hours of the poll are fundamental to any election. It does not require the evidence of persons who did not vote as a result of not keeping to the hours. Since the hour of election was disrupted, no form of election could be said to have taken place. Once the petitioners discharged the burden that polling hours were not complied with, the burden of proof shifts to the respondent to establish that they were complied with and there was polling for six hours. In the rural areas, voters will not wait for 3-4 hours to vote particularly when there was no announcement about change of hours of the polls. The nature of non-compliance in this case is enough to nullify the election.

Issue NO. Ten:

"Whether the learned trial judges were right in holding that the departure of electoral materials from the premises of the Central Bank of Nigeria (CBN) behind schedule led to the disenfranchisement of a majority of the electorates in election."

The appellants submitted that because of the pandemonium which occurred at the Central Bank, Enugu, the voting materials were unable to leave until when soldiers intervened and fired to the air to disperse the crowd and the gates was opened at 12 noon. The election materials did not leave the Central Bank until 1.00p.m. - it was a hastened conclusion made by the tribunal when there was no evidence to that effect. The electorate was not disenfranchised. Some voters could not go because of late arrival of material. The petitioners failed to give either numbers or the polling booth where the incident

occurred. The appellants, plea that there was an extension of polls places an obligation on the respondents to show even at the end of the extended time, the people were available to vote but could not vote. Exhibit P4 series showed that things were in order and people came out to vote but judges of the tribunal did not rely on such evidence. The number of voters disenfranchised by the late start at the polls must be pleaded and proved with reasonable certainty. From the analysis of the respondents, the alleged number of voters enfranchised due to the fact that voting did not start on time was 477,873. Even with this number, the final result of the election would still not change in favour of the respondents.

The judgment of the tribunal did not flow from the facts nor evidence of the parties on record - same must be reversed.

The respondents replied that there was substantial non-compliance with the conduct of elections as stipulated in the Electoral Act. Since the election materials arrived at the Local Government Areas late. Those who reported to the polling booth early and in compliance with the electoral procedure went back since there was no supply of voting materials. Those people who went back home were obviously disenfranchised. The Form EC8C for the 17 Local Governments tendered before the tribunal show the total number of registered voters in Enugu as 1,376,884. The number of registered voters who voted at the said election was 899,011. The people purported to have been disenfranchised were 477,873 registered voters. This figure represents 34% of registered voters. It is trite that once petitioner has shown that polling started at various times which they held at the 17 Local Government Areas of Enugu State must later than the time prescribed by law, the burden shifts to the respondents to establish that the poll remained open for the seven hours prescribed by the Electoral Act. The respondent cited the case: *Bassey v. Young* (1963) 1 All NLR 31 at 37; (1963) 1 SCNLR 61. The respondents particularly INEC has failed to discharge the burden.

Issue No. Eleven

Whether the learned trial judges were right in relying on the Election Tribunal and Court Practice Directions 2007 (Practice Directions) to reject the result sheets, which the appellants sought to tender and rely upon in the trial of the petition, thereby denying them their right to fair hearing?

The appellants referred to one of the grounds upon which the respondents predicated their petition were -

“corrupt practices, violence, intimidation and irregularities which substantially affected the result of the election such as announcing results in places where no elections were held and illegal declaration of unlawful and wrong results.”

At page 583 of the records, the tribunal refused some of the result sheets by virtue of paragraph 4(8) of the Practice Directions. The same tribunal had on 19th October, 2007 granted leave to the petitioners to tender documents not front-loaded on oral application as above after the petitioners had withdrawn his motion for the same purpose. The appellants contended that the provisions of paragraph 4(8) of the Practice Directions run into direct conflict with the provisions of the substantive law dealing with elections and election petitions i.e. the Election Act, 2006, as the Practice Directions were not validly made.

The respondents identified the grouse of the appellants on this issue as the rejection of some registered sheets contained in Form EC8B through RW11 the electoral officer for Orji Local Government Area of Enugu State. RW11 was INEC witness. INEC did not plead the results and there was no formal application brought pursuant to paragraphs 4(8), 7 and 8 of the Practice Directions to tender the said results. The rejected result was in respect of only one local government area. The rejection of the result did not occasion a miscarriage of justice. The respondents referred to section 227(2) of the Evidence Act and cited cases: *Awuse v. Odili* (2005) 16 NWLR (Pt. 952) 416 at 479; *Arum v. Nwobodo* (2004) 9 NWLR (Pt. 878) 411 at 446.

The appellants narrated the grounds for the petition and the reliefs claimed by the respondents before the election petition. All the allegations made by the respondents were denied by the appellants who led evidence in support of their case.

The 3rd respondent - INEC equally joined issues with the petitioners and put the petitioners to the strictest proof of their claim. It was the case of the INEC that voting materials left CBN office Enugu around 10 O'clock in the morning for various local government areas and that voting took place in all the polling booths in the state and that votes were counted, collated and the results declared. Peti-

tioners/respondents called twenty-five witnesses and tendered documents in support of their case that voting material left Central Bank Enugu late. He was at his polling booth between 4p.m -7p.m. but electoral officials did not show up there and there were no voting materials either. The evidence of this witness was found to be contradictory and has no probative value as he was alleged to be a victim of teargas at Central Bank premises and had to be hospitalized. He could not have been at the Central Bank and the polling booths simultaneously. The evidence of PW21 was also found to be contradictory. They both gave evidence of hijacking of election materials meant for the Local Government Areas by PDP functionaries. In the face of failure to adduce evidence to support their wild allegations, the court still believed the petitioner. The appellants gave evidence that materials were fully distributed by INEC officials ready for the election. The evidence of PW19 was also found to be contradictory, yet the tribunal concluded that the petitioners had proved various acts of irregularities and non-compliance with the provisions of the Electoral Act. 2006. Exhibit P4 (2) a certified police reports on the conduct of the election which expressed police opinion about the election, that materials were received, that people turned out in large numbers to cast their votes, and the election was generally peaceful. The tribunal rejected the reports because it contradicted the appellants' case. Various local governments were hand picked as samples. The tribunal held that the appellants did not plead and lead evidence to establish extension of hours of poll on the day of the election and therefore nullified the election of the appellants notwithstanding that the appellants copiously pleaded and led uncontroverted evidence of this fact. Tribunal also rejected certified true copies of result sheets which the appellants duly pleaded and sought to tender and rely upon at the trial of the petition. The court is urged to rectify these errors and allow the appeal.

On this issue, the respondents replied by drawing attention of this court to the fact that the petitioners abandoned all other grounds of the petition and premised their case on the issue of irregularities and non-compliance and the judgment of the tribunal was based on these. The incident at the Central Bank of Nigeria. Enugu was the genesis of the irregularities in the election. Parties joined issues on them but never led any evidence on them. The lower tribunal based

its judgment on the following:

- (1) Non-election in most Local Government Areas
- (2) Late arrival of electoral materials
- (3) Irregularities in allotting of votes to the 1st respondent.
- (4) Non-availability of result sheets.

B (5) Non-collation of results in places where there were voting.

The incidents which occurred during the gubernatorial elections in Enugu State on the 14th and 28th of April, 2007 violated the Electoral Act, 2006 and the election manual and electoral guidelines for electoral officers exhibits P2 and P2 A respectively in the petition which dictates that time of the polls shall begin at 8am and end at 3pm. The petitioners called twenty five witnesses and tendered documents used for the elections. Election materials left the Central Bank of Nigeria late after the time designated for commencement of election at various polling booths about 12 noon, and reasons was given for them. The movement was amidst shooting by Army personnel to keep party agents away and under control. The materials arrived various Local Governments very late. As a result of which voters had already left, and where there were voters voting commenced very late. The tribunal evaluated the probative value and quality of the evidence of the parties. Rejected the admission of documents like police report exhibit P4 1-15 tendered by the respondents/applicants in that they were tendered under subpoena and not by the makers and the result sheets of elections were rejected since they were not tendered in accordance with Practice Directions for the Election 2007 - Section 4(8). Evidence of petitioners' witnesses about die conduct of election were reviewed, and evidence of witnesses of the respondents/appellants and INEC in respect of non-holding of gubernatorial election in Enugu State. At the end of address of counsel returned a verdict that the ground that a case of substantial non-compliance with the Electoral Act, Electoral Guidelines and Manual was made out. This court is urged to affirm the judgment of the lower court and nullify the election held in Enugu State on the 14th and 28th of April, 2007. I have gone through the brilliant and elucidating briefs of the learned senior counsel prepared in defence of their respective positions. It has really assisted this court in its decision in this case. I identify myself with the contention that the parties joined issues on a quadrangle of incidents peculiar to the 14th and 28th of

April, 2007 gubernatorial election in Enugu State. They are in election parlance dubbed as acts of irregularities and non-compliance as follows -

- (1) Non-election in most local government areas
- (2) Late arrival of voting, material resulting in disenfranchisement of voters
- (3) Non-availability of result sheets -the Form EC8 series
- (4) Non-collation of results in places where there were voting.

The twelve issues for the determination of this court in this appeal are rooted in them. The genesis of the facts is as narrated earlier on in this judgment. I intend to tackle issues numbers one to four together as they are interwoven, and similar in context being a challenge to the validity and scope of the Election Tribunal and Court Practice Directions, 2007 issued by the President of the Court of Appeal to be applicable to the Presidential, Governorship, National Assembly and States Election Petition.

Issue No. One:

Whether the learned trial Judges were right in holding that under the Election Tribunal and Court Practice Directions, 2007 (Practice Directions) the burden of proving that there was an election and that voting occurred lay with the respondents to the petition.

Issue No. Two:

Whether the learned trial Judges were right in holding that the Practice Directions have displaced the principles enunciated in *Ayogu v Nnamani* (2006) 8 NWLR (Pt.981) 160 at 187; *Nnaji v. Agbo* (2006) 2 EPR 867 at 860 as well as the other judicial authorities on the nature, quantum and quality of evidence required of a petitioner to prove allegation of non- voting in an election.

Issue No. Three:

Whether the learned trial Judges were right in holding that the onus of proving that there was an election and that voting occurred had shifted to the respondents in the petition.

Issue No. Four:

Whether the Election Tribunal and Court Practice Directions, 2007 were validly made, and if so, whether they are superior to the provisions of the 1999 Constitution, the Electoral Act, 2006, the Federal High Court (Civil Procedure) Rules, 2000 and the other sources of law relating to the hearing and determination of elections.

It is right and appropriate to quote from that portion of the judgment of the lower tribunal which portrayed that the onus of proving that there was an election and that voting occurred lay with the respondents to the petition. At page 611 vol. III of the record of proceedings, the learned Judges of the tribunal has this to say -

- B *"It is to be noted that under the Practice Directions Paragraph 2, a respondent is mandatorily required to front-load the copies of documentary evidence that he is relying upon. Thus, where a petitioner alleges that there were no elections in most area, it is incumbent under the present novel procedure for the respondents to put*
 C *their cards on the table face up to show their positive averment that there was election. Thus the cases of Ayogu v. Nnamani (2006) 8 NWLR (Pt.981) 160 at 194 and Nnaji v. Agbo (2006) 2 EPR 867 at 890-891 where they state that a petitioner should call witnesses from*
 D *each polling booth and/or tender the voters register that they could vote cannot stand under the new dispensation. Once the petitioner has been able to discharge the evidential burden on him by credible evidence, which is believed, the onus shifts to the respondent to rebut.*
 E *INEC who refused to front-load its documentary evidence will most likely not be ready to make electoral materials in its custody available. To our mind, the old practice has given way to the new one. So in this case, the respondents have failed to give evidence in rebuttal (see section 13 7(2) of the Evidence Act) since the onus has*
 F *shifted to them. See also Adedeji v. Kolawole (2006) 2 EPR 70 at 87 where the Court of Appeal held that the burden of proof shifts to prove same. In the instant case the respondents assert that there was election. Thus the respondents are to rebut since the petitioners have*
 G *done so much in proof of their averment. The respondents have failed to adduce evidence in rebuttal."*

H The conclusion of the lower tribunal is a kind of mixed-grill in that while admitting the efficacy of the burden of proof in the Evidence Act, it is of the opinion that the Practice Directions has brought something new and extra to the rules of evidence with emphasis on election matters. I have this, say that the Election Tribunal and Court Practice Directions. 2007 have not deviated from tenets of the Evidence Act. Cap 112. Laws of the Federation. 1990. Like all rules of practice in our courts it is promulgated to complement the Evidence

Act. What is novel about the Practice Directions is that it is promulgated with the sole aim of hearing, determining and attaining justice in election matters with ease, certainty and dispatch That is the reason for the pre-hearing session and scheduling Embodied in section 3 and need to streamline the number of witnesses and to allow parties to admit or exclude documents by consent in Section 4(8) amongst other directions embodied in the booklet. An Election Tribunal and Court Practice Directions, 2007 therefore is an assembly of directions given by an appropriate authority. In this instance, the President of the Court of Appeal stating the way and manner a particular rule of court in the hearing of an election matter shall be observed, obeyed and complied with. They are instrument in aid of the practice in court. In election matters there is need to have a Practice Direction so as to ease congestion in the hearing of the matters first and foremost and also because an election matter is *sui generis* not seen as a civil proceedings in an ordinary sense or a criminal proceedings. Elections, according to my Lord Justice Uwais, CJN (as he then was) in the case: *Orubu v. N.E.C.* (1988) 5 NWLR (Pt. 94) 323 at 347.

“An election petition is not the same as ordinary civil proceedings. It is a special proceedings because of the peculiar nature of elections which, by reason of their importance to the well-being of a democratic society, are regarded with aura that places them over and above the normal day to day transaction between individuals which give rise to ordinary or general claims in court. As a matter of deliberate policy to enhance urgency, election petitions are expected to be devoid of the procedural clogs that cause delay in the disposition of the substantive dispute.”

Practice Directions are promulgated to bring election petitions out of procedural clogs that cause delay in the disposition of the substantive dispute. In the instant election petition, the tribunal was to make a finding on the grouse of the petitioner before the court as to

- (a) Non-qualification
- (b) Non-compliance with the provisions of the Electoral Act, which substantially affected the result of the election.
- (c) Corrupt practices, violence, intimidation and irregularities, which substantially affected the result of the election.
- (d) That 1st respondent was not returned with a majority of

lawful votes

During the trial before the lower tribunal, the petitioner/ respondent dropped the other complaints and concentrated on the various acts of non-compliance and irregularities such as enumerated earlier on in this judgment. It is in the process of consideration of the complaint of non-election in most areas that the election tribunal has to consider the burden of proof on the parties. ***The reasoning of the tribunal is very confusing and in my view amounts to contradiction in terms. Whereas in the Practice Directions - what the lower tribunal has referred to as novel procedure or new dispensation has provided the procedure for calling of witnesses and tendering or front-loading of documents, it makes provision for the burden of proof which is, still predominantly the preserve of the Evidence Act.*** I must add also that in the proof for non-voting it has not deviated from what the courts pronounced in the cases of *Ayogu v. Nnamani* (2006) 8 NWLR (Pt. 981) 160 at 187; *Awuse v. Odili* (2005) 16 NWLR (Pt. 952) 416; *Nnaji v. Agbo* (2006) 2 EPR 867; *Remi v. Sunday* (1999) 8 NWLR (Pt. 613) 92; *Onoyom v. Egari* (1999) 5 NWLR (Pt. 603) 416 at 425; *Okoronji v. Ngwu* (1992) 9 NWLR (Pt. 263) 113.

In proving that voting did not take place in the Enugu gubernatorial elections, the petitioner must lead positive and credible evidence on the alleged non-holding of the election in each of the polling booth that voting did not take place. The onus is on the petitioners to prove the allegation. The onus of proving that voting took place may shift to the respondents in the petition if the petitioner has discharged the primary burden that is on them. In order words. I agree that the Practice Directions have not introduced the novel procedure, which relieves the petitioner, who alleges non-voting in an election, of the onus or burden of proving that voting did not take place.

The general position of the law is by virtue of sections 135, 136, 137 and 139 of the Evidence Act, that the party who asserts in his pleading the existence of a particular fact is required to prove such fact by adducing credible evidence. If he fails to do so, his case fails. On the other hand, if he succeeds in adducing evidence to prove the pleaded facts, he is said to have discharged the burden of proof that rests on him. The burden then shifts to his adversary to prove that the fact

established by the evidence adduced would not on the preponderance of the evidence result in the court giving judgment in favour of the party. See *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1.

As regards shifting of the burden of proof, I will refer to my Lord. U. F. Abdullahi, PCA in the case of *Buhari v. Obasanjo* (2005) 3 NWLR (Pt. 910) 241 at pages 412-413 that - B

“There is need at this stage to clarify an important issue with regard to shifting of burden of proof. It has been settled principle of our law that he who asserts must prove. There are, however, occasions when the situation may require the burden of proof to shift. In this case, there are situations that would warrant the burden to shift... A clear example is when the petitioners averred that in certain places no elections were held and they produced evidence to show that there were no election materials supplied or that there were no electoral officials available or even both. On the other hand, the respondents called evidence to show that election were held peacefully and that there were election materials available as well as electoral officials who performed their duties. In this situation, someone has to do more to show the veracity of his position. In my view, the party to do more to show the veracity of his position should be the one who tried to show that elections was held in accordance with the law. The simple way to do so is produce the results of the elections. “ C D E

In the situation in hand, both parties equally has the primary duty and are expected to front-load whether by listing or attachment of the documents available to prove his allegation Paragraph 1(1) (c) of the Practice Directions. F

The next question is whether the learned trial judges were right in holding that the Practice Directions have displaced the principles enunciated in *Ayogu v. Nnamani* (2006) 8 NWLR (Pt.981) 160 at G 187 and *Nnaji v. Agbo* (2006) 2EPR 867 at 890 as well as another judicial authorities on the nature, quantum and quality of evidence required of a petitioner to prove allegation of non-voting in an election.

I dare say that the principle laid down in the case of Ayogu v. Nnamani has not in the least changed by circumstance or transformed by any rules of procedure or substantive law. In the case of Ayogu v. Nnamani (2006) 8 NWLR (Pt.981) 160 my Lord, Justice Z. A. Bulkachuwa, JCA said at page 187: H

“In the instance case, the appellant who asserted before the lower tribunal that there were no voting materials no INEC officials to supervise the voting and that no voting in fact took place in at least 13 Local Government Areas out of the 17 Local Governments in Enugu State must prove so by calling at least a registered voter from each of the polling booths in each of the wards in the respective local governments to show that he could not vote in the said 19/4/03 at the said polling booths as there was no voting materials or INEC officials to preside over the voting. He must also establish by credible evidence how the lack of voting in these local Government areas affected the final results of the election to his disadvantage. Kodilinye v. Ochi (1935) 2 WACA 336: Rotimi v. Faforiji (1999) 6 NWLR (Pt. 606) 305: Kalgo v. Kalgo (1999) 6 NWLR (Pt. 608) 639: Adegoke v. Adibi (1992) 5 NWLR (Pt. 242) 410.”

Learned senior counsel for the petitioner/respondent referred to the judgment of the lower tribunal on Pg. 611 of vol. III record book that the message of the court was that all parties must put their cards on the table at the trial by presenting witnesses and filing document in line with the provisions of the Practice Directions. He analyzed the difference in this case and that of *Ayogu v. Nhamani* to conclude that every case must be considered on its own facts and peculiar circumstance while he referred to the case of *Odu’a Investment Co. Ltd. v. Talabi* (1997) 10 NWLR (Pt. 523) 1 at 44-45.

I can add with certainty that Practice Directions is not made to dispense with the nature, quantum and quality of evidence required of a petitioner to prove non-voting in an election petition, neither can it detract from the principles laid down in Ayogu’s case.

By way of swift reaction to this issue and with the *case of Buhari v. Obasanjo (supra)* from where I quoted from the pronouncement of my Lord. U. F. Abdullahi. PCA answered this question he said a clear example is when the petitioners averred that in certain places no elections were held and they produced evidence to show that there were no election materials supplied or that there were no electoral officers available or even both and the respondents called evidence that election was held, and there were election materials as well as electoral officers, someone has to do more to show the verac-

ity of his position. It should be the one who tried to show that election was held in accordance with the law. The lower tribunal in the judgment as page 611 of the record said-

“Once the petitioner has been able to discharge the evidential burden on him by credible evidence - the onus shifts to the respondents to rebut is just reconfirming the position in all the cases earlier cited. The position with the Practice Directions is that streamlining of witnesses will now be done by the lower court so as to enable a party to present its case properly and in the interest of justice and fair trial.”

In this case, the tribunal and parties streamlined 25 witnesses to testify for 2,874 polling booths in 17 Local Governments. It is my conclusion on this issue that the consideration of the respondents’ claim will not arise unless the petitioners has made out a case; as he who asserts must prove *Ei qui affirmat non ei qui negat incumbit probative* (Section 137(2) of the Evidence Act). One would be expected to succeed on the strength of his own and not on weakness of the defence See *Igwe v. A.C.B Plc* (1999) 6 NWLR (Pt. 605) 1; *Fadlallah v. Arewa Textiles Ltd.* (1997) 8 NWLR (Pt. 518) 546. In short, he who asserts must prove what he asserts - the negative does not admit of the direct and simple proof of which the affirmative is capable.

Issue No. Four:

Whether the Election Tribunal and Court Practice Directions, 2007 (Practice Directions) were validly made, and if so, whether they are superior to the provisions of the 1999 Constitution, the Electoral Act, 2006 of the Federal High Court (Civil Procedure) Rules, 2000 and the other sources of law relating to the hearing and determination of election petitions.

Under this issue, the learned senior counsel challenges the validity of the Election Tribunal and Court Practice Directions, 2007. The preamble to the Practice Directions reads -

“In the exercise of the power conferred on me by section 285 (3) of the Constitution of the Federal Republic of Nigeria. 1999. Paragraph 50 of the First Schedule to the Electoral Act, 2006, and by virtue of all other powers enabling me in that behalf I, Umaru Abdullahi CON President Court of Appeal hereby issue the following Practice Directions. These Practice Directions shall apply to the Presidential, Governorship, National Assembly and State Assembly Election Peti-

tion."

Section 285(3) reads:

"The composition of the National Assembly Election Tribunals, Governorship and Legislative Houses Election Tribunals shall be as set out in the Sixth Schedule to this Constitution."

- B The Sixth Schedule (Section 285) Election Tribunals - Governorship and Legislative Houses Election Tribunals.

Section 2(3)

- C *"The Chairman and other members shall be appointed by the President of the Court of Appeal in consultation with the Chief Judge of the State, the Grand Khadi of the Sharia Court of Appeal of the State or the President of the Customary Court of Appeal of the State, as the case may be."*

Section 151 of the Electoral Act stipulates that -

- D *"The rules of procedure to be adopted for election petitions and appeals arising therefrom shall be those set out in First Schedule to this Act."*

Paragraph 50 of the First Schedule to the Electoral Act, 2006 reads -

- E *"Subject to the express provision of this Act, the practice and procedure of the tribunal on the court in relation to an election petition shall be as nearly as possible, similar to the practice and procedure of the Federal High Court in the exercise of its civil jurisdiction and the (Civil Procedure) Rules shall apply with such modifications as may be necessary to render them applicable having regard to the provisions of this Act, as if the petitioner and the respondent were respectively the plaintiff and the defendant in an ordinary civil action."*

- G ***It is apparent from the foregoing that besides the rules of practice for Election petitions as stipulated in the First Schedule to the Electoral Act, 2006, to be read conjunctively with sections 147(3), 151 and 164(3) of the Act, the appropriate authority shall issue another practice and procedure to guide the Election Petition Tribunal and the Court of Appeal in the hearing of petition. The relevant law shall be subject to the First Schedule of the Electoral Act, 2006.***

Whenever the phrase subject *to* is used in a statute, or subject to the intention, purpose and legal effect is to make the provisions of the section inferior dependent on or limited and restricted in

application to the section to which they are made subject to. In other words, the provisions of latter shall govern, control and prevail over the provision of the section made subject to it. Practice Directions is subject to the First Schedule to the Electoral Act, 2006. In the interpretation of statute of this nature, the literal rule shall be adopted which enjoins the court in invoking its interpretative jurisdiction in the provisions of a statute to employ words which are clear, simple and unambiguous so that the intention of the legislature can be ascertained or discerned. See *Aqua Ltd v. Ondo State Sport Council* (1988) 4 NWLR (Pt. 91) 622; *Fawehinmi v. I.G.P.* (2000) 7 NWLR (Pt. 665) 481; *Awolowo v. Shagari* (1979) 6-9 SC 51; *Salami v. Chairman, L.E.D.B.* (1989) 5 NWLR (Pt. 123) 539; *Alamieyesegha v. F.R.N.* (2006) 16 NWLR (Pt. 1004) 1; *Labiya v. Anretiola* (1992) 8 NWLR (Pt. 258) 139; *Tukur v. Government of Gongola State* (1989) 4 NWLR (Pt. 117) 517; *Yusuf v. Obasanjo* (2003) 16 NWLR (Pt. 847) 554; *F.R.N. v. Osahon* (2006) 5 NWLR (Pt. 973) 361.

It is undoubtedly the intention of the lawmakers clearly expressed in Paragraph 50 of the First Schedule to the Electoral Act, 2006, that the Practice Directions shall be as near as possible similar to the practice and procedure of the Federal High Court in the exercise of its civil jurisdiction.

The practice and procedure to be promulgated is not meant to be another Federal High Court (Civil Procedure) Rules or a Federal High Court Practice Direction meant to be an aid in the dispatch of speedy trial in view of the fact that time is of essence in election petition matters. This accounts for the contents of the Election Tribunal and Court Practice Directions, 2007. The general intention of the draftsman reflected in paragraph one, is to encourage and enforce front-loading, as a principle of our modern civil procedure system so that a defendant would have full knowledge and adequate notice of the cause of the plaintiff so as to avoid delays in trials and fulfill the objective of speedy administration of justice. This takes me to who is competent to issue the Election Tribunal and Court Practice Directions, 2007? The learned counsel to the appellants submitted that the power purportedly exercised by the President Court of Appeal pursuant to Section 285 (3) of the Constitution is without legal backing

hence unconstitutional, null and void, and that the power belongs to the Chief Judge of the Federal High Court.

The learned senior counsel for the respondents disagrees with her. The learned senior counsel rested his opinion on the community reading of Section 285(3) of the 1999 Constitution. Sixth Schedule to the Constitution, paragraph 50 (d) of the First Schedule to the Electoral Act, 2006, that the President of the Court of Appeal can issue Practice Direction. I agree with this latter submission as the President of the Court of Appeal is vested with the power under the 1999 Constitution to constitute the panel of judges as chairman and members of the Election Petition Tribunal, with the Court of Appeal as its final appellate court in the Governorship and Legislative Houses Tribunal. He appoints the Chairman and members for the Presidential Election Petition Tribunal. The Court of Appeal has become the administrative headquarters for Election and Election related matters. By virtue of section 10(2) of the Interpretation Act Cap. 192. Laws of the Federation of Nigeria -

“Any enactment which confers power to do any act shall be construed as also conferring all such other powers as are reasonably necessary to the doing of it.”

In order to cloth the chairman and members of the Election Petition Tribunal with jurisdiction over election petitions they must have all the necessary lubricant for the smooth running of the machinery of justice. Moreover, if the president of the Court of Appeal appoints the chairman and members of an election petition panel is it not logical that he who pays the piper must dictate the tune? With the foregoing. I rest my case and hold tenaciously to the opinion that the President, Court of Appeal is the only competent and appropriate authority to issue out Practice Directions for election tribunals.

However, **I hold that the hierarchy of the laws down to the Practice Directions are as follows - 1999 Constitution, Statutes, First Schedule to the Electoral Act, 2006. Rules of court and finally Practice Directions in that order, Since Practice Directions does not have the authority of rules of court and they are less efficacious they cannot override any of the superior laws.** See *University of Lagos v. Aigoro* (1985) 1 NWLR

(Pt. 1) 143.

Issue No. Five:

Whether the learned Tribunal was right in holding that the petitioners, allegation of irregularities non-compliance with the Electoral Act, 2006 and guidelines are not criminal in nature and thus not required proof beyond reasonable doubt? B

The issue here is to decide whether acts of non-compliance and irregularities are criminal in nature or civil and to determine the burden and standard of proof required in them.

In the judgment of the trial tribunal at pages 610-611, such acts of non-compliance and irregularities are - C

(a) Non-election in most places

(b) Late arrival of electoral materials causes no voting or late voting.

(c) Non-availability of result sheets. D

(d) Irregularities in allotting of votes to 1st respondent, and

(e) The collation of results in places where there was no voting.

The lower tribunal said at page 610 of vol. III record of proceedings said that the above-mentioned irregularities and non-compliance are not criminal in nature and are to be proved on preponderance of evidence or balance of probabilities. ***In the case of Buhari v. Obasanjo (2005) 13 NWLR (Pt.941) 1 at 231 Paragraph F-G the Supreme Court said that where an allegation is made that an election was invalid by reason of corrupt practices or non-compliance with the provision of the section 135(1) of the Electoral Act, 2002, which is in pari materia with section 146 (1) of the 1999 Constitution., the section vests on an election tribunal or court entertaining an election with the power to decide from the evidence tendered before it in such case whether an alleged non-compliance is substantial enough to invalidate the election. The emphasis is not on whether those acts of non-compliance are of criminal or civil nature - but on whether the election was conducted substantially in accordance with the principles of the Electoral Act, and that non-compliance did not substantially affect the result of the election.*** See *Awolowo v. Shagari* (1979) All NLR 120; (1979) 6-9 SC 51; *Akinfosile v. Ijose* (1960) SCNLR 447; *Ibrahim v. Shagari* (1983) 2 SCNLR 176; *Swem v. Dzungwe* (1966) NMLR 297; (1966) 1 E
F
G
H

SCNLR 111. My Lord, Belgore, CJN (as he then was) in the case of *Buhari v. Obasanjo* (2005) 13 NWLR (Pt.941) 1 at 191- 192 said that

“It is manifest that an election by virtue of Section 135(1) of the Electoral Act, 2002 shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provisions of the Act, it must be shown clearly by evidence that the non-substantiality has affected the result of the election. Election and its victory, is like soccer and goals scored. The petitioners must not only show substantial non-Compliance but also the figures that is the votes, that the non-compliance affected or omitted. The elementary evidential burden of the person asserting must prove has not been derogated from by section 135(1). The petitioners must not only assert but must satisfy the court that the non-compliance has so affected the election result to justify-nullification.”

On the sum total of evaluation of evidence on the acts identified by the court at page 610 vol. III of the record, it concluded that the election was so badly conducted in Enugu and substantially not in accordance with the law as to election and the Governorship election was thereby nullified. **I hold that there is overwhelming evidence that the voting materials left the Central Bank Enugu late - around 12 noon and got to local government areas late thereby leading to late voting. Election had to be postponed in four local governments to the 28th of April, 2007. In spite of the acts of non-compliance, the petitioner still contended that the 899,007 registered voters voted for the 1st appellant out of 1,376,884. According to this calculation. 477,875 voters could not cast their votes. If that figure were to be added to that of the 1st petitioner/respondent the 1st appellant would still have a lawful majority of 300,000 votes. In that scenario, it cannot be said that the non-compliance substantially affected the final results of the election.** The court relied on the same various acts to establish irregularities and particularly that there were no voting materials delivered to the local government during the proper voting hours of between 8am to 3pm as a result of which voting started late and ended. The 1st petitioner has the burden of proof of establishing them with credible evidence. See *Buhari v. INEC* (2008) 4 NWLR (Pt. 1078) 546.

Issue No. Six:

Whether the learned trial judges were right in relying on the analysis of exhibit P5 (1-734) (exhibit P5 series) in the written address of the learned counsel to the petitioners/respondents in making a finding that there were irregularities and over voting in the election when the same were not the petitioners' case on the pleadings and the purport of exhibit P5 series was not demonstrated in evidence. B
The learned senior counsel referred to the judgment of the lower tribunal at page 614 vol. III of the record said -

*“To prove this allegation, the petitioner tendered exhibit P5. C
They are 734 Forms EC8A's and EC8C's obtained from INEC. The learned senior counsel in his written address dealt with them exhaustively. He has painstakingly demonstrated the cases of irregularities in them in his address. They includes (sic) where to the 1st respondent, ballot papers less than scores recorded, that is over-voting and cancellation among others.” D*

This exhibit P5 are 734 Election Result Forms EC8As and EC8Cs which the learned senior counsel for the 1st-3rd respondents comprehensively packaged in his address to reflect facts as follows -

That voting did not take place in virtually all the polling booths E
in all the Local Government Areas for reasons;

- (a) Late or non-arrival of electoral materials
- (b) Non-availability of result sheets/forms
- (c) Non-availability of ballot papers
- (d) No ink and ink-pads. F

***There was no oral evidence of any witness on the contents of exhibit P5. The tribunal relied on its own observation about the documents. Exhibit P5, 734 Forms EC8A and EC8Cs are election result sheets which emanate from the custody of INEC. Only INEC and not the 1st petitioner/respondent or his counsel is competent to give evidence on it and be cross-examined. The observation and findings of the tribunal lack any probative value for the purpose of this judgment. It is trite that address of counsel, however, brilliant cannot serve as substitute for evidence. See Auto Import Export v. Adebayo (2005) 19 NWLR (Pt. 959) 44; Yoye v. Olubode (1974) 10 SC 209; Obasanjo v. Buhari (2005) 13 NWLR (Pt. 941) 1. G
H***

The learned counsel referred to the evidence of twenty-five

witnesses and the documentary evidence tendered by the 1st petitioner/respondent in the course of this trial. The documents are as follows -

- (a) Two copies of the INEC guidelines for the election which are marked as exhibits P and P2.
- B (b) 8 copies of Newspapers and one Tell Magazine admitted as exhibit P3 and numbered serially.
- (c) 15 Police reports from the various Local Governments in Enugu State admitted and marked as exhibits P - P4 respectively.
- C (d) 734 copies of Forms EC8A from 734 polling units and 17 copies of forms EC8C for the 17 Local Governments in Enugu State.
- (e) Four video tapes admitted and marked as exhibits Pb1 - Pb4.
- (f) One copy - local observer report on the said election from D Justice and Peace Commission of the Catholic Arch Dioceses of Nsukka in Enugu State admitted and marked as exh

Out of the foregoing exhibits, only exhibits P and P2 are relevant to the petitioners' case, exhibit P3 has no evidential value having not come from proper custody were admitted in evidence. Copies of Forms EC8A and EC8C, video tapes and observer reports are devoid of evidential value. The tribunal had the evidence of witnesses, on which by rules of procedure, it has the pre-eminence to see, hear and determine their credibility and finding base on evaluation.

Issue No. Seven

F Whether the learned trial judges were right when they held that Police reports on the conduct of the election (exhibit P4 1-15) had no evidential value for the reasons that the makers thereof were not called as witnesses.

G The tribunal in their judgment rejected exhibits P4 - P15 Police reports because the makers were not witnesses before them. The tribunal refused to attach probative value to the exhibits by virtue of Section 91(1) of the Evidence Act.

H It was the contention of the petitioners/respondents that the elections of 14th and 28th April, 2007 were marred by corrupt practices and irregularities which prevented voting from taking place and brought about generation of false results credited to the 1st respondent.

Exhibits P4 - P15 the police gave the picture of what took

place at the venue of the election throughout the State. The reports gave the picture that elections were generally peaceful and conducted in substantial compliance with the provisions of the Electoral Act, 2006 and that the 1st respondent won the elections with a majority of lawful votes in all the local governments. The documents were tendered through PW 24, the petitioner. The essence of tendering the reports was to establish the election was held in places covered by them. ***The learned senior counsel for the appellants held that report were public document by virtue of section 109 of the Evidence Act, and certified true copies of them may be tendered by any person who has paid the prescribed fees. The learned senior counsel emphasized that exhibit P5 series Forms EC8As and EC8Cs were admitted in evidence through PW24, who is not their maker but as public documents, as they were made by presiding officers and collating officers. If the reports of the police had been admitted in evidence, the tribunal would have been privileged to see another aspect of what took place at the polling booths on the day of the election. Admitting exhibit P5 series while rejecting P4 series was perverse.***

The learned senior counsel for the respondents submitted that the court rejected the police reports in that they were not self-explanatory and the court would not have been able to make use of them without explanation by the maker. The reason for rejecting the police report to my mind is weak. It is trite that the issue of admissibility of a document and the weight to be attached to it are two separate and distinct issues. See Dalek (Nig.) Ltd. v. Oil Producing Areas Development Commission (OMPADEC) (2007) 7 NWLR (Pt. 1033) 402 at 441.

At this stage of the judgment, I intend to consider issues number 12, which is the last issue in that issues numbers eight to eleven are subsumed in issue 12. This is for ease of reference and avoidance of repetition of the facts and principles of law applicable.

Issue No. Twelve

Was the petitioner/1st respondent entitled to judgment on the basis of the evidence he adduced before the learned trial judge?

At page 611 of vol. III of the record, the tribunal in its judgment, identified those acts of non-compliance and irregularities on

which the petitioners/respondents intend to premise their petition as follows -

- (1) Non-election in most places
- (2) Late arrival of electoral materials causing no voting or late voting.

- B
- (3) Non -availability of result sheets.
 - (4) irregularities in allotting of votes to the 1st respondent, and
 - (5) No collation of results in places where there were voting.

I have to chip in at this stage that what is major or substantial irregularity in an election is for the total number of votes to exceed the total number of accredited voters in which cases such a result would be nullified. ***In this appeal, the respondents before the tribunal complained about irregularities in allotting of votes to the 1st appellant and that there were no collation of results in places where there were voting due to non-availability of results sheets in places where be to the detriment and disadvantage of the contestants at the election.*** See Alalade v. Awodoyin (1999) 5 NWLR (Pt.604) 529. ***However, irregularities at an election which are neither the act of a candidate nor linked to him cannot affect his election.*** See Agomo v. Iroakazi (1998) 10 NWLR (Pt. 568) 16.

The two hurdles to climb by the petitioner/respondent through adducing cogent evidence are as follows:

- F
- (1) ***Whether the irregularities particularly allotment of votes have been established.***
 - (2) ***Whether the allotment of votes can be attributable to the appellants.***

G ***I cannot trace any evidence on printed record on which I can find the irregularity of allotment of votes established by the petitioner/respondent against the appellant in this case.***

On non-compliance, in an election petition, a petitioner who alleges non-compliance with the electoral rules or Act and avers that such non-compliance was substantial, has two fold burden on him to prove and satisfy the court -

- H
- (a) That the alleged non-compliance actually occurred and took place.
 - (b) That the non-compliance affected or might have affected the result of the election. See Bassey v. Young (1963) 1 SCNLR 61;

Buhari v. Obasanjo (2005) 13 NWLR (Pt.941) 160; Awolowo v. Shagari (1979) 6-9 SC 51.

In order for non-compliance with the Electoral Rule to render election invalid or contrary to the principle of the Electoral Act, must be so great and substantial and the court or tribunal must be satisfied that it affected or might have affected the majority of the voters or the result of the election. See Sorunke v. Odebunmi (1960) SCNLR 414; Uwawah v. Ekwejunor-Etchie (1962) 1 SCNLR 157; Dada v. Dosunmu (2006) 18 NWLR (Pt. 1010) 134; Amosun v. INEC (2007) All FWLR (Pt.391) 1712.

However, it is very important that a party seeking nullification of an election must succeed on the strength of his own case and not on the weakness of the respondents' case, so that failure of his adversary to call evidence would not relieve the party from satisfying the tribunal by cogent and reliable proof or evidence in support of his petition.

In an election where an allegation is made that registered voters did not cast their votes, the allegation must be proved by concrete evidence. See Rotimi v. Faforiji (1999) 6 NWLR (Pt. 606) 305; Okoroji v. Ngwu (1992) 9 NWLR (Pt. 263) 113.

By Sections 115, 148 and 149 of the Evidence Act, there is presumption that any election result declared by a returning officer is authentic and correct. The burden is on the person who denies its correctness to rebut its correctness. See Jalingo v. Nyame (1992) 3 NWLR (Pt. 231) 538; Nwobodo v. Onoh (1984) 1 SCNLR 1; Omoboriowo v. Ajasin (1984) 1 SCNLR 108.

The duty also lies on the court whether or not to determine that an election was conducted substantially in accordance with the Constitution and the Electoral Act, 2006, the court will look at the circumstances of the case, including the state of pleadings, especially the credibility of the petitioners' position and nature and substance of the complaints of the petitioner, the attitude of the functionaries charged with the conduct of the election and whether the omissions complained of by the petitioner - even if proved affected the conduct of the election. See Okoroji v. Ngwu (1992) 9 NWLR (Pt. 263) 113; Ajadi v. Ajibola (2004) 16 NWLR (Pt. 898) 91.

Issue No. 11 is whether the trial Judges were right in relying on the Election Tribunal and Court Practice Directions, 2007 (Practice

Directions) to reject the result sheets, which the appellants sought to tender and rely upon in the trial of the petition?

The simple and straight forward response to this issue is that it is stipulated in paragraphs 1 (1) and (2) of the Practice Directions 2007, that all petitions presented before tribunals or courts shall be accompanied by -

(a) List of all the witnesses that the petitioner intends to call in proof of the petition.

(b) Written statements on oath of the witnesses, and

(c) Copies or list of every document to be relied on at the hearing of the petition,

A petitioner who fails to comply with the above, his petition shall not be accepted for filing by the secretary of the tribunal. The general intention of the law is to encourage and enforce “front loading” as a principle of civil procedure system so that a defendant would have full knowledge and adequate notice of the cause of the other party so as to avoid delay in trials and fulfill the objective of speedy administration of justice. ***Any court or tribunal must realize now***

that rules of procedure are important, as they are handmaids of justice. They are aids to the attainment of justice to oil the wheels of justice to enable them roll and revolve smoothly to take justice to its logical conclusion and ultimate destination.

They, however, cease to be aids when they take over turning the courts and litigants into slaves to the rules, thereby leading to perpetration of injustice in the process. The dictates of substantial justice demands that in invoking the rules of court even where the operative word there is shall which is purely directory. Justice must be done. We have examined the documents sought to be tendered and determine the weight of the relevancy to the case and the interest of justice in the matter.

After all in the application of the Practice Directions the provision of paragraph 4(8) of the Practice Directions, 2007 empowers the tribunal to grant leave in exceptional circumstances to receive in evidence documents which were not filed along with the petition in accordance with the Practice Directions. Exceptional circumstance in paragraph 4(8) of the Practice Directions is synonymous with the interest of justice in paragraph 43(1) and (2) of the First Schedule to the Electoral

Act, 2006. See Abubakar v. Yar'adua (2008) 4 NWLR (Pt. 1078) 465; INEC v. Iniama (2008) 8 NWLR (Pt. 1088) 182; Ogunsakin v. Ajidara (2008) 6 NWLR (Pt. 1082) 1.

In the presentation of their case at the lower tribunal, parties adduced evidence by calling witnesses and tendering documents. The issues revolving round the admissibility of these documents have been considered in preceding issues. B

On the 14th of April, 2007, a date designated by INEC to hold the gubernatorial election all over Nigeria. In Enugu State, 17 Local Governments with 2,874 polling booths were prepared for the exercise. Electoral materials for voting both sensitive and otherwise were kept at the Central Bank Enugu where INEC officials and other interested parties including security officers went to collect them. Initial take off of the exercise was marred with the distribution of electoral materials as releasing of the voting materials to the supervisory presiding officers could not be effected within time to let voting commence at 8a.m and end at 3p.m. I quote from the evidence of RW13, an INEC officer who said: C

"The distribution of electoral materials commenced at about 8am and ended at 12.30pm by the electoral officer for Udi Local Government Area" E

These voting materials according to the evidence got to some local governments late while others did not receive them. It actually led to the postponement of elections in four local governments to the 28th of April, 2007. In Igbo Etiti Local Government the 9th respondent testified. F

"Election activities started very late in the Local Government as a result of late arrival of election materials from the Central Bank Enugu." G

In Ezeagu Local Government it was testified that -

"The election generally was smooth and hitch free throughout the period of voting which commenced or about 1610 hours and ended at about 2000 hours."

In Isi-Uzo Local Government the 9th respondent testified that- H

"At about 11.05 hours distribution had been concluded and everybody move to his/her various wards/polling booths for the election proper.

The foregoing led to the major complaints that a lot of voters

were disenfranchised as they had left the polling booths as at the time. There were other irregularities complained of like lack of result sheets and inks for stamping. As a whole 300 polling stations out of 2,874 were supposed to be affected by non-voting. The scores of the candidates in the 300 are -

- B 1st petitioner - 1,435
 1st respondent - 97,496

At the end of the voting for the two days, the 14th and the 28th of April, 2007 the votes accredited to the parties on exhibit P5 Form EC8C collated results for the 17 Local Government Areas in Enugu State are as follows -

- C 1st petitioner - 22,502
 1st respondent - 811,798

There is evidence on printed record that members of the public were invited to go back to the polling booth when election materials were delivered by an announcement on air.

The contention of the 1st respondent and why this court is requested to nullify this election is that the numbers of registered voters in Enugu State are 1,376,884. The total number of those who voted was 899,011. The numbers of people disenfranchised are 477,873 - approximately 34% of the population here in Enugu State.

The observation of the appellants is that if the figure of the disenfranchised voters is added to that of the 1st respondent 477,803 to 22,502 it will give 500,375. This figure still gives the 1st appellant a clear lead at the polls. Even the figure of 477,803 may not be for those disfranchised alone, voters might have been prevented from voting for other inevitable reasons.

From the overwhelming evidence on printed record from the parties elections were held in Enugu State on the 14th and 28th of April, 2007. The only shortcoming was that voting started late due to late delivery of voting materials by INEC. INEC is the only body saddled with the responsibility to conduct elections. It has the power to fix and shift dates for elections, to fix and change the time for holding of elections. All the non-compliance established were at the instance of INEC. The irregularities in allotting votes to the appellants were not established and being criminal in nature must be established beyond reasonable doubt. This court has to deem them abandoned. Another important aspect of this case is reconciling evidence

of disenfranchisement with Paragraph 3 (8) (b) of the Election Tribunal and Court Practice Directions, 2007. Every one deprived of voting must come and show his voters card, express the disappointment to exercise his constitutional right to pick a candidate of his choice. The comprehensive voters register must be tendered, authentic evidence of what happened at each polling booth must be given and this will not admit of any generalization of evidence for Local Government or Constituency as it will not serve the purpose. I cannot end this judgment without touching upon the applicability of the Election Tribunal and Court Practice Directions, 2007. In applying the Practice Directions, the tribunal streamlined the witnesses so that only twenty witnesses gave evidence in respect of the pattern of voting on the 2,874 polling booths, and particularly the 300 polling booths where it was alleged that there was no voting on the two days of the election. This has dealt a heavy blow to the evidence of the petitioners in proving that there was no election in Enugu State. The evidence of the witnesses for the petitioners/respondents turned out to be substantially hearsay, as they got information from people who were in the field and not directly by themselves. The justice of this case demands that there must be evidence of voting at each polling booth before the court. The aspect of streamlining of witnesses must be approached by the court in the hearing of cases with extra caution.

It has to be applied not generally but according to the merit of each case. The number of witnesses required to prove the case of a petitioner complaining about exclusion, will defer to that in a claim about having the majority of lawful votes or that complaining of non-qualification. The Practice Directions is an adjunct to the rules of court, the Federal High Court (Civil Procedure) Rules and the Court of Appeal Rules, It was issued to aid the tribunals and courts to administer justice with ease and dispatch. It is not meant to assist court to sacrifice justice in the altar of speed. It is not meant to overrule or override the substantive law in respect of procedure like the Evidence Act. A Practice Directions is not as potent; it is less efficacious than the substantive laws in the administration of our legal jurisprudence.

In this appeal, we do not have a clear fixture of how and whether or not people voted at the polling centres. The address of

the learned senior counsel which the tribunal relied upon in irregularities is not acceptable. The petitioners/respondent failed to demonstrate how they arrived at the conclusion that votes were allotted to the appellants. The most important aspect to court in the evaluation of evidence is to decide where the scale preponderates by qualitative evidence.

It is our conclusion that the Tribunal did not provide itself with the opportunity to consider the case of the parties dispassionately so as to place evidence adduced by each party on each side of that imaginary scale and see where it preponderates or watch out with eagle's eye for where it tilts. See cases: *Mogaji v. Odofin* (1978) NSCC 275; (1978) 4 SC 91; *Ebba v. Ogodo* (1984) 1 SCNLR 372.

On the overall evidence there emerged a clear winner of the election of the 14th and 28th of April, 2007 in Enugu State. Is this court now been asked to perform the task of nullifying an election when the irregularities complained of were not the act of this candidate known to this court or attributed to him? An election in this country is not a carnival, it is a gangantous waste of tax-payers money, it involves logistic planning, time and morale consuming. People must learn to accept defeat graciously.

In the final analysis, this court finds merit in the appeal and it is accordingly allowed. The judgment of the lower tribunal delivered on the 18th of January, 2008 in Petition No. NAGL/EPT/EN/GOV/43/2007 which nullified the election of the appellant as Governor and Deputy Governor of Enugu State is hereby set aside, and the petition is equally dismissed.

ADEKEYE JCA

This is a consolidated appeal filed against the judgment of the National Assembly Governorship and Legislative Houses Election Tribunal Enugu State delivered on the 18th day of January, 2008, nullifying the Election returns declared by the Independent National Electoral Commission (INEC) and 3,372 others in favour of the 4th and 5th respondents Sullivan I. Chime and Sunday Onyebuchi - the Governor and Deputy Governor of Enugu State, delivered on the 18th of January, 2008. By way of introduction, it is one of those appeals consolidated following the order of this court made on the

2nd of June, 2008 emanating from the Election Petition Suit No. NAGL/EPT/EN/GOV/43/2007. The petitioners before the Tribunal are now 1st-3rd respondents in this appeal. The facts of this case are similar to the other appeal. The reason for the consolidation of the appeals are that the two appeals are against the same judgment and the issues raised therein are similar to each other and can conveniently be heard together. Furthermore, there is one set of record of appeal compiled by the secretary of the lower tribunal for the two appeals. I shall conveniently adopt the facts as stated in the first appeal CA/E/EPT/19/2008. B

The appellants filed eleven grounds of appeal. At the hearing of the appeal on 2/6/2008, the appellants relied on the appellants' brief filed on 5/3/2008 where upon two issues were distilled for determination in the appeal as follows - C

(a) Whether on the pleadings and evidence canvassed at the hearing the petitioners have successfully established a case for the nullification of the election returns. D

(b) Whether the tribunal properly addressed its mind to the appropriate standard of proof in the nature of the allegations made in the petition. E

The respondents adopted and relied on the joint respondents' brief filed on 11/3/08 and formulated seven issues for the determination as follows -

"(1) Whether the learned tribunal properly evaluated the evidence including the exhibits before it made a proper inference therein and came to the right conclusion. F

(2) Whether the learned trial tribunal was right in its evaluation of what transpired at the Central Bank of Nigeria on the morning of 14/4/07. G

(3) Whether the learned tribunal was right in holding that the petitioners allegation of irregularities/non-compliance with the Electoral Act, 2006 and guidelines are not criminal in nature requiring proof beyond reasonable doubt.

(4) On whom lies the burden of proof that election/voting did not hold in most polling booths in Enugu State. H

(5) Whether the learned tribunal was right in holding that the voting period allowed under the Electoral Act, 2006, and the guidelines therein were not complied with in Enugu State.

(6) *Whether the learned trial tribunal was right in holding that the Supreme Court's case of Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) Pg. 317 was inapplicable to the facts of the petition having regards to the provisions of the Electoral Act, 2006 and the Tribunal and Court Practice Directions, 2007.*

B (7) *Whether the 1st - 3rd respondents were entitled to judgment on the basis of the evidence adduced before the tribunal."*

It is my observation that issues one and seven are one and the same thing. Issues 2-6 are subsumed in issue one. I shall consider this appeal in the light of the issues, raised by the appellants.

C Issue No. One:

Whether on the pleadings and evidence canvassed at the hearing the petitioners have successfully established a case for the nullification of the election returns.

D The learned counsel for the appellants - Mr. Ani decided to consider this issue under three headings as follows:

(a) The pleadings of the parties in the petition. The learned counsel summarized the grounds of the petition as follows –

- a. Non-compliance with regards to the hours of poll.
- E b. Non-availability of result sheets.
- c. Non-availability of ballot papers.
- d. Non-availability of materials like ink and ink pads.

On corrupt practices - it was alleged that due to the late arrival of voting materials, voters had left the polling booths, as a result of which no election took place - yet results were written by a few selected persons in unauthorized places purporting same to be the result of the election. Going through the evidence of some witnesses like PW1 at page 490 vol. III -Udenu Local Government with 706 polling stations could not possibly have covered all of them. He agreed that he saw election materials at CBN, counted ballot paper, and saw voters register and all materials for all the 17 local governments. He did not state the polling stations he visited or state that no elections took place there. PW2 at page 492 gave evidence of occurrence at CBN, left for the local government and witness voting from 4p.m. to 7p.m. at a polling station and that there was no collation at the local government.

PW3 gave evidence that he remained at a polling station from 9a.m. till 6.30p.m. without officials of INEC but agreed that he voted

for three minutes before materials were carried away.

PW4 at Igbo Etiti Local Government saw voters between 200 -300, and by 7 p.m. they were gone.

PW5 - for Oji River saw materials allocated for Oji River which left CBN and those who moved the materials were INEC officials but he did not visit Oji River. B

PW6 at pages 504-505 gave evidence that election materials arrived very late. There was no voting in one ward. He did not follow officials to local government INEC headquarters. Also alleged that there was no voting. C

PW7 gave evidence of incomplete ballot papers at CBN, result sheets arrived late. Election materials which were sent to Enugu North were carried away. He claimed there was no election in Enugu State without specifying where and when.

PW8 at pages 509 - 510 claimed that ballots were thumb printed D with the police. Though he registered but did not vote. Did not testify as to when he visited 14 polling stations under him or how long he stayed at each of them.

PW9 - page 510 gave evidence of cancellation of election at Okpara Square polling station in Enugu North and not used in the E collation of the results.

PW10 - the petitioners' agent. He was to cover three villages out stayed in one throughout.

PW 11 pages 512-513 -17 polling units admitted not visiting F the 17 units but was able to say there was no election held there.

The appellants gave a brief outline of the evidence of each of the twenty-five witnesses called by the petitioner and their activities during the two days of the election. The witnesses did not establish one single allegation pleaded by the petitioners, whereas R10 - R15 G electoral officer offered clear and convincing evidence that the returns declared are product of election exercise in Enugu State. The tribunal rejected all the certified true copies of results for each local government in the State.

The tribunal did not adduce any legal reason for rejecting to H admit certified true copies of results for Oji Local Government. Admission should have improved the case, since it was the position of the petitioners that there was no election in Enugu State though figures were credited to the parties as the result of the two elections.

There was reliance on the 25 witnesses to hold that there was no election in Enugu State holding that ward agents testified to it. There were 260 wards and 2874 polling units; in Enugu State Constituency. No evidence in terms of proof came from the ward agents except the general evidence that no election was held there. There were no complaints against the election held on 28/4/07. The election of the 14th was extended till 6p.m. from 3p.m. to enable voters to vote. The petitioner failed to establish those who did not exercise their franchise by credible evidence. The tribunal did not make a proper finding on what happened.

On issue one, the learned respondents replied by referring to the evidence of the twenty-five witnesses and the documents tendered which are -

(a) Two INEC guidelines for the election which are marked as exhibits P and P2.

(b) 8 copies of Newspapers and one Tell Magazine admitted as exhibit P3 and numbered serially.

(c) 15 police reports from the various local governments in Enugu State admitted and marked as exhibits P4¹ - P4¹⁵ respectively.

(d) 734 copies of Form EC8A from 734 polling units and 17 copies of Forms EC8C for 17 local governments in Enugu State admitted and marked jointly as exhibit P5 and numbered serially.

(e) Four (4) Nos. video, tapes, admitted and marked as exhibit P6¹-P6⁴

(f) One copy of Local Observer Report on the said election from Justice and Peace Commission of the Catholic Arch Dioceses of Nsukka in Enugu State admitted and marked as exhibit P7.

The appellants and the 4th - 3423rd respondents failed to give concrete and credible evidence only called 6 and 9 witnesses respectively. The tribunal disbelieved the evidence of the appellants and the 4th - 5th respondents. On the issue of the credibility of the witnesses the tribunal had the advantage of seeing and watching their demeanour.

The incident at CBN at non-availability of result sheets were admitted by the witnesses. An appellate court will not interfere with the evidence of witnesses based on their demeanours. The 1st - 3rd respondents gave evidence of non-compliance referred to section 47

of the Electoral Act, 2006.

The 1st - 3rd respondents established evidence of late departure from Central Bank of Nigeria on the date of the election to the various local governments headquarters of Enugu State through witnesses like-

- | | |
|--|---|
| PW1 for Udeni Local Government | B |
| PW2 for Aninri Local Government | |
| PW5 for Oji River Local Government | |
| PW6 for Uwani Local Government | |
| PW8 for Nsukka Local Government | C |
| PW9 for Enugu North Local Government | |
| PW10 for Igbo Eze North Local Government | |
| PW13 for Nkanu East Local Government | |
| PW14 for Enugu South Local Government | |
| PW16 for Eze South Local Government | D |
| PW19 for Enugu East Local Government | |
| PW22 for Angu Local Government 9th respondent's report | |
| PW4 - Igbo Etiti Local Government. | |

(b) The tribunal considered exhibit P5 (1-734) which are Forms EC8A results from polling booths given to them by INEC by order of the tribunal to show irregularities and non-compliance with the Electoral Act, 2006 and that 1st -3rd respondents have shown that through over balloting at the polling stations had discharged the onus of non-compliance and irregularity which affected the results in the 17 local governments. On exhibit P5 (Form EC8C) - collated results for the 17 local governments are declared as follows –

- | | | | |
|------------------------------|---|---------|---|
| 1st petitioner | - | 22,502 | |
| 1st respondent | - | 811,798 | |
| Scores in 300 polling units: | | | G |
| 1st petitioner | - | 1,435 | |
| 1st respondent | - | 97,496 | |

The learned senior counsel held that exhibit P5 series were related to pleadings, and that irregularities are shown on the face of the exhibits. Unlike exhibit P5 which the court can admit in evidence and interpret without further evidence/exhibit P4 (115) the police report cannot be admitted in evidence without interpretation by the makers. The election result in respect of Oji Local Government was rejected for non-compliance with paragraph 4(8), 7 and 8 of the

Practice Directions.

On Issue No. Two

The appellants quoted from the judgment of the tribunal as follows:

B *“Irregularities, non-compliance with the Electoral Act and guidelines are not criminal in nature and are to be proved on preponderance of evidence or balance of probabilities.”*

C The appellants submitted that the irregularities raised in the issues for determination by the tribunal constitute offences under sections 130 (ii) - (b) of the Electoral Act, 2006. It follows that it has to be proved beyond reasonable doubt. Further on, the burden of proof the appellants referred to the fact that any results declared enjoy the presumption authenticity and validity is the duty of any one who contends otherwise to dislodge that presumption. In general times, D the court is bound to evaluate the evidence of the plaintiff and be satisfied with it that it is credible and sufficient to sustain the claim. In effect, consideration of the respondents’ case did not arise until and unless the petitioner had made out a case. In election case, evidence alleging election malpractices or irregularity must not only be precise E and definite it must be unequivocal and certain. The appellants cited cases: *Nwobodo v. Onoh* (1984) 1 SCNLR 1; *Buhari v. Obasanjo* (2005) 13 NWLR (Pt.941) 1 at 122 – 123; *Awuse v. Odili* (2005) All FWLR 261 at 248 at 313; (2005) 16 NWLR (Pt. 652), 416; *Akinyele v. Afribank Plc* (2005) 17 NWLR (Pt. 955) 504. F

The appellants further submitted that once a petitioner has alleged a particular non-compliance in an action, the petitioner must strive to satisfy the court that the non-compliance is substantial enough to affect the overall result of the poll complained about. In order to G vitiate an election, the non-compliance must be proved to have affected the result of the election substantially. The lower tribunal admitted exhibit P4 series police report on the election in evidence but later turned round not to attach any weight to it in the judgment as it offends section 91 (1) of the Evidence Act not having been tendered H by the police at the hearing of the petition. Whereas exhibit P5 series were made the basis of the irregularities to prove allocation of votes to the 4th respondent. The irregularities include allocation of votes, over-voting and cancellation of votes. All the irregularities as admitted by the tribunal arose in the written address of the learned senior

counsel for the respondent not by way of evidence at the hearing.

The respondents did not plead any specific issues of irregularity or non-compliance. A party who pleads a fact, and tenders a document to support the fact is duty bound to demonstrate in open Court, the effect of the document to the case.

The appellants could not react to the allegations because they were not pleaded. The tribunal having fully realized that the evidence was not pleaded should not have relied on them. There was a remarkable contradiction in the evidence of the petitioners with P4 series and allegation that there was no election, as the P4 series confirmed that election was held. The court is urged to allow the appeal as the petitioners failed to establish the case set up in their pleadings with satisfactory evidence, while the tribunal fell into grave errors of law in its evaluation of evidence thereby occasioning a miscarriage of justice.

The learned senior counsel for the 1st - 3rd respondents replied that the irregularities and non-compliance are as identified by the tribunal at page 607 of vol. III of the record, are irregularities and non-compliance with the Electoral Act, 2006 and guidelines and therefore not criminal in nature that are to be proved on preponderance of evidence or balance of probability. He referred to the case of *Omoboriowo v. Ajasin (supra)*. The learned senior counsel submitted further that the 25 witnesses cut across all the local governments. The burden of proof is discharged as soon as credible evidence is led before the tribunal or court. The burden will only be deemed not to shift if there is no scintilla of evidence on the part of the petitioner. The appellants did not lead any evidence in this case but they are challenging that only twenty-five witnesses were called and that voters' register must be tendered before the burden of proof can shift. The appellants are to rebut when the tribunal have believed their evidence. There was enough evidence to shift the burden of non-voting to the appellants to defend. In this case, where the petitioners have asserted that there was no election and backed same up with witnesses' statements/depositions, the respondents must show by positive averments that there was election and back it up with witnesses' depositions. The respondents also stressed that fact that the appellants did not adhere to the time designated for voting under the Electoral Act, 2006, and the guidelines. The respondents considered

the issues involved in *Buhari v. Obasanjo* (2005) 13 NWLR (Pt.941) 1 and compared them with the issue of late delivery or non delivery of electoral materials in this present appeal to conclude that the facts of non-compliance/irregularities raised in the former case are totally and clearly different from those in this case. The respondents urged
 B this court in evaluating the evidence to take judicial notice of the admissions of the appellants about the late commencement of the elections and hold that the petitioners have made out a case of substantial non-compliance with the Electoral Act and the Election Guidelines and Manual issued pursuant to section 161 of the Electoral Act,
 C 2006. This court has no reason to interfere with the evaluation of witnesses and consequently to affirm the decision of the tribunal nullifying the election into the office of the Governor/Deputy Governor of Enugu State on the 14th and 28th of April, 2007 and to order a
 D fresh election.

I have given a careful consideration to the submission of the parties in this appeal. The parties raised similar issues for the determination of this court as in Appeal No. CA/E/EPT/19/2008. It is noteworthy that the two appeals now consolidated are challenging the
 E conduct of the 14th and 28th of April, 2007 gubernatorial election in Enugu State. The appellants in this appeal has the constitutional duty of conducting election. Besides constitutional provision, it is guided by the Electoral Act, 2006, the Elections Guidelines and Manual issued from the powers based on section 161 for its officials. All steps
 F taken pursuant to conducting a free, fair and hitch free election as much as humanly possible are embodied in the foregoing documents. For instance, section 47 of the Electoral Act, 2006 provides that -

G *“The Commission shall not later than 14 days before the day of election, cause to be published, in such manner as it deems fit, a notice specifying the following matters -*

- (a) the day and hours fixed for the poll;*
- (b) by way of indication, the persons entitled to vote, and*
- (c) the location of the polling stations.”*

H The manual - which is part of evidence in this appeal - as exhibit P2 provides that at the opening of the polls on election day, *“at 8am. the presiding officer shall declare the poll open.”*

Under another column captioned close of polls it says: *“The presiding officer shall officially announce the close of the polls. -*

On 14th of April, 2007 the foregoing could not be complied with. The evidence on record put it that there was a hitch at the Central Bank of Nigeria where the voting materials were kept - which was described as “pandemonium” in the judgment of the lower tribunal. In view of the fact that the hours for voting were not complied with - result sheets were missing when the electoral materials were to be collected, the ballot papers were short. All stakeholder, supervisory officials for the local governments INEC headquarter, party officials, contestants and all other stakeholders must obviously be agitated. The evidence also on record put it that vehicle started to move out of the Central Bank premises around 10a.m. amidst shooting by Army personnel to keep away the agitated crowd. B C

At the hearing of the petition, pre-hearing sessions were held to afford an opportunity to determine the pattern of hearing in the matter. Witnesses were streamlined and front loading of documents D occurred. Witnesses for the petitioner -Twenty-five, for the 1st and 2nd respondents - Nine and for INEC - Six.

The next stage of evidence from witnesses was that vehicles conveying voting materials to local governments got there between 2p.m. - 2.30p.m. Voters who had turned up for voting must be affected by the long waiting. Remarkably, voting took place as there were complaints like - E

(1) There were no accreditation, votes not counted, results not announced, results not issued to polling agents and where there was no voting but results were produced by the respondents. F

(2) Arbitrary votes were recorded and voting started late.

(3) By the appellants’ time of voting was extended to allow voters to cast their, votes.

(4) Appellants testified that all materials were delivered to all polling booths and people voted freely. G

It is also important to note that all allegations made in the court by the learned senior counsel - Dr. Izinyon, SAN except the ground for non compliance and irregularities were abandoned.

In view of the late arrival of materials to local government areas and another election was fixed for Udi, Usi-Uzo, Enugu South and Nsukka Local Government Areas on the 28th of April, 2007. Coincidentally about the election of the 28th of April, 2007, there was no evidence that it suffered any complaints and attack peculiar H

to the April, 14 election, due to diversion of electoral materials. At the trial of the petition, the main issues facing the tribunal like in the earlier appeal, dubbed as non-compliance and irregularities are as follows -

- (a) Non election in most places.
- B (b) Late arrival of electoral materials causing no voting or late voting.
- (c) Non-availability of result sheets.
- (d) Irregularities in allotting of votes to the 1st respondent.
- (e) No collation of results.

C The 1st issue for determination of the appeal challenges the way and manner the lower tribunal handled the trial, particularly whether on the nature of evidence and pleadings canvassed at the hearing, the petitioners have successfully established a case for nullification of the elections?

D I have enumerated the allegations. The petitioners/respondent; called witnesses whose evidence were believed by the lower tribunal on the late arrival of election materials. I must agree that there is overwhelming evidence that voting started late and also that time was extended for people to vote. This I presume was not ultra vires of INEC to extend time for people to vote. This was borne out of exigencies or circumstances prevailing to allow people to exercise their right of choosing their leader. I am very apprehensive about the evidence of witnesses about the events at the polling booths. There were 2,874 polling booths in the 17 Local Governments of Enugu State. It is impossible for twenty-five people to cover the voting exercise in all the polling booths and come back with a report on activities going there. The activities complained of are -

- G (a) Allotment of votes
- (b) Carting away of result sheets
- (c) Non- voting which can only be established by the one who was unable to vote.

Allotment of votes to PDP to my mind has to be established. Forms EC8As and EC8Cs tendered as P5 1-734 were tendered to this effect because their faces are full of irregularities. As between INEC and the petitioner the genuine results prepared by INEC officials - have to be shown to court and the traits of irregularity on them identified. Oral evidence

has to be led to identify the irregularities or the justices of the tribunal or this court, if left to do that shall be engaged in investigation, which is not the duty of court. The duty of the court is to be an unbiased umpire. There was the compliant of overballoting. I will quote from the judgment, which is based on the evidence of PW24 - the 1st petitioner himself, who was said to have monitored the election in the local government areas from CBN office, said that "there were no result sheets. That the buses that conveyed the materials took them to other places. That the votes were merely allotted to the 1st respondent." It was practically impossible to see what was happening at the other local government areas from the Central Bank. He derived the information from other sources and this amounts to hearsay evidence. It is trite that hearsay evidence is inadmissible in law. The bulk of the evidence of this witness PW24 on the irregularities must be expunged from record as hearsay evidence.

By the order of the tribunal, INEC released two sets of documents from its custody to the petitioners - P5 series Nos. 1-734 Forms for collation of results from the election issued by INEC officers and tendered by the petitioners and accepted in evidence by the tribunal. The other sets are police report P4 series (1-15) the tribunal declined to attach any probative value to these documents as they were not tendered by the police - the maker invoking section 91(3) of the Evidence Act. The contents of the reports of the police were that election was held throughout the State. My comment is that it was procedurally wrong of the tribunal to reject one document and admit another as evidence when both of them are already public documents by virtue of section 109 of the Evidence Act. Both documents were not tendered by their makers. The petitioner/respondent is asking that finding in the appeal based on the evidence of witnesses who in their evidence cannot substantiate them and they are not in a position to give evidence of the events at other polling station beyond where they can physically be present. Moreover, demeanour is of no moment while considering documentary evidence. It is also trite that a court cannot make a case for the parties where parties do not aver a particular fact in their pleadings, it goes to no issue. See cases: *Kaugama v. NEC* (1993) 3 NWLR (Pt. 284) 681; *Opia v. Ibru*

(1992) 3 NWLR (Pt. 231) 658. The acts of non-compliance and irregularities complained about were not established by evidence from witnesses but appeared during the rounding-up of the case in the address of counsel -the lower tribunal has this to say -

B *“The learned senior counsel in his written address dealt with them exhaustively. He has painstakingly demonstrated the cases of irregularities in them in his address. They include where no ballot papers were allocated, votes were allocated to the 1st respondent, ballot papers less than the scores recorded - that is, over-voting and*

C *cancellation among others.”*
It is trite that address of counsel however brilliant cannot become evidence. See *U.B.A. Plc. v. A.C.B (Nig.) Ltd.* (2005) 12 NWLR (Pt. 939) 232; *Ogunsakin v. Ajidara* (2008) 6 NWLR (Pt. 1082) 1. The irregularities emanated from the imagination of the learned senior counsel, and they can only be confined to the address. The irregularities have not been established and they have no evidential value to the relief of nullification sought in this case. The petitioners did not specifically plead them in that regard they cannot go to any issue. See case: *Hashidu v. Goje* (2003) 15 NWLR (Pt. 843)352.

E ***This takes me to the burden and standard of proof in the allegations before the court on the catalogue of irregularities and non-compliance.***

F ***Any irregularities connected with ballot papers including allocation of votes, over-voting and cancellation of votes are in my view criminally tainted. They are acts borne out of deceit by the culprit. The act might be committed by someone or his agent on his behalf and without his knowledge. Any irregularities pertaining to an election must have been committed as offence for dereliction of duty by INEC officers for which are covered by section 130 of the Electoral Act, 2006. The sanction is fine or imprisonment. Since the operative word used in the section is conviction - the offences are criminal in nature.***

H The burden of proof generally in the sense of establishing a case, virtually lies on the plaintiff or the initiator in the law suit. The proof or rebuttal of issues which arise in the course of proceedings may shift from the plaintiff to the defendant and *vice versa* as the case progresses. However, until the plaintiff or the petitioner has dis-

charged the onus cast on him by law, the onus does not shift. See section 137(2) of the Evidence Act; *Buhari v. Obasanjo* (2005) 2 NWLR (Pt. 910) 241; *Igwe v. A.C.B. Plc.* (1999) 6 NWLR (Pt.605) 1; *Ajadi v. Ajibola* (2004) 16 NWLR (Pt. 898) 91; *Haruna v. Moddibo* (2004) 16 NWLR (Pt.900) 487.

The burden of proof required in criminal matters or civil matters in which claims are founded on conduct bordering on crime differ from the burden which a claimant is proved on the balance of probabilities. In criminal matters or claims founded on criminal conduct, the allegation has to be proved beyond reasonable doubt. In civil matters, the burden does shift. In the other situation the burden is static, ever remaining on the prosecution or the claimant as the case may be. In the instant case, the appeal is premised on the conduct of INEC officials that bordered on criminality. It was therefore incumbent on the respondents to prove their allegations beyond reasonable doubt. And the burden would not shift, it remained on the respondents to prove their allegations beyond reasonable doubt and the burden would not shift. It remained on them until it had been fully discharged .See *Nsirim v. Nsirim* (1995) 9 NWLR (Pt. 418) 144; *U.B.N. Ltd. v. Odusote Bookstores Ltd.* (1995) 9 NWLR (Pt.421) 558; *Ugbo v. Aburime* (1994) 8 NWLR (Pt.360) 1; *Edokpolo & Co. Ltd. v. Ohenhen* (1994) 7 NWLR (Pt. 358) 511.

On the issue of the applicability of the case of *Buhari v. Obasanjo* (2005) 13 NWLR (Pt.941) 1 to the facts of this case as concluded by the tribunal. It is the contention of the respondents' counsel that the facts of the two cases radically are different. There can only be deductions of the number of voters allegedly affected when the court finds that there was an election. In the appeal before the tribunal found that there was no election as the one held was not conducted in substantial compliance with the Electoral Act and consequently declared same invalid. The appellants referred this court to the decision in *Buhari v. Obasanjo* that there is a rebuttal presumption that the result of any election declared by the electoral commission is correct and authentic and the burden lies on the party that disputes the correctness and authenticity of the results to lead rebuttal evidence which the 1st respondent had led. See *Buhari v. INEC* (2008) 4 NWLR (Pt. 1078) 546. The similarity between this case and *Buhari v. Obasanjo*

is that they affect the conduct of an election by officers of INEC. What the court is to determine is whether the election was conducted in substantial compliance with section 135 (1) of the Electoral Act in the 2003 election, and section 146(1) of the Electoral Act, 2006. The twin issues involved in section 146 (1) is for the tribunal or court
B to determine -

(1) Whether the election was conducted substantially in accordance with the principle of this Act.

(2) Whether non-compliance did not substantially affect the
C conduct of the election.

In this appeal, the petitioner was able to show that there was an election and that the election was not conducted in accordance with the provisions of the electoral law as to the timing of holding of the election, the non-compliance proved, did not substantially affect
D the result of the election particularly that going by the overall figures of registered voters and non-voters in the election.

***Finally, an election ought not to be nullified by reasons of shortcoming or lapses in the performance of duty of electoral officers without any evidence of corrupt motives by the
E electoral officials if the tribunal is satisfied that election was notwithstanding those really and in substance conducted under the electoral law and that the result of the election was not and could not have been affected by the lapses.*** See: Buhari v. Obasanjo (2005) 2 NWLR (Pt. 910) 241; Swem v. Dzungwe (1966)
F NMLR 297; (1966) SCNLR 111.

***Another question to ask is whether in timing of the election and date amount to non-compliance under the Electoral Law and Guideline or Manual? Sections 26 and 27(1) of the
G Electoral Act, 2006, INEC has the power to fix the date for election into any of our political post, and where a date has been appointed for the holding of an election, and reasons of breach of the peace shall or natural disasters, or other emergencies, the commission may postpone the election and ap-
H point another date for it.***

By the combined reading of sections 27 and 47 (a) of the Electoral Act, 2006 the commission can alter or shift the time for voting when circumstance dictates. Where there is a shift of time the petitioner must adduce evidence that it has

affected the result of the election. Buhari v. INEC (2008) 4 NWLR (Pt. 1078) 546.

In the evaluation of evidence, a court must ensure that it holds the string or cord of justice evenly balanced between parties so that justice may be seen not only to have been done, but to be manifestly done. A situation where a court will subject the applicability of our laws of evidence to a double yardstick so as to leave a party in a limbo does not augur well for the administration of justice. I have considered the issue of evaluation of evidence in the other appeal, it will become boring to go over the same submission again. I resolve the two issues in favour of the appellants.

In sum, I find that there is merit in this appeal and it is accordingly allowed. In the final analysis, the consolidated appeal succeeds and it is allowed. The order of the nullifying the election of the 14th and 28th of April, 2007 is set aside, and the petition is hereby dismissed. A sum of N50,000 is awarded to each set of appellants against each set of respondents.

JEGA JCA

I agree.

BADA JCA

I agree.

SAULAWA JCA

Having read before now the judgment of my learned brother, Adekeye, JCA, in the instant consolidated appeal, the records of proceedings of the lower tribunal, the submissions of the learned counsel in the respective briefs thereof, I cannot but concur with the reasoning and conclusions reached therein.

It is trite that both appellants in Appeal No. CA/L/EPT/19/2008 were the 1st and 2nd respondents, respectively in petition No. NAGL/EPT/EN/GOV/43/2007, filed by the 1st, 2nd and 3rd respondents herein. At the conclusion of the hearing of the petition in question, the lower tribunal delivered a judgment on 18/01/08 nullifying the

declaration and return of both appellants as the Governor and Deputy Governor of Enugu State respectively. The appeal No. CA/E/EPT/19/2008 in question is against that judgment.

The second appeal, however, was filed by INEC (the 5th respondent) and 3372 others against the 1st appellant and 1st respondent (in the first appeal) and 10 others. The said second appeal is against the judgment of the lower tribunal delivered on 18/01/08 nullifying the declaration by the 1st appellant in favour of the 4th and 5th respondents (1st and 2nd appellants in the first appeal). Essentially, both the 1st and 2nd appeals in question have challenged the same judgment of the lower tribunal delivered on 18/01/08 in question.

Not surprisingly, on 12/5/08, Chief A. O. Mogboh (SAN) filed a motion on notice, dated 09/5/08, seeking to consolidate both appeals Nos. CA/E/EPT/19/2008 and CA/E/EPT/19A/2008 for hearing and determination thereof. The motion in question was indeed moved by the learned silk and duly granted by the court on 22/5/08. The consolidated appeal was thus adjourned to 02/6/08 for hearing.

CA/E/EPT/19/2008

Instructively, both parties had filed and served their respective brief of argument. On the 02/6/08, when the consolidated appeal came up for hearing, the learned counsel on both sides adopted the respective briefs thereof. Thus, resulting in the appeal being reserved for judgment. The submissions of the learned counsel have been extensively alluded to in the lead judgment. Chief (Mrs.) Offiah (SAN) had in the oral submission thereof alluded to the 1st appellant's brief filed on 03/3/08 and the reply brief thereof filed on 23/4/08. She adopted both briefs in question. She emphasised that none of the parties frontloaded any document at the trial. She referred to pages 538 to 556 of volume 3 of the record of proceedings of the lower tribunal. That, the petitioner was allowed by the tribunal to file documents that were not frontloaded. However, the 1st appellant's application seeking to tender documents pleaded but not frontloaded was refused, and the documents were rejected by the tribunal.

It was argued that the tribunal, having blocked off the 1st appellant from tendering the documents, turned round to vilify him for not tendering the election results. That, the analysis of the petitioners' counsel in the address thereof was heavily relied upon by the

tribunal in its judgment. That, there is no basis for the conclusion reached by the tribunal in the judgment thereof. The court was urged to allow the appeal, set aside the judgment and accordingly dismiss the petition in its entirety.

A. I. Ani Esq. of counsel for the 2nd set of appellants (INEC et al) equally adopted the brief thereof. He alluded to the respondent's preliminary objection which according to him was merely reproduced in their brief without any argument thereon. He urged the court to thus deem the preliminary objection as having been abandoned. However, out of abundant caution, he filed a reply brief there to urging on the court to dismiss the preliminary objection. See *Ngige v. Obi* (2006) 14 NWLR (Pt. 999) 1 at 294 – 295; *Buhari v. Obasanjo* (2005) 13 NWLR (Pt.941) 1. B
C

The learned counsel referred to page 384 of volume 3 of the record regarding withdrawal or abandonment of grounds of the petition leaving noncommand irregularity. That, the tribunal nullified the petition on the abandoned grounds of the petition. See pages 615-616 of the record; section 136 of Electoral Act, 2006. D

Finally, the learned counsel urged upon the court to allow the appeal, set aside the judgment of the lower tribunal and accordingly dismiss the said petition. E

Dr. Izinyon (SAN) was the counsel for the 1st, 2nd & 3rd respondents. He equally adopted the said respondents' brief. He argued, inter alia, that the issue of admissibility of the documents cannot be raised (at this stage) because it did not arise from the final judgment of the lower tribunal, See *Ogigie v. Obiyan* (1997) 10 NWLR (Pt. 524) 179 at 195 paragraphs F - H. That, the respondents/ appellants had had the opportunity to lead evidence and prove that the election was held and they won. That, the petitioner also led evidence. The respondents did not frontload any document. That, it was only during cross examination that they sought to tender these exhibits. See *Prince Amgbare & Anor v. Chief Timi Sylva CA/PH/EPT/534/07* (unreported) now reported in (2007) 18 NWLR (Pt. 1065) 1; paragraph 4(8) Practice Directions 2007 by which frontloading of documents was required. The court was urged not to interfere with the lower tribunal's findings. See pages 565 - 566 of the record; *Buhari v. Obasanjo* (supra). F
G
H

Dr. Izinyon (SAN) equally identified and adopted the brief in

the second brief filed on 11/3/08. He adopted same and the preliminary objection without much ado. He argued that the appeal is incompetent -and should be struck out. See *Ngige v. Obi* (2006) 14 NWLR (Pt. 999) at 103 paragraphs E - F. He adopted his submissions in the sister appeal issue No. 10. That INEC did not do what it was supposed to have done. He urged the court to affirm the lower tribunal decision.

On points of law, Chief (Mrs.) Offiah. SAN argued, *inter alia*, that *Timi Sylva's* case (*supra*) was given *per in curium*. See *Buhari v. Obasanjo* (*supra*); *Agbo v. Nnaji Nnamani*; *Atiku v. Yar'Adua* (*supra*) etc. That *Timi Sylva's* case was given without due regard to decisions of the Supreme Court in *Buhari v. Obasanjo* etc.

On the other hand, Ani Esq. on onus of proof cited and relied on *Nnaji v. Agbo* (2006) All FWLR 1 (Pt. 305) paragraphs 7361: *D Remi v. Sunday* (1998) 8 NWLR (Pt. 613) 93, and urged in the court to distinguish *Sylva's* case from these cases and accordingly urged the court to allow the appeal.

Notice of Preliminary Objection.

As borne out by the records, the 1st, 2nd & 3rd respondents have raised a preliminary objection at pages 3-4 of the brief thereof challenging the competence of the entire appeal. The preliminary objection was predicated on the following grounds:

1. The 4th respondent to the appeal makes the appeal incompetent.
2. Secondly, grounds 4 and 5 of the notice of appeal are incompetent and should be struck out.

3. ground 11 of the notice of appeal should be struck out.

Ground 1 of the preliminary objection is to the effect, that the 4th respondent cannot be made a respondent to an appeal filed by its candidate. That, the law recognises only a sponsoring political party and not the candidate in the event of success. The respondents cited and relied on the notorious case of *Amaechi v. Omehia & 2 Ors.*

It was submitted for the appellants in the reply brief thereof filed on 23/4/08, but deemed properly filed and served on 22/5/08, that the preliminary objection should be deemed as having been abandoned on the ground that no argument was proffered thereon. See *Abuul v. BENSU* (2003) 16 NWLR (Pt. 845) 59 at 86 per Muktar, J.C.A (as she then was).

Alternatively, it was submitted that by virtue of section 144 (1) & (2) of the Electoral Act, 2006, a candidate in an election is recognised as a party in an election petition either as a petitioner or respondent. That, the case of *Amaechi v. INEC* (*supra*) cannot be an authority for the alleged objection that the law does not recognise candidates. I think, I cannot agree more with that submission. In the first place, it should be pointed out that the citation of Amaechi's case (which is by no means a notorious case) in the 1st, 2nd & 3rd respondents' brief as *Amaechi v. Omehia & 2 Ors.* (Unreported) SC/252/2007; reported as *Amaechi v. INEC* (2008) 5 NWLR (Pt. 1080) 227 is to say the least wrong and misleading, with due respect to the learned silk the correct citation. I believe, should have been *Rt. Hon. Rotimi Amaechi v. Independent National Electoral Commission & 2 Ors.* or *Amaechi v. INEC & 2 Ors.* SC. 252/2007 dated 18/05/2008 (Unreported), now reported in (2008) 5 NWLR (Pt. 1080) 227.

Omehia is undoubtedly the 2nd respondent in that case. So his name cannot for whatever reason be made to supercede that of INEC, which is the first respondent. In any event, the case has since been reported in the (2008) 5 NWLR (Pt. 1080) 227 and (2008) All FWLR (Pt. 407) 1 volume, respectively.

For obvious reasons, *Amaechi v. INEC*'s case (*supra*) is quite distinguishable from the instant case. One, Amaechi contested the PDP Governorship primaries and won with 6,527 votes. The second respondent, Omehia did not at all contest that primary election.

Amaechi's name was initially forwarded by PDP to INEC which published his name as the candidate of PDP for Rivers State Governorship election. Soon thereafter, rumour became rife that Amaechi's name was substituted with Omehia's name. He filed a suit in the court to stop PDP from substituting his name. The reason given for Amaechi's substitution was that his name was submitted to INEC "in error". Thus, not surprisingly, it was held by the Supreme Court at 297 paragraph E thus:

"The reason given by PDP as 'error' for Omehia for Amaechi did not meet the requirement of section 34 of the Electoral Act." See also *Ugwu v. Ararume* (2007) 12 NWLR (Pt. 1048) 367.

Two, in Amaechi's case, as pointed out above, Omehia never contested the PDP primary election. Thus, informing the wise decision of the apex court at page 296 paragraphs F - H per Oguntade

JSC-

When a political party later asks to substitute a candidate, it does so against the background of the result of the primary election. If there is a problem with a candidate who comes first, then the party will opt for the 2nd and later 3rd etc. in that order. There is simply no room for a candidate who never contested a primary election in such setting to emerge a party candidate. This seems to me a praise worthy attempt to enthrone intra party democracy in order to ensure that our democracy is truly reflective of the peoples choice.

Three, unlike *Amaechi's* case, which has to do with section 34 of the Electoral Act, 2006 (*supra*), the instant case deals with the right of persons to present a petition in the election tribunal or court, as the case may be, duly provided for under section 144 of the Act thus:

“ 144(1) An election petition may be presented by one or more of the following persons;
 (a) a candidate in an election;
 (b) a political party which participated in the election.”

Hence, by virtue of the above provisions or section 144 (1) Electoral Act, 2006 (*supra*), it has become rather obvious that a candidate who participated in an election has an unfettered right to present a petition to challenge the result of that election in either an election tribunal or court, as the case may be. If I may add, the right to present a petition by a candidate who contested an election is unquestionable and rather absolute. And I so hold.

The second ground of the preliminary objection complains that both grounds 4 and 5 of the grounds of appeal did not attack the judgment of the lower tribunal, but were rather based on an academic and hypothetical circumstances. Having critically, albeit dispassionately, considered the said grounds 4 & 5 and the particulars thereof, I am unable to appreciate, let alone uphold, that contention, Ground 4 alleges that the lower tribunal has subordinated the provisions of the 1999 Constitution, the Electoral Act, 2006, the Evidence Act, the Federal High Court (Civil Procedure) Rules. 2000 and judicial authorities to the Practice Directions. While ground 5 alleges that the said Practice Directions were not validly made. Thus, in my view, ground 2 of the preliminary objection is most undoubtedly misconceived and highly misleading, to say the least. See *CSS Bookshop*

Ltd. v. Regd. Trustees of Muslim Community in River State (2006) 11 NWLR (Pt. 992) 530 at 573.

The 3rd ground of the preliminary objection does not appear to me to have been argued. Thus, it's deemed abandoned. And I so hold.

Hence, in the light of the foregoing, there is every reason for me to uphold the submission of the learned senior counsel for the appellants, to the effect that the preliminary objection lacks any substance whatsoever and same is hereby overruled. B

Regarding the main appeal itself, it's instructive that the appellants have formulated a total of twelve issues in the brief thereof. Issue No.6 especially, raises the question of whether the lower tribunal was right in relying on the analysis of exhibit P5 series (1-7340) made in the written address of the petitioner's counsel in making a finding that there were irregularities and over voting in the said election, which was not the petitioner's case on their pleadings, and that the purport of exhibit 5 was not demonstrated in evidence. I have amply considered the submissions of learned counsel in the respective briefs of argument thereof on the issue, As borne out by the record at page 614 volume 3, the lower tribunal has made an allusion to the issue of irregularities and allocation of votes to the 1st appellant thus: C
D
E

To prove this allegation, the petitioner tendered exhibit P5. They are 734 Form EC8As and EC8Cs obtained from INEC. The learned senior counsel in his written dealt with them exhaustively. He has painstakingly demonstrate the cases of irregularities in them in his addresses. They includes (sic), where no ballot papers were allocated, votes were allocated to the 1st respondent. Ballot papers less than scores recorded, that is over voting and cancellation among others. F
G

The above finding of the lower tribunal was regarding the analysis made by the petitioners counsel in the brief thereof, at pages 332 to 357 of the record drawing inferences to the effect of non-holding of elections, over balloting or over voting in the various polling booths in question. Ironically, however, the allegation of improper completion of election result sheets (exhibit P5) as an act of non compliance or irregularity was not specifically pleaded by the petitioners. What they actually pleaded were that H

(i) voting did not take place in virtually all the polling booths in

Enugu State, on the grounds of late or non-arrival of electoral materials at the polling booths;

(ii) non-availability of result sheet/forms;

(iii) non availability of ink and ink pads; ballot papers;

(iv) using serving state and local government PDP officials as agents at polling booths etc, by the appellants.

For the analysis on the improper completion of exhibit P5 series to be valid, facts relating thereto ought to have been pleaded, and evidenced adduced thereon. I am afraid to say that this was not the case in the instant appeal. The lower tribunal was thus in error in allowing the petitioner's counsel to canvass a case for the petitioners that was not pleaded in the petition. See *Ajadi v. Ajibola* (2004) 16 NWLR (Pt. 898) 169 at 170; *Vibelko (Nig.) Ltd. v. N.D.I.C.* (2006) 12 NWLR (Pt. 994) 280 at 297 – 293; *Ngige v. Obi* (2006) 14 NWLR (Pt. 999) 1 at 226; *Ige v. Olunloyo* (1984) 1 SCNLR 158; *Ekpenyong v. Nyong* (1975) 2 SC 79.

What's more, the petitioners' counsel's analysis heavily relied upon by the lower tribunal has amounted to a counsel giving an evidence from the bar which is most unacceptable. It is a well trite fundamental doctrine that the submission of a counsel in a case, no matter how articulate or eloquent, cannot serve as a substitute to pleadings and/or evidence. See *U.B.N. Plc v. Ayodare & Sons (Nig.) Ltd.* (2007) ALL FWLR (Pt. 383) 1 at 42 paragraphs F - G, (2007) 13 NWLR (Pt. 1052) 567 per Oguntade, JSC; *Buhari v. INEC & Ors* CA/A/EPT/2/07 delivered on 26/02/08, reported in (2008) 4 NWLR (Pt. 1078) 546 thus:

The petitioner made heavy weather about stamping and voting and counter signing in his written address. These irregularities were not pleaded and therefore go to no issue. Moreover documents apart from what they contain do not speak however ingenious or brilliant can be a substitute for evidence or pleading. See *Oduola v. Coker* (1981) 5 SC 197.

There is a need to reiterate the fundamental principle, that a document cannot serve any useful purpose in the absence of an oral evidence explaining the essence thereof. The Supreme Court had about four decades ago aptly reiterated this fundamental principle in the case of *Brown Holding Coy Ltd. v. Bogoco* (1971) 1 All NLR 324 at 330 - 331 wherein it held, inter alia, as follows:

The Independent examination of exhibits by a court was considered in *Muhammadu Duriminiya v. Commissioner of Police* (1961) All NLR 70, which the court said this: The magistrate examined the books but apparently not in court - for records does (sic) not show that he observed or was shown any entries in court except the few we have mentioned and in examining them out of court, as appears B from his judgment, he observed points which ought to have been brought out in court at the hearing but were not. In doing this, the magistrate was not trying the case, he was investigating it.

A fortiori, what the lower tribunal did in the instant case was C that it had descended into the arena by unilaterally embarking on a voyage of discovery or investigation of exhibit P5 series. By virtue of the above authorities, it had no power to do so.

In the circumstance, I have no hesitation in resolving issue No. 6 in favour of the appellants. And I so hold. D
Issue No. 10 was distilled from ground 15 of the grounds of appeal. It raises the question of whether the lower tribunal was right in holding that departure of electoral materials from the premises of the Central Bank of Nigeria (CBN) behind schedule led to the disenfranchisement of a majority of the electorate in Enugu State. It was E deposited to in paragraph 18 (f) of the petition found at page 61 volume one of the record, thus:

Enugu State prospective voters who come out to vote could not vote because elections did not stand (*sic*) on time as election F materials left the Central Bank of Nigeria (CBN) premises in Enugu very late due to reason of the act omission and or commission of 3rd-11th respondents and or their agents.

The appellants' reply to the above averment could be found in paragraphs 7 and 8 of their reply to the petition contained at page G 56 volume two of the record. Issues were thus joined by the parties. I have assiduously considered the submissions of the learned counsel in the respondent's briefs thereof, the pleadings as well as the evidence adduced at trial of the petition. The argument of the appellants could be found at pages 46-49 of the brief thereof, while the H argument of the 1st, 2nd & 3rd respondents is contained at pages 88 - 97 (issue No.7) and pages 88 - 90 (issue No. 8) of their brief.

According to the respondents of page 78 of their brief, by virtue of the evidence of PW1 - 24. i.e. 24 of the 25 witnesses who

adopted their witnesses' statements as evidence for the petitioners, it was clear that the voting time was not complied with. On the other hand, it was the case of the appellant, especially in paragraph 8 of the joint reply thereof, that voting admittedly started later than the time stated or prescribed by INEC but that it commenced at 10.00am B - 6.00pm and was widely and repeatedly announced over the radio. See page 56 of vol. 2 of the record. The evidence of RW1 at page 565 of the record is to the effect, *inter alia*, that –

C “...voting, started at 11: 30am and not 8:00am as was suppose to be Closing was 6:00pm instead of 3:00pm announcement was made the”

It is noted, that the above evidence was challenged under cross examination by the petitioners. The RW4, under cross examination by 4th respondent, of page 569 of the record, stated thus:

D “...voting started at the ward by about 12:30am. Voting end about 6:00pm material arrived around 11:30am...”

Furthermore, under cross examination by the petitioner, the RW4 stated thus:

E “...materials arrived around 11:30am I was not in the DPO's Office. I voted at old Op Nkno Ibagwa - Aka polling booth... I am a member of RPN not PDP”

F An allusion was made to the skirmishes that allegedly occurred at the CBN on the day of the election (14/4/07). The respondents thus submitted that the election was substantially conducted. The evidence from CBN on the movement of voting materials to other L.G. A.'s show that the voting or polling hours was disrupted and no form of election known to law could be said to have taken place. See *Bassey v. Young* (1963) All NLR 31 at 37; (1963) 1 SCNLR 61. It G was accordingly argued by the 1st, 2nd & 3rd respondents that the lower tribunal was on a solid footing on its findings of what happened at the CBN. See *Odofin & Ors. v. Mogaji & Ors.* (1978) NSCC 275 at 277. The court was urged to accordingly dismiss the appeal on this ground.

H As borne out by the record at page 609, the lower tribunal has held *inter alia* thus:

This is a matter of common knowledge to all those involved in the election... The situation was such that the electoral officers did not leave the CBN well after 1:00pm... furthermore they gave im-

pression that there was no pandemonium at the Central Bank of Nigeria we doubt them because what happened at the CBN on the morning of 14/4/2007 was a matter of common knowledge to all those present.

Now, the pertinent question is whether the above far reaching and sweeping remark by the lower tribunal was supported by evidence adduced at the trial, or it was merely presumptuous or speculative. It is rather obvious, that there's no specific or express evidence to the effect that:

"electoral officers did not leave the CBN well after 1:00pm." as expressed by the lower tribunal above. The evidence of the PW5 is to the effect *inter alia* thus:

"...the materials were able to leave when soldiers intervened and fired to the air to disperse the crowds... the gates was (sic) opened at 12:00 noon the delay was not caused by „ the crowd..."

Under cross examination of page 503 volume 3 of the record, the same PW5 has this to say:

"The material arrived in the morning ... it was about 12:00 noon on 14/4/2007."

From the above highlight, it is rather obvious that the lower tribunal had allowed itself to be carried away by sheer sentiment in making the above far reaching and sweeping findings that would hardly be sold to be backed up by the evidence adduced at the trial. If "the electoral officers did not leave the CBN well after 1:00pm", as the lower tribunal would want to believe, then by implication the election materials, *ipso facto* could not have left the CBN later than that time. Unfortunately for the lower tribunal, however, that finding was not supported by any evidence adduced by the parties before it. The trite fundamental rule is that a court of law or tribunal as the case may be is duty bound to confine its findings strictly within the ambit of the evidence adduced vis-a-vis issues formulated by parties before it. See *Ngige v. Obi* (2006) 14 NWLR (Pt. 999) 1 at 226; *Ekpenyong v. Nyong* (1975) 2 SC 71.

Of course, the fact that there was evidence of late arrival of H voting materials in some polling booths is not in doubt. That was, as a matter of fact, what must have led to the cancellation or postponement of the election in four of the seventeen local government areas in Enugu State. The rest of the four local governments where voting

was rescheduled to 28/4/07 comprised of Udi, Isi-Uzo, Enugu South and Nsukka Local Government Areas respectively. See page 605 of volume 3 of the record wherein the lower tribunal stated thus:

That another election was fixed for Udi, Isi-Uzo, Enugu South and Nsukka Local Government Areas on 28th April, 2007. The same
B scenario as that of 14/4/2007 was reported as there were diversion of electoral materials. No result sheets and illegal writing of results.

In the light of the above postulations, there is every reason for me to hold that if the INEC had not rescheduled the election on 14/
C 4/07 in four of the seventeen Local Government Areas of Enugu State in question to 28/4/08, the departure of the electoral materials from the CBN behind schedule could have led to the disenfranchise-
ment of a majority of voters in the election. Resultantly, my answer to issue No. 10 of the appellants is undoubtedly in the negative and
D same is hereby resolved in the appellants' favour.

The last, but by no means the least, is the issue No.2 of the appellants. It was distilled from ground one of the grounds of appeal. It raises the question of whether the 1st respondent (petitioner) was entitled to judgment on the basis of the evidence adduced at the trial,
E I have considered the submissions of the learned counsel on the issue, and the various authorities referred to in their respective briefs of argument. As alluded to above, essentially the petitioner's counsels' written address at the trial was to the effect that all grounds of the petition dealing with criminal allegations had been abandoned,
F thus, the lower tribunal held in the judgment in question that the remaining allegations in the petition should be proved only on the balance of probability, as against proof beyond reasonable doubt. The allegations in question highlighted above include allotment of
G votes to the 1st appellant, failure to hold election, failure to collate results etc. Paragraphs 16 & 17 of the petition are to the effect that the 1st appellant polled or was allotted 811,798 votes and thus returned as winner of the said election.

Viewed against the background of the far-reaching allegations
H alluded to above, it goes with out saying, that all the votes credited or allotted to the 1st appellant were false. And by implication, the certificate of declaration or return issued to the 1st appellant was also false, especially in view of the very serious allegation that no election, as a matter of fact, took place; as votes were merely allotted thereto.

Instructively, we had treated or addressed this vexed issue earlier in our first judgment in Appeal No, CA/E/EPT/15/2008: *Mr. Ugochukwu Agballah v. Mr. Sullivan Iheanacho Chime*; (2) INEC & 3,238 Ors. (Unreported). It was delivered on 04/6/08 in the heart of this famous coal city and within the four walls of this very magnificent, albeit regrettably dilapidated, court hall. There is no gainsaying the fact, that the present appeal was a fall-out of the same judgment of the lower tribunal which gave rise to the *Agballah v. Chime's* appeal (*supra*). In that case, we held rightly in my view, thus:

It is unfortunate for the appellant to have made so much heavy weather of issue of the alleged abandonment of paragraphs 31 (a) and 31 (b) of the petition. Apart from the alleged abandoning of 31 (a) and 31 (b) of the petition, the appellants has failed to prove the other allegations regarding the alleged invalidity of the 811,798 votes credited to the 1st respondent (i.e. the 1st appellant in the instant appeal). Nevertheless an extensive appraisal or community reading of the entirety of the petition even without paragraphs 31 (a) and 31 (b) in question would unequivocal establish that the gravamen of the appellants allegation borders on wrongful or false declaration and return of the 1st respondent. Thus, the standard of proof required is that of proof beyond reasonable doubt, within the purview or contemplation of the provisions of section 138(1) of the Evidence (*supra*).

In the instant case, it goes without saying, that just like in *Agballah v. Chime* 'a case (*supra*), the return of the 1st appellant had allegedly amounted to be false within the purview of section 130(4) & (5) of the Electoral Act 2006, and which allegation must be proved beyond reasonable doubt in accordance with section 138(1) of the Evidence Act (*supra*). See for instance page 604 of volume 3 of the record wherein the lower tribunals held, *inter alia*, thus:

That on the 14th April, 2007, when they went to the CBN, they and other stake-holder the leaders of the other political parties found that the result sheets that were missing were found being endorsed for distribution by 3rd respondent (INEC Resident Electoral Commissioner).

As it was setting late to hold on that day, the stakeholder suggested to the 3rd respondent that election be postponed to another date considering the time that it would take to transport the materials

to the local government and to be distributed.

As they were on this, the GOC, commissioner and SSS director came. They and the 3rd respondent insisted on holding the election on that 14/4/07. Soon thereafter mobile policemen and soldiers arrived at the scene, and chase away all the party agents except those
B of the PDP.

That after the pandemonium it was getting very late, yet the materials were delivered to unknown places. As a result the materials got to the local government area late. That the result sheets still found
C missing from the material sent to the local government areas. The said section 130(4) & (5) of the Electoral Act is to the effect thus:

“130....

(4) Any person who announces or publishes an election result knowing same to be false or which is at variance with the signed
D certificate of return commits an offence and is liable on conviction to 36 months imprisonment.

(5) Any returning officer or collation officer who delivers or causes to be delivered a false certificate of return knowing same to be false to the commission or a state Independent Electoral Commis-
E sion, commits an offence and is liable on conviction to a maximum imprisonment for 3 years without an option of fine.”

See also *Buhari v. Obasanjo* (2005) 13 NWLR (Pt.941) 1 at 209; *Nwobodo v. Onoh* (1984) 1 SCNLR 1; *Omoboriowo v. Ajasin* (1984) 1 SCNLR 108; *Ayogu v. Nnamani* (2006) 8 NWLR (Pt.981)
F 160 at 182 respectively.

On the whole, in view of the above highlight, I hereby answer issue No. 13 of the appellant in the negative and accordingly resolve same in favour of the appellants.

Before putting the final dot on this judgment, I have deemed it
G expedient to reiterate that rigging or over voting has from time immemorial been a cause for concern all over the world, especially in the so called third world or developing countries. It is indeed a very serious and highly lamentable electoral malpractice. It is a most shame-
H ful and degrading act that ought to be condemned in all its ramifications by all well meaning and patriotic citizens, and non citizen, of this country alike. As emphatically lamented by Aderemi, JSC (as he then was) in *Seriki v. Olukorode Are & Ors.* (1999) 3 NWLR (Pt. 595) 469 at 480, paras. F-G thus:

“Rigging or over voting is a serious electoral malpractice.... it is an illegal act. And no persons involved in any form of immoral or illegal act or transaction shall be allowed to come to court to seek a redress. No polluted hand shall touch the pure foundation of justice.”

Hence, in consequence of the above postulations, and the much more detailed reasoning and conclusion reached in the lead judgment prepared and delivered by Adekeye JCA, I hereby, without any further hesitation, hold that the instant appeal is meritorious and same is allowed by me. B

Consequently, the judgment of the lower tribunal, delivered on 18/01/2008 nullifying the election and return of the 1st and 2nd appellants as Governor and Deputy Governor of Enugu State, is hereby set aside. C

SAULAWA JCA

D

I have had the privilege of reading before now the lead judgment prepared and delivered by my learned brother, Adekeye, JCA; to the effect that this appeal is meritorious and, ought thus be allowed by this court. I have also accorded an ample consideration upon the records of appeal as a whole, the submissions of the learned counsel in the respective briefs thereof and the authorities referred to therein, I adopt the reasoning and conclusion as mine. E

Consequently, I hereby without any further hesitation hold that the appeal is meritorious and same is hereby allowed by me. The judgment of the lower tribunal dated 18/01/08 nullifying the election in question is hereby set aside. The Petition No. NAGL/EPT/EN/ GOV/ 43/2007 is accordingly dismissed. The appellants are entitled to N30,000.00 costs against the 1st respondent. F

G

JAURO JCA

I agree.
Appeal allowed.

H