

**SUPREME COURT OF NIGERIA**  
5TH MARCH, 2010, SC. 279/2007  
**CORAM:- G. A. OGUNTADE, M. MOHAMMED,**  
**W. S. N. ONNOGHEN, I. F. OGBUAGU, F. F. TABAI,**  
**M. S. MUNTAKA-COOMASSIE, O. O. ADEKEYE**

1. DR. ARTHUR AGWUNCHANWANKWO
2. COMRADE MUHAMMAD ABDULLAHI ..... APPELLANTS
3. PEOPLE MANDATE PARTY [PMP]

AND

1. ALHAJI UMARU YAR'ADUA
2. DR GOODLUCK JONATHAN ..... RESPONDENTS
- 3 INDEPENDENT NATIONAL  
ELECTORAL COMMISSION  
(INEC) & 38 OTHERS

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PRACTICE & PROCEDURE - Parties - Argument - Effect of failure to counter a point argued by opponent - The point not so countered is deemed conceded - By the defaulting party (H1)

ELECTION PETITIONS - Motions - When to hear - Practice directions 2007 - The tribunal can only hear motions - At the pre-hearing session - Not when it sits as a tribunal - To hear petitions (H2)

PRACTICE & PROCEDURE - Performance of duties - Regulated by statute - Methods - Where statute provides for a particular method - No other method is to be employed - In doing the particular thing (H3)

JURISDICTION - Election tribunals - Hearing of motions outside pre-hearing session - Validity - Any such hearing is done without jurisdiction - And is consequently null and void - Under paragraph 6(1) of Practice Directions 2007 (H4)

***FACTS***

The petitioners/appellants filed an election petition against respondents before the Court of Appeal in its capacity as the Presidential Election Petition Tribunal for the presidential election held on

April 21, 2007. Appellants' claims were for sundry reliefs by which they contested the return of 1st and 2nd respondents as president and vice president duly elected from the said elections. The basis of appellants' petition was, *inter alia*, that the election was invalid by reason of corrupt practices and noncompliance with the provisions of the Electoral Act 2006.

By a notice of preliminary objection, the 3rd to 41st respondents challenged the competence of the court to entertain the petition on the grounds, *inter alia*, that the petition was vague and moreover that it failed to meet the mandatory requirements of paragraph 4 of the first schedule to the Electoral Act. Though the tribunal was yet to hold the pre-hearing session for the parties, it set down the objection, heard and sustained same. Consequently, it struck out appellants petition as incompetent. Aggrieved, appellants have brought this appeal against the ruling of the tribunal. Appellants contend that the hearing of the objection outside the pre-hearing session was done without jurisdiction.

### **ISSUE FOR DETERMINATION**

*"Whether having regard to the provisions of paragraph (1) of the Electoral (sic) Tribunal and Court Practice Amendment Directions 2007 (NO.1) and paragraph 49(2) of the First Schedule to the Electoral Act 2006, the hearing and determination of the Preliminary Objection by the Court of Appeal was not without jurisdiction."*

### **HELD (Unanimously allowing the appeal per **ONNOGHEN JSC**) ***Parties - Argument - Effect of failure to counter a point*****

1. It is clear the issues formulated and argued by Learned Senior Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents in their brief of argument do not include argument on appellants' said issue No. 8.

It is settled law that where an opponent fails or neglects to counter any argument or issue validly raised in the brief of argument or during oral presentation, the issue not so contested is deemed conceded by the defaulting opponent. I therefore, in the circumstance, hold that the 1<sup>st</sup> and 2<sup>nd</sup> respondents, by not reacting to the issue in question, have conceded the issue as formulated and argued by the learned counsel for the appellants. (p. 1234 E)

***ELECTION PETITIONS - Motions - When to hear***

2. Paragraph 6(1) of the Election Tribunal and Court Practice Directions, 2007 provides as follows:-

*“6.(1) No motion shall be moved. All motions shall come up at the pre-hearing session except in extreme circumstances with leave of the tribunal or court”*

In paragraph 3(7) of the Practice Direction, supra, the tribunal or court is enjoined, at the pre-hearing session, to take appropriate action in respect of the following as may be necessary or desirable,

“(a) \_\_\_\_\_

“(b) \_\_\_\_\_

“(c) \_\_\_\_\_

“(d) *hearing and determination on objections on point of law.”*

From the totality of the above provisions of the Practice Direction, it is very clear that an election tribunal or court can only hear motions and/or objections on point of law at the pre-hearing session not when it sits as a tribunal or court to hear or try election petitions. (pp. 1235 F / 1236 F)

***Performance of duties - Regulated by statute***

3. It is settled law that where a statute lays down a procedure for doing anything no other method is to be employed in doing the thing. In other words, *“where a statute or legislation provides for a particular method of performing a duty regulated by the statute that method and no other must have to be adopted.”*

In the instant case, the Practice Direction provides clearly that motions and/or objections on points of law can only be taken and determined by the tribunal or court at its pre-hearing session, which was not done in this case. (p. 1237 B)

***Election tribunals - Hearing of motions***

4. In the case of *Okereke vs Yar'adua* (2008) 4-5 S.C (pt.1) 206 this Court considered the provisions of paragraph 6(1) of the Practice Direction supra and came to the conclusion that any motion or preliminary objection raised in an election petition not taken and determined at the pre-hearing session is done or taken without jurisdiction and consequently null and void, as the same would have been done

without fulfilling the condition precedent to the exercise of its jurisdiction.

It is therefore clear that the proceedings of the lower court leading to the ruling of that court delivered on the 3<sup>rd</sup> day of September, 2007, subject of the instant appeal, is a nullity and the same was conducted without jurisdiction and is consequently set aside.  
(p. 1237 E/G)

### **NOTABLE POINTS OF INTEREST**

#### **MUNTAKA-COOMASSIE JSC**

##### *1. Election petition - A party may ask for further particulars*

It is clear from the above provisions that a person who claims that an averment in the petition is vague or general in terms is entitled to file an application for further particulars or direction of the court. By this procedure a party who complains of vagueness may request the petitioners to furnish further particulars as to his allegations contained in the grounds of the petition to enable him adequately reply them on each allegation. This application could be made either immediately the party complaining files its memorandum of appearance or ten days after filing its reply to the petition. (p. 1257 G)

##### *2. Complaint of vagueness is barred ten days after filing reply*

The legal consequence of failing to file an application for further particulars or the direction of the court, where a complaint of vagueness or general averment is made is that the party complaining is deemed to have understood the grounds of the petitioners complaints, and is barred from so applying after the expiration of the time fixed by the provisions of paragraph 17(10) of the First Schedule to the Electoral Act, 2006.

In the instant case, the respondents did not avail themselves of the provisions of the rule and I have no hesitation in holding that they were barred from complaining as to the vagueness or otherwise of the averments contained in the petition. (p. 1258 A)

##### *3. Federal High court Rules only apply where there is lacuna*

It is crystal clear that the provisions of the Federal High Court Rules are subject to the provisions of the First Schedule of the Electoral Act, 2006, and if there is any conflict between them the provisions of the

Rules under the Electoral Act, 2006 prevails. It is where there is a lacuna in the provision of the Rules provided in the Electoral Act, 2006 that the provisions of the Federal High Court Rules will apply. (p. 1259 A)

### **REPRESENTATION**

N. J. Edechime Esq. leading M. Edozie (Miss), Uba Chukwuka Esq. for the Appellants.

D. D. Dodo SAN with him Dr. A. F. Afolayan, Ayo Adesanmu, Audu Anuga, Hannatu Abdurrahman (Mrs.), Terhemba Bashima, A. A. Dodo, Oluleye Sokale, Akpe Adoh (Mrs.) Aisha Ali (Miss) and Toyin Agunriade for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent

Chief. Amaechi Nwaiwu SAN and with him Dr. A. N. Aguwa, Oddi Achike Esq., Okon N. Efut Esq., Peter O. Ofikwu Esq., Rita O. Ogar (Mrs.), Lami N. Jibrin (Miss), Ifunanya Obumselu (Mrs.), Egani Agabi D Esq., Okwa Morphy Enebeli (Mrs.), Tosin Adeoye (Miss), Nneka Bon-Nwakanma (Mrs.), Ngozi Udokwu (Miss), Ifeanyi Okechukwu Esq. , Coxon Dappa Esq. and A. Ekon . Bassey Esq. for the 3<sup>rd</sup> to 41<sup>st</sup> Respondents.

### **CASES REFERRED TO**

Ishola v. Ajiboye (1994) 6 NWLR (Pt.352) 506

Mark v. Eke (2004) 5 NWLR (pt. 865) 54 at 812

Gwan v. Adole (2003) FWLR (Pt.176) 747 @ 760

Agu v. Ikewibe (1991) 3 NWLR (Pt.130) 385 @ 401

Ibrahim vs Ojomo (2004) 4 NWLR (pt. 862)89 at 104

Shittu v. Fashawe (2005) 14 NWLR (Pt. 946) 671 at 687

Okereke vs Yar'adua (2008) 4-5 S.C (pt.1) 206 at 228 - 230

Iwuoha vs NIPOST Ltd (2003) 8 NWLR (pt. 822) 308 at 332

Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) 1 at 313 - 314

Adefulu v. Chief Okulaja & 7 ors. (1998) 5 NWLR (Pt.550) 435

CCB vs A-G Anambra state (1992) 8 NWLR (pt. 261) 528 at 566

Nalsa & Team Associates v. NNPC (1996) 3 NWLR (Pt. 439) 621 @ 633

Chief Ukwu & 3 ors. v. Chief Bunge (1997) 8 NWLR (Pt. 678) 527 @ 541

Buhari v. Yusuf (2003) 6 S.C. (pt.II) 156 (2003) 4 NWLR (Pt.841) 446 @ 492

Adelusola & 4 ors. v. Akinola & 3 ors. (2004) 12 NWLR (pt.887) 295 @ 311

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

- B Electoral Act, 2006, ss. 13, 37 and 49, and paragraph 4 of First schedule
- Election Tribunal and Court Practice Directions, 2007, paragraph 6
- Election Tribunal and Court Practice Amendment Directions 2007 (No.1)
- C Constitution of the Federal Republic of Nigeria, 1999, s. 6
- Supreme Court Act, s. 22

### **LEAD JUDGMENT BY ONNOGHEN JSC**

D On the 18th day of May, 2007, the appellants filed an election petition against the respondents praying for the following reliefs:-

“(i) *An order of the court that the Presidential election held on April 21, 2007 is invalid for reasons of non-compliance with substantial sections of the Electoral Act, 2006.*

E “(ii) *An order of the court that the Presidential election held on April 21, 2007 is invalid for reasons of corrupt practices.*

“(iii) *An order of the court that at the time of the election, the 1st and 2<sup>nd</sup> Respondents were not qualified to context.*

F “(iv) *An order that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not duly elected by majority of lawful votes cast at the election.*

“(v) *An order of the court that the Presidential election 2007 may be declared nullified.”*

G The grounds on which the reliefs are sought are stated as follows:-

“i. *That the Presidential election held on 21<sup>st</sup> April 2007 was invalid by reason of corrupt practices and non-compliance with the provisions of the Electoral Act 2006.*

H ii. *That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not duly elected by majority of lawful votes cast at the election.*

iii. *That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as serving Governors of Katsina and Bayelsa States respectively were not qualified to context the election”.*

The 1<sup>st</sup> and 2<sup>nd</sup> appellants were candidates sponsored by the

3<sup>rd</sup> appellant, a registered political-party at the election into the office of President and Vice President of the Federal Republic of Nigeria held on the 21<sup>st</sup> day of April, 2007 which the 1<sup>st</sup> and 2<sup>nd</sup> respondents were returned/declared elected as President and Vice President of the Federal Republic of Nigeria.

By a Notice of Preliminary Objection filed on the 2<sup>nd</sup> day of August, 2007, the 3<sup>rd</sup> to 41<sup>st</sup> respondents challenged the competence of the court to entertain the petition on the following grounds:-

1. The petition is incompetent and fails to meet the mandatory requirements of paragraph 4(1) (a) (d) 4(2) and 4(4) of the First Schedule of the Electoral Act, 2006. C

2. Paragraphs 8, 10(1), 11-22 of the petition are vague without sufficient and material particulars to sustain the allegations.

3. The petitioner failed to join the persons and/or electoral officers who allegedly perpetrated corrupt practices and electoral irregularities in thirty-six states of the Federation and the Federal Capital Territory as well as constituent local governments areas, the wards and polling units, the failure of which is fatal quite from the fact that particulars of the corrupt practices and irregularities are not stated.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are not in the category of persons who ought to resign from office before contesting the election as alleged or canvassed by the petitioners. E

5. Nothing in the law justifies the assumption that the death of a candidate must lead irresistibly and conclusively to the postponement or cancellation of the election. F

6. The petition is an abuse of the process of the court and is instituted in bad faith.

The objections were grounded on paragraphs 4(6), 4 (a) (b) of the First Schedule to the Electoral Act, 2006; paragraph 6(2) and (3) of the Court Practice Directions 2007; Order 3 Rule 3(1) of the Court of Appeal Rules 2002 and Section 6(6) (a) and (b) of the Constitution of the Federal Republic of Nigeria 1999. G

The lower court found that the preliminary objection was well taken and consequently sustained same in the ruling delivered on the 3<sup>rd</sup> day of September, 2007 which resulted in the instant appeal. H

Learned Counsel for the appellants N.J. EDECHIME ESQ in the appellants brief filed on 15/10/07 identified the following issues for determination:

*"i. Whether the appellants' petition was incompetent, defective and not initiated by due process of the law.*

*ii. Whether there is non-compliance by the appellants as petitioners with the mandatory provisions of paragraph 4(1) (d) of the First Schedule to the Electoral Act, 2006 and S. 144(2) of the Electoral Act 2006 in the contents of the petition and the documents annexed thereto.*

*iii. Whether it was not too late for the Court of Appeal to entertain the Preliminary Objection dated 2<sup>nd</sup> August 2007 after all the Respondents have joined issues with the petitioners by filing their respective Replies prior to the hearing of the Preliminary Objection.*

*iv. Whether it is proper for the Court of Appeal to resolve and decide on all the substantive issues in the petition in the Course of Ruling on the 3<sup>d</sup> to 41<sup>st</sup> Respondents' Preliminary Objection.*

*v. Whether the Petitioners were not denied their constitutional right to fair hearing having regard to all the circumstances of this case.*

*vi. Whether the provisions of S. 37(1) of the Electoral Act 2006 does not make it mandatory for the presidential election held on 21<sup>st</sup> April 2007 to be countermanded or postponed following the death of a nominated Presidential Candidate after the time for the delivery of nomination paper and before the commencement of the poll.*

*vii. Whether the provision of S.13(1) (a) is not applicable to 1<sup>st</sup> and 2<sup>nd</sup> Respondents as serving state Governors at the date of the Presidential election held on 21<sup>st</sup> April 2007.*

*viii. Whether having regard to the provisions of paragraph (1) of the Electoral (sic) Tribunal and Court Practice Amendment Directions 2007 (NO.1) and paragraph 49(2) of the First Schedule to the Electoral Act 2006, the hearing and determination of the Preliminary Objection by the Court of Appeal was not without jurisdiction."*

On the 14<sup>th</sup> day of January, 2008, learned senior counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, CHIEF WOLE OLANIPEKUN SAN, filed a Notice of Preliminary Objection against the grounds of appeal in which counsel prayed the court for:

*"1. An order striking out some of the issues for determination same not been born out from of (sic) the grounds of Appeal."*

The objection is said to be grounded on the following:-

*"1. The Appellants filed a notice of appeal on the 24<sup>th</sup> Septem-*



ber, 2007.

2. *That in the said Notice of Appeal, Appellants raised 6 grounds of appeal from the ruling of the tribunal.*

3. *The Appellants' Brief of Argument was filed on the 15<sup>th</sup> October, 2007.*

4. *That in the said Appellants' Brief of Argument, 8 issues were distilled from the 6 grounds of appeal.* B

5. *That the issues are more than the grounds of appeal.*

6. *That proliferation of issues is not allowed by this honourable court.*” C

Argument on the objection has been preferred by learned senior counsel in the 1<sup>st</sup> and 2<sup>nd</sup> respondents' brief of argument filed on the 14<sup>th</sup> day of January, 2008.

However, learned counsel for the appellants filed a reply brief on the 9<sup>th</sup> day of November, 2009 in which he pointed out that this Honourable Court did grant an application by the appellants to amend the Notice of Appeal on the 26<sup>th</sup> day of October, 2009. I have gone through the Amended Notice of Appeal. It is clear from the record that whereas the original notice of appeal to be found at pages 238 to 244 contains six grounds of appeal as contended by learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the amended Notice of appeal filed on the 26<sup>th</sup> day of October, 2009 contains seven grounds of appeal. It is true that learned counsel for the appellants formulated eight issues out of the seven grounds of appeal. E

Learned Counsel for the appellants has submitted, in the-Reply Brief filed on 9/1/09 that “...issues 3 and 8 fall within the scope or ambit of ground VII of the Amended Notice of Appeal filed on the 26<sup>th</sup> October 2009. In the circumstance, the Preliminary Objection is no longer tenable.” F

By the above submission, it is clear that learned counsel concedes that he formulated two issues out of a ground of appeal. What he has done - formulation of two or more issues from a ground of appeal - is what the law regards as proliferation of issues and consequently frowns upon. It is settled law that whereas counsel may formulate an issue out of a ground of appeal or a combination of grounds of appeal, he is not allowed/permitted to formulate more than an issue out of a ground of appeal. The above constitutes the foundation of the objection of Learned Senior Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> H

respondents. I hold the view that the objection is well founded in law. Consequently the objection is sustained and issue NO. 3 is hereby struck out for being incompetent. See *Ibrahim vs Ojomo* (2004) 4 NWLR (pt. 862) 89 at 104; *Iwuoha vs NIPOST Ltd* (2003) 8 NWLR (pt. 822) 308 at 332; *Shutu vs Fashawe* (2005) 14 NWLR (pt. 946) 671 at 687; *Mark vs. Eke* (2004) 5 NWLR (pt. 865) 54 at 81-82.

Looking closely at the surviving issues, it is clear that the first issue to be tackled must logically be the original issue NO. 8 since it deals or challenges the competence or jurisdiction of the lower court to entertain and determine the preliminary objection at the stage it did. Jurisdiction being a periphery matter it is always advisable to resolve same before proceeding any further where necessary because where it is found that a court has no jurisdiction the matter ends there. It is only when it is found that the court has jurisdiction that we can proceed further to determine the appeal on the merit.

In arguing the issue, Learned Counsel for the appellants referred the court to the proceedings of the 22<sup>nd</sup> day of August, 2007 at pages 194 to 196 of the record where the lower court sat as the Presidential Election Tribunal and heard arguments from counsel for both parties on the preliminary objection; not in a pre-trial session; and paragraphs 6(1) and (4) of the Election Tribunal and Court Practice Directions 2007 and submitted that where a Statute provides for a particular method of performing a duty regulated by the Statute that method and no other must have to be adopted, relying on *CCB vs A-G Anambra state* (1992) 8 NWLR (pt. 261) 528 at 566; that parties are free to File their motions but the method of hearing the application so filed is as prescribed by the Statute, particularly paragraph 6(1) *supra* which states clearly that no motion shall be moved except at the pre-hearing session except extreme circumstances with the leave of the Tribunal or court; that objections on point of law, as in the instant case, can only be entertained at the pre-hearing session not in the tribunal; that the determination of the objection by the court below while sitting as a tribunal was without jurisdiction and consequently null and void, relying on *Adesolu vs Abidoye* (1999) 12 SCNJ 61; *Okereke vs Yar'adua* (2008) 4-5 S.C (pt.1) 206 at 228 - 230; *Hope Democratic Party vs INEC* (2009) 3-4 S.C 106; that paragraph 3(4) of the Practice Direction *supra* does not apply to the appellants in this case because they were still within time to file their

pre-hearing notice considering that the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their reply to the petition on 21<sup>st</sup> August, 2007, and urged the court to allow the appeal.

In the 1<sup>st</sup> and 2<sup>nd</sup> respondents' brief of argument filed on 14/1/08, Learned Senior Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted the following issues for the determination of the appeal:-

*"1. Whether the petition was defective and incompetent by reason of non-joinder necessary parties and vagueness and now compliance with the mandatory provisions of the Electoral Act, 2006 and the court and Tribunal Practice Direction, 2007 (Encompassing grounds 1 and 6).*

*2. Whether all the substantive issues raised in the petition were resolved in the Preliminary Objection of the 3<sup>rd</sup> - 41<sup>st</sup> Respondents (Encompassing grounds 2 and 3).*

*3. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as serving Governors are not in the class of the persons who ought to resign from office before contesting for office as president (Encompassing ground)*

*4. Whether the petition by virtue of section 37(1) of the Electoral Act, the death of anyone of the candidates ought to lead conclusively and irresistibly to the postponement of the election. (Encompassing ground 5)."*

It is very clear that the brief of argument of the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not contain any argument on appellants' issue 8 which was formulated from ground VII of the Amended grounds of appeal earlier referred to in this judgment. The ground in question complain as follows:-

*"(vii) The Court of Appeal erred in law and acted without jurisdiction by hearing and delivering a ruling on the Respondents' Preliminary Objection dated 2<sup>nd</sup> August 2007 prior to any pre-hearing session as stipulated by the paragraph 6(1) of the Electoral (sic) Tribunal and Court Practice Directions 2007 (NO. 1).*

**PARTICULARS:-**

*i. Paragraph 6(9) of the Practice Directions provide thus "No motion shall be moved. All motions shall come up at the pre-hearing session except in extreme circumstances with leave of the tribunal or court.*

*ii. Paragraph 3 of the Practice Direction makes provisions for the pre-hearing session and scheduling under which the petitioner*

*has 7 days after the filing and service of the petitioner's Reply on the Respondent, or 7 days after the filing and service of the Respondents' reply whichever is the case, within which to apply for the issuance of the pre-hearing notice.*

*In the instant case the 1<sup>st</sup> and 2 Respondents only filed their*  
 B *Reply to the petition on 21<sup>st</sup> August 2007 and without giving room*  
*for the statutory period for the issuance of pre-hearing Notice as re-*  
*quired, the Court of Appeal on the 22 August 2009 peremptorily*  
 C *proceeded to hear the Preliminary Objection filed by the 3rd - 41st*  
*Respondents and thereafter delivered the ruling 3<sup>d</sup> September 2007*  
 D *which rendered the decision a nullity since the proceedings including*  
*the Preliminary Objection and Ruling thereon were made wit requi-*  
 E *site jurisdiction."*

Once again, appellants' issue 8 is as follows:-

D *"viii. Whether having regard to the provisions of paragraph*  
*6(1) of the Electoral (sic) Tribunal and Court Practice Amendment*  
*Directions 2007 (NO.1) and paragraph 49(2) of the first schedule to*  
*the Electoral Act 2006; the hearing and determination of the Prelimi-*  
 E *nary Objection by the Court of Appeal was not without jurisdiction."*

E ***It is clear from the issues formulated and argued by***  
***Learned Senior Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents in their***  
***brief of argument do not include argument on appellants' said***  
***issue No. 8.***

F ***It is settled law that where an opponent fails or neglects***  
***to counter any argument or issue validly raised in the brief of***  
***argument or during oral presentation, the issue not so con-***  
***tested is deemed conceded by the defaulting opponent. I there-***  
 G ***fore, in the circumstance, hold that the 1<sup>st</sup> and 2<sup>nd</sup> respon-***  
***dents, by not reacting to the issue in question, have conceded***  
***the issue as formulated and argued by the learned counsel for***  
***the appellants.***

In the brief of argument for the 3rd - 41st respondent pre-  
 pared by learned senior counsel for the 3rd - 41st respondents,  
 H KANU AGABI, ESQ SAN, the issues formulated for determination  
 are five. These are as follows:-

*"I. Whether the lower court was right to hold that having not*  
*met the requirement of paragraph 4(1) (d) of the First Schedule to*  
*the Electoral Act, 2006, the petition was fundamentally defective*

and incompetent (From Ground 1 of the Notice of Appeal).

2. Whether by considering and resolving the issues raised in the 3<sup>rd</sup> to 41<sup>st</sup> Respondents' Preliminary Objection, the Lower Court could be said to have delved into the substantive case and breached the petitioners' right to fair hearing (Grounds 2 and 3).

3. Whether the Lower Court was right in holding that the 1<sup>st</sup> B and 2<sup>nd</sup> Respondents as serving Governors were not in the class or persons who ought to resign from office before contesting for the office of President as provided for in section 137(1) (g) of the Constitution. (Distilled from Ground 4 of the Notice of Appeal).

4. Whether the Lower Court was right in holding that section C 37(1) of the Electoral Act which deals with the effect of the death of one of the candidates in an election did not avail the petitioners, (Distilled from Ground 5 of the Notice of Appeal).

5. Whether the Lower was right in holding that the petition- D ers' failure to join the persons and/or electoral officers who allegedly perpetrated corrupt practices and electoral irregularities was fatal to the petition. (Distilled from Ground 6 of the Notice of Appeal). "

It is clear that learned senior counsel for the 3<sup>rd</sup> -41<sup>st</sup> respondents, like his brother silk did not consider appellants' issue No. 8 E supra. It follows therefore that the principle of law earlier stated as being applicable to the situation and circumstance of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, applies with equal force to the 3<sup>rd</sup> - 41<sup>st</sup> respondents.

However, the above position notwithstanding, is learned counsel F for the appellants right in his submission on the issue in question?

**Paragraph 6(1) of the Election Tribunal and Court Practice Directions, 2007 provides as follows:-**

**"6.(1) No motion shall be moved. All motions shall come up at the pre-hearing session except in extreme circumstances G with leave of the tribunal or court".**

The above provision clearly states that all motions shall be heard at the pre-hearing session except by leave of court or Tribunal where there exists extreme circumstances. Though the term extreme circumstance is not defined, I take same to mean very special or special H circumstances.

What then are the businesses to be transacted by the tribunal or court at the pre-hearing session? The answer can be found in subparagraph 3 of paragraph 6 of the Practice Direction supra which

provides thus:-

*“3. Pre-hearing session and scheduling:*

*(i) Within 7 days after the filing and service of the petitioner’s Reply on the respondent, or 7 days after the filing and service of the respondent’s Reply, whichever is the case, the petitioner shall apply*  
 B *for the issuance of pre-hearing as in Form TF007.*

*2. Upon application by a petitioner under paragraph (1) above, the tribunal or court shall issue to the parties or their legal practitioners (if any) a pre-hearing conference notice as in Form TF*  
 C *007 accompanied by a pre-hearing information sheet as in Form TF 008 for the purposes set out hereunder:*

*(a) Disposal of all matters which can be dealt with on interlocutory application;*

*(b) Giving such directions as to the future course of the petition as appear ..... adopted to secure it just, expeditious and economical disposal in view of the urgency of election petition;*

*(c) Giving direction on order of witnesses to be called and such documents to be tendered by each party to prove their cases having in view the need to expeditious disposal of the petition;*

E *(d) Fixing clear dates for hearing of the petition.*

*3. The respondent may bring the application in accordance with sub-paragraph (1) above where the petitioner fails to do so, or by motion which shall be served on the petitioner and returnable in*  
 F *3 clear days, apply for an order to dismiss the petition.*

*4. Where the petitioner and the respondent fail to bring an application under this paragraph, the tribunal or court shall dismiss the petition as abandoned petition and no application for extension of time to take that step shall be filed or entertained.”*

G ***In paragraph 3(7) of the Practice Direction, supra, the tribunal or court is enjoined, at the pre-hearing session, to take appropriate action in respect of the following as may be necessary or desirable,***

H *“(a) \_\_\_\_\_*

*(b) \_\_\_\_\_*

*(c) \_\_\_\_\_*

***(d) hearing and determination on objections on point of law.”***

***From the totality of the above provisions of the Practice***

***Direction, it is very clear that an election tribunal or court can only hear motions and/or objections on point of law at the pre-hearing session not when it sits as a tribunal or court to hear or try election petitions.*** In the instant case, it is not disputed that what was heard and determined by the lower court was a preliminary objection on points of law raised against the election petition of the appellants and that the Lower Court did not hear and determine same at a pre-hearing session as provided in the Practice Direction but at the hearing/trial of the petition. ***It is settled law that where a statute lays down a procedure for doing anything no other method is to be employed in doing the thing. In other words, "where a statute or legislation provides for a particular method of performing a duty regulated by the statute that method and no other must have to be adopted."*** "See C.C.B. Plc vs A-G Anambra State *supra*.

***In the instant case, the Practice Direction provides clearly that motions and/or objections on points of law can only be taken and determined by the tribunal or court at its pre-hearing session, which was not done in this case.***

***In the case of Okereke vs Yar'adua (2008) 4-5 S.C (pt.1) 206 this Court considered the provisions of paragraph 6(1) of the Practice Direction *supra* and came to the conclusion that any motion or preliminary objection raised in an election petition not taken and determined at the pre-hearing session is done or taken without jurisdiction and consequently null and void, as the same would have been done without fulfilling the condition precedent to the exercise of its jurisdiction.*** It is settled law that no matter how well conducted, where a court is without jurisdiction to hear and determine a matter, the proceedings so conducted are a nullity.

***It is therefore clear that the proceedings of the lower court leading to the ruling of that court delivered on the 3<sup>rd</sup> day of September, 2007, subject of the instant appeal, is a nullity and the same was conducted without jurisdiction and is consequently set aside.***

Since the appellants were still within time to take steps to initiate the pre-hearing session, the proper thing to do in the circumstance is to remit the matter to the Lower Court to be dealt with in

accordance with in provisions of the Practice Direction, Rules of court and substantive law applicable thereto by another panel to be constituted by the appropriate authority, for whatever it is worth.

This is clearly not the case in which the powers of this Court under section 22 of the Supreme Court Act can be invoked to deal with the matter despite the fact that the appellants are running against time.

Having found that the lower court was without jurisdiction when it heard and determined the preliminary objection filed by the 3<sup>rd</sup> - 7 41<sup>st</sup> respondents, it becomes unnecessary to consider the rest of the issues that have to do with the merit of the ruling already set aside.

The said issues are therefore discountenanced by me.

In conclusion, the appeal is allowed for being meritorious. The ruling of the lower court delivered on the 3<sup>rd</sup> day of September, 2007 is hereby set aside for being null and void, the same having been rendered without jurisdiction. The matter is consequently remitted to the lower court to be dealt with according to law by another panel to be constituted by the President of the Court of Appeal.

There shall be costs of N50,000.00 in favour of the appellants against each set of the respondents.

Appeal allowed.

F

### **MOHAMMED JSC**

I have had the privilege before today of reading in draft the judgment of my learned brother Onnoghen, JSC which has just been delivered. I am completely with him in the manner he considered and resolved the main issue of jurisdiction for determination in this appeal. The law is indeed trite that a Court is only competent to exercise jurisdiction in respect of any matter where-

1. It is properly constituted as regards numbers and qualification of the members and no member is disqualified for one reason or the other.

2. The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the Court from exercising



ing its jurisdiction.

3. The case comes by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction. See Madukolu & Ors. v. Nkemdilim 7 Ors. (1962) 2 S.C.N.L.R. 341.

Taking into consideration the circumstances under which the Appellants/Petitioners petition was struck out by the Court below on a Preliminary Objection contrary to the requirements of the law, the Court below was deprived of jurisdiction to entertain and determine the Preliminary Objection thereby making the determination a complete nullity. I therefore allow the appeal and abide by the orders in the leading judgment including the order on costs.

### OGBUAGU JSC

This is an appeal against the RULING of the Court of Appeal, sitting at Abuja as the Presidential Election Tribunal as a court of first instance (hereinafter called “the Tribunal”) delivered on 3<sup>rd</sup> September, 2007 sustaining the Preliminary Objection raised by the 3<sup>rd</sup> and 41<sup>st</sup> Respondents and consequently, struck out the Petition of the Appellants.

Dissatisfied with the said Ruling, the Appellants initially, filed six (6) Grounds of Appeal. They later filed an Amended Notice of Appeal with the leave of this Court granted on the same 26<sup>th</sup> October, 2009. The Appellants formulated Eight (8) issues for determination. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ learned Counsel -Chief Olanipekun, (SAN) in consequence, filed a Notice of Preliminary Objection praying for an Order striking out some of the said issues for determination “*same not been (sic) Bom (sic) out from of (sic) the grounds of Appeal*”.

The thrust of the Objection is that there are more issues formulated for determination than the number of the said grounds of Appeal. That this amounts to proliferation of issues which is not allowed by this Court. I agree. This fact of proliferation of issues, has been deprecated by the two Appellate Courts in a number of decided authorities. See the cases of Agu v. Ikewibe (1991) 3 NWLR (Pt.130) 385 @ 401; (1991) 4 SCNJ. 56; Ayisa v. Akanji & 5 ors. (1995) 7 SCNJ. 245; Adelusola & 4 ors. v. Akinola & 3 ors. (2004) 12 NWLR (pt.887) 295 @ 311; (2004)5 SCNJ. 235 and ACB PLC

v. Odulawe (2005) All FWLR (pt.276) @ 804. It can only be in special cases where the grounds so dictate. See the case of Gwan v. Adole (2003) FWLR (Pt.176) 747 @ 760.

I note however, that in paragraph 2.2 of the Appellants' Reply Brief to the above Objection, dated 6<sup>th</sup> November, 2009 but deemed  
B filed on the same 26<sup>th</sup> October, 2009, it is submitted that;

*“issues 3 and 8 fall within the scope of ground VII of the Amended Notice of Appeal filed on the 26<sup>th</sup> October, 2009. In the circumstances, the preliminary objection is no longer tenable”.*

On 21<sup>st</sup> January, 2010 when this appeal came up for hearing,  
C the leading learned counsel for the parties, adopted their respective Brief and while that for the Appellants, urged the Court to allow the appeal, those for the Respondents, urged the Court to dismiss the appeal. Thereafter, Judgment was reserved till today.

I hold that with the said submission of the learned counsel  
D for the Appellants in the said Reply Brief, it is a concession to the said Objection. But since the prayer of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, is for an Order striking out some of the said issues, and my learned brother, Onnoghen, JSC in his lead Judgment just read and which I had the  
E privilege of reading before now and I agree with, has also sustained the Objection and has proceeded to strike out issue No. 3 as being incompetent, I too, will deal with issue No. Viii which touches on jurisdiction which is very fundamental, and if it succeeds, it will surely be  
F an end to the instant appeal. As firmly settled, where issue of a court's jurisdiction is raised in any proceedings and at any stage, it must be taken first, immediately, promptly or expeditiously. See the cases of First City Merchant Bank Ltd. & 4 ors. v. Abiola & Sons Bottling Co. Ltd. (1991) 1 NWLR (Pt.165) 14 @ 27 C.A.; Nalsa & Team Associates v. NNPC (1996) 3 NWLR (Pt.439) 621 @ 633; (1996) 3 SCNJ. 50, 61; Chief Ukwu & 3 ors. v. Chief Bunge (1997) 8 NWLR (Pt.678) 527 @ 541, 542, 544; (1997)7 SCNJ. 262 @ 273; Galadima v. Alhaji Tambai & 11 ors, (2000) 6 SCNJ. 190 @ 200, 203; Jerric Nig. Ltd. v. Union Bank of Nig. PLC (2000) 12 SCNJ. 184 @193 and  
H two many others. This is because, a court has jurisdiction to decide whether or not, it has jurisdiction. See also the case of Shitta-Bey v. Attorney-General of the Federation & anor. (1998) 10 NWLR (Pt. 392); (1998) 7 SCNJ. 264. In fact, in the Case of Alhaji Maleri & 6 ors. v. Ahmadu Dangaladima & anor. (1993) 2 SCNJ. 122 @ 130,

this Court -per Karibi-Whyte, JSC, stated inter alia:

*“It is of the utmost important in the administration of justice that where jurisdiction of the court is raised and is an issue, to dispose of that issue. Jurisdiction is a radical and fundamental prerequisite for adjudication. See Adeigbe v. Kushinmo (1965)1 ANLR 248. If the court is shown to have no jurisdiction the proceedings however well conducted are a nullity. See Madukolu v. Nkemdilim (1962)1 ANLR 587”.*

Now, the subject-matter that led to the said Ruling of the Tribunal, was/is predicated on a Notice of Preliminary Objection filed by the 3<sup>rd</sup> – 41<sup>st</sup> Respondents contending among other things, that the Petition is incompetent. I note that the objection, was after the said Respondents, had joined issues in their Reply to the Petition. Not that it is of any moment. The Tribunal, in spite of the mandatory provisions of paragraphs 3(2), 3(7) and especially paragraph 6(1) of the Election Tribunal & Court Practice Directions 2007, proceeded to hear the matter on 22<sup>nd</sup> August, 2007 and it delivered its said Ruling that is the subject-matter of this appeal, on 3<sup>rd</sup> September, 2007.

For the avoidance of doubt, I will reproduce hereunder, the provisions of the said paragraph 6(1). It reads as follows:

*“No motion shall be moved. All motions shall come up at the pre-hearing session except in extreme circumstances with the leave of Tribunal or Court”.*  
[the underlining mine]

Again, for purposes of emphasis, paragraph 3(2) ibid provides as follows:

*“Disposal of all matters which can be dealt with on interlocutory application, is at the pre-hearing session”.*

While paragraph 3(7) is to the effect,

*“at the pre-hearing session, the Tribunal shall consider and take appropriate action in respect of the following as may be necessary or desirable.*

*a, b & c ( are not applicable); but (d) hearing and determination of objections on point of law”.*

These provisions, are clear and unambiguous.

I will pause here to stress that Practice Directions, have been pronounced by the two Appellate Courts to have force of law and

that parties, must adhere strictly to them. See the cases of Abubakar v. INEC (2004) 11 WRN 147 @ 161-162 C.A.; Owuru v. Awuse (2004) All FWLR 1425 @ 1439 and Buhari v. INEC (2008) 4 NWLR (Pt.1078) 546.

Of course and without any doubt Whatsoever, I completely agree with the submissions of the Appellants in their paragraphs 10.6 and 10.7 of their Brief that firstly, the determination by the Tribunal sitting as a Tribunal, instead of the pre-trial session, is without jurisdiction and therefore, null and void. I will add that it is without any effect whatsoever. Secondly, as I stated earlier in this Judgment, being a jurisdictional question or issue, it could or can be raised at any stage of the proceedings including on appeal. At page 21 paragraph 10.7 of the Appellant's Brief, the case of Amadi v. NNPC (2006) SCNJ. at Page 11 (sic) is cited (i.e. the month is not stated) (it is reported as Captain Amadi v. NNPC (2000) 6 SCNJ.) 1.

Thirdly, that once an act, is without jurisdiction as in the instant case, the proceedings and the decision therein, are void, no matter how well conducted. The case of Adesolu v Alhaji Abidoye & anor. (1999) 12 SCNJ. 61 @ 79 is not quite correctly cited (it is also reported in (1999) 10 - 12 S.C. 109). This position of the law, is not only trite, but it is also well settled. In other words, there is no doubt that a judgment or order by a court without jurisdiction, is a nullity. See also the cases of Timitimi v. Anabebe 14 WACA 374; Adefulu v. Chief Okulaja & 7 ors. (1998) 5 NWLR (Pt.550) 435; (1998) 4 SCNJ. 139 and of course, Madukolu & ors. v. Nkemdilim (1962) 1 All NLR 587; (1962) 2 SCNLR 341; and Ishola v. Ajiboye (1994) 6 NWLR (Pt.352) 506 just to mention but a few.

Very interestingly, it appears "muted" that a judgment being a Nullity, need not to be appealed against. In the English case of Marsh v. Marsh (1945) A. C. 271 @ 284, the Privy Council observed as follows:

*"..... If an order is void, the party whom it purports to effect can ignore it, and he who has obtained it will proceed thereon at his peril".*

Lord Denning (of blessed memory) in the case of Macfoy v. U.A.C. Ltd (1961) 3 WLR 1405 (P.C.) @ 1409 stated inter alia, as follows:

*".....If an act is void, then it is in law a nullity. It is not only*

*bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.* B  
*[the underlining mine]*

In his own dissenting judgment Bello, CJN (of blessed memory) in the case of Rossek. & 2 ors. v. ACB Ltd. & 2 ors. (1993) 8 NWLR (Pt.312) 382 @ 471-472; (1993) 10 SCNJ. 20 @ 82 stated inter C alia, as follows:

*“It has never been the law of Nigeria as some of our judges like judicial robots, have been parroting the dicta of Lord Denning in Macfoy v. U.A.C that there is no need for an order of a court which is void to be set aside by a court and thereby implying that all and D sundry have the right to disobey the order. It is not the law of England: Isaacs v. Robertson. It has never been the law that a party may review a judgment, regard it a nullity and disobey it. A prisoner who thinks that His conviction was a nullity cannot with impunity E walk out of prison. Similarly a judgment debtor cannot lawfully resist execution because he considers the judgment against him was null and void. Thus a judgment of a court of law remains valid and effective unless it is set aside by an appeal court or by the lower court itself if it acted without jurisdiction or in the absence of an aggrieved party”.* F

His Lordship referred to other decided authorities. This pronouncement which of course is the law in this country, gives support to the present appeal which I too, hold is meritorious in view of the fact that the Practice Direction which has the force of law, makes it mandatory, that motions and/or objections on points of law, can only G be taken and determined by the Tribunal or court in or at its pre-trial or pre-hearing session which is a condition precedent. This provision with respect, was breached by the Tribunal. For its effect or consequence, See also the cases of Adesolu v. Abidoye (supra); Chief H Okereke v. Alhaji M.S. Yar’Adua & 34 ors. (2008) 4 S.C. (Pt.1) 206 @ 228 - 229 - per Muhammad, JSC and @ pages 238 - 240 - per H Onnoghen, JSC, and Hope Democratic Party (HDP) v. INEC & 4 ors. (2009) 3-4 SCNJ. 106; (it is also reported in (2009) 3 SCNJ. 45) and (2009) 8 NWLR (Pt. 1143) 297) all referred to and relied

on by the Appellants in their Brief except the complete citations of the said cases as supplied by me.

Before concluding this Judgment, I will touch even briefly, on the issue or principle in respect of the laid down procedure in a statute or rules of court which was also briefly discussed in Chief  
 B Okereke's v. Yar'Adua & ors. case (supra) @ page 238- per Onnoghen, JSC. It is now firmly established that where a statute lays down a procedure for doing a thing, there should be no other method of doing it. See the cases of CCB PLC v. The Attorney-General of  
 C Anambra State (1992)10 SCNJ. 37 at 163; Buhari v. Yusuf (2003) 6 S.C. (pt.II) 156 (2003) 4 NWLR (Pt.841) 446 @ 492. In the case of Mr. Adesola v. Alhaji Abidoye & anor. (supra), Iguh JSC @ page 96 stated that, where a special statutory provision is laid down, that procedure, ought to be followed and complied with unless it is such that  
 D may be waived.

In the instant case leading to this appeal, the necessary procedure to be adopted in case of a motion or objection on a point(s) of law, appears to be specifically laid down in paragraphs 3(2)(a), 3(7) and 6(1) and (4) of the Election Tribunal and Court Practice  
 E Directions, 2007. Regrettably, unfortunately or deliberately, the Tribunal with respect, ignored or discountenanced the said procedures. I will refrain from speculating anything.

It is from the foregoing and the fuller lead Judgment of my learned brother, Onnoghen, JSC, that I too, allow the appeal which  
 F is meritorious. I too, hereby set aside the said Ruling and also remit the case or Petition to the Court of Appeal for re-hearing on its merits by another Panel to be constituted by the President of that court.

Costs follow the event. I accordingly award N50,000.00 (Fifty  
 G thousand Naira) against each set of the Respondents - i.e. (1<sup>st</sup> and 2<sup>nd</sup> Respondents and 3<sup>rd</sup> to 41<sup>st</sup> Respondents respectively) payable by each of them to the Appellants.

H

### **TABAI JSC**

I have read before now the lead judgment of my learned brother ONNOGHEN JSC and I entirely agree with the reasoning and conclusion that the appeal be allowed and is accordingly allowed. I also adopt the order on costs as assessed in the lead judgment.

**MUNTAKA-COOMASSIE JSC**

I was opportuned to read in draft the excellent judgment of my learned brother, Walter Onnoghen, JSC just delivered, I am in entire agreement with his Lordship's reasons and conclusion, in allowing the appeal. I wish however, to add by way of emphasis my little analysis of the appeal itself. The appellants filed this petition before the lower tribunal challenging the election of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as the President and Vice-President of the Federal Republic of Nigeria respectively in an election held on the 21<sup>st</sup> day of April, 2007 on the following grounds:-

(i) That the Presidential election held on 21<sup>st</sup> April, 2007 was invalid by reason of corrupt practices and non-compliance with the provisions of the Electoral Act, 2006.

(ii) That the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not duly elected by majority of lawful votes cast at the election.

(iii) That the 1<sup>st</sup> and 2<sup>nd</sup> respondents as serving Governors of Katsina State and Bayelsa State respectively were not qualified to contest the election.

In paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of the petition the appellants stated the facts, which they based on the grounds for the petition.

The 1<sup>st</sup> and 2<sup>nd</sup> respondent filed their reply to the petition, so also were the 3<sup>rd</sup>- 41<sup>st</sup> respondents. Both sets of the two respondents also filed preliminary objections of the petition and prayed the lower tribunal based its application on the following grounds:-

1. The petition is incompetent and fails to meet the mandatory requirements of paragraphs 4(1) (a) (d).

2. Paragraphs 8, 10(1) 11-12 of the petition are vague without sufficient and material particulars to sustain the allegations.

3. The petitioners failed to join the persons and for electoral officers who allegedly perpetrated corrupt practices and electoral irregularities in the thirty Six States of the Federation and the Federal Capital Territory as well as constituents, Local Government areas, the words and the Polling Units of the failure of which is fatal quite apart from the fact that particulars of the corrupt practices and irregularities are not stated.

4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are not in the category of per-

sons who ought to resign from the office before contesting the election as alleged or canvassed by the petitioner.

5. Nothing in the law justifies the assumption that the death of a candidate must lead irresistibly and conclusively to the postponement or cancellation of the election.

B 6. The petition is an abuse of the process of the court and is instituted in bad faith, while the 1<sup>st</sup> and 2<sup>nd</sup> respondents based their objection on the following grounds:-

C 1. The court lacks jurisdiction to entertain the petition as constituted in that the mandatory provisions of the Electoral Act were not observed.

D 2. Failure to join the electoral officers and or persons alleged to have perpetrated corrupt practices and electoral irregularities in all the 36 States of the Federation and the Federal and the Federal Capital Territory, Abuja.

3. The petition was filed in gross abuse of the process of the court.

E 4. The paragraphs of the petition are Vague, general in terms, at large and lack particulars to sustain them and this makes the petition to be vexation and discloses no reasonable cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

F Both parties were heard on the preliminary objection and on the 3<sup>rd</sup> of September, 2007 the lower tribunal delivered its ruling in which it struck out the petition. However, on whether the petition was competent for failure to comply with the mandatory provisions of paragraphs 4(1) (a) (d) 4 (2) and 4(4) of the first schedule of the Electoral Act, 2006 the lower tribunal disagreed with the respondents and held that the petition was competent. In its words the lower G tribunal held as follows:-

H *"It is very clear on the face of the petition that the petitioners in no uncertain terms specify the parties interested in this election petition and this is specifically stated in paragraph 1,2,3,4 and 5 of the petition, accordingly the content one of the 3<sup>rd</sup> - 4<sup>1st</sup> respondents that the petitioner did not comply with the provisions of paragraph 4(1) (a) of the first schedule of the Electoral Act, 2006 is misconceived and untenable. Equally it is glaring on the face of the entire petition that the petitioners have strictly complied with the provisions of paragraph 4(2) of the first schedule of the Electoral Act,*



2006 in that the petition is divided into paragraphs. Further the contention of the respondent/applicants that the petitioner did not comply with paragraph 4(4) of the first schedule of the Electoral Act, 2006 cannot be sustained. It is crystal clear that at page 10 of the petition, the petitioners have stated the addresses documents intended for the petitioners may be left. At the foot of the election petition filed by the petitioners read thus:-

No.1 Nnabuike J. Edechime, Esq.,  
Veritas Chambers,  
Petitioners Counsel,  
51A Ikorodu Road,  
Fadays House,  
c/o No. 7A Danuba Street,  
Maitama, Abuja.

From the foregoing there is no iota of doubt that the petitioners have complied with the provisions of paragraphs 4(1) (a), 4(2) and 4(4). Accordingly, issue No.1 is partly resolved in favour of the petitioners against the 3<sup>rd</sup> and 41<sup>st</sup> respondents ..... ”

Nonetheless the lower tribunal struck out the petition on the grounds that:-

1. 1<sup>st</sup> and 2<sup>nd</sup> respondents are not in the class of persons ought to resign before contesting for the offices of President and Vice President respectively.

2. The petition is bad for vagueness;

3. The death of the Alliance for Democracy Presidential candidate did not affect the appellants, and

4. By not joining the necessary parties.

The appellants were dissatisfied with the above ruling and have appealed to this court. In accordance with Rules of the Supreme Court, both parties filed and exchanged their respectively briefs for argument. From the 6 grounds of appeal contained in the Notice of Appeal, the appellants formulated eight issues for determination as follows:-

#### ISSUES FOR DETERMINATION

“i. Whether the appellants’ petition was incompetent, defective and not initiated by due process of the law.

ii. Whether there is non-compliance by the appellants as petitioners with the mandatory provisions of paragraph 4(1) (d) of the

*first schedule to the Electoral Act 2006 and section 144(2) of the Electoral Act 2006 in the contents of the petition and the documents annexed.*

B *iii. Whether it was not too late for the Court of Appeal to entertain the preliminary objection dated 2<sup>nd</sup> August, 2007 after all the respondents have joined issues with the petitioners by filling their respective replies prior to the hearing of the preliminary objection.*

C *iv. Whether it is proper for the Court of Appeal to resolve and decide on all the substantive issues in the petition in the Course of ruling on the 3<sup>d</sup> to 41<sup>st</sup> respondent preliminary objection.*

*v. Whether the petitioners were not denied their constitutional right to fair hearing having regard to all the circumstances of this case.*

D *vi. Whether the provision of section 37(1) of the Electoral Act 2006 does not make it mandatory for the presidential election held on 21<sup>st</sup>, 2007 to be countermanded or postponed following the death of a nominated presidential candidate after the time for the delivery of nomination paper and before the commencement of the poll.*

E *vii. Whether the provision of section 137 (g) is not applicable to 1<sup>st</sup> and 2<sup>nd</sup> respondents as serving State Governors at the date of the presidential election held on 21<sup>st</sup> April, 2007.*

F *viii. Whether having regard to the provisions of paragraph 6(i) of the Electoral Tribunal and Court Practice Amendment Directors 2007 (No.1) and paragraph 49(2) of the first schedule to the Electoral Act 2006, the hearing and determination of the preliminary objection by the Court of Appeal was not without Jurisdiction."*

G Whilst the and 2<sup>nd</sup> respondents distilled four issues for determination as follows:-

#### ISSUES FOR DETERMINATION:

H *"1. Whether the petition was defective and incompetent by reason of non-joinder of necessary parties and vagueness and non-compliance with the mandatory provisions of the Electoral Act, 2006 and the court and tribunal Practice Direction 2007.*

*2. Whether all the substantive issues raised in the petition were resolved in the preliminary objection of the 3<sup>d</sup>-41<sup>st</sup> respondents.*

*3. Whether 1<sup>st</sup> and 2<sup>nd</sup> respondents as serving Governors are not in the class of the persons who ought to resign from office before*

*contesting for office as President.*

4. *Whether the petition by virtue of section 37(1) of the Electoral Act, the death of any one of the candidates ought to lead conclusively and irresistibly to the postponement of the election. ”*

The third to forty first (3<sup>rd</sup> - 41<sup>st</sup>) respondents formulated five (5) issues consideration of the appeal thus:-

#### ISSUES FOR DETERMINATION:

“1. *Whether the lower court was right to hold that having not met the requirement of paragraph (4) (1) (d) of the First Schedule to the Electoral Act, 2006, the petition was fundamentally defective and incompetent.*

2. *Whether by considering and resolving the issues raised in the 3<sup>rd</sup> to 41<sup>st</sup> respondents preliminary objection, the lower court could be said to have delved into the substantive case and breached the petitioners' right to fair hearing.*

3. *Whether the lower court was right in holding that 1<sup>st</sup> and 2<sup>nd</sup> respondents as serving Governors were not in the class of persons who ought to resign from office before contesting for the office of President as provided for in section 137 (1) (g) of the constitution.*

4. *Whether the lower court was right in holding that Section 37(1) of the Electoral Act which deals with the effect of the death of one of the candidates in an election did not avail the petitioners.*

5. *Whether the lower court was right in holding that the petitioners' failure to join the persons and/or Electoral officers who allegedly perpetrated corrupt practices and electoral irregularities was fatal to the petition. ”*

The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a notice of preliminary objection to this appeal and prayed this court to strike out same of the issue of determination, same not born out of the grounds of appeal. The appellants singled out issues 3 and 8 of the appellant's issue for determination and submitted that they were not predicated on any of the grounds of appeal, and submitted that they were by reason this failure in competent. The case of Mark v. Eke (2004) 5 NWLR (pt. 865) 54 at 812 where the supreme court per Musdapher, JSC stated:- It is the law that neither a party nor a court is permitted to argue or deal with an issue not related to any ground of appeal. He relied on Oniah v. Onyia (1989) 1 NWLR (Pt. 99) 514; and Nwosu v. Udejaja (1990) 1 NWLR (Pt.125) 188.

I have now gone through the Notice of Appeal filed and the grounds contained therein, I am unable to find any ground dealing with the issue questioning the time the lower tribunal heard the preliminary objection before it. Issues for determination must relate to the grounds of appeal before the court. Issues must fall within the scope or ambit of the grounds of appeal and any issue falling outside is competent. My Lords, issues for determination whether formulated by the appellants or the respondents must be tailored to the real issues in the grounds of appeal. See the following case of (a) Shittu v. Fashawe (2005) 14 NWLR (Pt. 946) 671 at 687; and (b) Mark v. Eke (supra). It is for the above reasons that I hold that issues for determination Nos. 3 and 5 formulated by the appellants are incompetent and are subsequently struck out.

At the hearing of the appeal, learned counsel for the appellants adopted his brief of argument and urged this court to allow the appeal. On the issues numbers 1 and 2 the learned counsel Edechime submitted that the petition fully satisfied the requirement of paragraph 4 (1) (d) of the First Schedule to the Electoral Act, 2006 to the effect that the petition states clearly the facts of the election petition and the grounds on which the petition is based and the reliefs sought. The petition, further submitted, is challenging the Presidential election held on the 21<sup>st</sup> April, 2007 on the grounds provided in section 145 of the Electoral Act, 2006.

It was his submission that the lower tribunal was wrong to hold that paragraphs 10(1), 11, and 22 of the petition are vague and consequently the entire petition is bad for vagueness without considering the other averment in the petition contained in paragraphs 6, 7, 8, 12, 13, 14, 16, 17, 18, 19, 20 and 21. That none of the averments in the petition is vague including paragraphs 10(1), 11 and 22. He submitted that the petition is challenging the election of the 1<sup>st</sup> and 2<sup>nd</sup> respondents under section 145(1) of the Electoral Act, 2006 and section 137 (1) of the 1999 constitution of the Federal Republic of Nigeria.

It was also his submission that the petition contains sufficient material facts which support corrupt practices enough to invalidate the election of the 1<sup>st</sup> and 2<sup>nd</sup> respondent. He referred to paragraphs 8, 10, 11, 12, 18, 21 and 22 of the petition and contended that all were proved at the trial. He then referred also to paragraph 5 of the

first schedule of the Electoral Act, 2006, and submitted that if the respondents are not clear about any paragraph they should have applied to the tribunal for the appellants to supply further particulars. Learned counsel in addition made reference to section 16, 20, 21 and 22 of the Electoral Act, 2006 and contended that they were contravened for non publication of voters register. He added also that the failure to administer oath of neutrality by the election officers on all staff appointed for the conduct of the election contrived section 29 of the Electoral Act, 2006. B

On issue No. 4 the learned counsel submitted that the provisions of paragraph 49 of the First Schedule to the Electoral Act, 2006 clearly established that the objection permitted to be taken is one in respect of a defect on the face of the election petition. On the face of the petition, there is no apparent defect that warrants the determination of the petition on the preliminary objection filed by the 3<sup>rd</sup> - 41<sup>st</sup> respondents. The issues involved in the preliminary objection should have been left in abeyance until the hearing commences. All those facts could then be revived along with the evidence to be prove whatever allegation. The tribunal with respect rushed things by considering the whole merit of this type of cases on preliminary objection that explains away why it was said that Electoral petitions or matters are sniggers. Their proceedings are slightly different from other normal proceedings. If one is not cautious the other parties may not be heard on the alter of unnecessary technicalities. See: Egolun v. Obasanjo (1999) 5 SC (Pt. 1) at 46 per Achike, JSC of blessed memory. C D E F

Learned counsel then submitted that in the face if the instant petition there is no apparent defect that warrants the determination of the petition on the preliminary objection filed by the 3<sup>rd</sup> - 41<sup>st</sup> respondents. Hence any defect that is not apparent on the face of the petition must wait to be addressed at the trial of the petition after issues have been joined by the parties and evidence has been taken. He cited the case of Ajudua v. Nwosu CA/PH/EPT/03. The learned counsel further contended in general all the allegations by both parties in petitions and the preliminary objections should have been deferred until the trial proper of the matter in order to avoid a situation where a party will not cry out that it has not been granted a fair hearing. In other words, all electoral matters should be heard in their G H

own merit. He relied on *Nwobodo v. Onoh* (1984) 1 SCNLR 1 at 92; and *Nwosu v. Imo State Environment Sanitation Authority* (1990) All NLR 379 at 398.

B On the issue No. 5 learned counsel submitted that the lower tribunal had denied the appellants the right of fair hearing deciding the substantive issues in the interlocutory proceeding without bearing the appellants and their witnesses. Learned counsel relied on: *Alsthom v. Saraki* (2005) 1 SC (Pt. 1) 1 at 14-15; *Salhu v. Egeibon* (1994) 6 NWLR (Pt. 348) 23; *Otapo v. Samonu* (1987) NWLR (pt.58) 587 at 605.

C On issue No. 6 the learned counsel submitted that the statutory provisions of section 37(1) of the Electoral Act, 2006 read together with section 132 (2) of the 1999 Constitution made it mandatory for the Electoral Body to countermand or postpone the Presidential poll of 21/4/07 upon the death of the Alliance for Democracy Presidential Candidate.

E On the issue No. 7 the learned counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are public officers within the preview of the provision of section 137(1) of the 1999 Constitution and thus not eligible to participate in the presidential election held on 21/4/07 except they first resign as the Governors of Katsina and Bayelsa States respectively. He cited in support the following cases, *Okomu Oli Palm Co. Ltd. v. Serhienrhin* (2001) 3 SC 140/152.

F Learned counsel to the 1<sup>st</sup> and 2<sup>nd</sup> respondents adopted his brief of argument at the hearing and urged this court to dismiss the appeal.

G On issue No. 1 in his brief, learned counsel submitted that the petition is incompetent as it failed to comply with paragraph 4(1) (d) of the First Schedule of the Electoral Act 2006, which is mandatory. He continued and submitted that the petition failed to state clearly the facts of the election petition and the ground or grounds on which a petition is based and the reliefs sought by the petitioners.

H It was the counsel's submission that the petition does not contain material facts which support corrupt practices enough to invalidate the election of the 1<sup>st</sup> and 2<sup>nd</sup> respectively. He submitted that the averments in paragraph 10(1), 11 and 22 of the petition are not only general in terms, they are Vague and this makes it impossible for the court to determine the real issues in controversy between the

parties.

On Section 144(2) of the Electoral Act, 2006 learned Senior Advocate submitted that on section 144(2) of the Electoral Act, 2006 learned counsel submitted that the appellants only joined Resident Electoral Commissions for the 36 States and the Federal Capital Territory. For the provisions of section 144(2) of the Electoral Act 2006 to avail the appellants, it has to be expressly pleaded in the petition that all the official like Electoral Officers, returning officers, presiding officers poll clerks that took part in the conduct of the election an agents of Independent National Electoral Commission, this the appellants failed to do; and as a result they have a burden to join these officials in their official capacities. The case of Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) 1 at 313 - 314 was cited. Learned counsel therefore submitted that failure to plead material facts or supply particulars to specifically support the allegation is fatal to the petition.

On the issue No. 2, learned counsel submitted that the preliminary objection filed by the 3<sup>rd</sup> - 41<sup>st</sup> respondents hinged on the jurisdiction of the court to entertain the petition. It was the submission of the learned counsel and paragraph 49(2) of the First Schedule to the Electoral Act 2006 is not relevant to this petition and does not in any way support the position of the appellants. The lower court was therefore right in deciding the issues of the qualification of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to contest the Presidential election held on the 21/4/2007 at the resolution of the preliminary objection. The lower court was also right in deciding the issue of the failure to subject the Independent National Electoral Commission Electoral Officers to Oath taking. The learned counsel therefore submitted that the appellants were not denied their constitutional right to fair hearing because they were given the opportunity to respond and they did reply to the notice of preliminary objection.

On the issue No. 3 learned counsel submitted that it is not mandatory for the 3<sup>rd</sup> respondent to countermand or postpone the election upon the death of the Presidential candidate of the Alliance for Democracy, particularly when the appellants were not members of the Alliance for democracy. Learned counsel submits that there is a conflict between the provisions of section 37 (1) of the Electoral Act, 2006 and section 1 (3) of the 1999 Constitution of Nigeria, section 37(1) of the Electoral Act, 2006 is void for being inconsistent

with the provisions of section 13(2) of the 1999 Constitution.

Finally, learned counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are not public officers within the pur-view of the provisions of section 137(1) of the 1999 Constitution and they were thus qualified to contest in the Presidential election held on 21/4/2007 without first  
B resigning as the Governors of Katsina and Bayelsa States respectively.

Learned counsel to the 3<sup>rd</sup> to 41<sup>st</sup> respondents also adopted his brief of arguments and urged this court to dismiss this appeal.

On issue No. 1, learned counsel submitted that the findings of  
C the lower tribunal that the averment in the petition are perverse cannot be faulted as they are Vague without any particular reference to any State, Local government or wards where the election was conducted. Allegations in the petition were not substantial and no particulars were given to sustain the allegations in the case of KANURI V.  
D DALORI (1986) 6 NWLR (pt. 536), 149. The pleadings did not meet the degree of clarity required by paragraph 4(1) (d) of the First Schedule to the Electoral Act, 2006.

On the 2<sup>nd</sup> issue, learned counsel submitted that although the law is clear that the court should not delve into the substantive  
E matter while dealing with interlocutory application but if there is no case then there is nothing to delve into. In the instant case, it was contended that there was no petition before the court, and the lower court was right in examining the petition, since the points raised are  
F points of law that could be determined in limine. The following cases were cited in support: - Elabanjo v. Daudu (2006)15 NWLR (Pt. 1001) 76 at 139; Martins v. A-G Federation (1992)1 SCNLR 209. Hence the determination of whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents were  
G qualified on the ground of non-resigning as the Governor of Katsina and Bayelsa States respectively, the issue of their not being elected by majority lawful votes and the non-joinder of necessary parties could be determined on the basis of the preliminary objection. It was the submission of the learned counsel that the factual bases for the remedies sought were non existent; hence the issue of fair hearing  
H did not arise and could not have arisen. It is not a requirement of fair hearing that every case must proceed to full trial even when the case is not properly constituted with respect to the condition precedent, proper parties and valid factual basis; the case of Ntuka v. NPA (2007) 31 NSCLR 430 at 456 was cited.



On the 3<sup>rd</sup> issue, the learned counsel submitted that section 137(1)(8) of the constitution did not apply to the 1<sup>st</sup> and 2<sup>nd</sup> respondents as they were not public officers as envisaged by the section.

On the 4<sup>th</sup> issue, learned counsel agreed with the submissions of the learned counsel to the effects of section 37(1) of the 1999 Constitution on the death of Presidential candidate of the Alliance for Democracy. B

On issue No. 5, learned counsel submits that if the petition is vague as contended it is not surprising that the persons or electoral-officers who were alleged to have perpetrated irregularities were not joined it is therefore reasonable that they did not exist. C

My Lords, as earlier pointed out in this judgment, the lower tribunal had held that the petition satisfied the provisions of paragraphs 4(1) (a) 4 (2) of the First Schedule of the Electoral Act, 2006, hence on the face of it the petition is competent except that, as held D by the lower tribunal that the averments contained in the grounds are vague. Paragraphs 4(1) (d) of the First Schedule to the Electoral Act, 2006, provides as follows:-

*"4(1) An election petition under this Act shall:- —————*

*(d) State clearly the facts of the election petition and the ground E or grounds on which the petition is based and the relief sought by the petitioner."*

In the petition at hand, the appellants pleaded as follows:-

(a) GROUNDS OF PETITION

*"(i) That the presidential election held on 21<sup>st</sup> of April, 2007 F was invalid by reason of corrupt practices and non-compliance with the provisions of the electoral act, 2007*

*(ii) That the 1<sup>st</sup> and 2 respondents were not dully elected by majority of lawful votes cast at the election. G*

*(iii) That the 1<sup>st</sup> and 2<sup>nd</sup> respondents as saving Governors of Katsina and Bayelsa States respectively were not qualified to contest the election."*

In support of paragraphs a (i) and (ii) above your petitioners aver as follows:- H

"10(1) The presidential election was marred by several mal-practices and irregularities including but not limited to deliberate refusal to supply election materials to many states in the country, diversions of election materials, illegal possession of ballot boxes by

unauthorised individuals and groups, stuffing of ballot boxes, multiple voting, widespread violence, absence of valid voters registers, all culminating in declaration of arbitrary cum imaginary scores and results in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

12. Your petitioners aver that the 3<sup>rd</sup> to 41<sup>st</sup> respondents in flagrant disregard and deliberate refusal to comply with the Electoral Act, 2006 proceeded to hold the disputed election despite the death of a presidential candidate, Chief Adebayo Adefarati, the then Presidential candidate of a registered political party, the Alliance for Democracy on Thursday, March 20, 2007 in violation of section 37 of the Electoral Act, 2006. The petitioners contend that it was prejudicial to their campaign programme and strategy as they had believed that the 3<sup>rd</sup> respondent would in compliance with the Electoral Act, 2006 postpone the election.

13. In support of paragraph 9(11), the petitioners aver that the 1<sup>st</sup> and 2<sup>nd</sup> respondents being serving Governors who never resigned their appointments prior to the election, and who are not seeking re-election as Governors were not qualified to contest the Presidential election by virtue of their employment as public officers.

14. .... 15. .... 16. .... 17. .... 18. ....

19. The 3<sup>rd</sup> respondent failed, neglected or omitted to subject the Electoral Officers who participated in the conduct of the election to an oath or affirmation of loyalty to the Federal Republic of Nigeria and neutrality in the conduct of the election in negation of the provisions of Section 29 of the Electoral Act, 2006, Your petitioners plead that this failure, neglect or omission robbed all the officers who participated in the conduct of the election of the fundamental competence to participate in the conduct of the election. As a result, the petitioners plead that the election is null and void.

20. .... 21. .... 22. .... 23. ....

24. WHEREFORE Your petitioners pray for the following reliefs:-

*“(i) An ORDER of the court that the presidential election held on April, 21<sup>st</sup>, 2007 is invalid for reasons of non-compliance with the substantial of section of the Electoral Act, 2006.*

*(ii) An ORDER of the court that the presidential election held on April, 21, 2007 is in valid for reasons of corrupt practices.*

*(iv) AN ORDER, that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the court*

*were not duly elected by majority of lawful votes, cast at the election qualified to contest.*

*(v) AN ORDER of the court that the Presidential election 2007 may be declared invalid."*

The lower tribunal had held that these averments are vague and are in violation of the provisions of paragraph 4 (a) (d) of the First Schedule to the Electoral Act, 2006. Relying on the case of KANURI V. DALORU supra at page 149; already quoted.

With due respect to their Lordships of the lower tribunal, it is my view that the appellants have stated the grounds of the petition and the reliefs claimed in compliance with the provisions of paragraph 4(1)(d) of the First Schedule to the Electoral Act, 2006. If the respondents complained of vagueness, the Electoral Act, 2006 made provisions for a party to request for more particulars. Paragraphs 17 of the First Schedule to the Electoral Act, 2006, provides as follows:- D

*"17 (1) If a party in an election petition wishes to have further particulars or other direction of the tribunal or court, he may, at any-time after entry appearance, but not later than ten days after the filing of the reply apply to the tribunal or court specifying in his notice of motion the direction for which he prays and the motion shall, unless the tribunal of court otherwise orders to be set down for hearing on the available day.*

*(2) if a party does not apply as provided in paragraph (1) of this paragraph, he shall be taken to require no further particulars or other direction and the party shall be barred from so applying after the period laid down in paragraph (1) of this paragraph has lapsed.*

*(3) Supply of further particulars under this paragraph shall not entitle the party to go beyond the ambit of supplying such further particulars as have been demanded by the other party and embark on undue amendment of, or addition to his petition or reply contrary to paragraph 14 of the schedule."*

(Italics mine for emphasis)

It is clear from the above provisions that a person who claims that an averment in the petition is vague or general in terms is entitled to file an application for further particulars or direction of the court. By this procedure a party who complains of vagueness may request the petitioners to furnish further particulars as to his allegations contained in the grounds of the petition to enable him adequately

reply them on each allegation. This application could be made either immediately the party complaining files its memorandum of appearance or ten days after filing its reply to the petition. The legal consequence of failing to file an application for further particulars or the direction of the court, where a complaint of vagueness or general  
 B averment is made is that the party complaining is deemed to have understood the grounds of the petitioners complaints, and is barred from so applying after the expiration of the time fixed by the provisions of paragraph 17(10) of the First Schedule to the Electoral Act,  
 C 2006.

In the instant case, the respondents did not avail themselves of the provisions of the rule and I have no hesitation in holding that they were barred from complaining as to the vagueness or otherwise of the averments contained in the petition.

D No doubt the rules of court are meant to be obeyed. A party who fails to comply with the provisions of the rules that will enhance the timeous disposition of the election petition cannot be heard to complain of an imaginary defect, when the rules of court have been provided so that such alleged defect can be cured. The cases of Kanuri  
 E v. Dalori (supra); Saidu v. Abdullahi (1989) 4 NWLR (pt. 116) 387 at 442 cited by the respondents were not based on the provisions of the Electoral Act, 2006, and thus are not relevant to this case.

The respondents heavily relied on the provisions of order 25  
 F of the Federal High Court Rules 2000 and the decision in the cases of Arobu v. Ayeleru (1993) 3 NWLR (pt. 280) 126; and Emechi v. Orakwe (2005) 1 NWLR (Pt 961) 342 at 352 and submitted that the pleadings did not meet the degree of clarity required by paragraph 4 (1) (d) of the First Schedule to Electoral Act 2006. With respect my  
 G Lords, I am of the opinion that the provisions of the Federal High Court Rules would only apply where Electoral Act 2006 fails to make provisions in its rules or is silent thereof regarding a given situation. Paragraph 50 of the First Schedule to the Electoral Act, 2006 provides thus:-

H *"50. Subject to the express provisions of this Act, the practice and procedure of the tribunal or the court in relation to an election petition shall be as possible, similar to the practice and procedure of the Federal High Court in the exercise of its civil jurisdiction and the Civil Procedure Rules shall apply with such modification as may be*

*necessary to render them applicable having regard to the provisions of this Act as if the petitioner and the respondent were respectively the plaintiff and the defendant in an ordinary civil action.*”

From the above, it is crystal clear that the provisions of the Federal High Court Rules are subject to the provisions of the First Schedule of the Electoral Act, 2006, and if there is any conflict between them the provisions of the Rules under the Electoral Act, 2006 prevails. It is where there is a lacuna in the provision of the Rules provides in the Electoral Act, 2006 that the provisions of the Federal High Court Rules will apply. I wish to refer to the provisions of paragraph 5 of the First Schedule to the Electoral Act, 2006, that completely put this issue of vagueness to rest.

Paragraph 5 provides as follows:-

*“5 Evidence need not to be stated in the election petition, but the tribunal or court may order such further particulars as may be necessary.*

*(a) To prevent surprise and unnecessary expense*

*(b) To ensure fair and proper hearing in this same way as in civil action in the Federal High Court; and*

*(c) Or such terms as to costs or otherwise as maybe ordered by the tribunal or court.”*

While paragraph 5 of the First Schedule to the Electoral Act spells out the power of the tribunal or court to order further particulars. Paragraph 17 of the same provided for the procedure for applying for further particulars or the direction of the court. For the above reasons I hold that the instant petition is competent as it satisfied the provisions of paragraph 4(1) (d) of the First Schedule to the Electoral Act, 2006. I hereby respectfully resolve this issue in favour of the appellants herein.

Now turning to the issue of non-joinder. 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that the appellants only joined the Resident Electoral Commissioners for the 36 States and the Federal Capital Territory and these are the only officials they averred in paragraph 5 of the petition. It was the learned counsel submission that the proviso to section 144(2) of the Electoral Act, 2006 could only be involved if it is expressly pleaded in the petition. That all the officials like Electoral Officers, returning officers, presiding officers, poll clerks that took part in the conduct of the election are agents of Independent National

Electoral Commission in the conduct of the election. The appellants having failed to expressly plead that the official names in the petition, the case of Buhari vs. Obasanjo (2005) 13 NWLR (Pt. 941) 1 at 313-314. In this judgment, I have earlier set out the findings of the lower tribunal as to the parties interested in the petition. The lower tribunal  
B has earlier found as follows:-

*“It is very clear on the face of petition that the petitioners in no uncertain terms specify the parties interested in election petition and this specifically stated in paragraphs 1, 2, 3, 4 and 5 of the petition...”*

C The body responsible for the conduct of the election i.e. Independent National Electoral Commissioner is the 3<sup>rd</sup> respondent, while in paragraph 5 of the petition the appellants pleaded that all the 6 to 41<sup>st</sup> respondents are agents of the 3<sup>rd</sup> respondent as follows:-

D *“5. The 6<sup>th</sup> to 41<sup>st</sup> respondents are the officials and agents of the 3<sup>rd</sup> respondents directly responsible for the conduct of the afore-said presidential election in the various thirty six states of the Federal Republic of Nigeria and the Federal Capital Territory Abuja.”*

Hence, it is not correct, as submitted by the learned counsel to the 1<sup>st</sup> and 2<sup>nd</sup> respondents that only the Resident Electoral Com-  
E missioners in the 36 States and the Federal Capital Territory were joined as parties, more so there was also express pleading to the effect that they are agents to Independent Electoral Commission. Section 144(2) of the Electoral Act, 2006 makes provisions for whom  
F may be parties to all election petition as follows:-

G *“147 (2). The person whose election is complained of is in this Act referred to as the respondent, but if the petitioner complains of the conduct of an Electoral Officer, presiding officer, a returning officer, or any other person who took part in the conduct of an elec-  
tion, such officer or person shall for the purpose of this Act be deemed to be a respondent and shall be joined in the election petition in his or her official status as a necessary party ..... PROVIDED where such officer or person is shown to have acted as an aspect of the commis-  
H sion, his non-joinder will not on its own operate to void the petition if the commission is made a party.”*

This provision was lacking in the Electoral Act, 2002. I have no doubt in my mind that it was made to cure the difficulty petitioners may encounter in joining polling agents returning officers, presid- ing officers, and electoral officers, if an election of the magnitude in

nature of the presidential election is being challenged. Not only the Presidential election, also the Governorship, National Assembly, States Assembly and even the Local Government election. It is a provision made to hasten the hearing and determination of election petition provided the commission (INEC), is made a party to the petition and it is shown that the conduct of the officials being challenged are agents of the commission put in another way was non-joinder of a party who has been shown to be an agent of the commission will not void an election petition provided the commission is made a party to the petition. Unless the conduct of a party who is not an agent of the Commission is in question, it will then be necessary to join such party as a necessary party to the petition in order to afford such party a fair hearing. However, where such party is not made a party it will not result into the whole petition being struck out, but the particular allegation against such party is liable to be struck out. It is therefore necessary that the complaints of a petition must be examined before a decision is taken whether the appropriate official who took part in the conduct of an election and whose conduct is subject of complaint in the petition was joined.

In the instant case, where the appellants complained of malpractice in the conduct of the election the details of the person responsible could only come in the evidence presented at the trial. I have no iota of doubt that the parties joined by the appellants were adequate as far as the appellant's complaints of malpractices are concerned. See: *Buhari v. Obasanjo* (supra), at page 313-314. In the case at hand, the petition did not go to trial, no evidence was taken to enable the appellants give the details of the persons who alleged committed the malpractices, I therefore, with respect, resolve this issue in favour of the appellants.

My Lord, the only issue left to be thrashed out and determined is whether the lower tribunal was right in deciding the issue of electoral malpractices and irregularities, non-qualification of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to participate in the election, and the allegations of non-compliance with Section 28, 37 (1) of the Electoral Act, 2006 at the interlocutory state as done in this case. I have earlier held in this judgments that the averments contained in the petition were not bad for vagueness as held by the trial court. They prima facie raise allegations that required ventilation by the trial tribunal by way

of hearing the appellants at the trial.

*This court has warned, in plethora of its decisions that it is not proper for a court to comment or decide the substantive matters in an interlocutory proceedings. In the case of OKOTIE-BOH v. EBIOWO Manager (2004) 12 SCNJ 139 at 152; this court per,*  
 B *EDOZIE, JSC held as follows:-*

*“The preliminary objection was taken on 27<sup>th</sup> January, 2003 and in the course of arguments of learned counsel a wide range of issues was canvassed which misled the learned trial Judge in having unknowingly to make remarks which appears to have prejudged the merit of the main suit. This is contrary to the principle that in a ruling on an interlocutory application, the court should avoid making any observation that might appear to prejudge the main issue in contention between the parties. See Sylvanus Mortune v. Alhaji Mohammed*  
 C *Gambo (1983) 4 NCLR 237 at 242. In an interlocutory matter parties must not only shy away from the merit of the matter but must completely refrain there from. Ojukwu v. Government of Lagos State (1986) 3 NWLR (Pt. 26) 39. See also Bank Ireland v. UBA Ltd. (1998) 7 SCNJ 385; and Oduka v. S.C Sheep Horiman Grachi (1997) 5*  
 D *SCNJ 216.”*

A close reading of the grounds contained in the respondent's notice of preliminary objection at the trial discloses that it touches on all the issue contained in the substantive matter that ought to be heard on merit. This led the lower tribunal to un-wittingly fall to the error of pronouncing on all the issues that ought to be heard on merit. I will therefore restrain my self by not making any comment on these issues so that I will not fall into the same error committed by the lower tribunal. The decisions of the lower tribunal cannot stand.  
 F  
 G The lower court cannot be saddled with jurisdiction when they decided all the issues contained in the main and substantive matters in deciding a preliminary objection. The issue of the preliminary objection should not have been disposed off by deciding the substantive issues at that stage. With respect, they did that wittingly or un-wittingly in a rush manner.  
 H

Finally, for this and the fuller and more elaborate reasons adumbrated in the lead judgment of my learned brother, Walter Onnoghen, JSC that I also agree that the appeal is pregnant with merit same is therefore allowed by me. The ruling of the lower tribu-



nal delivered on 3/9/2007 is glaringly null and void and I so declare. The whole matter is remitted back to the lower court to be tried a fresh according to our law by another panel to be constitutes immediately by the president of that court. I endorse the order as to costs.

B

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### **ADEKEYE JSC**

I was privileged to read before now, the judgment just delivered by my learned brother, W.S.N. Onnoghen, JSC. On the 22<sup>nd</sup> of August 2007, a preliminary objection was moved at the hearing of the Presidential Election Petition before the Presidential Election Tribunal. At that stage of hearing of the petition, the respondents, Alhaji Umaru Musa Yar'dua and 40 ors had joined issues with the petitioners, Dr. Arthur Agwuncha Nwankwo and two others. After hearing the argument and submission of the parties, the Presidential Tribunal ruled that the Preliminary Objection to the petition on the ground of incompetence raised by the 3<sup>rd</sup>- 41<sup>st</sup> respondents was sustained. If was established that the petition was not initiated by due process of law. The mandatory procedural requirement stipulated In paragraph 4 (1) (d) of the first schedule to the Electoral Act 2006, and Section 144 (2) of the said Act were not followed. The petition filed on 18/5/2007 was consequently struck out. Being aggrieved by the decision of the Lower Tribunal - the appellants came to this court on appeal against the Ruling. In the Notice of Appeal filed on 21/9/07, the appellants raised six grounds of appeal out of which eight issues were distilled for determination as follows:-

(1) Whether the petition was incompetent, defective and not initiated by due process of law.

(2) Whether there is non-compliance by the petitioners with the mandatory provisions of paragraph 4 (1) (d) of the First Schedule to the Electoral Act 2006 and Section 144 (2) of the Electoral Act 2006 in the contents of the petition and the documents annexed thereto.

(3) Whether it was not too late for the Court of Appeal to entertain the Preliminary Objection dated 2<sup>nd</sup> August 2007 after all the respondents have joined issues with the petitioners by filing their respective Replies prior to the hearing of the Preliminary Objection.

(4) Whether it is proper for the Court of Appeal to resolve and decide on all the substantive issues in the petition in the course of Ruling on the 3<sup>rd</sup> to 41 Respondents' Preliminary Objection.

(5) Whether the petitioners were not denied their Constitutional right to fair hearing having regard to all the circumstances of the case.

(6) Whether the provisions of section 37 (1) of the Electoral Act 2006 does not make it mandatory for the Presidential election held on 21<sup>st</sup> April 2007 to be countermanded or postponed following the death of a nominated candidate after the delivery of nomination paper and before the commencement of the poll.

(7) Whether the provision of S. 137 (v) (g) is not applicable to 1<sup>st</sup> and 2<sup>nd</sup> respondents as serving State Governors at the date of the Presidential election held on 21<sup>st</sup> April 2007.

(8) Whether having regard to the provision of paragraph 6 (1) of the Electoral Tribunal and Court Practice Amendment Directions 2007 (No.1) and paragraph 49 (2) of the 1<sup>st</sup> Schedule to the Electoral Act 2006, the hearing and the determination of the preliminary objection by the Court of Appeal were not without jurisdiction.

I wish to say a few words in respect of issue eight. It is however worthy of note that the appellants in their notice of appeal raised only seven grounds of appeal - but surprisingly settled eight issues for determination out of them. It is trite law that issues for determination must flow from the grounds of appeal. An appellant is therefore not permitted to raise issues in excess of his grounds of appeal. Having one issue more than the seven grounds of appeal is totally not in line with the contemplation of the law relating to formulation of issues for determination in an appeal. It amounts to proliferation of issues which is not acceptable. The multiplicity of issues more than the grounds of appeal are discountenanced.

Unilorin v. Oluwadare (2003) 3 NWLR pg. 808 pg. 557.

Padawa v. Yatau (2003) 5 NWLR pt. 813 pg. 247.

Sogbesan v. Ogunbiyi (2006) 4 NWLR pt. 969 pg. 19

Issue Eight

*"Whether having regard to the provisions of paragraph 6 (1) of the Electoral Tribunal and Court Practice Amendment Direction 2007 (No.1) and paragraphs 49 (2) of the First schedule to the Electoral Act 2006, the hearing and determination of the Preliminary*

*Objection by the Court of Appeal was not without jurisdiction.*”

The Electoral Act 2006 and Court Practice Amendment Direction 2007 cover all election Petitions which challenge the validity of elections into the Office of President and Vice President of the Federal Republic of Nigeria. By virtue of Section 239 of the 1999 Constitution, the Court of Appeal has the original jurisdiction to hear and determine any question as to whether any person have been validly elected to the Office of President or Vice President under the Constitution. B

The Rules of procedure for the election petitions are as stipulated by law as follows: - C

Section 151 of the Electoral Act 2006 which says that: -

*“The Rules of procedure to be adopted for election petitions and appeals arising therefrom shall be those set out in the first Schedule to this Act.”* D

Under the First Schedule paragraphs 49 (2), (3) and (5) state that:- Paragraph 49 (2)

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

Paragraph 49 (3)

An application to set aside an election petition or a proceeding pertaining thereto shall show clearly the legal grounds on which the application is based. F

Paragraph 49 (5)

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

Paragraphs 51

Subject to the provisions of this Act, an appeal to the Court of Appeal or to the Supreme Court shall be determined in accordance with the practice and procedure relating to appeals in the Court of Appeal or of the Supreme Court as the case may be, regard being had to the need and urgency on electoral matters. H

The President of the Court of Appeal clothed with powers

under the Constitution and the Electoral Act, 2006 promulgated the Election Tribunal & Court Practice Directions 2007. While the First Schedule to the Electoral Act 2006 sets out rules of procedure regarding the practice and Procedure in Election Tribunals, what the practice direction does is to guide and regulate compliance with and the observance of the said rule governing the practice and procedure in Election Tribunals by setting out how and when things are to be done. This helps to avoid absurdity in the application of the Rules. The practice Directions, as rules of court promulgated for the purpose of making the Rules more efficacious, must be complied with and should not at anytime be circumvented. No favour should be shown for non-compliance with the Practice Direction.

Ladipo v. Oduyoye (2004) 1 FPR pg. 705.

Ojugbele v. Lamidi (1999) 10 NWLR pt. 621 pg. 162 at 177.

Paragraph 3 of the Election Tribunal and Court Practice Directions 2007 is all about what should be done at the pre-hearing session of the petition.

As regards motions and applications Paragraph 6(1) states that-

*"No motion shall be moved. All motions shall come up at the pre-hearing session except in extreme circumstances with leave of Tribunal or Court."*

The foregoing is surely a mandatory provision because the operative word there is "shall". The word shall when used in a statutory provision imports that a thing must be done. It is a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.

Bamaiyi v. A-G Federation (2001) 12 NWLR pt. 722 pg. 468.

Ifezue v. Mbadugha (1984) 1 SCNLR pg. 427.

Chukwuka v. Ezulike (1986) 5 NWLR pt. 45 pg. 892

Ngige v. Obi (2006) 14 NWLR pt. 991 pg. 1.

It is also the cardinal principle of Interpretation of Statutes that where the words used in the provisions of a statute are clear, simple and unambiguous, they should be given their simple, natural and ordinary meaning.

Salami v. Chairman L.E.D.B. (1989) 5 NWLR pt. 183 pg. 539.

Ogbonna v. A-G Imo State (1992) 1 NWLR pt. 220 pg. 447.

Awolowo v. Shagari (1979) 6-9 SC pg. 51.

Aqua Ltd. v. Ondo State Sports Council (1988) 4 NWLR pt. 91 pg. 622. Alamieyesegha v. FRN (2006) 16 NWLR pt. 1004 pg. 1.

NNPC v. Lutin Investment Ltd. (2006) 2 NWLR pt. 965 pg. 506. B

Exception to the practice Direction that motions shall be heard at the pre-hearing session is in extreme circumstance. The application before the court is surely not one of the situations envisaged.

In the like manner paragraph 3 (2) directs that-

*“Disposal of all matters which can be dealt with on interlocutory application, is at the pre-hearing session. Again paragraph 3 (7) is to the effect that at the pre-hearing stage, the tribunal shall consider and take appropriate action in respect of the following as may be necessary or desirable particularly under paragraph 3 (7) (d) - D hearing and determination of objections on point of law.”* C

The decision now on appeal is not only interlocutory but also on point of law, hence it offends against paragraph 6 (1) of the Election Tribunal & Court Practice Directions 2007. The tribunal can only dispose of it at its pre-hearing sessions. Non-compliance with the Practice Direction is fundamental as it vitiates all steps taken at the trial resulting in nullity. Where any proceedings are begun other than as provided by the rules, such proceedings are incompetent. In the instance of this case, failure to comply with the provisions of paragraph 6(1) of the Election Tribunal and Court Practice Directions 2007 invalidates the steps taken by the Presidential Election Tribunal in the hearing of the application and its decision in the Ruling delivered on 3/9/07. E F

A court is only competent to exercise jurisdiction in respect of any matter where – G

(a) It is properly constituted as regards numbers and qualification of the members of the bench and no member is disqualified for one reason or the other.

(b) the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the Court from exercising its jurisdiction and H

(c) The case comes by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

A-G Anambra State v. A-G Federation (1993) 6 NWLR pt. 302 pg. 692.

Madukolu v. Nkemdilim (1962) 2 SC NWR pg. 341.

The Ruling delivered by the Presidential Election Tribunal on 3/9/01 is hereby declared null and void and consequently set aside.

- B The appeal is allowed. Since the court cannot invoke Section 22 of the Supreme Court Act to hear the petition as if it were the Presidential Election Tribunal, the petition is ordered to be remitted for re-trial before another differently constituted Panel of Presidential Election Tribunal of the Court of Appeal.
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