

**SUPREME COURT OF NIGERIA**

19TH FEBRUARY, 2010. SC. 261/2008, SC. 261<sup>A</sup>/2008 and SC.  
261<sup>B</sup>/2008 (CONSOLIDATED)

**CORAM:- D. MUSDAPHER, W. S. N. ONNOGHEN,  
F. F. TABAI, I. T. MUHAMMAD, O. O. ADEKEYE, JJSC**

NJIDEKA EZEIGWE ..... APPELLANT  
AND

1. CHIEF SIR BENSON CHUKS NWAWULU

2. INDEPENDENT NATIONAL  
ELECTORAL COMMISSION ..... RESPONDENTS

3. PEOPLES DEMOCRATIC PARTY  
AND

PEOPLES DEMOCRATIC PARTY ..... APPELLANT  
AND

1. CHIEF SIR BENSON CHUKS NWAWULU

2. INDEPENDENT NATIONAL ..... RESPONDENTS  
ELECTORAL COMMISSION

3. NJIDEKA EZEIGWE  
AND

INDEPENDENT NATIONAL

ELECTORAL COMMISSION ..... APPELLANT  
AND

1. CHIEF SIR BENSON CHUKS NWAWULU

2. NJIDEKA EZEIGWE ..... RESPONDENTS  
3. PEOPLES DEMOCRATIC PARTY (PDP)

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APPEALS - Issues - Freshness of - Issues from Court of Appeal decision - Predicated on s. 15 of Court of Appeal Act - As the exercise of its powers under section 15 - Makes that court a court of first instance - Such issues cannot be fresh (H1)

ACTIONS - Commencement - Originating summons - Propriety - As the relief only calls for construction of section 34 of Electoral Act - Commencement by originating summons is appropriate (H2)

EVIDENCE - Facts - Conflicts - Existence of - Since the question to be decided is the candidate - Sought to be substituted by the party -

There is no conflict in relation to relevant facts of the case (H3)

ELECTIONS - Political parties - Substitution of candidates - Whether within time - In view of the date of the letters of substitution viz-a-viz the date of the elections - The substitution was done within time - Contrary to the holding of Court of Appeal (H4)

ELECTIONS - Political parties - Substitution of candidates - Cogency of reasons - As exhibit 2 does not say that 1st respondent - Was involved in any of the allegations made therein - There is no cogent reason given for his substitution (H5)

STATUTES - Interpretation - S. 15 of Court of Appeal Act - Applicability - It applies where inter alia, trial court has legal power over the matter - The issue at trial was capable of arising from grounds of appeal - And necessary materials are before the court (H6)

APPEALS - Respondent's notice - Seeking variation - Necessity - It having been decided that 1st respondent is the legal winner of the election - Other reliefs naturally follow - It does not require the variation sought by the respondent's notice (H7)

### ***FACTS***

1st respondent in these three appeals, as plaintiff, had sued the Peoples Democratic Party (PDP) by way of originating summons before the Federal High Court Enugu challenging the act of PDP in substituting 1st respondent as its duly nominated candidate for the election into the Anambra State House of Assembly allegedly with less than 60 days to the election and without any cogent and verifiable reason. Subsequently, appellant in the first appeal herein, whose name was substituted in place of 1st respondent by PDP and 2nd respondent therein intervened in the action and was joined as 2nd and 3rd defendants. Upon the joinder, 2nd and 3rd defendants brought an application before the trial court praying for an order striking out/dismissing the suit for want of jurisdiction to grant the reliefs sought.

Upon hearing the application by 2nd and 3rd defendants, the trial court ruled that it lacked jurisdiction to entertain the suit. Ag-

grieved, 1st respondent appealed to Court of Appeal which court allowed the appeal and reversed the ruling of trial court. Moreover, Court of Appeal, in reliance on s. 15 of Court of Appeal Act decided the matter between the parties and granted the reliefs sought by 1st respondent. Dissatisfied the three respondents before that court have each appealed to the Supreme Court against the judgment of Court Appeal. They contend, *inter alia*, that the suit was wrongly commenced in that it was commenced by originating summons notwithstanding what they regarded as conflicts in the affidavit depositions of the parties. The three appeals were consolidated and heard together.

**ISSUES FOR DETERMINATION:**

1. Whether the Court of Appeal was right to have decided the matter on originating summons.
2. Whether the Court of Appeal was right to have held that the 1<sup>st</sup> respondent was wrongly substituted, and,
3. Whether the Court of Appeal was right to have invoked section 15 of the Court of Appeal Act to decide the matter before it when the appellants were not heard thereon.

**HELD** (Unanimously dismissing all three appeals per **ONNOGHEN JSC**)

***APPEALS - Issues - Freshness of***

1. In the circumstance and having regards to the fact that the issues arise from the decision of the lower court in its exercise of the powers conferred on it by section 15 of the Court of Appeal Act, thereby making it a court of first instance, the issues involved in this case cannot be said to be fresh issues being raised for the first time before this Court. It follows therefore that the appellants do not require the leave of this Court or that of the lower court to raise them in this Court. It would have been a different kettle of fish if the issues were raised and determined at the trial court but not raised and determined by the lower court before being raised, for the first time after the determination by the trial court in this Court. In such a situation, appellants must obtain the leave of this Court before raising same as such an issue would qualify as an issue being raised for the first time before this Court, after the decision of the trial court. (p. 548 B)

***Originating summons - Propriety***

2. When one goes through the reliefs claimed in the Originating Summons one cannot resist the conclusion that the main relief is that stated as relief No. 6. Grounds 1 and 2 of the grounds on which the reliefs in this case are based are relevant to the consideration of the above relief. Section 34 of the Electoral Act, 2006 makes provisions for the substitution of nominated candidates before the date of an election. I hold the view that an action for a declaration in terms of the relief *supra* is clearly one that calls for the construction of the provisions of section 34 of the Electoral Act, 2006 in order to determine whether the substitution in question was in compliance with that provision of the Act. I hold the considered view that Originating Summons procedure is the appropriate mode of commencing the action and resolve the issue against the appellants in S.C/261/08; S.C/261<sup>A</sup>/08 and S.C/261<sup>B</sup>/08 (pp. 551 H/552 B/D/553 E)

***EVIDENCE - Facts - Conflicts - Existence of***

3. I do not see any conflict in relation to the relevant facts of the case. In the first place, the issue of validity of the nomination of the 1<sup>st</sup> respondent is not only irrelevant to the determination of the case but robs the courts of the jurisdiction to determine same as it is still the law that the courts are without jurisdiction to determine the issue of validity of nomination of candidates of any political party. So whether the nomination of the 1<sup>st</sup> respondent was conclusive as contended by the 1<sup>st</sup> respondent or inconclusive as contended by the appellants is clearly irrelevant. The question remains who is the candidate of the party sought to be substituted? (p. 552G)

***G Substitution of candidates - Whether within time***

4. It is clear that from the 5<sup>th</sup> of February, 2007 and the 13<sup>th</sup> of February, 2007 when exhibits 1 & 2 were written to the 14<sup>th</sup> day of April, 2007 when the general election was held, is within 60 days to the election in question. The law is now settled that in calculating or computing time stipulated by statute, generally the first day of the period will be excluded from the reckoning while the last day will be included except, where the last day is a public holiday in which case the end of the following day, which is not a public holiday, will be included

Therefore having regards to the facts of this case and the law applicable thereto I hold the considered view that the lower court was in error when it held that the substitution of the 1<sup>st</sup> respondent was not done within 60 days to the election of 14<sup>th</sup> April, 2007. (p. 557 G/558 A)

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***Substitution of candidates - Cogency of reasons***

5. As stated by the lower court, the panel of inquiry allegedly set up by the 3<sup>rd</sup> respondent/appellant did not find the 1<sup>st</sup> respondent liable for any of the allegations in exhibit 2 otherwise exhibit 2 would have said so. It is very clear from the provisions of section 34 of the Electoral Act, 2006 that a nominated candidate acquires a justiciable right hence the requirement that before he can be substituted the political party concerned must give cogent and verifiable reasons. Exhibit 2 does not say that the 1<sup>st</sup> respondent was involved in any of the allegations of intimidation, unauthorized changes of delegate list, vote buying etc.

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I therefore in the circumstances agree with the lower court that no cogent and verifiable reasons was given for the substitution of the 1<sup>st</sup> respondent in exhibits 1 & 2 and resolve the issue against the appellants in S.C/261/08; S.C/261<sup>A</sup>/08 and S.C/261<sup>B</sup>/08 (p. 560 G)

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***S. 15 of Court of Appeal Act - Applicability***

6. In interpreting the above provision, this Court has, in the case of Obi vs INEC (2007) 1 NWLR (pt. 1046) 465 stated that for the provision to apply the following conditions must exist, to wit:

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(a) that the lower court or trial court must have the legal power to adjudicate in the matter before the appellate court can entertain it;

(b) that the real issue raised by the claim of the appellant at the lower court or trial court must be seen to be capable of being distilled from the grounds of appeal;

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(c) that all necessary materials must be available to the court for consideration

(d) that the need for expeditious disposal of the case or suit to meet the ends of justice must be apparent on the face of the materials presented; and,

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(e) that the injustice or hardship that will follow if the case is remitted to the court below must be clearly manifest. (p. 564 B)

***Respondent's notice - Seeking variation - Necessity***

7. From the above passage from the judgment of the lower court, it is very clear that the court found that the 1<sup>st</sup> respondent was the duly nominated candidate of PDP for the election in issue and therefore won the said election for the constituency in question I therefore hold the view that the lower court having held that 1<sup>st</sup> respondent is, in the eyes of the law the candidate of PDP for the election in issue who won the said election, it follows that every other relief naturally flow from that decision as no other person can legally represent Ogbaru 1 State Constituency in Anambra State House of Assembly except the 1<sup>st</sup> respondent neither is any other person recognized by law to be paid salary, allowances *etc, etc* for being a member of that House representing Ogbaru 1 State Constituency except the 1<sup>st</sup> respondent. In effect, the variation sought by Learned Counsel for the 1<sup>st</sup> respondent, of the judgment of the lower court does not arise in view of that judgment. (pp. 569 G/570 A)

***NOTABLE POINT OF INTEREST***

***ONNOGHEN JSC***

***1. Substitution of a candidate presupposes his prior nomination***

A political party may present its list of candidates to INEC 200 days to the holding of the general election or earlier but definitely not less than 120 days before the holding of the said election. It is also clear that it is only after a political party has complied with the above provisions that it can now talk of substitution of the said nominated candidate as a political party cannot substitute a candidate for a non existent candidate. In other words, there cannot be substitution of a candidate without a nominated candidate.

It has been argued by the appellants that the documents which purportedly conveyed the nomination of the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent/appellant are not authentic. In other words they are invalid. If that is so, it means clearly that as at the time exhibits 1 & 2 were written seeking the substitution of the appellant for the 1<sup>st</sup> respondent, the 3<sup>rd</sup> respondent/appellant had no candidate recognized by law under section 32(1) *supra* to be substituted. (p.556 C)

**REPRESENTATION**

H. O. Afolabi Esq., for the Appellant with him are Messrs A. O. Popoola and A. F. Yusufu in SC. 261/2008

O. J. Nnadi Esq., for the Appellant in SC.261A/2008.

Gordy Uche Esq., for the Appellant in SC.261B/2008 with Dori Chime (Miss.) Ebere Nwanya (Miss.) and Ngozi Bon-Nwakanma (Miss). **B**

Sylvia Ogwemoh Esq., for the 1st Respondent in all appeals with Messrs E. Nwoye, C. E. Okonkwo and Elizabeth, Ochigbo (Miss.).

Emeka Etiaba Esq., with him Ijeoma Anidi (Miss.) for 3rd Respondent in SC. 261/2008.

Emeka Okpoko Esq., for 3rd Respondent in SC. 261 B/2008. **C**

**CASES REFERRED TO**

Ladoja vs INEC (2007) 12 NWLR (pt. 1047)119

Emeka vs Emodi (2004) 16 NWLR (pt. 900) 433 **D**

Olumide v. Ajayi (1997) 8 NWLR pt. 517 pg. 433

Ekiyor vs Bomor (1997) 9 NWLR (pt. 519) 1 at 14

Inakoju vs Adeleke (2007) 4 NWLR (pt. 1025) 423

Ugwu v. Ararume (2007) 12 NWLR pt. 1048 pg. 307

Akeredolu vs Akinremi (1985) 2 NWLR (pt. 10) 787 at 794 **E**

Ossai vs Wakwah (2006) NWLR (pt. 969) 208 at 227-228

University of Lagos v. Olaniyan (1985) 1 NWLR pt. 1 pg. 156

Agbakoba vs INEC (2008) 18 NWLR (pt. 1119) 489 at 554 - 555

Akad Industries Ltd vs Alhaji Lasisi Olubode (2006) 4 NWLR (pt. 862) I at 13 **F**

**STATUTES & RULES REFERRED TO**

Electoral Act, 2006, s. 34

Court of Appeal Act, s. 15

Constitution of the Federal Republic of Nigeria, 1999, ss. 36 & 221 **G**

Federal High Court (Civil Procedure) Rules 2000, O. 3 r. 1

**LEAD JUDGMENT BY ONNOGHEN JSC**

The appeal is against the judgment of the Court of Appeal, **H**  
Holden at Enugu in appeal NO. CA/E/406/2007 delivered on the  
10<sup>th</sup> day of July 2008 in which the court reversed the decision of the  
Federal High Court, Holden at Enugu in suit NO. FHC/EN/CS/79/  
2007 to the effect that the court had no jurisdiction to entertain the

matter as constituted. The ruling of the trial court giving rise to the appeal before the lower court was rendered on the 27<sup>th</sup> day of April, 2007.

The facts for the case are largely undisputed.

B On the 23<sup>rd</sup> day of March 2007 the 1<sup>st</sup> respondent, as plaintiff caused to be issued an originating summons against the 2<sup>nd</sup> defendant therein for the determination of the following questions:-

C “1. *Whether the Defendant’s statutory power to substitute a nominated candidate of a political party, under section 34 of the Electoral Act 2006, is qualified or absolute?*

2. *Whether the Defendant has power to substitute a nominated candidate of a political party less than 60 days to the election when the candidate is not dead?*

D 3. *Whether the Defendant can substitute a nominated candidate of a political party in the absence of cogent and verifiable reasons?*

E 4. *Whether in view of section 36 of the Constitution of the Federal Republic of Nigeria 1999 and other rules of law relating thereto, the Defendant can fairly and constitutionally determine the cogency and validity of substitution of a nominated candidate without some notice to the candidate or hearing or some form of inquiry from or input by the affected candidate?*

F 5. *Whether the legislative innovation introduced for the first time by section 34 of the Electoral Act is not aimed at deepening and strengthening democracy in Nigeria in relation to substitution of a nominated candidate in an election?*

In view of the answers to Questions 1, 2, 3, 4 and 5 above:

G 6. *Whether the act of the Defendant in substituting the plaintiff, as the duly nominated candidate of Peoples Democratic Party (PDP) for election into the State House of Assembly in respect of Ogbaru 1 State Constituency of Anambra State in the manner it did is not ultra vires Defendants power, undemocratic arbitrary, unlawful; illegal, unconstitutional, null and void?”*

H The reliefs claimed by the plaintiff are as follows:-

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

2. A DECLARATION that the Defendant has NO power to



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

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

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

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

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

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

8. *AN ORDER OF MANDATORY INJUNCTION directing the Defendant to restore the plaintiff as the duly nominated candidate of the Peoples Democratic Party for election into the State House of Assembly in respect of Ogbaru 1 State Constituency of Anambra State".*

The above reliefs are said to be grounded on the following:-

"1. *Section 34 of the Electoral Act 2006 only empowers the Defendant to substitute nominated candidates not later than 60 days to election and upon an application giving cogent and verifiable reasons to so do.*

2. *The purported substitution of the plaintiff by the Defendant is illegal having been effected less than 60 days to the election, when the plaintiff is not dead.*

3. *Article 13(1) of the African Charter on Human and Peoples*

*Rights (Ratification and Enforcement) Act Cap A9 Laws of the Federation of Nigeria 2004 guarantees the right of the plaintiff to freely participate in the government of Nigeria by voting for representatives or presenting himself to be voted for.*

4. *Being a decision seriously affecting the Plaintiffs right, the Defendant acted in violation of section 36 of the Constitution of the Federal Republic of Nigeria 1999 and the duty on the Defendant to act fairly when it failed to hear the plaintiff or require an input from the plaintiff on the cogency and verifiability of his substitution.*

5. *The substitution of the plaintiff is arbitrary, unfair, unreasonable, procedurally and substantially ultra vires the statutory powers vested in the 1<sup>st</sup> Defendant by the Electoral Act and based on improper motive.*

6. *The Defendant lacks the power to proceed contrary to the provisions of the Constitution and the Electoral Act 2006 and its compliance with the requirement of cogency and verifiability of substitution of a nominated candidate is subject to judicial scrutiny, being a statutory duty."*

The originating summons was supported by a 22 paragraphed affidavit as well as an 8 paragraphed Affidavit of Urgency. There was also a further affidavit filled on 5<sup>th</sup> day of April, 2007.

By an application filed on 11/4/07, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents applied to be joined in the action which application was subsequently granted resulting in another further affidavit filed by the plaintiff on 18<sup>th</sup> day of April, 2007.

On the 24<sup>th</sup> day of April, 2007 counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a motion on notice at the trial court praying the court for *"AN ORDER striking out/dismissing this suit on the ground that this Honourable court lacks the jurisdiction to grant the reliefs which the plaintiff is seeking.*

It is the ruling on the above motion that resulted in the appeal to the lower court and subsequently the further appeal to this Court.

There are three appeals as a result of the judgment of the lower court delivered on the 10<sup>th</sup> of July, 2008 reversing the ruling of the trial court. The three defendants/respondents before the lower court have each appealed to this Court which appeal was, by an order of this Court consolidated.

The issues for determination in the first appeal, No. S.C./261/

08 as identified by the learned Senior Counsel for the appellant therein, L.O. FAGBEMI ESQ., SAN in the appellants brief of argument deemed filed on 29/6/09 are as follows:-

*“1. Whether the Court of Appeal -was right to have decided the matter on originating summons?”*

*(GROUND II)*

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*2. Whether the Court of Appeal was right to have held that the 1<sup>st</sup> Respondent was wrongly substituted?*

*(GROUND 3,5, 6 & 9)*

*3. Whether the Court of Appeal relied on inadmissible on or in-reliable affidavit and documentary evidence to give judgment in favour of in reliable (sic) affidavit and documentary evidence to give judgment in favour of the 1<sup>st</sup> Respondent?*

*(GROUNDS 4, 7 & 8)*

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*4. Whether the Court of Appeal was right to have invoked D section 15 of the Court of Appeal Act to decide this matter.*

*(GROUND 2)*

*5. Whether the Court of Appeal was right to have given judgment in favour of the 1<sup>st</sup> Respondent in view of the obvious delay or tardiness of the plaintiff in bringing the action?*

*(GROUND 10).”*

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In respect of appeal No. SC/261<sup>A</sup>/08 learned Senior Counsel for the appellant, DR. O IKPEAZU, SAN, in the appellant’s brief of argument filed on 8/9/09 submitted the following four issues for determination:

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*“1. Whether the learned Justices of the Court of Appeal were not in breach of principle of fair hearing when they relied on section 15 of the Court of Appeal Act, 2004 to make a determination on the merit of the Originating Summons when the Appellant was not heard G on that point nor did the Respondents urge them so to do. Ground II,*

*2. Whether the learned Justices of the Court of Appeal were wrong when they decided the matter based on originating summons proceedings when the facts as presented by the parties were irreconcilably and materially in conflict. Ground IX.*

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*3. Whether the learned Justices of the Court of Appeal were wrong when in holding that the matter was a pre-election matter proceeded to favourably consider the 1<sup>st</sup> Respondent’s case when*

*the 1<sup>st</sup> Respondent failed to present his case within the appropriate period. Grounds III, IV, VIII.*

4. *Whether the learned Justices of the Court of Appeal -were correct when they held that the evidence before the court justified the Respondents contention that he was duly nominated by the Appellant who did not provide cogent and verifiable reasons for the substitution. Grounds 1, VI, VII and X."*

The issues identified for determination in the third and final appeal No. S.C/261<sup>B</sup>/08 in the appellant's brief prepared by GORDY UCHE ESQ. and deemed filed on 23/11/09 are also four. They are as follows:-

*"3.01 Whether the court below right (sic) in its interpretation of section 34(1) of the Electoral Act 2006 when the court held that "the purported substitution by the political party made on 5/2/2007 is outside the 60 days to the date of the election which took place on 14/4/2007" (Ground 1).*

*3.02 Whether the court below was right in ordering the Appellant to swear in the 1<sup>st</sup> Respondent as the winner of the said election when no such relief was claimed before the said court, and without allowing parties an opportunity to address the court on such relief (Ground 2)*

*3.03 Was the court below right in its application of the case of Amaechi vs INEC (2008)5 NWLR (1080) 227 even when the facts of the present case were distinguishable from those in Amaechi's case. (Ground 3).*

*3.04 Was the court below right in entering judgment on the merits in favour of the 1<sup>st</sup> Respondent in the face of irreconcilable and hotly contested affidavit evidence and when his suit ought not to have been commenced by way of originating summons. (Ground 4)."*

When all the issues as formulated by learned counsel for the appellants are considered closely, one cannot escape the irresistible conclusion that they are the same though differently couched or worded. In fact, having regards to the facts of this case and the judgment of the lower court, there is really no need for the three separate appeals when a single one would have resolved the issues in controversy arising from the judgment of the lower court. However, since the right of appeal is a constitutional right, one is compelled to deal

with the appeals as filed but parties and counsel ought to realize that nothing is gained by wasting the time of the court with multiple appeals on the same issue when a single one would have been sufficient. It has always been said that repetition does not improve an argument, which saying, I strongly recommend to counsel.

On the other hand, learned Counsel for the 1<sup>st</sup> respondent in the three appeals formulated three identical issues for the determination of the appeals. These are as follows:-

*“(i) Was the Court of Appeal right to have decided this matter on the originating summons of the 1<sup>st</sup> Respondent and by invoking the court’s power as preserved under section 15 of the Court of Appeal Act, Cap C. 36 Laws of the Federation of Nigeria, 2004.*

*“(ii) Was the substitution of the 1<sup>st</sup> Respondent by the and 3<sup>rd</sup> Respondents based on cogent and verifiable reasons and if not, is the substitution not therefore null and void.*

*“(iii) Were there available and admissible evidence upon which the Court of Appeal proceeded to enter judgment in favour of the 1st Respondent declaring him the duly nominated and elected candidate of the PDP for the 14<sup>th</sup> April, 2007 election into the Ogbaru 1 Constituency seat in the Anambra State House of Assembly.”*

It should be noted that the 1<sup>st</sup> respondent filed and argued a preliminary objection in respect of almost each of the appeals. In respect of appeal No. S.C/261/08, the objection relates to appellant’s issues 1 and 5 which the 1<sup>st</sup> respondent contends to be issues that have been raised for the first time on appeal and without the leave of the court first had and obtained.

The objection in relation to S.C/261<sup>A</sup>/08 relates to issue 2 which is also contended to be a fresh issue for which the leave of the court is required and that since no leave was obtained, the court should strike same out.

It should be noted that the trial court struck out the suit of 1<sup>st</sup> respondent on the ground that it lacks the jurisdiction to entertain same. The court never went into the merits of the matter neither did it decide the issue as to the appropriateness of the commencement of the action by way of originating summons. When, however, the lower court, upon appeal on the said judgment came to the conclusion that the trial court has jurisdiction to hear and determine the matter, it proceeded under the powers conferred on it by the provisions of

section 15 of the Court of Appeal Act, to determine the suit based on the affidavits on record. It is the judgment of the lower court in the circumstances that is presently on appeal before this Court. The issues being contested before this Court never existed in the decision of the trial court which was on appeal before the lower court and therefore could not have been raised before that court.

The argument of learned Counsel for the 1<sup>st</sup> Respondent is not that the issues involved facts or mixed law and fact for which the leave of court is required but that they are being raised for the first time in this court for which the leave of the court is required. ***In the circumstance and having regards to the fact that the issues arise from the decision of the lower court in its exercise of the powers conferred on it by section 15 of the Court of Appeal Act, thereby making it a court of first instance, the issues involved in this case cannot be said to be fresh issues being raised for the first time before this Court. It follows therefore that the appellants do not require the leave of this Court or that of the lower court to raise them in this Court. It would have been a different kettle of fish if the issues were raised and determined at the trial court but not raised and determined by the lower court before being raised, for the first time after the determination by the trial court in this Court. In such a situation, appellants must obtain the leave of this Court before raising same as such an issue would qualify as an issue being raised for the first time before this Court, after the decision of the trial court.***

In the circumstance, I find no merit whatsoever in the preliminary objections which are accordingly dismissed in appeal NO. SC/261/08 and S.C/261<sup>A</sup>/08.

From the record before the Court, it is clear that the 1<sup>st</sup> respondent together with other candidates, participated in the 3<sup>rd</sup> respondent/appellant (Peoples Democratic Party, PDP) primary election to nominate candidates for election into the Ogbaru 1 Constituency seat in Anambra State House of Assembly, which took place on 18<sup>th</sup> November, 2006 which the 1<sup>st</sup> respondent allegedly won by 184 votes as against the 23 votes allegedly scored by the appellant in S.C/261/08, which placed him second in the contest - see exhibit B.

Following exhibit B, the name of the 1<sup>st</sup> respondent was duly

forwarded to the 2<sup>nd</sup> respondent/appellant, INEC, by the 3<sup>rd</sup> respondent/appellant alongside other nominated candidates of the said 3<sup>rd</sup> respondent as the candidate of the 3<sup>rd</sup> respondent/appellant for the election which was scheduled for the 14<sup>th</sup> day of April, 2007 - see exhibit C. Consequent upon the nomination, the 1<sup>st</sup> respondent completed all nomination processes with INEC as evidenced in exhibit D B as a result of which his name was duly published by INEC vide exhibit E as the 3<sup>rd</sup> respondent's/appellant's candidate for Ogbaru 1 Anambra State Constituency. The 1<sup>st</sup> respondent subsequently attended screening exercise upon invitation by the 2<sup>nd</sup> respondent/ap- C appellant and was cleared by INEC to contest the said election.

However, by letters dated 5<sup>th</sup> and 13<sup>th</sup> February, 2007, the 3<sup>rd</sup> respondent/appellant wrote to INEC substituting the appellant for the 1<sup>st</sup> respondent as candidate for the said general election of 14<sup>th</sup> April, 2007. It is the substitution of the 1<sup>st</sup> respondent that resulted in D the institution of the action culminating in the instant appeal, the reliefs of which 1 had earlier reproduced in this judgment.

On the other hand, the appellant contends that he is the duly nominated candidate of the 3<sup>rd</sup> respondent/appellant for the election in issue and that it was his name that was duly displayed for that purpose; that the primary election was not conclusive; that exhibit B E is not an authentic document as it did not state the name of the electoral officer as required amongst other short coming such as absence of the names and signatures of the agents of the aspirants; that F exhibits D is also not authentic. Appellant however agrees that the substitution was effected by the 3<sup>rd</sup> respondent/appellant on 5<sup>th</sup> February, 2007 “upon a *proper verification of the petitions and after taking into account many factors which will improve the chances of the party at the general election.....*” G

One however wonders the necessity for the substitution if it was not the name of the 1<sup>st</sup> respondent but that of the appellant that was initially sent to the 2<sup>nd</sup> respondent/appellant as the candidate of the 3<sup>rd</sup> respondent/appellant for the election in question.

Haven reproduced the issues as formulated by counsel for the parties and the basic facts of the case, I am of the view that the issues common to the appellants and relevant for the determination of the appeal are as follows:-

1. Whether the Court of Appeal was right to have decided the

matter on originating summons.

2. Whether the Court of Appeal was right to have held that the 1<sup>st</sup> respondent was wrongly substituted, and,

3. Whether the Court of Appeal was right to have invoked section 15 of the Court of Appeal Act to decide the matter before it  
B when the appellants were not heard thereon.

In respect of issue 1, it is the submission of learned Counsel for the appellant in SC/261/08 that the affidavits of the parties conflicted on material facts and as such originating summons was not the proper  
C mode of commencing the action particularly as the 1<sup>st</sup> respondent claimed that he won the primary election conducted by the 3<sup>rd</sup> respondent/appellant but stated that the said primary election was inconclusive due to various irregularities; that the name of 1<sup>st</sup> respondent never got to INEC and that the documents supporting the claim  
D of the plaintiff/1<sup>st</sup> respondent are not genuine. Citing and relying on order 2 Rule 2(2) of the Federal High Court (Civil Procedure) Rules, 2000; *Ossai vs Wakwah* (2006) NWLR (pt. 969) 208 at 227-228; *National Bank of Nigeria Ltd vs Alakija* (1978) 9 - 10 S.C 59 at 71, counsel submitted that to resolve the conflicts in the case of the parties, oral evidence is required thereby rendering originating summons  
E inappropriate in the circumstance.

Learned Senior Counsel for the appellant in S.C/261<sup>A</sup>/08 treated the matter as his issue No. 2 and submitted that the suit in the  
F Originating Summons is not for interpretation of statutes as required by Order 2 Rule 2(2) of the Federal High Court (Civil Procedure) Rules 2000 but deals with conflicting facts which needed to be resolved at the trial; that the validity of the nomination of 1<sup>st</sup> respondent was in issue in the case which ought to have been resolved first  
G before proceeding to determine the issue as to whether the letter of substitution complies with the provisions of section 34 of the Electoral Act; 2006; that the lower court, by evaluating the evidence on record, admits that the case presented by the parties conflict with each other and as such Originating Summons was not the right mode  
H of commencing the action.

In respect of S.C/261<sup>B</sup>/08, learned Counsel for the appellant treated the issue in his issue No. 4 and made submissions very similar to those of the other two appellants earlier summarized in this judgment.



On his part, learned Counsel for the 1<sup>st</sup> respondent SYLVA OGWEMOH ESQ. referred the court to the reliefs claimed by the 1<sup>st</sup> respondent and Order 2 Rule 2(2) supra and submitted that the cause of action of the 1<sup>st</sup> respondent is as contained in the Originating Summons and not the contents of the counter affidavit of appellants, relying on *Capital Bancorp Ltd vs S.S.L. Ltd* (2007) 2 NWLR (pt. 1020) 148 at 170 - 171; *Tukur vs Government of Gongola State* (1989) 4 NWLR (pt. 117) 517; *Okulate vs Awosanya* (2000) 2 NWLR (pt. 646) 530; *Emeka vs Emodi* (2004) 16 NWLR (pt. 900) 433; that the action of the 1<sup>st</sup> respondent seeks the construction of section 34 of the Electoral Act, 2006 and does not qualify as a hostile proceeding; that the case of the 1<sup>st</sup> respondent being mainly documentary can be effectively determined on affidavit evidence without recourse to oral evidence - relying on *Agbakoba vs INEC* (2008) 18 NWLR (pt. 119) 489 at 538; that by the provisions of Order 3 Rule 1(1) of the Federal High Court (Civil Procedure) Rules 2000, failure to comply with the form of commencement of an action is a mere irregularity which is incapable of nullifying the proceedings or judgment or order; that a challenge of the mode of commencement of an action must be made before any party to the action takes a step in the said action or proceedings; that in instant case, appellants never raised any preliminary objection in any form.

It is settled law that Originating Summons procedure is adopted where the sole or principal question at issue is, or is likely to be that of the -construction of a written law or of any instrument made under any written law or of any deed, will, contract or other document or some other question of law; or where there is likely to be no or any substantial dispute of fact relevant to the determination of the issue in controversy however, see *National Bank of Nigeria Ltd vs. Alakija* (1979) 9-10 S.C 59.

In the instant case, the appellants contend that the material facts in issue in the action are in conflict and as such the proceeding is a hostile one which ought not to have been commenced by Originating Summons but by an ordinary Writ of Summons. The question is whether they are right.

***When one goes through the reliefs claimed in the Originating Summons one cannot resist the conclusion that the main relief is that stated as relief No. 6.***

"A *DECLARATION* that the substitution of the plaintiff by the 1<sup>st</sup> Defendant as the duly nominated candidate of the Peoples Democratic Party (PDP) for election into the State House of Assembly in respect of Ogbaru 1 State Constituency of Anambra State in the manner it did is *ultra vires*, arbitrary, unlawful, illegal, unconstitutional, null and void."

**Grounds 1 and 2 of the grounds on which the reliefs in this case are based are relevant to the consideration of the above relief.** The grounds are:

"1. Section 34 of the Electoral Act 2006 only empowers the Defendant to substitute nominated candidates not later than 60 days to election and upon application giving cogent and verifiable reasons so to do.

2. The purported substitution of the plaintiffs by the Defendant is illegal having been effected less than 60 days to the election, when the plaintiff is not dead."

**Section 34 of the Electoral Act, 2006 makes provisions for the substitution of nominated candidates before the date of an election. I hold the view that an action for a declaration in terms of the relief supra is clearly one that calls for the construction of the provisions of section 34 of the Electoral Act, 2006 in order to determine whether the substitution in question was in compliance with that provision of the Act.**

On the sub-issue as to whether the facts relevant to the determination of the case are in -conflict thereby rendering Originating Summons an inappropriate mode of commencing the action, it is the contention of the appellants that the fact of nomination of the 1<sup>st</sup> respondent is in dispute between the parties as well as the authenticity of the documents exhibited to the affidavit in support of the Originating Summons. **I do not see any conflict in relation to the relevant facts of the case. In the first place, the issue of validity of the nomination of the 1<sup>st</sup> respondent is not only irrelevant to the determination of the case but robs the courts of the jurisdiction to determine same as it is still the law that the courts are without jurisdiction to determine the issue of validity of nomination of candidates of any political party. So whether the nomination of the 1<sup>st</sup> respondent was conclusive as contended by the 1<sup>st</sup> respondent or inconclusive as con-**

**tended by the appellants is clearly irrelevant. The question remains who is the candidate of the party sought to be substituted?**

However, the fact that is very crucial to the determination of the issue under consideration remains the issue of substitution of the 1<sup>st</sup> respondent, which fact is not disputed by the parties. Though the appellant in SC/261/08 has contended that the 1<sup>st</sup> respondent was never nominated by the party (PDP) as its candidate for the election in question, that contention cannot be correct as one cannot talk of substitution of a candidate who was never nominated by the party. So having agreed that by a letter dated 5/2/2007 the party (PDP) sought to substitute the 1<sup>st</sup> respondent with the appellant in SC/261/08, it means that by the provisions of the Electoral Act, 2006, the 1<sup>st</sup> respondent was the duly nominated candidate of the party 120 days to the election in question hence the application for substitution. If the appellant is the nominated candidate, obviously there would be no need for substitution as his name would have been the one sent to INEC 120 days to the election.

It follows therefore that the argument of the parties on the issue of substitution narrows down the matter before the court to the issue as to whether the said substitution was done in compliance with the provisions of section 34 of the Electoral Act, 2006 and nothing more and **I hold the considered view that Originating Summons procedure is the appropriate mode of commencing the action and resolve the issue against the appellants in S.C/261/08; S.C/261<sup>A</sup>/08 and S.C/261<sup>B</sup>/08.**

On the second issue, Learned Senior Counsel for the appellant in S.C/261/08 submitted that the lower court was in error when it held that the substitution of the 1<sup>st</sup> respondent does not satisfy either of the conditions stated in section 34 of the Electoral Act, 2006; that if the lower court had painstakingly examined the documentary evidence before it, it would have come to a different conclusion on the matter; that the letter of 5/2/07 applying for the substitution was within 60 days to the election of 14<sup>th</sup> April, 2007 - the same applies to the letter of 13/2/07 - and that the lower court was in error when it found and held that the substitution was not done within 60 days of the election; that the reason for the lower court holding that there was no cogent and verifiable reason for the substitution is that the

substitution is unfair to the 1<sup>st</sup> respondent when the concept of “fairness” is alien to the provisions of section 34 of the Electoral Act, 2006; that the lower court also misconstrued the contents of the letter of substitution; that “*The letter did not say that the enquiry - was inconclusive. It only states that the panel conducted extensive enquiries on the allegations but because there was a dearth of time to conduct a fresh primaries it recommended that the appellant be nominated as a consensus candidate of the party. This we submit is cogent and also verifiable*”; that primary election is not the only mode of nominating a candidate for an election as the lower court seems to have held; that it is within the province of a political party to nominate its candidate to any election and the mode of nomination includes the choosing of a consensus candidate.

In arguing the issue, Learned Senior Counsel for the appellant D in S.C/261<sup>A</sup>/08 made submissions similar to that of the learned Senior Counsel for the appellants in S.C/261/08 and further submitted that “*where a political party states that its primaries were beset with intimidation, unauthorized alteration of the names of delegates as compiled by the political party in its list of candidates and buying of votes, as a basis for nullification of the faulted election, the reasons are not only cogent but clearly verifiable,....*”; that the lower court read into the provision of the Act the requirement that a person should be “involved or indicted” before a substitution made after due inquiry by a political party could be deemed cogent and verifiable contrary to the decision in *Ladoja vs INEC (2007) 12 NWLR (pt. 1047)119*.

It is the submission of learned Counsel for the appellant in S.C/261<sup>B</sup>/08 that the lower court was in error in its interpretation of the provisions of section 34(1) of the Electoral Act, 2006 as the substitution was made within the time stipulated by law.

On his part, Learned Counsel for the 1<sup>st</sup> respondent referred the court to the provisions of section 34 of the Electoral Act, 2006 and contents of exhibits 1 & 2 (letters of substitution) and submitted H that the exhibits do not contain cogent and verifiable reasons for the substitution; that the reasons given for the substitution of the 1<sup>st</sup> respondent are similar to those given in the case of *Agbakoba vs INEC supra*, which this Court had held not to be cogent and verifiable.

On the sub-issue as to whether the substitution was done within

60 days of the election, learned Counsel stated that the appellants have not denied the averment in paragraph II of the supporting affidavit to the effect that the 1<sup>st</sup> respondent was substituted less than 60 days to the election as what is not denied is deemed admitted; that the date of receipt of exhibits 1 & 2 are not stated thereon thereby making the letters suspect and urge the court to resolve the issue against the appellants. B

It is to be noted that the 1<sup>st</sup> respondent filed and argued a respondent's notice to the effect that the court affirms the holding by the lower court that the substitution of the 1<sup>st</sup> respondent was not done within 60 days of the election on grounds other than those stated in the judgment of the lower court. C

In arguing the notice, learned Counsel submitted that there are many reasons on record to show that 1<sup>st</sup> respondent's substitution was done outside the 60 days allowed by law, which include the following: D

(a) that as at 13/2/07 when 1<sup>st</sup> respondent visited the office of INEC at Abuja, the name of 1<sup>st</sup> respondent was still on the list of candidates for the election of 14/4/07, which fact was not denied by the counter affidavits. E

(b) that 1<sup>st</sup> respondent's name was removed from the list as at 22/2/07 when he went back to the offices of INEC in Abuja.

(c) that form E.G. 4B(iii) was dispatched to 1<sup>st</sup> respondent on 6/2/07 who filed and returned same to INEC on 12/2/07 as evidenced at pages 132-133 of the record. F

(d) that exhibit I dated 5/2/07 could not have substituted the 1<sup>st</sup> respondent before his nomination form got to INEC.

Learned Counsel then submitted that the substitution of the 1<sup>st</sup> respondent could only have been done after the 14<sup>th</sup> day of February, 2007; that using the 2007 calendar from 14/2/07 to 14/4/07 gives 59 days and submitted that the lower court was therefore right in holding that the substitution was done outside the 60 days allowed by law. G

In his reply brief filed on 28/9/09 by Learned Senior Counsel for the appellant in S.C/261/08, stated clearly that Learned Counsel for the 1<sup>st</sup> respondent cannot urge on the court to affirm the decision of the lower court on the issue as he had filed no respondent's notice. That observation is not correct as the respondent's notice was H

filed on 20/7/09. Obviously it was yet to be served on the Learned Senior Counsel for the appellant as at the time he filed the reply brief on 28/9/09.

To begin with, section 32(1) of the Electoral Act, 2006 provides as follows:-

B *“(1) Every political party shall not later than 120 days before the date appointed for a general election under the provisions of this Act submit to the Commission in the prescribed form the list of the candidates the party proposes to sponsor at the election.*

C The above provision clearly stipulates that a political party must submit its list of candidates for any election 120 days before the date appointed by the provisions of the Electoral Act, 2006 for a general election. It means that if a political party fails to comply with the above provision, it cannot participate in the said election. A political party  
D may present its list of candidates to INEC 200 days to the holding of the general election or earlier but definitely not less than 120 days before the holding of the said election. It is also clear that it is only after a political party has complied with the above provisions that it can now talk of substitution of the said nominated candidate as a  
E political party cannot substitute a candidate for a non existent candidate. In other words, there cannot be substitution of a candidate without a nominated candidate. It is settled law that the question of who is a candidate of any political party for any election remains the exclusive preserve of the political parties and that the courts have no  
F jurisdiction to determine the issue.

It has been argued by the appellants that the documents which purportedly conveyed the nomination of the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent/appellant are not authentic. In other words they are  
G invalid. If that is so, it means clearly that as at the time exhibits 1 & 2 were written seeking the substitution of the appellant for the 1<sup>st</sup> respondent, the 3<sup>rd</sup> respondent/appellant had no candidate recognized by law under section 32(1) supra to be substituted particularly as exhibits 1 & 2 were written less than 120 days to the election and  
H cannot be taken as nominating the appellant.

The present issue however, deals with substitution of a candidate by a political party after due nomination by that party as provided under section 34 of the Electoral Act, 2006. The reason why the two provisions must be kept separate becomes obvious in view of

certain aspects of the submissions of Learned Counsel for appellants to be dealt with in the resolution of the issue under consideration.

Section 34 of the Electoral Act, 2006 provide as follows:-

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

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

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

It is clear from the above provisions that a political party intending to substitute a candidate for any election except, in the case of the death of the candidate to be substituted, must fulfill two conditions; to wit:

(a) Inform the Commission (INEC) in writing of the change not later than 60 days to the election; and

(b) Give cogent and verifiable reasons in the application for substitution for the intended substitution.

It follows therefore that an application for substitution of a candidate made 59 days or less to the election except where the candidate to be substituted is dead, is clearly not in compliance with the law. Secondly, where the application for substitution does not contain cogent and verifiable reasons, it must of necessity fail.

The question is whether the letters of substitution, exhibits 1 & 2, complied with the requirements of the law.

The lower court has held that exhibits 1 & 2 do not comply with the requirements of the law - that is both aspects of the provisions of section 34. Is the lower court right in so holding?

To begin with, ***it is clear that from the 5<sup>th</sup> of February, 2007 and the 13<sup>th</sup> of February, 2007 when exhibits 1 & 2 were written to the 14<sup>th</sup> day of April, 2007 when the general election was held, is within 60 days to the election in question. The law is now settled that in calculating or computing time stipulated by statute, generally the first day of the period will be excluded from the reckoning while the last day will be included except, where the last day is a public holiday in which case the end of the following day, which is not a public holiday, will be included***

- see section 15(2) of the Interpretation Act and *Akeredolu vs Akinremi* (1985) 2 NWLR (pt. 10) 787 at 794.

**Therefore having regards to the facts of this case and the law applicable thereto I hold the considered view that the lower court was in error when it held that the substitution of the 1<sup>st</sup> respondent was not done within 60 days to the election of 14<sup>th</sup> April, 2007.** The above holding is notwithstanding the argument of counsel for the 1<sup>st</sup> respondent in respect of the respondent's notice having regards to the fact that the relevant dates from which to calculate the 60 days are clearly stated on exhibits 1 & 2, and they speak for themselves. There is therefore no need or reason for the court to go outside those dates particularly as the proceedings is based on Originating Summons under which the court cannot resolve conflicting facts or evidence which would result in the court believing one deponent at the expense of the other. In the circumstance I find no merit in the 1<sup>st</sup> respondent's notice which is consequently dismissed.

Now to the 2<sup>nd</sup> arm of the provisions of section 34 of the Electoral Act, 2006. Did the appellant assign cogent and verifiable reasons in exhibits 1 & 2 for the substitution of the 1<sup>st</sup> respondent with the appellant in S.C/261/08?

I now reproduce exhibit 1 & 2 attached to the counter affidavit of 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents/Appellants. They read:

*"February 5, 2007*

*Prof. Maurice Iwu*

*Chairman*

*INEC*

*Abuja*

***SUBSTITUTION: PDP CANDIDATE FOR OGBARU STATE CONSTITUENCY, ANAMBRA STATE***

*This is to confirm that Njideka Ezeigwe is the PDP candidate for Ogbaru State Constituency, Anambra State.*

*Njideka Ezeigwe substitutes the earlier name for the aforementioned constituency which was submitted without enough information.*

*This is for your necessary action.*

*OJOMADUEKWE, C.FR National Secretary."*

*SEN. (DR) AMADUALI, GCON*

*National Chairman."*



*"February, 13, 2007*

*Prof. Maurice Iwu*

*Chairman*

*INEC*

*Abuja*

***SUBSTITUTION OF PDP CANDIDATE FOR OGBARU CON-  
STITUENCY, ANAMBRA STATE.***

*Further to our letter to you dated 5th February, 2007, over the above subject we write to intimate you that following the allegation of intimidation, unauthorized changes of delegates list, vote buying which resulted to the inconclusiveness of the party primaries of November 18, 2006, a panel was set up to conduct an extensive inquiry.*

*The panel after an extensive inquiry and due to want of time to conduct another primary, recommended that Hon. (Mrs.) Njideka Ezeigwe be the consensus PDP candidate for the above constituency.*

*The purpose of this letter is to affirm that Hon (Mrs.) Njideka Ezeigwe is the party candidate for Ogbaru I Constituency, Anambra State.*

***SEN. (DR) AMADUALI, GCON***  
***National Chairman."***

I hold the view that since exhibits 1 & 2 were written within 60 days to the election of 14<sup>th</sup> April, 2007 on the issue of substitution of the appellant in S.C/261/08 for the 1<sup>st</sup> respondent, they can be treated as a single letter of application for substitution and hereby proceed to treat them as such. It is clear that the reason for the substitution as recorded in exhibit 1, is that the name of the 1<sup>st</sup> respondent "*the earlier name*" "*was submitted without enough information*". Is that a cogent and verifiable reason as required by law? The question is, enough information by whom? It is the 3<sup>rd</sup> respondent/appellant that submitted the name of the 1<sup>st</sup> respondent in a list containing other names as its candidate for the said election of 14<sup>th</sup> April, 2007, 120 days to that election following a primary election conducted by it on 18<sup>th</sup> November, 2006 which was non by the 1<sup>st</sup> respondent according to the record. These facts are known to the 3<sup>rd</sup> respondent/appellant before nominating the 1<sup>st</sup> respondent as its candidate for that election. What other information does the 3<sup>rd</sup> respondent/appellant need before nominating the 1<sup>st</sup> respondent which was not available at the

time of his nomination? Obviously none as even the letter of 13<sup>th</sup> February, 2007, exhibits 2, has not contained the new details which would amount to “sufficient information” for the nomination of the 1<sup>st</sup> respondent or lack of it.

B This Court has held in a number of cases with similar facts that to say that substitution of a candidate is sought on the ground that the nomination was without sufficient information is to give no reason at all for the application for substitution - see for instance Agbakoba vs INEC (2008) 18 NWLR (pt. 1119) 489 at 554 - 555; Ehinlanwo vs Oke (2008) 16 NWLR (pt 1113)357.

C With regards to exhibit 2, the reasons are that the primary election of November 18, 2006 was inconclusive as a result of which a panel of inquiry was constituted which conducted extensive inquiry but due to want of time to conduct another primary election, the D appellant was adopted as consensus candidate. Are these cogent and verifiable reasons for the substitution? The lower court held that they are not.

E Having regards to the state of the law applicable to the relevant facts, it does not matter whether the primary election of the party was conclusive or inconclusive. What matters is the nomination of a candidate and submission of his name by the party to INEC 120 days to the election. It does not matter whether the nomination is a result of a conclusive primary election or an inconclusive one. Once F the name of a candidate for an election is submitted to INEC 120 days before the relevant election the political party cannot, except where the candidate dies before the election, substitute him with another candidate without giving cogent and verifiable reasons, and within 60 days to the election.

G ***As stated by the lower court, the panel of inquiry allegedly set up by the 3<sup>rd</sup> respondent/appellant did not find the 1<sup>st</sup> respondent liable for any of the allegations in exhibit 2 otherwise exhibit 2 would have said so. It is very clear from the provisions of section 34 of the Electoral Act, 2006 that a nominated candidate acquires a justiciable right hence the requirement that before he can be substituted the political party concerned must give cogent and verifiable reasons. Exhibit 2 does not say that the 1<sup>st</sup> respondent was involved in any of the allegations of intimidation, unauthorized changes of delegate list,***

**vote buying etc.**

***I therefore in the circumstances agree with the lower court that no cogent and verifiable reasons was given for the substitution of the 1<sup>st</sup> respondent in exhibits 1 & 2 and resolve the issue against the appellants in S.C/261/08; S.C/261<sup>A</sup>/08 and S.C/261<sup>B</sup>/08.***

On the 3<sup>rd</sup> and final issue for determination, Learned Senior Counsel for the appellant in S.C/261/08 submitted that the lower court was in error in invoking the provisions of section 15 of the Court of Appeal Act in deciding the matter as the conditions precedent for the invocation of that power did not exist at the time the court invoked same; that the conditions are:-

- (i) the lower court must have the legal power to adjudicate in the matter before the appellate court can entertain it;
- (ii) the real issue raised in the claim of the appellant at the lower or trial court must be seen to be capable of being distilled from the grounds of appeal;
- (iii) all necessary materials must be available to the court for consideration;
- (iv) the need for expeditious disposal of the case to meet the ends of justice must be apparent on the face of the materials presented; and
- (v) the injustice or hardship that will follow if the case is remitted to the court below must clearly manifest itself; relying on *Obi vs INEC* (2007) 11 NWLR (pt. 1046) 565 at 639-640; that the above conditions were not satisfied before the lower court invoked it said powers; that all the issues could not be distilled from the grounds of appeal; that all necessary materials for the determination of the case were not before the court particularly as the facts deposed to in the affidavits conflict and that the court lacked the jurisdiction to entertain the matter by way of Originating Summons; that no urgency or hardship is shown on the face of the materials to prevent the matter being sent back to the lower court for determination; that it is not the practice of the Court of Appeal to hear evidence but to correct errors in the judgment of the lower court, relying on *Akad Industries Ltd vs Alhaji Lasisi Olubode* (2006) 4 NWLR (pt. 862) I at 13.

In arguing the issue, Learned Senior Counsel for the appellant in S.C/261A/08 submitted that the lower court erred in proceeding

to invoke the provisions of section 15 of the Court of Appeal Act when the issue before the court and the argument of the appellant thereon was limited to the issue as to whether the trial court had jurisdiction to hear and determine the suit as constituted; that haven  
 B ter, the lower court ought to have invited arguments from parties on the merits of the Originating Summons instead of proceeding to determine the merit of the case without hearing from the appellants; that parties were not called upon to adopt their argument in the  
 C substantive suit either at the Federal High Court or the Court of Appeal, relying on *Ekiyor vs Bomor* (1997) 9 NWLR (pt. 519) 1 at 14; that the appellant was in the circumstances denied the right of fair hearing which is a constitutional right, relying on *Adigun vs A-G Oyo State* (1987) 1 NWLR (pt. 53) 678 at 694; *INEC vs Musa* (2003) 3  
 D NWLR (pt 806) 72. *Ntukidem vs Oko* (1986) 5 NWLR (pt. 45) 909; *UBN Ltd vs Nwaokolo* (1995) 6 NWLR (pt. 400) 127; *Ekpeto vs Wanogho* (2004) 18 NWLR (pt. 905) 394; *Brifina Ltd vs Intercontinental Bank Ltd* (2003) 5 NWLR (pt. 814) 540; that the 1<sup>st</sup> respondent never prayed the lower court to invoke the provisions of section  
 E 15 of the Court of Appeal Act neither did he argue the substantive case before the lower court. Finally Learned Senior Counsel urged the court to set aside the entire proceedings before the lower court or in the alternative set aside the determination made by the lower court on the substantive case which was arrived at without hearing the  
 F appellant and without the issue being placed before that court in any cognisable manner and remit the matter to the High Court for hearing.

On his part, Learned Counsel for the appellant in S.C/261B/  
 G 08 submitted that the lower court was in error in ordering the appellant to swear-in the 1<sup>st</sup> respondent as no such relief was claimed by the 1<sup>st</sup> respondent neither can the relief be said to be a consequential one; that parties were also not allowed to address the court thereon. Learned Counsel also referred to the preconditions for the invocation of section 15 of the Court of Appeal Act, as laid down in *Obi vs INEC* supra and submitted that the conditions do not exist in the  
 H instant case.

In his response to the argument of the appellants, Learned Counsel for the 1<sup>st</sup> respondent referred to the provisions of section

15 of the Court of Appeal Act and conceded that before the lower court could act under the said section of the Act, certain pre-conditions must exist which preconditions are as stated by Learned Counsel for the appellants but submitted that the pre-conditions exist in the instant case; that the power of the Federal High Court to try the case is not in dispute as the matter before that court is a pre-election matter-relying on *Obi vs INEC* supra; that the real issues raised by the 1<sup>st</sup> respondent's claim were clearly distilled from the grounds of appeal filed at the lower court, referring to the Notice of Appeal at page 176 of the record, particularly ground 1 thereof; that in the reliefs claimed at the lower court, the 1<sup>st</sup> respondent specifically urged the lower court to invoke its powers under section 15 of the Court of Appeal Act and determine the matter on merit; that there were sufficient materials for the court to deal with the case on the merit; that the case of the 1<sup>st</sup> respondent requires urgent attention particularly as the tenure of members of the State House of Assembly is fixed at four years and that a remittal of the case to the Federal High Court for determination after holding that that court has jurisdiction on the matter would not have met the justice of the case; that the appellants were not denied fair hearing as the matter was under Originating Summons where issues raised are determined by affidavit evidence which were filed by the parties and the lower court duly considered the depositions in its judgment and urged the court to dismiss the appeals.

Section 15 of the Court of Appeal Act, 2004 provides as follows:-

*“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, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal, and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken, and, generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may rehear the case in whole or in part or may remit it to the court below for the purposes*

*of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in the case of an appeal from the court below, in that court's appellate jurisdiction, order the case to be reheard by a court of competent jurisdiction."*

**B In interpreting the above provision, this Court has, in the case of *Obi vs INEC (2007) 1 NWLR (pt. 1046) 465*; *Amaechi vs INEC (2008) 5 NWLR (pt. 1080) 227*; *Inakoju vs Adeleke (2007) 4 NWLR (pt. 1025) 423* and *Agbakoba vs INEC (2008) 18 NWLR (pt. 1119) 489* stated that for the provision to apply the following conditions must exist, to wit:**

**(a) that the lower court or trial court must have the legal power to adjudicate in the matter before the appellate court can entertain it;**

**D (b) that the real issue raised by the claim of the appellant at the lower court or trial court must be seen to be capable of being distilled from the grounds of appeal;**

**(c) that all necessary materials must be available to the court for consideration**

**E (d) that the need for expeditious disposal of the case or suit to meet the ends of justice must be apparent on the face of the materials presented; and,**

**F (e) that the injustice or hardship that will follow if the case is remitted to the court below must be clearly manifest.**

It is not in dispute that the lower court did invoke its powers under section 15 of the Act to determine the matter on the merit. The issue is whether the court was right in so doing. There is no doubt whatsoever that the matter before the trial court as evidenced G in the reliefs earlier reproduced in this judgment is a pre-election matter and as found by the lower court, the trial court has the requisite vires to deal with same. It should be noted that the attack on the jurisdiction of the trial court to entertain the suit as argued in the briefs of argument before this Court is not with regards to the holding of the lower court that the matter being a pre-election matter, the trial court has jurisdiction to hear and determine same but that in view of the conflicting affidavits of the parties the lower court/trial court has no jurisdiction in entertaining the matter under an originating summons. That leaves the finding of the lower court on the juris-

diction of the trial court intact. As regards the issue of the jurisdiction of the trial court/lower court to entertain the matter under Originating summons, I had earlier found in this judgment that the court is clothed with the requisite jurisdiction in view of the narrow issue of validity of the substitution of the 1<sup>st</sup> respondent under the provisions of section 34 of the Electoral Act, 2006. It follows therefore that whether looked at from the point of view of the holding of the lower court that the trial court has jurisdiction to entertain the matter the same being a pre-election matter, or the proper mode of commencing the action by way of Originating Summons, it is without doubt that the trial/lower court has the requisite jurisdiction as required by condition (a) supra.

On condition (b) the grounds of appeal of the 1<sup>st</sup> respondent are at pages 176 - 177 of the record while the relief sought from that court is as stated at page 178 of the record. From the grounds of appeal, the lower court found at pages 273 - 279 of the record that the case was a pre-election matter dealing with the nomination of the 1<sup>st</sup> respondent. The grounds of appeal are as follows:-

**"GROUND ONE.**

**ERROR IN LAW**

*The learned trial judge erred in law when he held that the Federal High Court Jurisdiction to inquire into the appellant's complaint which borders on unlawful substitution of his name as a candidate of Peoples Democratic Party in Ogbaru 1 State constituency of Anambra State and thereby came to a wrong decision.*

**PARTICULARS OF ERROR**

- i. The case brought to the court by the appellant was unlawful substitution and not party nomination.*
- ii. The case of unlawful substitution brought by the appellant is a pre-election matter which the Federal High Court has jurisdiction to decide on merit.*
- iii. The case was instituted on 23/03/07 long before the House of Assembly election which took place on 14/4/2007.*

**GROUND TWO**

**ERROR IN LAW**

*The learned trial judge erred in law and thereby came to a wrong decision when he held that the jurisdiction of the Federal High Court to entertain the appellant's suit was ousted by section 285 (2) of the*

*Constitution of the Federal Republic of Nigeria, 1999.*

**PARTICULARS OF ERROR**

*i. The appellant never sought to be declared the winner of any election*

*ii. The appellant only sought an interpretation of section 34 of the Electoral Act, 2006 and section 36 of the Constitution of the Federal Republic of Nigeria, 1999.*

*iii. Election had not been held at the time the appellant filed his suit at the court below.*

*iv. The appellant's suit at the Court below was not an election matter.*

**GROUND THREE**

**ERROR IN LAW**

*The learned trial judge erred in law and thereby came to a wrong decision when he struck out the appellant's suit without hearing same on merit.*

**PARTICULARS OF ERROR**

*i. The striking out of the appellant's suit without determining same on merit had robbed him of the right to fair hearing.*

*ii. The appellant's said suit which was struck out without hearing was not an election matter.*

*iii. The said appellant suit was within the jurisdiction of the court below to hear and determine on merit."*

It is clear from the above that condition (b) is also fulfilled as the real issues raised by the 1<sup>st</sup> respondent's claim were clearly distilled from the grounds of appeal.

On condition (c) from the affidavits in support and counter affidavits of the parties, the material facts for the determination of the main issue in controversy between the parties are before the court particularly exhibits 1 & 2 being the letters of substitution. By exhibits 1 & 2 the issue of the nomination of the 1<sup>st</sup> respondent as a candidate of the 3<sup>rd</sup> respondent/appellant is put beyond doubt as you cannot talk of substitution of a candidate who had not been nominated and his name submitted to INEC 120 days before the election. The question as to whether the substitution was in compliance with section 34 of the Electoral Act, 2006 can be easily determined within the four corners of exhibits 1 & 2, the authenticity of which has not been in doubt in any event.



With regard to condition (d) it is apparent on the face of the documents relevant to the determination of the suit that this is a pre-election matter where time is of the essence. The election in which the controversial substitution was effected took place on 14<sup>th</sup> April, 2007 and the members of the House of Assembly duly sworn in. If the question as to who was the proper candidate of the party at that election between the appellant in S.C/261/08 and the 1<sup>st</sup> respondent does not need expeditious disposal, I wonder what should, particularly as appellant had been duly sworn in and has been functioning in that capacity for about two years out of a term of four years!!

On the same vein, I hold the view that condition (e) is also meet as time is of the essence in matters of this nature and to remit the case to the trial court for hearing would clearly result in injustice to the 1<sup>st</sup> respondent.

On the issue of breach of the right of fair hearing of the appellants in the circumstances of this case I wish to point out that the matter was commenced by way of Originating Summons in which all the parties filed affidavits and counter affidavits as required by law. In addition to the said affidavits, Learned Counsel for the parties also filed their respective addresses on the issues arising from the claims of the plaintiff/1<sup>st</sup> respondent. The lower court merely took into consideration the facts as deposed to in the various affidavits and arguments canvassed by Learned Counsel in their written addresses filed at the trial court in coming to the conclusion it did. Does what the lower court did amount to a denial of the right of fair hearing? I do not think so because what is necessary in the exercise of the right to fair hearing is the opportunity to be heard. The question usually is whether a party to an action has been given an opportunity to be heard. Where he has, then he cannot later complain of lack of fair hearing. Where he was given the opportunity but he failed or neglected or refused to utilize same, he cannot later be heard to complain of lack of fair hearing. The issue of resolution of conflicts in the affidavits by the calling of oral evidence has been dealt with in this judgment in that there is no conflict as regards the relevant facts in issue in this case, particularly the issue of the validity of the substitution of 1<sup>st</sup> respondent.

On the invocation of section 15 of the Court of Appeal Act, it is clear from the record that the court was specifically invited to do so

by the appellant before it who is the 1<sup>st</sup> respondent in this Court. The lower court did not do so *suo motu* as it appears to be the argument of learned counsel for the appellants.

There is also a respondent's notice in respect of S.C/261<sup>B</sup>/08 in which Learned Counsel for the 1<sup>st</sup> respondent has urged this Court  
B to invoke its powers under section 22 of the Supreme Court Act and Order 6 Rule 6(2) of the Supreme Court Rules to vary the judgment of the Court of Appeal by making the following orders, which Learned Counsel contends will meet the justice of the case:-

C “(a) *That the 1<sup>st</sup> respondent is the validly nominated and elected candidate of the Peoples Democratic Party (PDP) for Ogbaru I Constituency Seat at the Anambra State House of Assembly.*

(b) *That the 1<sup>st</sup> Respondent be issued a Certificate of Return by the Appellant as the duly nominated and elected candidate of the*  
D *PDP for Ogbaru I Constituency Seat at the Anambra State House of Assembly.*

(c) *That the Speaker and or Clerk of Anambra State House of Assembly should immediately swear the 1<sup>st</sup> Respondent into office as the duly elected member of the Anambra State House of Assembly*  
E *representing Ogbaru I Constituency.*

(d) *That Anambra State House of Assembly, its Speaker, Clerk, Accountant-General of Anambra State or any other officer of Anambra State or the House of Assembly of Anambra State designated in that*  
F *behalf to pay to the 1st Respondent, his salaries allowances and entitlements from 6<sup>th</sup> June, 2007, when the Anambra State House of Assembly was inaugurated till the date the 1<sup>st</sup> Respondent is formally restored to office as a member of the Anambra State House of Assembly representing Ogbaru I Constituency.”*

G Learned Counsel stated that out of a four year tenure of the House of Assembly, appellant in S.C/261/2008 had spent two years and that the justice of the case will only be served if the 1<sup>st</sup> respondent is declared the validly elected candidate of the PDP that eventually won the election in question as held in *Amaechi vs INEC*;  
H *Agbakoba vs INEC* and other cases; that if the 1<sup>st</sup> respondent is held to be the winner of the election in the eyes of the law, he ought to have been sworn in as a member of the House on 6<sup>th</sup> June, 2007 when the House was inaugurated and paid his salary, allowances etc relying on *Amaechi vs INEC* and section 221 of the Constitution of

the Federal Republic of Nigeria, 1999.

It should be pointed out that there is no reply brief by Learned Counsel for the appellant in S.C/261B/08 in answer to the submission of learned Counsel for the 1<sup>st</sup> respondent on the 1<sup>st</sup> respondent's notice supra.

However, what is the decision of the lower court which Learned Counsel for the 1<sup>st</sup> respondent wants this Court to vary as stated above. At page 307 of the record, the lower court held, inter alia, as follows:-

*"..... this Court has no doubt been graced with or given wide power to hand down any other or orders that would meet the justice of the case before it, be it consequential or one sought by a complaint.*

*I have closely looked at the eight reliefs sought by the plaintiff/appellant in his amended Originating Summons. All the eight reliefs mentioned therein are grantable, upon the court being convinced that the plaintiff or complainant has established his claims. With regard to reliefs 7 and 8, I do not agree that granting them amount to usurping any power of an election tribunal or that I am in effect nullifying the election held on 14/4/2007. For the purpose of emphasis, having held that the plaintiff/appellant -was unlawfully substituted, the consequence is that he is legally speaking the recognized candidate of the PDP and not the 2<sup>nd</sup> defendant, Hon. (Mrs.) Njideka Ezeigwe. It goes without saying therefore, that since PDP, the 3<sup>rd</sup> defendant was the winner at the election held on 14/4/2001, it was Chief (Sir) Benson Chuks Nwawulu that must be deemed the candidate of the election for the party. In actual fact and legally speaking, Hon. Mrs. Njideka Ezeigwe had never been a candidate at the said election and could not have been declared a winner of same....."* Emphasis supplied by me.

**From the above passage from the judgment of the lower court, it is very clear that the court found that the 1<sup>st</sup> respondent was the duly nominated candidate of PDP for the election in issue and therefore won the said election for the constituency in question.** In taking that decision, the lower court relied on the decision of this Court in the case of Amaechi vs INEC supra. The above decision of the lower court has been affirmed by me earlier in this judgment.

***I therefore hold the view that the lower court having held that 1<sup>st</sup> respondent is, in the eyes of the law the candidate of PDP for the election in issue who won the said election, it follows that every other relief naturally flow from that decision as no other person can legally represent Ogbaru 1 State Constituency in Anambra State House of Assembly except the 1<sup>st</sup> respondent neither is any other person recognized by law to be paid salary, allowances etc, etc for being a member of that House representing Ogbaru 1 State Constituency except the 1<sup>st</sup> respondent. In effect, the variation sought by Learned Counsel for the 1<sup>st</sup> respondent, of the judgment of the lower court does not arise in view of that judgment.***

As to the payment of the salary of 1<sup>st</sup> respondent from June 2007 when the Anambra State House of Assembly was inaugurated, it cannot be done in view of the provisions of section 149 of the Electoral Act, 2006. It follows therefore that the 1<sup>st</sup> respondent can only be paid salary from the date the lower court declared him the PDP candidate who, in the eyes of the law, won the election of 14/4/2007 not earlier as the State Government should not be made to pay salary for two 'members' for the same seat for the period in question.

In the circumstance I hold the view that the 1<sup>st</sup> respondent's notice in S.C/261<sup>B</sup>/2008 is unnecessary in view of the decision of the lower court reproduced supra which I hereby affirm and is consequently struck out for being superfluous.

In conclusion I resolve the issue against the appellant in S.C/261/08; S.C/261<sup>A</sup>/08 and S.C./261<sup>B</sup>/08.

Haven resolved all the relevant issues in the appeal as supra, I have come to the following conclusion

In re appeal:

(a) No. S.C/261/2008 I find no merit whatsoever in the appeal which is hereby dismissed with N50,000.00 costs in favour of the 1<sup>st</sup> respondent

(b) No. S.C./261<sup>A</sup>/2008, I find no merit in the appeal which is hereby dismissed with N50,000.00 cost in favour of the 1<sup>st</sup> respondent

(c) No. S.C./261<sup>B</sup>/2008 is hereby dismissed for lack of merit with costs assessed and fixed at N50,000.00 in favour of the 1<sup>st</sup> re-

*spondent.*

The judgment of the lower court in appeal No. CA/E/406/2008 delivered on the 10<sup>th</sup> day of July, 2008 is hereby affirmed.

Appeal dismissed.

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**MUSDAPHER JSC**

I have read before now the judgments in these matters just delivered by my learned brother ONNOGHEN, JSC with which I respectfully agree. In the aforesaid judgments his lordship has meticulously and comprehensively dealt with all the relevant issues submitted for the determination of the appeals. I adopt his reasoning as mine and I accordingly dismiss the three appeals and affirm the decision of the Court of Appeal. I also abide by the Order for costs contained in the judgments.

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**TABAI JSC**

I have had the benefit of reading, in draft, the lead judgment of my learned brother Onnoghen JSC and I agree that the three consolidated appeals lack merit. The result is that each of the appeals is hereby dismissed by me. I assess the costs of each of the appeals at N50,000.00 in favour of the 1<sup>st</sup> Respondent.

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**MUHAMMAD JSC**

I read before now the judgment delivered by my learned brother Onnoghen, JSC. I agree with him that the appeals listed and consolidated, to wit: SC.261/2008; SC.261 A/2008; SC.261 B/2008 lack merit. I hereby dismiss each of these appeals. I affirm the judgment of the court below. I abide by orders as to costs made in the leading judgment.

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**ADEKEYE JSC**

I was privileged to read before now the consolidated judgments of my brother W.S.N. Onnoghen JSC. The three appeals were against the judgment of the Court of Appeal, Enugu Division delivered on the 10<sup>th</sup> of July 2008. The parties in the three appeals numbered as SC.261/2008, SC.261<sup>A</sup>/2008 and SC.261B/2008 are as presented by my learned brother in the leading judgment. Chief Benson Chuks Nwawulu, the 1<sup>st</sup> respondent in each of the consoli-

dated appeals filed an originating summons at the Federal High Court, Enugu against the Independent National Electoral Commission, whereupon he sought declaratory reliefs and orders of that court, that as the proper candidate nominated by the People's Democratic Party for Ogbaru 1 State Constituency in Anambra State, his name  
 B was wrongfully substituted less than sixty days to the election held on the 14<sup>th</sup> of April, 2007. There was an objection against the suit on the ground that it was no longer a live issue as the election had already been conducted, and that the court lacked the requisite juris-  
 C diction to entertain it. The Federal High Court struck out the suit for want of jurisdiction based on the Section 69 (c) of the Electoral Act 2006, Section 285 (2) of the 1990 Constitution, Sections 140 and 145 (1) (d) of the Electoral Act 2006. The trial court saw the suit as one to be handled by the Election Petition Tribunal or the Court of  
 D Appeal. Being aggrieved by that decision, an appeal was lodged at the Court of Appeal Enugu by the 1<sup>st</sup> respondent. The lower court reversed the finding of the Federal High Court and concluded that the trial court had jurisdiction to hear the matter. Since it failed to do so, the lower court invoked its jurisdiction under Section 15 of the  
 E Court of Appeal Act 2004 to assume the jurisdiction of the Federal High Court over the matter as if the proceedings were introduced in the court as court of first instance. The lower court found that the substitution of Chief Sir. Benson Chuks Nwawulu with another Peoples  
 F Democratic Party candidate was wrongfully done for failure to comply with Section 34 of the Electoral Act 2006. The lower court entertained the originating summons of the plaintiff before the trial court and granted all the reliefs he prayed for therein.

The three appellants in this consolidated appeal being  
 G dissatisfied with the judgment of the Court of Appeal, filed appeals to this court. The germane issues identified for determination in each of the three appeals are as follows: -

- (1) Whether the Court of Appeal was right to have entertained and decided the matter on originating Summons.
- H (2) Whether the Court of Appeal was right to have held that the 1<sup>st</sup> respondent was wrongly substituted.
- (3) Whether the Court of Appeal was right to have invoked Section 15 of the Court of Appeal Act to decide the matter before it when the appellants were not heard thereon.

My brother had dealt with these issues in the leading judgment. In line with the previous pronouncement of this court in various authorities on similar issues.

These appeals are on the interpretation of Section 34 (1) and (2) of the Election Act 2006 as the provisions relate to the substitution of a candidate who had scaled through the rigours of election in the primaries and his name was thereafter submitted to INEC as the person nominated to contest on the platform of the party for the election. In line with its previous judgments on this issue and on a proper consideration of the facts and documents on record, this court agreed with the conclusion of the lower court that the 1<sup>st</sup> respondent won the PDP Primary into Ogbaru 1 Constituency seat in Anambra State for the House of Assembly election. His name was submitted to INEC as the PDP candidate for the 14<sup>th</sup> of April 2007 general election. In accordance with Section 34 of the Electoral Act 2006, no cogent and verifiable reasons were provided by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, PDP and INEC, for the substitution of the 1<sup>st</sup> respondent.

I agree with my brother in his leading judgment that the 1<sup>st</sup> respondent was wrongfully substituted contrary to the provisions of Section 34 of the Electoral Act.

Ugwu v. Ararume (2007) 12 NWLR pt. 1048 pg. 307.

Amaechi v. INEC (2008) 5 NWLR pt. 1080 pg. 227.

Ehinlawo v. Oke (2008) 16 NWLR pt. 1113 pg. 357.

Odedo v. INEC 17 NWLR pt. 1117 pg. 554.

Agbakoba v. INEC (2008) 18 NWLR pt. 1119 pg. 489.

Udeh v. Okoli (2009) NWLR pt. 1141 pg. 571.

Section 34 of the Electoral Act 2006 reads: -

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

(2) Any application made pursuant to subsection (1) of this section shall give cogent and verifiable reasons Except in the case of death, there shall be no substitution or replacement of any candidate whatsoever after the date referred to in subsection 3 (1) of this section.

On whether the court was right to have invoked Section 15 of the Court of Appeal Act to decide the matter before it. Section 15 of the Act now used to be Section 16 in numerous notorious cases in

which the court had invoked this section. The operative words in Section 15 of the Court of Appeal Act are - "The Court of Appeal may, from time to time make any order necessary for determining the real question in controversy in the appeal."

B Before the Court of Appeal can invoke and exercise its powers under Section 15, such undermentioned factors must exist -

(1) The question must be a ground of appeal.

(2) The High Court from which the matter emanates must have jurisdiction in the matter. Jurisdiction of the High Court is the C prerequisite for the invocation of the provisions of Section 15 by the Court of Appeal.

(3) Availability of the necessary materials to consider and adjudicate in the matter.

(4) The length of time between the disposal of the action at the D trial court and the hearing of the appeal.

(5) The interest of justice by eliminating further delay that would arise in the event of remitting the case back to the trial court for rehearing and the hardship such an order would cause on either or both parties in the case.

E The case before the Federal High Court was substantially to determine whether the substitution of the 1<sup>st</sup> respondent was done in accordance with Section 34 of the Electoral Act 2006. As it was mainly an issue of the interpretation of a Statute - it was rightly brought to court by filing an originating summons asking for declaratory reliefs

F and orders. It was a pre-election matter which a Federal High Court has jurisdiction to adjudicate upon. All the materials required to decide whether there was cogent and verifiable reasons for the substitution and that the 1<sup>st</sup> respondent emerged as the winning candidate in

G the primaries held to nominate him as candidate were before the Court of Appeal. The lower court has wide powers under this section - the exercise of such power is however limited by the peculiar circumstance of each case. There is no doubt about it that there were overwhelming surrounding circumstance for the court to fall back on this section. The seat in the House of Assembly the respondent in the H suit eyed is not in perpetuity, it is for a limited time - a period of four years - which is fast running to an end. Section 15 of the Court of Appeal Act, is akin to Section 22 of the Supreme Court Act.

Olutola v. University of Ilorin (2004) 18 NWLR pt. 905 pg.



416.

NICON v. Power and Industrial Engineering Co. Ltd. (1990) 1 NWLR pt. 129 pg. 697.

Faleye v. Otapo (1995) 3 NWLR pt. 381 pg. 1.

Adeyemi v. Y.R.S. Ike-Oluwa & Sons Ltd. (1993) 8 NWLR pt. 309 pg. 27. B

University of Lagos v. Olaniyan (1985) 1 NWLR pt. 1 pg. 156.

Jadesinmi v. Okotie-Eboh (1986) 1 NWLR pt. 16 pg. 264.

Yesufu v. Obasanjo (2003) 16 NWLR pt. 847 pg. 554.

U.B.N. Ltd. v. Fajebe Foods & Poultry Farms (1994) 5 NWLR C pt. 344 pg. 325.

Cappa D'Alberto Ltd. v. Akintilo (2003) 9 NWLR pt. 824 pg. 49.

Oshoboja v. Amuda (1992) 6 NWLR pt. 250 pg. 690.

Inakoju v. Adeleke (2007) 4 NWLR pt. 1025 pg. 423. D

Finally, was the Court right to have decided the questions before the court on originating summons - in order words, was the claim rightly commenced by an originating summons or the plaintiff should have filed a writ of summons?

Mode of commencement of action is an indispensable aspect E of our civil procedure; hence various courts have it embodied in their Civil Procedure Rules. Originating Summons is merely a method of procedure and not one that is meant to enlarge jurisdiction of the court. The main advantage is simplicity resulting from the elimination F of pleadings.

Order 2 Rule 2 of the Federal High Court Civil Procedure Rules stipulates that: -

Order 2 Rule 2: -

(a) Proceedings may begin by Originating Summons where - G

(a) The sole or principal question at issue is or is likely to be, one of the construction of a written law or of any instrument made under any written law or of any deed, will, contract or other document or some other question of law or

(b) Where there is unlikely to be any substantial dispute of fact H

U.B.A. v. Ekpo (2003) 12 NWLR pt. 834 pg. 932.

Saleh v. Monguno (2003) 1 NWLR pt. 801 pg. 221.

Jimoh v. Olawoye (2003) 10 NWLR pt. 828 pg. 307.

N.B.N. Ltd. v. Alakija (1978) 9 - 10 SC pg. 59.

Oloyo v. Alegbe (1983) 2 SCNLR pg. 35.

Din v. A-G Federation (1986) 1 NWLR pt. 17 pg. 471.

The procedure of originating summons is meant to be invoked in a friendly action between parties who are substantially ad idem on the facts and who, without the need for pleadings, merely want, for example, a directive of the court on the point of law involved. The procedure is not meant to be invoked in a hostile action between parties and in which the parties concerned need know before hand the issues which they are called upon to contend with from the pleadings. There can be disputed facts which originating summons procedure could resolve, but, where the disputed facts are substantial, the proper mode of commencing such an action is by writ of summons so that pleadings can be filed. In order words, originating summons procedure is appropriate where there is no substantial dispute of facts between the parties or likelihood of such dispute. In this appeal in hand, the core question for determination is whether in the substitution of the 1<sup>st</sup> respondent, the party PDP and INEC had complied with the provisions of Section 34 of the Electoral Act 2006. There can be no substantial dispute in the supporting affidavit of the parties, as the matter is for the interpretation of a written law.

Jimoh v. Olawoye (2003) 10 NWLR pt. 828 pg. 307.

Ogunsola v. A.P.P. (2003) 9 NWLR pt. 826 pg. 462.

Olumide v. Ajayi (1997) 8 NWLR pt. 517 pg. 433.

Unilag v. Aigoro (1991) 3 NWLR pt. 179 pg. 376.

Adeyemo v. Beyioku (1999) 13 NWLR pt. 635 pg. 472.

Kankara v. C.O.P. (2002) 13 NWLR pt. 785 pg. 596.

With fuller reasons given by my brother in the leading judgment, I also come to the conclusion in the appeals as follows: -

(1) No. SC.261/2008 I find no merit whatsoever in the appeal which is hereby dismissed with N50,000 costs in favour of the 1<sup>st</sup> Respondent.

(2) No. SC.261<sup>A</sup>/2008 I find no merit in the appeal which is hereby dismissed with N50,000 costs in favour of the 1<sup>st</sup> Respondent.

(3) No. SC.261<sup>B</sup>/2008 is hereby dismissed with costs assessed and fixed at N50,000 in favour of the 1<sup>st</sup> respondent. Judgment of the lower court is affirmed.