

**SUPREME COURT OF NIGERIA**  
21ST MAY, 2010 SC. 13 5/2009  
**CORAM:- D. MUSDAPHER, W. S. N. ONNOGHEN,**  
**F. F. TABAI, I. T. MUHAMMAD, J. A. FABIYI, JJSC**

CHIEF IMEH ALBERT AKPAN ..... APPELLANT  
AND  
1. SENATOR EFFIONG BOB  
2. OTU ITA TOYO  
3. INDEPENDENT NATIONAL  
ELECTORAL COMMISSION (INEC) ..... RESPONDENTS  
4. PROF. MAURICE IWU  
5. PEOPLES DEMOCRATIC PARTY

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WORDS & PHRASES - Appeals - Grounds - Meaning - It is an error of law or facts - Alleged by appellant - As the defect in the judgment appealed against - Which he relies upon to set it aside (H1)

APPEALS - Grounds - Text of judgment - Whether sole source - It is not the sole source - As a ground of appeal may also arise - From extrinsic factors like jurisdiction - Or some omission or commission by the court (H2)

APPEALS - Grounds - Failure to consider pending motion - Validity as a ground - It is a valid ground of appeal - As a court is bound to dispense every such motion - Before taking a final decision in a matter (H3)

APPEALS - Pending motions - Failure to notify court of - Effect - Where parties fail to notify court of a motion - And court fails to pronounce thereon - They cannot complain about the non-pronouncement on appeal (H4)

APPEALS - Issues - Competence - Effect of incompetent grounds - Any issue distilled from an incompetent ground - Is as well incompetent - And liable to be struck out (H5)

APPEALS - Briefs - Joint argument on issues - Severability - A court is at liberty to sever such argument - If doing so will meet the ends of justice (H6)

APPEALS - Issues - Striking out - Issue 2 of 1st respondent at lower court - Whether struck out - It is clear that issue 2 and arguments in support thereof - Was not struck out by the court - As contended by appellant herein (H7)

APPEALS - Issues - Issue on substitution of candidate - Whether canvassed at trial - Contrary to contention of appellant herein - The issue was canvassed and decided on at trial (H8)

APPEALS - Issues - Validity - Issue on substitution of candidate - Validity at lower court - It was valid as it was raised - Upon appropriate leave having been sought and obtained - By 5th respondent (H9)

ELECTIONS - Nomination - Issue before trial court - Whether merely on nomination - In view of the questions on which the court made pronouncements - The issue thereat transcends nomination - To issue of substitution (H10)

ACTIONS - Parties - Nonjoinder of PDP - Whether fatal - In view of the question for determination at trial court - The nonjoinder was not fatal - As it could be determined without joining PDP (H11)

### **FACTS**

The appellant and the 2nd respondent, as 1st and 2nd plaintiffs, sued the 3rd respondent, the 4th respondent and 1st respondent as 1st, 2nd, and 3rd defendants respectively. The suit, which was by originating summons, was before the Federal High Court Abuja and the claim was for sundry reliefs by which plaintiffs contested the substitution of the name of 1st plaintiff with that of 1st respondent by the 3rd and 4th respondents, as the candidate of the peoples Democratic Party ("PDP") for Akwa Ibom North East Senatorial District in the 2007 general elections. Plaintiffs' case was that 1st plaintiff contested and won the party primaries conducted to select PDP's candidate for the seat. His name was accordingly submitted to 3rd respon-

dent by the state chapter of PDP, represented in this suit by its chairman, the 2nd plaintiff. 3rd respondent subsequently invited, screened and cleared 1st plaintiff, giving him all assurances that he was PDP's flag bearer for the elections. Yet 3rd respondent eventually published 1st respondent's name, instead of that of 1st plaintiff, as the party's flag bearer.

It was in evidence that after the clearance of 1st plaintiff by 3rd respondent, the National Executive of PDP had written to 3rd respondent substituting 1st respondent's name for that of 1st plaintiff as the party's flag bearer. Nevertheless, after hearing, the learned trial judge found in favour of plaintiffs and gave judgment as prayed. Aggrieved, 1st respondent appealed to Court of Appeal. 5th respondent also, with the necessary leave, cross-appealed to Court of Appeal, as a person interested, against the judgment of trial court. Court of Appeal allowed the appeal and the cross-appeal and set aside the judgment of trial court. In doing so, the court failed to take into account a notice of withdrawal of its cross-appeal filed earlier by the 5th respondent. Moreover, the court considered issue No. 2 of the 1st respondent notwithstanding that the issue was argued jointly with issue No. 3 which was struck out for being incompetent. Dissatisfied, appellant has brought this appeal against the judgment of Court of Appeal. 2nd respondent has also cross-appealed.

### **ISSUES FOR DETERMINATION**

#### **APPEAL:**

1. *“Whether it was proper for the Court of Appeal to have countenanced and considered “arguments” in support of issue No.2 as formulated by the main appellant when the said arguments had been struck out along with issue No.3 same having been argued together.*

2. *Having resolved issue No.1 in the main appeal before the Court of Appeal in favour of the 1<sup>st</sup> respondent and having struck out all arguments in support of issues Nos. 2 & 3, was the Court of Appeal right in not dismissing the main appellant's appeal.*

3. *Was it proper for the Court of Appeal to have entertained the 5<sup>th</sup> respondent's/cross appellant's issue No.1 when:*

- (a) *it did not arise from the decision of the trial court and*
- (b) *the decision of the trial court that none of the parties raised the issue of cogent and verifiable reason was not appealed against*

and

(c) *The 5<sup>th</sup> respondent/cross appellant never sought let alone obtained leave to raise a fresh issue on appeal.*

4. *What is the effect of the Notice of withdrawal of appeal filed by the 5<sup>th</sup> respondent/cross appellant on its appeal.*

B 5. *Was it proper for the Court of Appeal to have ignored the Notice of Withdrawal of appeal filed by the 5<sup>th</sup> respondent/cross appellant and proceed to enter judgment in favour of the 5<sup>th</sup> respondent .”*

C **CROSS APPEAL:**

1. *“Whether the learned justices of Court of Appeal were right when they held that the suit filed by the 1<sup>st</sup> respondent does not relate to the domestic affairs of a political party.*

D 2. *Whether the learned justices of the court of Appeal were right when they held that the Peoples Democratic Party was not a necessary party to the suit filed by the 1<sup>st</sup> respondent at the trial court and that the said suit can be effectually and completely determined without the presence of the Peoples Democratic Party.*

E **HELD** (Unanimously dismissing both the appeal and the cross-appeal per **MUHAMMAD JSC**)

***Appeals - Grounds - Meaning***

F 1. Authorities are agreed on the legal definition of a ground of appeal. It is said to be the error of law or facts alleged by an appellant as the defect in the judgment appealed against upon which reliance has been placed to set it aside. In other words, it is the reason(s) why the decision is considered wrong by the aggrieved party. (p. 1645 B)

G ***APPEALS - Grounds - Text of judgment - Whether sole source***

H 2. Although many authorities lay emphasis that a ground of appeal must stem from the text of the judgment (*ipsissima verba*), such decisions in my humble view, by no means limit the scope of a ground of appeal. And, from the general definitions, a ground of appeal, can arise in a number of situations such as the following.

a) from the text of the decision appealed against (*ipsissima verba*),

b) from the procedure under which the claim was initiated

c) from the procedure under which the decision was rendered

or

d) from other extrinsic factors such as issue of jurisdiction of a court from which the appeal emanates.

e) from commissions or omissions by the court from which an appeal emanates in either refusing to do what it ought to do or doing what it ought not to do or even in overdoing the act complained of. B (p. 1645 D)

***Failure to consider pending motion - Validity as a ground***

3. The complaint of the appellant before this court in the said grounds of appeal relates to the refusal of the court below to consider a Notice of withdrawal of appeal lodged before the court about three months before the judgment was delivered. These grounds of appeal, as aforementioned challenged the inaction or omission of the court below to consider a court process duly filed before it delivered its judgment. That, in my view, is a good and valid ground of appeal. D

The trite position of the law is that where there are pending processes before a court, such as motions or other applications, such issues have to be dispensed with before a final decision is taken on the main action or appeal. It would be wrong of a court, whose attention has been drawn to a pending process, such as Notice of withdrawal of appeal or motion on notice to proceed to treat the appeal to finality when such processes have not been pronounced upon by it. (p. 1646 D/H) E

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***Pending motions - Failure to notify court of - Effect***

4. It is clear from the above that none of the parties drew the attention of the court below to the pending Notice of withdrawal. Thus, the court below can hardly be blamed for proceeding to deliver judgment on the main appeal when its attention had never been drawn to any pending matter by it and it could not say anything on the pending Notice of withdrawal of the 5<sup>th</sup> respondent's cross-appeal as it had no knowledge of its pendency. So, since there was no pronouncement by the court below on the Notice of withdrawal of the 5<sup>th</sup> respondent's cross-appeal, the appellant could not have validly raised any ground of appeal on the Notice of withdrawal of the 5<sup>th</sup> respondent's cross-appeal. Accordingly, grounds 4, 6, 7, 8 and 9 of the appellant's Notice of appeal are incompetent and are hereby G H

struck out. (p. 1648 D/F)

***Issues - Competence - Effect of incompetent grounds***

5. 3<sup>rd</sup> and 4<sup>th</sup> respondent's objection is on appellant's issue 4, which according to the learned counsel for the appellant stemmed from grounds 4, 6 and 7. This issue cannot be said to be competent as the grounds upon which it has been premised have been found to be incompetent. The resultant position is as provided by the case law that any issue which is distilled from an incompetent ground of appeal is as well incompetent and subject to be struck out. I, accordingly, sustain the objection raised against issue 4 by the learned counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents. Issue 4 and all arguments in respect thereof are hereby struck out. (p. 1649 G)

***D Briefs - Joint argument on issues - Severability***

6. All the court below did was to discountenance all submissions in support of the issue struck out which was issue No. 3. And in a bid to clarify its order, now the court below went ahead to state categorically:

E *"I will limit myself to submissions in the appellant's brief that relate to issue 2."*

Thus, except where one wants to be unnecessarily pedantic or splitting the hair, which always works against the ethics of the law, one is bound to accept that there was only one issue No.2 which was never struck out by the court below. There must, therefore, be arguments/submissions in support thereof. I personally see nothing wrong for a court to sift out the chaffs from the grains if doing so will meet the ends of justice which is the cardinal objective of any court of law. Where an allegation of presenting a bad brief to a court of law by any of the parties is raised, the worst that can be done on that brief by that court is only to make its adverse comments thereon. It has no jurisdiction to regard such a brief as no brief at all. (p. 1656 C/G)

***H Issue 2 of 1st respondent at lower court - Whether struck out***

7. The Court of Appeal was right in not dismissing the main appellant's appeal as there was no fact upon which it would dismiss same. Throughout the judgment of the court below, there is no single statement or holding which categorically, clearly and unequivocally struck

out issue No.2 or any argument in respect thereof. All that was struck out by the court below was issue No.3 and arguments thereof.

It is misleading of the learned counsel for the appellant to have even tagged the heading of his issue No. 2 as he did. It is clear that issue No. 2 and arguments in support thereof had never been struck out by the court below. (p. 1659 F/1660A)

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***Issue on substitution of candidate - Whether canvassed at trial***

8. Can it seriously be contended, as did the learned counsel for the appellant, that issue 1, placed before the court below for determination by the 5<sup>th</sup> respondent/cross-appellant, did not arise from the decision of the trial court? I think the answer to this question is No, but let me go further to say that whatever has been placed before a trial court and which is transmitted to an appeal court for a decision, the appeal court will be rightly exercising its powers to give a holistic consideration thereof. Failure to do that will certainly be a failure in the discharge of its statutory responsibilities.

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Now, if one examines the appellant's claim as set out earlier, it is quite clear and easy for one to see that it was the appellant himself who ignited the discussion at the court of trial on the provisions of the Electoral Act. (pp. 1667 F/ 1670 B)

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***Issue on substitution of candidate - Validity at lower Court***

9. Ground one of the 5<sup>th</sup> respondent/cross-appellant got its legal backing through the leave granted to it by the court below. The court below observed that in the following words:

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*"It would appear that the requisite leave having been granted the 5<sup>th</sup> respondent then it is definitely not in the province of the 1<sup>st</sup> plaintiff now complain about the grounds."*

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Thus, both the 1<sup>st</sup> ground of the cross-appellant and issue one tied to it did not come through the back door. They enjoyed legal backing from the court below. Accordingly, the issue of cogency and verifiable reasons were validly appealed against by the 5<sup>th</sup> respondent/cross-appellant and that the issue stemming from it i.e. issue 1 as I observed earlier, cannot by any stretch of imagination, be said to be a fresh issue on appeal. Thus, issues 3 (b) and (c) fail and are resolved against the appellant. (p. 1673 B)

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***Issue before trial court - Whether merely on nomination***

10. The main questions upon which the trial court made pronouncement, to my understanding, are:

- i. Who amongst the 1<sup>st</sup> plaintiff and the 3<sup>rd</sup> defendant is the authentic candidate for the PDP?
- B ii. Is the 1<sup>st</sup> defendant empowered to effect any CHANGE so requested by the party?
- iii. Was the name of the 1<sup>st</sup> plaintiff properly submitted to the 1<sup>st</sup> defendant? The above questions were answered by the trial court in favour of the 1<sup>st</sup> plaintiff; having considered and relied on Exhs. C EDB and H. It is this decision which the court below did not agree with and set same aside. The issue thus, transcends beyond mere nomination and sponsorship, it purely rested on CHANGE OR SUBSTITUTION. (p. 1682 B)

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***Nonjoinder of PDP - Whether fatal***

11. I think I need not to add anything on what the court below said on this question, that:

- E *“The instant suit is primarily seeking for the determination of the question as to whether or not the 1<sup>st</sup> plaintiff has been properly substituted for the appellant as the candidate of the PDP for Akwa Ibom North East Senatorial District given the affidavit evidence of the parties before the lower court. There is nothing therein that could not be effectually and completely determined by the said court without the presence of the PDP. By the above finding, failure to join PDP at the trial court could not be fatal to the plaintiff’s case as all issues could effectually, completely and meaningfully be decided upon by the affidavit evidence made available by the parties to the court.*
- F
- G (p. 1683 D/H)

***NOTABLE POINT OF INTEREST***  
***MUHAMMAD JSC***

***1. Technical justice should be eschewed***

- H It is helpful to always remember that technical justice is no justice at all and a court of law should distance itself from it. Several decided authorities of this court have laid down that principle of the law. I will only cite one of the recent ones and that is the case of Famfa Oil Ltd. v. Attorney General of the Federation [2003] 18 NWLR [pt. 852]



453 where this court stated:

*“Courts of law should not be unduly tied down by technicalities, particularly where no miscarriage of justice would be occasioned. Justice can only be done in substance and not by impeding it with mere technical procedural irregularities that occasioned no miscarriage of justice. Thus, where the facts are glaringly clear, the courts should ignore mere technicalities in order to do substantial justice.”* (p. 1660 C)

### **REPRESENTATION**

Chief Wole Olanipekun, SAN with him; Dr. Onyechi Ikpeazu, SAN, Chief Emeka Ngige, SAN, Solomon E. Umoh, Olugbenga Adeyemi, Agu, Obed Okwukwe, David Okokon, Linda Ikpeazu, Emeka Okoli, Tobechukwu Nweke and Obiajulu Onyeka. C  
Assam E. Assam, SAN with him; Iniabasi Udobong Esq. I. J. S. Okutepa D Esq., Abba Yabidu, Esq., Patience Obim Esq., Godwin Ikoiwak Esq. for 1<sup>st</sup> respondent.  
Dr. Alex Izinyon, SAN with him; B. K. Abu, H. Abdurrahman (Mrs.), F. O. Izinyon, L. O. Fagbemi, F. E. Aghemien and E. Oghojafor Esq. for the 2<sup>nd</sup> respondent/cross appellant. E  
Adewole Adebayo, Francis Ogunsikpe, Chuka Ugwu, Akpanye Mercy for 3<sup>rd</sup> and 4<sup>th</sup> respondents.  
Chief Olusola Oke, with him; Mourice Ezike (Miss.), Uchenna Ezeta, Vivian Ogoke (Miss.) for the 5<sup>th</sup> respondent. F

### **CASES REFERRED TO**

Idika v. Erisi (1988) 2 NWLR (Pt.78) 503 at 578  
Bhojsons Plc v. Kaho (2006) 2 SCNJ 156 at 169  
Amadi v. Orisakwe (1997) 7 NWLR (Pt.511) 161 G  
Irolo v. Uka (2002) 14 NWLR (Pt.786) 195 at 225 D  
Finnih v. Umade (1992) 1 NWLR (Pt.219) 511 at 534B  
Akpan v. The State (1992) 6 NWLR (Pt.248) 439 at 471  
Olaleye v. The State (1991) 1 NWLR (Pt.170) 708 at 718  
Borishade v. NBN Ltd. (2007) NWLR (Pt.1015) 217 at 235 H  
Agbakoba v. INEC (2008) 8 NWLR (Pt. 1119) 489 at 553-D  
Ademola v. Sodipo (1992) 7 NWLR (Pt.253) 251 at 260 - 261  
Christaben Group Ltd. v. Oni (2008) 11 NWLR (Pt. 1097) 84 at 105  
Nwosu v. Imo Sanitation Authority (1990) 2 NWLR (Pt.135) 688 at

717

DPCC Ltd. V. BPC Ltd (2008) 4 NWLR (Pt.1077) 376 at 396 - 397;  
418 - 419

Maximum Insurance Co. Ltd. v. Owonoyi (1994) 3 NWLR (Pt.331)  
178 at 189

- <sup>B</sup> Federal Mortgage Bank of Nigeria v. Nigerian Deposit Insurance Corporation [1999] 2 SCNJ 57 at page 78

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

- <sup>C</sup> Constitution of the Federal Republic of Nigeria, 1979, s. 258  
Electoral Act, 2006, ss. 32 & 34  
Court of Appeal Act, Cap C. 36, LFN, 2004 as amended, s. 15  
Federal High Court Rules, 2000, O. 12 rr. 1, 3 & 5  
Constitution of the Federal Republic of Nigeria, 1999, ss. 221, 222 &  
<sup>D</sup> 233  
Court of Appeal Rules, 2002, O. 3 r. 23

### **LEAD JUDGMENT BY MUHAMMAD JSC**

- <sup>E</sup> The plaintiffs at the Federal High court, Abuja (trial court) took  
out an originating summons against the defendants. In the affidavit  
in support of the originating summons, the 1<sup>st</sup> plaintiff, who with the  
consent of the 2<sup>nd</sup> plaintiff, deposed to the fact contained in the affi-  
davit in support which furnishes a summary of the facts from their  
own side. He averred that he is a card-carrying member of the Peoples  
<sup>F</sup> Democratic Party (PDP) while the 2<sup>nd</sup> plaintiff is the Akwa Ibom State  
Chairman of the PDP. 1<sup>st</sup> plaintiff indicated his interest to contest the  
party's primary election into the Akwa Ibom North East District Sena-  
torial Seat as a candidate in the April, 2007 General Elections into  
<sup>G</sup> the National Assembly. In realization of that ambition, the 1st plain-  
tiff obtained and filled the relevant party's nomination forms and re-  
turned same. He was cleared to contest the said primaries which took  
place on or about 4<sup>th</sup> - 6<sup>th</sup> December, 2006 in compliance with PDP's  
Constitution.
- <sup>H</sup> 1<sup>st</sup> plaintiff averred further that he scored over 60% of the total  
votes cast and was duly returned as the winner and the party's can-  
didate in respect of the April, 2007 General Elections. PDP issued  
him with a Certificate of Return. PDP subsequently proceeded to  
forward 1<sup>st</sup> plaintiff's name to the 1<sup>st</sup> defendant. 1st plaintiff was in-

vited by the 1<sup>st</sup> defendant for verification and screening exercise at the instance of PDP. He was screened by the 1<sup>st</sup> defendant on 21<sup>st</sup> February, 2007 and that he was advised by the 1<sup>st</sup> defendant that his name had been included in the list of candidates for the National Assembly elections in April, 2007 General Elections, representing the PDP in Akwa Ibom North-East Constituency. 1<sup>st</sup> plaintiff averred severally that he was given all the assurances by the PDP's Akwa Ibom Chairman and PDP's National Chairman (Dr.) Ahmadu Ali that he was the unequivocal candidate of the PDP in the National Assembly Elections holding in April, 2007 in respect of Akwa Ibom North-East Constituency. B  
C

But to the surprise of the 1<sup>st</sup> plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> defendants unilaterally removed his name from the list of candidates for the National Assembly elections and in a strange manner replaced it with the name of the 3<sup>rd</sup> defendant. 1<sup>st</sup> plaintiff averred that the exclusion of his name from the INEC list of candidates for the April, 2007 elections is completely in bad faith and the 1<sup>st</sup> and 2<sup>nd</sup> defendants never wrote to him or the PDP to explain why his name was excluded from the list. This, principally, was what compelled the plaintiffs to take out the originating summons for the trial court to determine the following questions: D  
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1. *“Whether having regard to the clear provisions of Section 65 and 66 of the Constitution of the Federal Republic of Nigeria, 1999 the 1<sup>st</sup> plaintiff is qualified to contest election into the Senate of the Federal Republic of Nigeria.”* F

2. *Whether as a member of the Peoples Democratic Party and having contested the primaries of the said Party seeking nomination as the Party's candidate for the April, 2007 General Elections in respect of Akwa Ibom North East Senatorial District, and having polled over 60% of the total votes cast at the said primaries which led to his being declared as the winner of the said primary election and consequently issued with a Certificate of Return by the Peoples democratic Party directing the 1<sup>st</sup> and 2<sup>nd</sup> defendants to list the 1<sup>st</sup> plaintiff as its candidate for the National Assembly Elections in respect of Akwa Ibom North East Senatorial District Constituency, the 1<sup>st</sup> defendant is at liberty not to enforce the directive of the Party to wit: listing him i.e. the 1<sup>st</sup> plaintiff as the Party's Senatorial candidate in Akwa Ibom North East for the April, 2007 General Elections, having regard to the rel-* G  
H

*evant provisions of the Electoral Act, 2006 and the Constitution of the Federal Republic of Nigeria, 1999.*

3. *Whether in the face of the several representations/correspondences made by the Peoples Democratic Party on behalf of the 1<sup>st</sup> plaintiff to the 1<sup>st</sup> defendant demanding that the name of the 1<sup>st</sup> plaintiff be placed on the list of the National Assembly candidates with the 1<sup>st</sup> defendant as the Peoples Democratic Party's candidate for the Akwa Ibom North East Senatorial District in the April, 2007 General Elections, the 1<sup>st</sup> defendant is at liberty to decline the enforcement of such directives having regard to the clear provisions of the Electoral Act, 2006 and the Constitution of the Federal Republic of Nigeria, 1999.*

4. *Whether in the absence of any positive explanation from the 1<sup>st</sup> defendant, having regards to the several representations made by the Peoples Democratic Party on behalf of the 1<sup>st</sup> plaintiff to the 1<sup>st</sup> defendant demanding that the 1<sup>st</sup> plaintiff's name be placed on the list of National Assembly candidates, the 1<sup>st</sup> defendant is at liberty to remove the name of the 1<sup>st</sup> plaintiff unilaterally after having screened him and verified his credentials, having regards to the relevant provisions of the Electoral Act, 2006 and the 1999 Constitution of the Federal Republic of Nigeria.*

5. *Whether the omission, substitution or removal of the name of the 1<sup>st</sup> plaintiff by the 1<sup>st</sup> defendant from the list of National Assembly candidates dated 15<sup>th</sup> March, 2007 to contest election into the Senate of the Federal Republic of Nigeria, particularly as representing Akwa Ibom North East Senatorial District in the April, 2007 General Elections does not constitute a gross violation of the 1<sup>st</sup> plaintiff's constitutional right to fair hearing, and by extension his right to contest election into the Senate of the Federal Republic of Nigeria as a Nigerian citizen, having regard to the clear provisions of the Electoral Act, 2006 and the Constitution of the Federal Republic of Nigeria, 1999.*

6. *Whether in the light of the fact that the Peoples Democratic Party had submitted the name of the 1<sup>st</sup> plaintiff for substitution with the name of the 3<sup>rd</sup> defendant by several correspondences, the 1<sup>st</sup> and 2<sup>nd</sup> defendant can validly decline such substitution, having regard to the Electoral Act, 2006 and the 1999 Constitution of the Federal Republic of Nigeria.*

7. *Whether in view of the clear provisions of the Electoral Act, 2006, the 1<sup>st</sup> and 2<sup>nd</sup> defendants are in a position to decline to act upon the representation of a political party vis-a-vis its choice of candidate to contest for an office in the April, 2007 General Elections more so when the candidate is not otherwise disqualified.*”

The plaintiffs prayed the trial court for the following reliefs: B

1. *“A declaration that the omission of the name of the 1<sup>st</sup> plaintiff by the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the list of candidates for National Assembly General Election dated 15<sup>th</sup> March, 2007 particularly as it affects Akwa Ibom North East Senatorial District constitutes a gross violation of the 1<sup>st</sup> plaintiff’s constitutional rights.* C

2. *A declaration that the refusal of the 1<sup>st</sup> defendant to comply with the several directives issued by the 1<sup>st</sup> plaintiff’s political party i.e. Peoples Democratic Party to the effect that the 1<sup>st</sup> plaintiff’s name be listed as its candidate for the Akwa Ibom North East Senatorial District in the April, 2007 General Election constitutes a wrongful and unlawful removal/substitution or exchange of a validly nominated candidate i.e. the 1<sup>st</sup> plaintiff.* D

3. *A declaration that the inclusion of the 3<sup>rd</sup> defendant’s as the Peoples Democratic Party’s candidate representing Akwa Ibom North East Senatorial District in the fourth-coming April, 2007 General Election is wrongful as it is against the position, wishes and aspirations of the Peoples Democratic Party.* E

4. *An order setting aside the inclusion of the name of the 3<sup>rd</sup> defendant in the list of the National Assembly candidates for the April 2007 General Election for Akwa Ibom North East Senatorial District.* F

5. *An order of mandatory injunction directing the 1<sup>st</sup> and 2<sup>nd</sup> defendants to forth with place the name of the 1<sup>st</sup> plaintiff on the list of candidates for the April, 2007 National Assembly General Elections as the candidate representing the People Democratic Party in Akwa Ibom North East Senatorial District in the said election.* G

6. *An order of perpetual injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from further removing the candidature of the 1<sup>st</sup> plaintiff as the candidate representing Akwa Ibom North East Senatorial District on the platform of the People Democratic Party in the said election.* H

7. *An order of perpetual injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from placing the name of the 3<sup>rd</sup> defendant on the ballot*

*for the forth coming election into the National Assembly as the candidate representing Akwa Ibom North East Constituency on the platform of the Peoples Democratic Party in the said election. ”*

After the parties filed all the necessary processes such as affidavits in support and counter-affidavits written addresses etc., learned counsel for the respective parties adopted their written addresses before the trial court on the 2<sup>nd</sup> day of April, 2007. The suit was adjourned to the 18<sup>th</sup> of April, 2007 for judgment and judgment was indeed delivered promptly on that date by Nyako, J. In that judgment, the learned trial judge found in favour of the 1<sup>st</sup> plaintiff, who is the appellant herein. She granted declarations as per reliefs 1, 2 and 3 and made orders as per reliefs 4, 5, 6 and 7, directing, among other things, that the 1<sup>st</sup> defendant to include the name of the 1<sup>st</sup> plaintiff as the candidate of the party in place of that of the 3<sup>rd</sup> defendant.

Dissatisfied with the judgment of the trial court, the 3<sup>rd</sup> defendant, as appellant, appealed to the Court of Appeal holden at the Abuja Division (court below). In its judgment which it delivered on the 30<sup>th</sup> day of March, 2009 the court below set aside the trial court’s judgment and declared the 3<sup>rd</sup> defendant (who is the 1<sup>st</sup> respondent herein) as the candidate of the party.

The 1<sup>st</sup> plaintiff, who is now appellant in this appeal was aggrieved with the judgment of the court below and now appealed to this court on nine grounds of appeal.

In this court parties filed and exchanged briefs of argument. Learned counsel for the appellant S. E . Umoh, formulated the following issues for determination by this court:

1. *“Whether it was proper for the Court of Appeal to have countenanced and considered “arguments” in support of issue No.2 as formulated by the main appellant when the said arguments had been struck out along with issue No.3 same having been argued together. (distillable from ground 1).*

2. *Having resolved issue No.1 in the main appeal before the Court of Appeal in favour of the 1<sup>st</sup> respondent and having struck out all arguments in support of issues Nos. 2 & 3, was the Court of Appeal right in not dismissing the main appellant’s appeal. (distillable from grounds 2 & 3)*

3. *Was it proper for the Court of Appeal to have entertained*

*the 5<sup>th</sup> respondent's/cross appellant's issue No.1 when:*

*(a) it did not arise from the decision of the trial court and*

*(b) the decision of the trial court that none of the parties raised the issue of cogent and verifiable reason was not appealed against and*

*(c) The 5<sup>th</sup> respondent/cross appellant never sought let alone B obtained leave to raise a fresh issue on appeal. (distillable from ground 5)*

*4. What is the effect of the Notice of withdrawal of appeal filed by the 5<sup>th</sup> respondent/cross appellant on its appeal (distillable from 4, C 6 and 7)*

*5. Was it proper for the Court of Appeal to have ignored the Notice of Withdrawal of appeal filed by the 5<sup>th</sup> respondent/cross appellant and proceed to enter judgment in favour of the 5<sup>th</sup> respondent (distillable from grounds 8 and 9)."* D

Learned senior counsel for the 1<sup>st</sup> respondent, Chief A . E . Assam formulated the following issues:

*1. "Whether it was proper for the Court of Appeal to have countenanced and considered "arguments" in support of issue No.2 as formulated by the main appellant when the said arguments had been struck out along with issue No. 3, same having been argued together. E*

*2. Having resolved issue No.1 in the main appeal before the Court of Appeal in favour of the 1<sup>st</sup> Respondent and having struck out all arguments in support of issues nos.2 and 3 was the Court of F Appeal right in not dismissing the main appellant's appeal"*

The learned SAN filed a Notice of Preliminary Objection which he set out and argued in the brief of argument. (I shall consider this objection later). G

Learned Senior Counsel for the 2<sup>nd</sup> respondent Dr. A. A. Izinyon, who also filed a Notice of Preliminary Objection; incorporated and argued it in his brief of argument. (I shall re-visit it later).

He formulated the following issues for determination:

*1. "Whether it was proper in the circumstance of this case for H the learned Justices of the Court of Appeal having struck out issue 3 as formulated by the 1<sup>st</sup> respondent and all arguments related thereto, to proceed to determine arguments in respect of issue 2 which was also arguments canvassed in support of issue 3 which was struck out.*

*(Encompassing grounds 1 and 2 of the Notice of Appeal).*

2. *Whether it was right for the Learned Justices of the Court of Appeal not to have dismissed the 1<sup>st</sup> respondents appeal having resolved issue 1 in favour of the appellant and struck out 1<sup>st</sup> respondent's issue 3 and all arguments in its support (Encompassing ground 3 of the Notice of Appeal)*

3. *Whether the learned Justices of the Court of Appeal were right in determining the 5<sup>th</sup> respondent's issue 1 in its cross appellant's brief of argument in the court below. (Encompassing ground 5 of the Notice of Appeal).*

4. *Whether considering the facts and circumstances surrounding the Notice of withdrawal of appeal purportedly filed by the 5<sup>th</sup> respondent, the learned Justices of the Court of Appeal were right not to have countenanced and given effect to it, (Encompassing grounds 4, 6, 7, 8 and 9 of the Notice of Appeal)."*

Learned counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents, filed a Notice of Preliminary Objection which he argued in his brief of argument. (I shall come back to it later). The following issues were set out in his brief:

1. *"Whether the Supreme Court ought to reverse the judgment of the lower court merely because the lower court having initially struck out issue 3 as irrelevant later proceeded to consider the merit of argument in support of issue 2 argued jointly therewith when the latter is competent and capable of independent understanding?"*

2. *Whether the cross appeal of the 5<sup>th</sup> respondent in the lower court after being heard on the merit upon argument by all counsel on record could be deemed withdrawn merely based on a purported Notice of Withdrawal subsequently filed by a solicitor not on record and who never brought same to the attention of their Lordship?"*

3. *Whether the lower court erred in overruling the appellant's objection to the competency of issue 1 in 5<sup>th</sup> respondent's cross appeal as a fresh issue when same was argued based on a ground of appeal filed and argued by 5<sup>th</sup> respondent with leave earlier granted by the lower court, especially when the ground complained of raises no fresh issue?"*

Learned counsel for the 5<sup>th</sup> respondent Chief O. Oke, formulated the following issues for our determination:

i. *"Whether the failure of the lower court to countenance the*



notice of withdrawal of appeal filed by the 5<sup>th</sup> respondent was proper.

ii. Whether it was proper for the lower court to have countenanced and considered argument in support of issue 2 as formulated by the main appellant (1<sup>st</sup> respondent) in this appeal, when the said argument had been struck out or urged to be struck out along with issue No.3 same having been argued together.” B

It is instructive to note that the 2<sup>nd</sup> respondent herein, filed a Notice of Cross-appeal. It contained four grounds of the cross-appeal. I prefer to delay consideration of this Cross-appeal to the end of my treatment of the objections raised by some of the respondents C and of course the main appeal.

The various Notices of Objections filed by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents were premised on different grounds. I shall set out each as couched by the respective parties:

1<sup>st</sup> Respondent: D

“Take Notice, that before or at the hearing of the appeal to which this application relates, 1<sup>st</sup> respondent herein will, by way of preliminary objection pray the Honourable Court to strike out the appellant’s issues 1 and 2 canvassed for determination in the appeal for being incompetent AND FURTHER TAKE NOTICE THAT the E Grounds upon which the preliminary objection is founded is that: Issues for determination in an appeal must be distilled from the grounds of appeal filed in the Notice of Appeal and must arise from the actual proceedings which formed the basis of the court’s decision F appealed against.

#### PARTICULARS:

1. The said issues do not arise and are not disenable from the grounds of appeal filed by the appellant.

2. The said issues are based on fallacy, to wit: that the Court G of Appeal struck out the arguments in issue number 2 in the main appellant’s brief and failed to dismiss the appeal based on those arguments, when no order striking out or discountenancing the arguments in respect of the said issue was ever made by the Court of Appeal. H

3. The said issues do not represent the factual situation in the proceedings in that the Court of Appeal after striking out issue number 3 on the basis of the present appellant’s objection stated thus at page 1100 paragraph 3 of the printed records of proceedings: Issues

2 and 3 formulated by the appellant were argued together. Before now, issue 3 had been struck out given the success of the 1<sup>st</sup> plaintiff's preliminary objection attacking the same. I will therefore limit myself to submissions in the appellant's brief that relate to issue 2."

2<sup>nd</sup> Respondent:

- B "TAKE NOTICE that at the hearing of the appeal the 2<sup>nd</sup> respondent shall raise objection to the competence of issue 2 of the appellant's Brief of Argument and grounds 4, 5, 6, 7, 8 and 9 of the Notice of Appeal and shall respectfully urge this Honourable Court to strike out the said issue 2 and all arguments in respect thereto, grounds 4, 5, 6, 7, 8 and 9 of the Appellant's Notice of Appeal together with all the issues formulated therefrom and the argument in support.

#### GROUND OF THE OBJECTION

- D 1. The Appellant's issue 2 does not arise from grounds 2 and 3 of the Appellant's Notice of Appeal.

2. The Appellant's grounds 4, 5, 6, 7, 8 and 9 of the Notice of Appeal do not relate to or arise from any decision of the court below."

3<sup>rd</sup> and 4<sup>th</sup> Respondents:

- E "TAKE NOTICE that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents shall at the hearing of the appeal raise a preliminary objection to the competence of grounds 4, 6, 7, 8 and 9 of the Notice of Appeal and issues 1, 2, 4 and 5 of the Appellant's brief and shall urge the Supreme Court to strike out same.

#### GROUND FOR THE OBJECTION

1. The appellant's ground 4 does not arise from or relate to any decision of the court below;

2. The appellant's ground 6 does not arise from or relate to any decision of the court below;

3. The appellant's ground 7 does not arise from or relate to any decision of the court below;

4. The appellant's ground 8 does not arise from or relate to any decision of the court below;

- H 5. The appellant's ground 9 does not arise from or relate to any decision of the court below;

6. The appellant's issue 1 does not arise from ground 1 in the Notice of Appeal from which it is purportedly distillable;

7. The appellant's issue 2 does not arise from grounds 2 and 3

*in the Notice of Appeal from which it is purportedly distillable;*

*8. The appellant's issue 4 is based on an incompetent grounds 4, 6 and 7 in the Notice of Appeal, and*

*9. The appellant's issue 5 is based on incompetent grounds 8 and 9 in the Notice of Appeal."*

As much as it is possible, I will, for the sake of convenience, B  
marry and summarise the arguments put forward by the parties in  
the above objections.

1<sup>st</sup> respondent attacked the competence of issues 1 and 2 for  
determination. 2<sup>nd</sup> respondent attacked in the same manner issue 2. C  
3<sup>rd</sup> and 4<sup>th</sup> respondents attacked the competence of issues 1, 2, 4 and  
5 of the appellant's brief. 2<sup>nd</sup> respondent attacked as well, the com-  
petence of appellant's grounds of appeal Nos. 4, 5, 6, 7, 8 and 9. 3<sup>rd</sup>  
and 4<sup>th</sup> respondents attacked equally, the competence of appellant's  
Grounds of Appeal Nos. 4, 6, 7, 8 and 9. D

I will consider the competence of Grounds 4, 5, 6, 7, 8 and  
9 of the Grounds of Appeal before treating the competence of the  
issues. The main challenge against these grounds by both 2<sup>nd</sup>, 3<sup>rd</sup> and  
4<sup>th</sup> respondents is that these grounds of appeal did not arise from the  
judgment of the Court below. Grounds 4, 6, 7, 8 and 9, it is argued, E  
relate to a Notice of withdrawal of Appeal purportedly filed by the 5<sup>th</sup>  
respondent in the court below. There was no pronouncement by the  
court below whatsoever on the purported Notice of withdrawal of  
appeal on the basis upon which the appellant appealed under the F  
said grounds. On ground 5 of the Notice of Appeal it is argued that  
same does not relate or arise from the judgment of the court below  
and that it should have directly and concisely been tailored against  
the findings of the court below on the issue that the appellants pre-  
liminary objection was belatedly raised as same should have been G  
raised when the 5<sup>th</sup> respondent sought leave to file the grounds of its  
cross-appeal. This is not what ground 5 of appellant's Notice of  
appeal is challenging. The cases of Adekesola v. Akunde (2004) 12  
NWLR (Pt. 887) 295 at 311E and Finnih v. Umade (1992) 1 NWLR  
(Pt.219) 511 at 534B. H

This court is urged to strike out these grounds of appeal.

Learned Senior counsel for the 1<sup>st</sup> respondent made his ar-  
guments on the preliminary objection in his brief of argument. His  
arguments centred principally on the competence of issues Nos. 1

and 2. He contended that the complaint of the appellant is anchored on the factual situation and pronouncement of the Court of Appeal that arguments on issue No. 2 were struck out and having so struck out the said arguments, the Court of Appeal erred in giving any legal consideration to materials which were no more before the court upon which to premise its judgment and that led to a miscarriage of justice. Learned senior counsel for the 1<sup>st</sup> respondent submitted that at no time during the proceedings or in its judgment did the Court of Appeal strike out the said issue number 2 and/or the arguments articulated by the appellant in support. There is also no doubt that the issue did not arise from the ground of appeal as couched nor did it arise as a true issue from the judgment of the Court of Appeal against which, this appeal is brought. It is at large he argued further. It is contended that issue No.1 does not flow from ground one, which it purports to flow from because it states the exact antithesis of the passage of the judgment set out in the ground. He argued further that it is clear that having struck out issue 3, and discountenanced all arguments in its support and limited themselves to those submissions that related to the issue not struck out, the Justices of the Court of Appeal did not strike out arguments in support of issue 2. The case of *FMBN V. NDIC* (1999)2 NWLR (Pt. 591) 339 was cited in support. Learned senior counsel urged that as the issues submitted for determination did not arise from the grounds of appeal and the factual pronouncements of the Court of Appeal and are fallacies which cannot ground the arguments proffered by the appellant, they are incompetent and should be struck out.

Learned counsel for the appellant in response to the points raised in the objection by the 1<sup>st</sup> respondent submitted that it is trite law that the main purpose of formulating issues for determination is to enable the parties determine the real questions in controversy as shown in the grounds of appeal. *Sha v. Kwan* (2000) 8 NWLR (Pt. 670) 685 was cited in support. He argued further that the Supreme Court will examine the issue raised and where appropriate, to meet the ends of justice, reframe same in order to determine the real question in controversy between the parties. He referred to the case of *Agbakoba v. INEC* (2008) 8 NWLR (Pt. 1119) 489 at 553-D. He made further submissions that examining the grounds of appeal, there is no doubt the case which the appellant presented for determination

of the court, which is that the Court of Appeal having struck out issue 3 and discountenanced the argument thereon, not having arisen from any of the grounds of appeal, ought to have equally applied similar treatment to issue 2 as it was argued along with the incompetent issue 3, argument in support of which was discountenanced.

Learned counsel for the appellant submitted on the objection on issue 2 that the appellant is contending the legal effect of striking out argument in support of issue 3, which was presented along with issue 2 and that there was no further argument available for the consideration of the Court of Appeal. Learned counsel urged this court to find nothing wrong with the manner in which the issues were formed, otherwise, the court is urged to invoke the powers of an appellate court in the presentation of issue for determination which was well articulated. Several cases were cited including *DPCC Ltd. V. BPC Ltd* (2008) 4 NWLR (Pt.1077) 376 at 396 - 397; 418 - 419. He urged this court to reframe same. Learned counsel submitted that the case of *FMBN v. NDIC* (supra) cited by the 1<sup>st</sup> respondent does not support 1<sup>st</sup> respondent's argument.

On the issue of whether it was right for the court to sift competent from incompetent arguments, learned counsel submitted that it is not whether or not a particular judge can sift the competent from the incompetent arguments, but whether on a calm and dispassionate appraisal of the arguments presented, legitimate severance could be reasonably and objectively attained. Learned Counsel submitted that the decisions in *Ngige v. Obi* (2006) 14 NWLR (Pt. 999) 1 and *Ayabgu v Agu* (1998) 1 NWLR (Pt. 532) 129 are not dissimilar with the present case and that is the more reason why there should be no attempt at sifting of the issues having regard to the facts of case. The learned counsel for the appellant made copious submissions on miscarriage of justice as there was no fair hearing on the matter of sifting the arguments on issues 2 and 3 as it cannot rightly be argued that the original argument in the brief at the court of Appeal sufficed. He cited the case of *Edibo v. State* (2007) 13 NWLR (Pt. 1051) 306 at 331- 1 332 H – D.

Now, from the totality of the Notices of objections filed and argued by almost all the respondents, they all aim at either:

i. Attacking the competence/validity of some of the grounds of appeal filed by the appellant and or,

ii. Attacking the competence/validity of the issue (s) formulated by the appellant for the determination of appeal.

The grounds of Appeal isolated for attack are Nos. 4, 5, 6, 7, 8 and 9. Permit me My Lords, to set out hereinbelow, seriatim, these grounds shorn of their particulars, from the Notice of Appeal filed by the appellant at the court below on the 27<sup>th</sup> day of April, 2009.

*“GROUNDS 4*

*ERROR OF LAW*

*The learned justices of the court of Appeal erred in law when in spite of the Notice of withdrawal of appeal filed by the 5<sup>th</sup> cross appellant they proceeded to entertain and allow the appeal.*

*GROUND 5*

*The Court of Appeal erred in law and acted in excess of its jurisdiction by entertaining the 5<sup>th</sup> respondent/cross appellant’s issue No.1 which did not come before it by due process of law.*

*GROUND 6*

*ERROR OF LAW*

*The learned justices of the Court of Appeal erred in law and acted in excess of their jurisdiction when they held thus:*

*The partial success of the cross-appeal of the 5 respondent (i.e. PDP) which strikes at the very or primary finding of the lower court therefore must result in the cross-appeal being allowed with the consequence that the declarations and reliefs granted the 1<sup>st</sup> plaintiff/ 1<sup>st</sup> respondent/ 1<sup>st</sup> cross-respondent by the lower court, particularly, the directive issued to the 1<sup>st</sup> defendant (now 3<sup>rd</sup> respondent) predicated on the wrong findings that there was proper substitution, must be set aside.’*

*GROUND 7*

*The learned justices of the Court of Appeal erred in law when they entered judgment in favour of the 5<sup>th</sup> cross appellant when;*

*a) The 5<sup>th</sup> cross appellant had withdrawn its appeal*

*b) The only thing the court could do with respect to the said appeal was to formally dismiss it. And this occasioned a miscarriage of justice.*

*GROUND 8*

*The learned justices of the Court of Appeal erred in law when they failed to dismiss the 5<sup>th</sup> Cross Appellant’s appeal in line with the Notice of Withdrawal of the appeal dated 16<sup>th</sup> December 2008 and*

filed on the 17<sup>th</sup> December, 2008 and this occasioned a miscarriage of justice.

#### GROUND 9

The learned justices of the Court of Appeal erred in law when they failed to entertain the Notice of withdrawal of appeal of the 5<sup>th</sup> cross appellant's dated 16th December, 2008 and filed on 17<sup>th</sup> December, 2008 and this occasioned a miscarriage of justice."

**Authorities are agreed on the legal definition of a ground of appeal. It is said to be the error of law or facts alleged by an appellant as the defect in the judgment appealed against upon which reliance has been placed to set it aside. In other words, it is the reason(s) why the decision is considered wrong by the aggrieved party** See: *Olaleye v. The State* (1991) 1 NWLR (Pt.170) 708 at 718. *Azatse v. Zegcor* (1994) 5 NWLR (Pt.342) 76 at 83; *Idika v. Erisi* (1988) 2 NWLR (Pt.78) 503 at 578.

**Although many authorities lay emphasis that a ground of appeal must stem from the text of the judgment (*ipsissima verba*), for instance, in the case of *Metal Construction (West Africa) Ltd. v. D. A. Megliore and Ors.* in *re-Miss C. Ogundare* (1990) ANLR 142 at 148; *FMB v. NDIC* (supra) **such decisions in my humble view, by no means limit the scope of a ground of appeal. And, from the general definitions, a ground of appeal, can arise in a number of situations such as the following.****

a) from the text of the decision appealed against (*ipsissima verba*),

b) from the procedure under which the claim was initiated

c) from the procedure under which the decision was rendered or

d) from other extrinsic factors such as issue of jurisdiction of a court from which the appeal emanates.

e) from commissions or omissions by the court from which an appeal emanates in either refusing to do what it ought to do or doing what it ought not to do or even in overdoing the act complained of.

The ideal thing is to have a pronouncement from the court from which the appeal emanates. But, where that court fails to make a pronouncement such as where motions or objections filed before it

are still pending, where it ought to have made one, that will give rise to a ground of appeal. In other situations, the court from which the appeal emanates may not have to make a pronouncement as it may not have had the opportunity to do so for instance where a judgment was delivered outside the 90 days period in contravention of section 258(1) of the 1979 Constitution, but now section 294 of the 1999 Constitution, if non-delivery within the time limit can cause a miscarriage of justice. Equally, in a case where a judge delivers his judgment after having fully known that he has ceased to be a judicial officer or that he has been elevated to a higher court. This may furnish a ground of appeal. Or still, where without genuine cause, proceedings or judgment were conducted or delivered in chambers. See: *Ifezue v. Mbadugha* (1984) ALL NLR 256; *Ogbunyinya v. Okudo* (1979) 6 - 9 SC 24. In any of the above situations a ground of appeal may be validly filed as of right or by leave of the court, as the case may demand.

As stated earlier ***the complaint of the appellant before this court in the said grounds of appeal relates to the refusal of the court below to consider a Notice of withdrawal of appeal lodged before the court about three months before the judgment was delivered. These grounds of appeal, as aforementioned challenged the inaction or omission of the court below to consider a court process duly filed before it delivered its judgment. That, in my view, is a good and valid ground of appeal.***

***The trite position of the law is that where there are pending processes before a court, such as motions or other applications, such issues have to be dispensed with before a final decision is taken on the main action or appeal*** See: *Irolo v. Uka* (2002) 14 NWLR (Pt.786) 195 at 225 D - F where this court held:

*"It is the duty of a court, whether of first instance or appellate to consider all the issues that have been joined by parties and raised before it for determination. If the court failed to do so, without a valid reason, then it has certainly failed in its duty, for in our judicial system, it is a fundamental principle of administration of justice that every court has a duty to hear, determine and resolve such questions."* Thus, ***it would be wrong of a court, whose attention has been drawn to a pending process, such as Notice of withdrawal of***



***appeal or motion on Notice to proceed to treat the appeal to finality when such processes have not been pronounced upon by it.***

In the appeal on hand, a perusal at the said grounds of appeal especially grounds 4, 6, 7, 8 and 9, shows that these grounds were premised upon a Notice of withdrawal of cross-appeal filed by the 5<sup>th</sup> respondent/cross-appellant at the court below. The Notice of withdrawal was dated 16<sup>th</sup> day of December, 2008 and filed at the same court on 17/12/08. Prior to that date, and precisely on the 17/6/08, learned counsel for the 5<sup>th</sup> respondent/applicant moved his motion for extension of time within which to file the 5<sup>th</sup> respondent's/cross-appellant reply brief. This was granted by the court below. Again, learned senior counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondent was granted extension of time on 17/6/08 within which to file the 3<sup>rd</sup> and 4<sup>th</sup> respondents' brief and same was deemed filed and served on that date. The appellant sought and was granted extension of time by 7 days within which to file his cross-respondent's brief. The appeal was then adjourned to 22/9/08 for hearing. On the 8<sup>th</sup> day of October, 2008, hearing of the appeal commenced. Learned senior counsel for the appellant, Chief Assam, SAN, Chief Olanipekun, SAN, for the 1<sup>st</sup> respondent; Dr. Izinyon SAN, for the 2<sup>nd</sup> respondent/cross-appellant; Mr. Adebayo, for the 3<sup>rd</sup> and 4<sup>th</sup> respondents/cross-appellants and Mr. Ozekhome for the 5<sup>th</sup> respondent/cross-appellant, each adopted the brief(s) he filed and made prayer for the relevant relief(s). It was only the learned SAN for the appellant who complained that he was not served with the brief filed on 21/2/08. The court adjourned the matter to 11/12/08 so as to enable the appellant to be served with said brief.

On the 22/1/2009, the learned SAN for the appellant was to make reply on points of law. He said that he filed a motion to enable him file a reply brief which he moved and the court below granted it and deemed it as properly filed and served. For some inexplicable reasons, the same learned SAN applied to withdraw that reply brief and a rejoinder earlier filed on 24/6/08. The court below granted same and such processes were struck out. The court below then reserved the appeal for judgment. Judgment was later delivered on the 30/3/2009.

My aim of disclosing the above episode is only to show that

although there was filed a motion of withdrawal of the cross-appeal filed by the 5<sup>th</sup> respondent/cross-appellant, it is beyond any doubt that all the parties were present in court and actively participated in the hearing of the main appeal and the cross-appeals. The appellant, who was represented by Chief Olanipekun, SAN, in company of other  
 B counsel including Mr. S. Umoh, participated fully and below is what Chief Olanipekun, SAN said in arguing the appeals:

*“Chief Olanipekun: we filed our brief on 1/4/08 and also on 18/3/08 12/6/08. We adopt the said briefs. We submitted list of authorities. Appeal is a continuation of hearing. I refer to Exh. D-D5. Distinguishing cases I refer to ODEDO V. INEC (unreported) of 11/7/08). I refer to Adeogun v. Fashogbon CA/A/81/07 of 5/08. I refer also to Odutolu v. Folola (1993) 7 NWLR (Pt.308) 637 at 655. We urge the court to dismiss the appeals.”*

***It is clear from the above that none of the parties drew the attention of the court below to the pending Notice of withdrawal.*** A court of law it is my belief does not possess a power of telepathy to know of facts that have tint been brought to its attention by any of the parties involved in a dispute before it or even by the  
 E Registry of that court. Inspite of what Order II Rule 4 of the Court of Appeal Rules 2007 (as amended) provides, I believe the court is entitled to be informed of the correct position of any process that is pending before it so as to know that court’s reaction on such a pending process. Where that is not done, justice has not been done to the  
 F court itself. ***Thus, the court below can hardly be blamed for proceeding to deliver judgment on the main appeal when its attention had never been drawn to any pending matter by it and it could not say anything on the pending Notice of withdrawal of the 5<sup>th</sup> respondent’s cross-appeal as it had no knowledge of its pendency. So, since there was no pronouncement by the court below on the Notice of withdrawal of the 5<sup>th</sup> respondent’s cross-appeal, the appellant could not have validly raised any ground of appeal on the Notice of withdrawal of the 5<sup>th</sup> respondent’s cross-appeal. Accordingly, grounds 4, 6, 7, 8 and 9 of the appellant’s Notice of appeal are incompetent and are hereby struck out.***

On the 2<sup>nd</sup> leg of the objection which relates to the issues, especially issues 2 and 3 which were said to have been argued together

and that the court below struck out issue 3 and discountenanced all arguments premised thereon. This 2<sup>nd</sup> leg of objection by almost all the respondents is against the competence of both issues 2 and 3 as formulated by the appellant though the learned counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents extended his objection to include issues 1, 4 and 5 formulated by the appellant. B

An objection in law portrays a formal opposition of an objector against the happening of an event which has already taken place or is about to take place now or in the future and the objector seeks the court's immediate ruling or intervention on the point. A preliminary objection seeks to provide an initial objection before the actual commencement of the thing being objected to. C

In considering this 2<sup>nd</sup> leg of the objection, I would have delayed its consideration but because it challenges the competence of the issues raised. For issues placed before an appeal court for determination of an appeal to be competent, they must be formulated from the grounds of appeal. They must be based on, related to or arise from the grounds of appeal. In the case of *Idika & Ors v. Erisi & Ors* (1988) 2 NWLR (Pt.78) 563, this court held that issues or questions for determination are framed from the grounds of appeal properly before the court. They do not arise in NUBIBUS from the skies. E

Learned counsel for the appellant married issue one to ground one of the grounds of appeal while issue two was distilled from grounds 2 and 3. I have carefully read grounds 1, 2 and 3 of the appellant's Notice and Grounds of appeal. I say with all emphasis that they are grounds which stemmed from the decision of the court below. They are competent. Any issue distilled from any of these grounds is also a competent issue whose merit can be examined. Accordingly G respondents' objection to issues 2 and 3 of the appellant's issues is hereby overruled. I shall consider these issues on their merit.

***3<sup>rd</sup> and 4<sup>th</sup> respondent's objection is on appellant's issue 4, which according to the learned counsel for the appellant stemmed from grounds 4, 6 and 7. This issue cannot be said to be competent as the grounds upon which it has been premised have been found to be incompetent. The resultant position is as provided by the case law that any issue which is distilled from an incompetent ground of appeal is as well incompetent*** H

**and subject to be struck out.** See Court of Appeal case in: Amadi v. Orisakwe (1997) 7 NWLR (Pt.511) 161.

***I, accordingly, sustain the objection raised against issue 4 by the learned counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents. Issue 4 and all arguments in respect thereof are hereby struck out.***

B I shall now consider the appeal on the remaining issues on the merit.

#### APPELLANT'S ISSUE 1

C It is the submission of learned counsel for the appellant that it is not contestable that the Court of Appeal struck out issue 3 together with the argument proffered in support thereof. He further argued that if argument had been presented with issue 2 and then struck out, no argument then remained to support issue 2. He contended that the legal effect of striking out argument in support of issue 3, D which was presented along with issue 2, which is that there was no further argument available for the consideration of the Court of Appeal.

E The submission of learned SAN for the 1st respondent is that at no time during the proceedings or in its judgment did the Court of Appeal strike out the said issue number 2 and/or the arguments articulated by the appellant in support. Learned senior counsel stated that it is clear and repeated in both issues 1 and 2 in the appellant's brief, that the Court of Appeal gave consideration to arguments which it had struck out. He submitted that the learned Justices of the Court F of Appeal did not strike out arguments in support of issue 2. They merely discountenanced all submissions in support of the issue struck out and limited themselves strictly to submissions in the appellant's brief that related to issue No.2 which was not struck out. It is argued G further that the fact that the argument in support of issue 3 was struck out does not mean that issue 2 will consequently be bereft of any argument.

H It was submitted for the 2<sup>nd</sup> respondent that the fact that argument in support of issue 3 was struck out does not mean that issue 2 will consequently be bereft of any argument. The joint argument in respect of issues 2 and 3, it was argued further, is still tied to each issue individually although argued together. The case of Akingboye v. Salisu (1999) 7 NWLR (Pt.611) 434 was recommended for our consideration.

Learned counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted that a court of law confronted with a problematic brief is not subject to an automatic knee-jerk reaction of throwing away a defective brief. It is only when the defect in the brief truly prevents the court from understanding the case or it would mislead the adverse party that it can be struck out which is not the case in this appeal. The court below B he argued did justice in the way it handled the issue under reference and he urged this court to resolve this issue against the appellant.

Learned counsel for the 5<sup>th</sup> respondent urged this court to determine whether the complaint raised in issue 2 by the appellant C relates to substance or technicality.

I think, I should observe that, since the introduction of brief writing in the two appellate courts i.e. this court and the Court of Appeal, these courts have to grapple with all sorts of briefs written by counsel involved in a case. Some briefs of arguments are well written D and provide some assistance to the courts. Others are badly written and they confuse, rather than clarify issues. They stultify the progress of the courts. Now, both the good, the bad and even the ugly are for the courts to consider. Nnaemeka-Agu, JSC; once made the following observation in the case of Akpan v. The State (1992) 6 NWLR E (Pt.248) 439 at 471.

*“Although the practice of brief writing has been with us for some fifteen years, we come across poorly written briefs practically everyday. Much as counsel have no excuse for producing poor briefs F now, the fact that they have done so will not discharge this court from its duty of doing substantial justice to the parties who appear before it.”*

This court, again, in Obiora v. Osele (1989) 1 NWLR (Pt.97) 279, held that it will be stretching the matter too far to regard a G defective brief as no brief. It is a faulty brief which is faulty and one cannot close one's eyes to the fact of its existence. It need not be struck out and the court should make the best that it can out of it. See: Gbafé v. Gbafé & Ors (1996) 6 NWLR (Pt.455) 417. At the risk of repetition, what happened at the court below was that issues Nos H 2 and 3 formulated by the 1<sup>st</sup> respondent (appellant at the court below) were argued together. An objection was raised by the 1<sup>st</sup> respondent at the court below and the court below upheld the objection. It accordingly struck out issue 3 and in its words, “all arguments

in the appellant's brief in support of it are to be discountenanced." However, the court below proceeded to determine issue 2 which was based also on the same argument in support of issue 3 which was struck out since issues 2 & 3 were argued together. Indeed there were arguments that if argument had been presented with issue 2 and then struck out no argument then remained to support issue 2 and the appeal ought to have been/dismissed. Learned counsel cited the case of Christaben Group Ltd. v. Oni (2008) 11 NWLR (Pt. 1097) 84 at 105; Ngige v. Obi (2006) 14 NWLR (Pt.979) 1 at 165; Borishade v. NBN Ltd. (2007) NWLR (Pt.1015) 217 at 235 in support of his submission that where an issue for determination is struck out all arguments in support of that issue must go with it. This is because, he further argued, issues Nos 2 and 3 of the main appellant's appeal in the Court of Appeal, were argued as one issue by the appellant himself. The Court of Appeal cannot attempt to sift the arguments in support of the various issues as it was beyond its duties and was capable of denying the appellant a fair hearing. Learned counsel urged this court to resolve this issue in favour of the appellant .

Learned senior counsel for the 1<sup>st</sup> respondent made the following submissions in respect of the 1<sup>st</sup> issue for determination formulated by appellant: that grounds 1, 2 and 3 of the appeal and the two issues formulated from them are fanciful and do not disclose any arguable ground of appeal because a judge sitting on appeal cannot be said to have erred in law by discountenancing arguments in support of an issue struck out and limiting himself to submissions in the appellant's brief which relate to the valid issues in the appeal. It is, in fact, his duty to do so, to discountenance the invalid and act on the valid so as to administer justice. That cannot amount to a miscarriage of justice. It was argued further that there is no rule of law against arguing issues together if they are related. That the facts of the cases of Ayelogu v. Agu (supra) Crystaben Group Ltd v. Oni (supra) Ngige v. Obi (supra) relied upon by the learned counsel for the appellant are not apposite in the present case. Learned counsel for the 1<sup>st</sup> respondent commended to this court the Court of Appeal case of Baffa v. Odili (2001) 15 NWLR (Pt.737) 709 at 734.

Learned counsel for the 1<sup>st</sup> respondent urged this court to deprecate the attitude of learned counsel for the appellant on his attack on the character and competence of the justices of the court below.

Learned SAN for the 2<sup>nd</sup> respondent opened his submissions on issue 1 of the appellant's issues by stating that the court below was right when it relied on the joint argument in support of issues 2 & 3 to determine issues 2 & 3 to determine issue 2 though issue 3 and argument in support thereof were struck out. He submitted that the case of Borishade v. NBN Ltd (supra) is not relevant to this case. He argued that issue 3 of the appellant's issues at the court below is a general or omnibus issue which can be subsumed under any issue and the fact that it was struck out together with the argument in support will not call for any need to sieve through the argument and fish out which aspect of the argument is proffered in support of which issue. The argument that the noble lords at the court below descended into the arena of conflict does not arise considering the facts and circumstances of this case. The joint arguments in support of issues 2 & 3 in the 1<sup>st</sup> respondent's brief are fully related to issue 2 and that issue 3 in the circumstances could be said to be mere academic. Other cases cited and relied upon by the learned counsel for the appellant, such as Christaben Group Ltd. v. Oni (supra); Ngige v. Obi (supra); Korede v. Adedokun (supra), Unity Bank Plc v. Bouri (supra), Adedogun v. Fashogbon (supra) and Ejeze v. Anuwu (supra), are said to be grossly inapplicable to the peculiar facts and circumstances of this case. Learned SAN urged this court to determine this issue in the affirmative and dismiss the appeal on this ground.

The learned counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents opened his submission on appellant's issue 1 by stating that this appeal is a campaign for victory of technicalities over justice. This is an appellant, according to him, who seeks to succeed merely by drawing attention to perceived technical potholes on the highway of justice rather than any substantive complaint that the end of justice has not been served in this case. He complains not that he was not heard or fairly heard but that his adversary ought not to have been heard on a defective or faulty brief. The learned counsel made copious but sound submissions on grounds 1, 2, 3 and issues 1 & 2. The submissions are almost the same as made by learned respective counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Learned counsel urged this court to resolve this issue against the appellant and dismiss the appeal.

Learned counsel for the 5 respondent argued appellants issue No.1 in his formulated issue No. 2. He, from the out set, both in

his written brief of argument and in his oral adumbration, informed this court in no uncertain terms that no act of the 5<sup>th</sup> respondent had been called to question in this appeal. The 5<sup>th</sup> respondent, having regard to the fact that the active parties i.e. the appellant and the 1<sup>st</sup> respondent are members of the 5<sup>th</sup> respondent, and in line with practice, the 5<sup>th</sup> respondent will, as much as possible, aspire to be neutral except in so far as it affects her duty to the court. 5<sup>th</sup> respondent's learned counsel's submission on his issue 2 is that he conceded the issue of whether the lower court was right in considering and upholding submissions made together on issues 1 & 2 after holding that issue 1 was not competent, the point appears well made out in the appellant's brief: He said that it is necessary and desirable for this court to determine whether such issue which does not seek to question resolutions of facts but the validity of the arguments canvassed on the facts does not amount to technicality which modern trend is against. He cited the cases of Okokju v. Odge (1985) 10 SC 267; Nwosu v. Imo Sanitation Authority (1990) 2 NWLR (Pt.135) 688 at 717. Learned counsel urges this court to do nothing but justice in this case.

While replying to points of law raised in the various briefs filed by the respondents the appellant endeavoured to reply each, point by point, in his reply briefs which he filed in response to each respondent. His reply to the points raised by the 1<sup>st</sup> respondent on two issues which are generally alike in a brief of argument, one competent and the other incompetent, jointly argued together, that the court can still rely on the joint argument to sustain the competent issue. He submitted that the authority of Akingboye v. Salisu (supra) cited by the 1<sup>st</sup> respondent, even though not binding on this court, did not lay down such principle and is inapplicable in this case. The case of Unity Bank Plc v. Bouri (supra) relied on by the respondent is not applicable as well. Learned counsel made further citations such as Kadzi International Ltd. v. Kano Taurani Co. Ltd (2003) FWLR (Pt.184) 255 in solidifying his earlier submissions. On issue of technicality, he responded that it was not an issue of technicality to ask the court to allow the appeal on issue 1 of the appellant's brief.

I have noted that almost all the points raised by the various respondents look alike. The learned counsel for the appellant's response to the points raised look the same in their effect. And, in fact,



almost all of such points were largely treated by the learned counsel for the appellant in his brief of argument. I do not consider it necessary to repeat them here.

Issue one as extensively argued by the parties in this appeal questions the propriety of the court below's countenancing and considering arguments in support of issue No. 2 as formulated by the appellant at the Court of Appeal (now 1<sup>st</sup> respondent herein), when the said arguments had been struck out along with issue No. 3 same having been argued together. This issue is said to have been tied to ground 1 of the appellant's grounds of Appeal.

I think for a better understanding of what appears to be a complex matter in the issue under consideration, there is need for me to revisit the facts of what actually took place at the court below pertaining to the issue on hand. The appellant at the court below, who is the 1<sup>st</sup> respondent in this appeal (who shall be referred to hereinbelow as "1<sup>st</sup> respondent"), filed a Notice of Appeal containing two grounds of appeal against the judgment of the trial court. He formulated three issues for the determination of the court below. The learned counsel for the appellant raised an objection challenging the competence of issue No. 3 on the ground that it emanated from no ground of appeal and it should be struck out. The 1<sup>st</sup> respondent had already argued issues 2 & 3 of his brief together. Relying on the said objection, the court below struck out the said issue 3 and all arguments in support thereto but proceeded to determine issue 2 which was based on the same argument in support of issue 3. Dissatisfied with the judgment of the court below, the appellant in this court, appealed against the said judgment on the ground that the 1<sup>st</sup> respondent, having argued issues 2 & 3 together; and that issue 3 and the argument in its support having been struck out, there was no more argument existing to support his issue 2. It was thus wrong for the court below to have relied on the same argument in support of issue 3 which was struck out to support issue 2.

I had a second look at the decision of the court below. I spotted the following holding from the judgment of the court below:

*"issue 2 and 3 formulated by the appellant were argued together. Before now, issue 3 had been struck out given the success of the 1<sup>st</sup> plaintiffs preliminary objection attacking same. I will therefore limit myself to submissions in the appellants brief that relate to issue*

2.”

I understand from the excerpt from the judgment of the court below as quoted above that issue 2 was a live issue which was never struck out. Thus, if issue 2 was not struck out by the court below, reference to limitation on submissions in the appellant’s brief that  
 B related to issue 2, could mean nothing other than reference to the intertwined submission which were argued together by the learned counsel for the then appellant at the court below. Again, having perused the decision of the court below, it is my finding that at no time  
 C during the proceedings or in its judgment did the court below strike out issue No. 2 and or the arguments in support thereof. **All the court below did was to discountenance all submissions in support of the issue struck out which was issue No. 3. And in a bid to clarify its order, now the court below went ahead to**  
 D **state categorically:**

***“I will limit myself to submissions in the appellant’s brief that relate to issue 2.”***

**Thus, except where one wants to be unnecessarily pedantic or splitting the hair, which always works against the**  
 E **ethics of the law, one is bound to accept that there was only one issue No.2 which was never struck out by the court below. There must, therefore, be arguments/submissions in support thereof.**

I think I should state that it is oftenly for the mere sake of convenience, that issues are argued together or conjunctively. Although it is a little untidy, there is certainly no rule or law that prohibits that. It can only elicit this kind of negative reaction and or confusion where a decision, unfavourable to the other party is taken by  
 F the court. **I personally see nothing wrong for a court to sift out the chaffs from the grains if doing so will meet the ends of justice which is the cardinal objective of any court of law. Where an allegation of presenting a bad brief to a court of law by any of the parties is raised, the worst that can be done on**  
 G **that brief by that court is only to make its adverse comments thereon. It has no jurisdiction to regard such a brief as no brief at all.** The court, on the contrary, must recognise the existence of such a brief and act upon it. It cannot strike it out on the premises of being bad. There are several authorities to that effect. I only cite  
 H

the following: Akpan v. State (supra); Obiora v. Osele (supra); Gbafe v. Gbafe (supra); Dike and anor v. Nwankwo (1997) 3 NWLR (Pt.495) 574; Union Bank of Nig. Ltd. v. Odusote Bookstores Ltd. (1995) 9 NWLR (Pt. 421) 558. There are several good decisions on the same subject matter by the Court of Appeal such as: Maximum Insurance Co. Ltd. v. Owonoyi (1994) 3 NWLR (Pt.331) 178 at 189; Incar Nigeria Plc and Anor v. Bolex Enterprises Nig. Ltd. (1996) 6 NWLR (Pt.454) 318; Ebe v. Nnamani (1997) 1 NWLR (Pt.513) 499; Nwugha & Ors v. Nwila & Ors (1992) 2 NWLR (Pt.225) 610. Further, the Court of Appeal and this court as well, can examine issues raised by either of the parties; condense them where they are verbose or reframe them entirely as long as they remain related to the grounds of appeal. See: Labiya v. Anretida (1992) 8 NWLR (Pt.255) 139; Ogunbiyi v. Ishola (1996) 6 NWLR (Pt. 452) 12.

In my humble view, what the court below did in relation to D issue No.2 before it, is right and unassailable. I therefore resolve appellant's issue No.1 against him.

#### APPELLANT'S ISSUE NO. 2

The bone of contention in this issue is whether the court below was right in not dismissing the main appellant's appeal having struck out all arguments in support of issues Nos. 2 & 3 and in view of the holding on issue No.1 which is in favour of the 1<sup>st</sup> respondent. E

It is the submission of learned counsel for the appellant (page 12 of his brief) that the Court of Appeal having resolved issue 1 in favour of the 1<sup>st</sup> respondent and having struck out issue No. 3 in the main appeal was left with only the arguments in support of issue F No.2 in the resolution of the said appeal, the live questions the court below can entertain for the resolution in an appeal must be triggered by the existence of a valid argument predicated on a valid issue. The G input of that is that if an appellant fails to distill an issue from his grounds of appeal then the grounds of appeal are deemed abandoned. And if his issues are found to be incompetent, then the arguments thereon must be discountenanced and struck out. Learned H counsel contended that there was no valid argument in support of issues Nos. 2 and 3 and that issue 2 was lifeless as there was no valid argument proffered thereon. It must be deemed abandoned and be struck out. Learned counsel submitted further that what the Court of Appeal did was clearly a voyage into the arena of conflict and it

ended up taking side with the main appellant and that clearly constitutes a breach of fair hearing. He argued that in our adversarial system of adjudication, no court is permitted to descend into the arena of conflict to make enquiries as to what could possibly have been the mind set of the appellant when it distilled the issue and emerged therefrom with a judgment against a respondent. That suggests that the court is no more an umpire in the litigation between the two parties. Learned counsel supported his submission with the case of *Compt. Comm. & Ind. Ltd. v. OGSWC* (2002) 9 NWLR (Pt.773) at 641; *Mohammed v. Olawunmi* (1990) 2 NWLR (Pt.133) 458 at 485 B - C; *UNTHUB v. NNOLI* (1994) 8 NWLR (Pt.363) 376 at 402. It was further argued for the appellant that the absence of any argument in support of an issue is tantamount to abandonment of the issue. The case of *Buhari v. Obasanjo* (2005) 13 NWLR (Pt.941) 1 at 201C was cited. The presumption of correctness in favour of the judgment of the trial court having not been rebuffed successfully was not open for impeachment by the Court of Appeal as it did and the only option available to that court was to dismiss the appeal and protect and preserve the correctness and sanctity of the judgment of the Federal High Court. This court is urged by learned counsel for the appellant to resolve this issue in favour of the appellant.

Learned SAN for the 1<sup>st</sup> respondent submitted that grounds 1, 2 and 3 of the appeal appear to complain that the action of the learned justices has occasioned a miscarriage of justice but, it cannot, he argued, upon any view, be a miscarriage of justice that a judge discountenanced arguments in support of an issue which he has struck out but limited himself in his determination of the appeal before him, to submissions that relate to the valid issue(s) in the appeal. He submitted further that issue No. 2 of the main appellant in the court below was the question as to the fundamental issue of who selects a candidate for an election. All the submission going to that issue were clear, direct and quite unmixed and incapable of being missed. It did not require any process of 'extraction' or 'sieving' to get at them because the argument were not homogeneously conceived and canvassed. The appellant, he argued, had the opportunity of answering them. Learned SAN for the 1<sup>st</sup> respondent submitted that the accusation leveled against the justices of the court below is preposterous and it should be condemned by the strongest language possible as it

was totally unwarranted.

In his submission, learned SAN for the 2<sup>nd</sup> respondent on appellant's issue 2 argued that the learned justices of the Court of Appeal were right having resolved issue 2 in favour of the 1<sup>st</sup> respondent instead of dismissing the appeal as argued by the appellant as there was no basis in law upon which that appeal would be dismissed. B  
Learned SAN argued that there was no where the court below specifically and clearly struck out the argument in support of 1<sup>st</sup> respondent's issue 2 and that this court is urged to dismiss the entire argument of the appellant in pages 11 - 18 of the brief as they are irrelevant. He urged this court to determine this issue in the affirmative and dismiss the appeal. C

3<sup>rd</sup> and 4<sup>th</sup> respondents submitted through their counsel that the gist of appellants grounds 1, 2 & 3 and issues 1 and 2 purportedly distillable from them dwells more on hugging technicalities rather than embracing justice. There is no reference to what manner of injustice was occasioned on the appellant and how it was occasioned when in his brief, he copiously argued the appeal on merit. Further, there is nothing from the appellant to show that he was in any shape misled by the defect in the formulation of the issues in the court below or that he could not adequately respond to issue No. 2 as argued in the court below. Learned SAN urged this court to resolve this issue against the appellant and dismiss the appeal. As for the 5<sup>th</sup> respondent, I already summarized his position vis-a-vis the issue formulated by the appellant. D E F

My answer to appellant's issue No. 2 is short and simple. ***The Court of Appeal was right in not dismissing the main appellant's appeal as there was no fact upon which it would dismiss same. Throughout the judgment of the court below, there is no single statement or holding which categorically, clearly and unequivocally struck out issue No.2 or any argument in respect thereof. All that was struck out by the court below was issue No.3 and arguments thereof.*** At the risk of repetition, I hereunder reproduce the holding of the court below in respect of issue No.3 and its arguments in the then appellant's brief. G H

*"Accordingly, the objection of the 1<sup>st</sup> respondent in relation to issue 3 formulated by the Appellant in his brief of Argument succeeds and it is upheld. The said issue 3 is hereby struck out and all argu-*

*ments in the Appellant's brief in support of it are to be discounted.*" [Underlining for emphasis]

**It is misleading of the learned counsel for the appellant to have even tagged the heading of his issue No. 2 as he did. It is clear that issue No. 2 and arguments in support thereof had**

**B never been struck out by the court below.** As I stated earlier, the worst one can say of the then appellant's brief at the court below is that it is defective. I said it with authority earlier that a defective brief is a brief and a court of law cannot just close its eyes against any merit that may be contained in such a brief, and more importantly, when  
C the court below found that it had a duty to consider the aspect of that brief under issues No. 2 and 3, though argued together but which were not struck out by it. It is helpful to always remember that technical justice is no justice at all and a court of law should distance itself  
D from it. Several decided authorities of this court have laid down that principle of the law. I will only cite one of the recent ones and that is the case of Famfa Oil Ltd. v. Attorney General of the Federation [2003] 18 NWLR [pt. 852] 453 where this court stated:

*"Courts of law should not be unduly tied down by technicalities, particularly where no miscarriage of justice would be occasioned. Justice can only be done in substance and not by impeding it with mere technical procedural irregularities that occasioned no miscarriage of justice. Thus, where the facts are glaringly clear, the courts should ignore mere technicalities in order to do substantial justice."*

**F** No such miscarriage of justice has been shown to exist in the present appeal. I think, a miscarriage of justice can only be said to present itself to a court of law when that court, after examination of the entire cause, including the evidence, is of the opinion that it is reasonably  
G probable that a result more favourable to the appealing party would have been reached in the absence of the error complained of. See: People V. Bernhardt 222 C. A. 2 d 567, 35 Cal Rptr. 401 and 419. I do not think there is a finding by the court below in that regard.

**H** Before I drop my pen on this issue, I think I should state in passing, that it is a matter of grave concern in the legal profession where a counsel launches attack and uncharitable remarks on the character and competence of the defenseless judges for conducting what their Oaths of office mandated them to do. All the justices did under the issue presented for their consideration in this matter was to

treat the issues to the best of their understanding of the law and ability. No one is saying that a judge, as a human being, cannot make a mistake. If he does make a mistake the learned counsel who is engaged by a party knows what is the right thing to be done. The right thing is not by passing uncharitable remarks against the judge or judges. There are proper and legal avenues for a redress, such uncharitable and castigating remarks do not in my view, arise and counsel should not be seen to indulge or propel such unethical and irritating allegations. A judge has no business in whoever wins or loses a case brought to him as an umpire. Appellant's issue No. 2 is resolved against him. B C

### APPELLANTS ISSUE NO. 3

The appellant's submission under this issue is that the 5<sup>th</sup> respondent/cross appellant completely ignored the fact that the issue does not arise from the decision of the trial court as that court already found and held that none of the parties raised the issue of cogent and verifiable reason at the lower court. The 5<sup>th</sup> respondent/cross-appellant was therefore raising a fresh issue on appeal and was under obligation to seek leave of the court below to do so. This he failed to do, thus, rendering the issue incompetent. Grounds of appeal must arise from the judgment appealed against. Reference was made to the case of Federal Mortgage Bank of Nigeria v. Nigerian Deposit Insurance Corporation [1999] 2 SCNJ 57 at page 78. Learned counsel went on to argue that the respondent was not a party to these proceedings in the court of trial. It did not file any papers. It was only joined as a party in the Court of Appeal upon application. It did not have a case of its own. Neither it nor any other party raised the question of cogent and verifiable reason at the trial court. 5<sup>th</sup> respondent/cross-appellants issue one which stemmed from ground one was not a live issue at both the court of trial and the court below. Again, none of the parties before the trial court appealed against the trial court's decision on cogent and sufficiency of reason for substitution. Learned counsel for the appellant urged this court to resolve this issue in favour of the appellant by allowing the appeal. E F G H

In the 1<sup>st</sup> respondent's brief, the learned Senior Advocate of Nigeria (SAN) submitted that it was the appellant himself who put the provisions of the Electoral Act which deals with substitution in issue at the trial. It is sophistry for the appellant to argue that the issue of

cogent and verifiable reason did not feature in the trial court. Substitution, he argued, is a matter of law and whoever alleges it as in this case has to establish compliance with the law. This is what gave jurisdiction to the trial court and is what the court below had to decide. Learned Senior Advocate of Nigeria submitted that a political party  
 B has a right to nominate and sponsor a candidate of its choice. However, the political party is expected to comply with the provisions of Section 34 (2) of the Electoral Act in that the party must inform the Independent National Electoral Commission (INEC) in writing of its  
 C intention to effect change of its candidates which must be done within sixty days to the election. The application must unequivocally state the reason for the substitution and such reasons must be cogent and verifiable. He cited the case of *Ugwu v. Ararume* (2007) 12 NWLR (Pt.1048) 437.

D Learned senior counsel for the 2 respondent made his own submissions in respect of this issue as follows: that the court below was right when it determined the 5<sup>th</sup> respondent's issue No.1 contained in its cross appellant's brief of argument. Contrary to the submission of the appellant, the 5<sup>th</sup> respondent's said issue No.1 clearly  
 E arose from the decision of the court below and that court had pronounced on the validity of Exhibit 'H' vis-a-vis section 32(2) of the Electoral Act, 2006. There was no basis for the 5<sup>th</sup> respondent to obtain leave to raise this issue before the court below. The entire  
 F submission of the appellant on this issue is academic. On the question of seeking leave before appealing on the issue under consideration, there is a finding by the court below that the 5<sup>th</sup> respondent/cross-appellant sought and obtained the requisite leave and there is no appeal against that finding. Learned senior counsel urged this  
 G court to determine the issue in the affirmative and dismiss the appeal on this ground.

Learned counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents argued that the issue of cogent and verifiable reason was not a fresh issue as it arose in the trial court. That alone, he said, gave rise at least by implication, to the issue of whether there was before the trial court any  
 H question of cogent and verifiable reasons. If none of the parties addressed it properly it is the case of the plaintiffs that must fail as they had the general onus of proof and the specific duty imposed on them by section 34 (2) of the Electoral Act, 2006 to provide cogency and



verifiability reason which is glaringly lacking in Exhibit 'H'. Learned Senior Advocate of Nigeria submitted finally on the issue that cogently and verifiably raised by the trial judge was in issue and not a fresh one. He urged this court to resolve issue No.3 against the appellant.

In his reply briefs, the learned counsel for the appellant answered new points raised by the respondents. For the 1<sup>st</sup> respondent, who replied that the trial court specifically held that no party raised the issue of section 34 (2) of the Electoral Act and that at the court below, the 1<sup>st</sup> respondent failed to secure the leave of the court to raise it as a point not canvassed in the High Court. Learned counsel then went on, perhaps, unwittingly to re-argue the issue once more.

In response to the 2<sup>nd</sup> respondent's the learned counsel submitted that the grant of leave to the Peoples Democratic Party [PDP] to cross-appeal against judgment of the trial court cannot be a licence for the party to raise fresh issues without leave. The Peoples Democratic Party was not a party at the lower (trial) court. The lower [trial] court found and held that none of the parties raised the issue of cogent and verifiable reasons. The Peoples Democratic Party was bound by that finding. The Peoples Democratic Party did not appeal against that finding. Learned counsel then asked: How then can they raise the issue of cogent and verifiable reasons at the appeal stage without leave to raise the same as a fresh issue?

It is for me now to consider this issue. Permit me My Lords, to approach it as usual, from the base. From the facts in the Record of Appeal, the 5<sup>th</sup> respondent as cross-appellant in the court below applied for leave to be joined in the appeal filed by the 1<sup>st</sup> respondent in that court as an interested party. The court below in its ruling granted the 5<sup>th</sup> respondent leave to be joined as a party in the appeal. Pursuant to that order, the 5<sup>th</sup> respondent filed its Notice of Cross-appeal. The 5<sup>th</sup> respondent filed its cross-appeal wherein it argued that the decision of the trial court should be set aside on the ground that the letter of substitution relied upon by the trial court to enter judgment in favour of the appellant contained no cogent and verifiable reasons. The court below upheld the said issue 1. Dissatisfied with that judgment the appellant filed his appeal to this court.

The appellant is challenging the court below for entertaining the 5<sup>th</sup> respondent/cross appellant's issue No.1 when it did not arise

from its decision and that none of the parties appealed against the trial court's holding on the issue of cogent and verifiable reason.

By an order granted by the court below on 12/2/2008, the 5<sup>th</sup> respondent joined as a cross-appellant. The 5<sup>th</sup> respondent's/cross-appellant's issue No.1 formulated at the court below reads as follows:

B “1. *Whether the learned trial judge was right in holding that the plaintiff was properly substituted for the 3 Defendant (appellant in this appeal) without cogent and verifiable reasons having been given for such substitution.*”

C *ALTERNATIVELY, whether the learned trial judge was right in holding that there was substitution at all.*”

It is the law generally, that where there is an allegation that an issue treated by an appeal court was never raised before the trial court, except where leave of the appeal court was sought and obtained, that exercise by the appeal court would be in futility and a nullity as the appeal court lacks jurisdiction to do so. But what determines the jurisdiction of an appeal court? Authorities agree that what determines the jurisdiction of an appeal court is the claim of the plaintiff before the trial court. See: the case of *Akinfalawe v. Akintola* (1994) 4 SCNJ 30 at p. 43 paragraph 21: *Adeyemi v. Opeyori* (1976)9- 10 SC 3.

In the originating summons which was taken out from the trial court by the learned counsel for the plaintiffs, Mr. Umoh, the following claims on behalf of the plaintiffs were indorsed:

F 1. *“A declaration that the omission of the name of the 1<sup>st</sup> plaintiff by the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the list of candidates for National Assembly General Election dated 15<sup>th</sup> March, 2007 particularly as it affects Akwa Ibom North East Senatorial District constitutes a gross violation of the 1<sup>st</sup> plaintiff's constitutional rights.*

G 2. *A declaration that the refusal of the 1<sup>st</sup> defendant to comply with the several directives issued by the 1<sup>st</sup> plaintiff's political party i.e. Peoples Democratic Party to the effect that the 1<sup>st</sup> plaintiff's name be listed as its candidate for the Akwa Ibom North East Senatorial District in the April, 2007 General Election constitutes a wrongful and unlawful removal/substitution or exchange of a validly nominated candidate i.e. the 1<sup>st</sup> plaintiff.*

H 3. *A declaration that the inclusion of the 3<sup>rd</sup> defendant's as the Peoples Democratic Party's candidate representing Akwa Ibom North*

*East Senatorial District in the fourth-coming April, 2007 General Election is wrongful as it is against the position, wishes and aspirations of the People Democratic Party.*

4. An order setting aside the inclusion of the name of the 3<sup>d</sup> defendant in the list of the National Assembly candidates for the April 2007 General Election for Akwa Ibom North East Senatorial District. B

5. An order of mandatory injunction directing the 1<sup>st</sup> and 2<sup>nd</sup> defendants to forth with place the name of the 1<sup>st</sup> plaintiff on the list of candidates for the April, 2007 National Assembly General Elections as the candidate representing the People Democratic Party in Akwa Ibom North East Senatorial District in the said election. C

6. An order of perpetual injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from further removing the candidature of the 1<sup>st</sup> plaintiff as the candidate representing Akwa Ibom North East Senatorial District on the platform of the People Democratic Party in the said election. D

7. An order of perpetual injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from placing the name of the 3<sup>d</sup> defendant on the ballot for the forth coming election into the National Assembly as the candidate representing Akwa Ibom North East Constituency on the platform of the Peoples Democratic Party in the said election.” E

It was the same learned counsel who laid before the trial court, the following questions for determination:

1. “Whether having regard to the clear provisions of Section 65 and 66 of the Constitution of the Federal Republic of Nigeria, 1999 the 1<sup>st</sup> plaintiff is qualified to contest election into the Senate of the Federal Republic of Nigeria. F

2. Whether as a member of the Peoples Democratic Party and having contested the primaries of the said Party seeking nomination as the Party’s candidate for the April, 2007 General Elections in respect of Akwa Ibom North East Senatorial District, and having polled over 60% of the total votes cast at the said primaries which led to his being declared as the winner of the said primary election and consequently issued with a Certificate of Return by the Peoples Democratic Party directing the 1<sup>st</sup> and 2<sup>nd</sup> defendants to list the 1<sup>st</sup> plaintiff as its candidate for the National Assembly Elections in respect of Akwa Ibom North East Senatorial District Constituency, the 1<sup>st</sup> defendant is at liberty not to enforce the directive of the Party to wit: listing him i.e. H

*the 1<sup>st</sup> plaintiff as the Party's Senatorial candidate in Akwa Ibom North East for the April, 2007 General Elections, having regard to the relevant provisions of the Electoral Act, 2006 and the Constitution of the Federal Republic of Nigeria, 1999.*

B 3. *Whether in the face of the several representations/corre-*  
 spondences made by the Peoples Democratic Party on behalf of the  
 1<sup>st</sup> plaintiff to the 1<sup>st</sup> defendant demanding that the name of the 1<sup>st</sup>  
 plaintiff be placed on the list of the National Assembly candidates  
 with the 1<sup>st</sup> defendant, as the People Democratic Party's candidate  
 C for the Akwa Ibom North East Senatorial District in the April, 2007  
 General Elections, the 1<sup>st</sup> defendant is at liberty to decline the en-  
 forcement of such directives, having regard to the clear provisions of  
 the Electoral Act, 2006 and the Constitution of the Federal Republic  
 of Nigeria, 1999.

D 4. *Whether in the absence of any positive explanation from*  
*the 1<sup>st</sup> defendant, having regards to the several representations made*  
*by the Peoples Democratic Party on behalf of the 1<sup>st</sup> plaintiff to the 1<sup>st</sup>*  
*defendant demanding that the 1<sup>st</sup> plaintiffs name be placed on the list*  
*of National Assembly candidates, the 1<sup>st</sup> defendant is at liberty to*  
 E *remove the name of the 1<sup>st</sup> plaintiff unilaterally after having screened*  
*him and verified his credentials having regards to the relevant provi-*  
*sions of the Electoral Act, 2006 and the 1999 Constitution of the*  
*Federal Republic of Nigeria.*

F 5. *Whether the omission, substitution or removal of the name*  
*of the 1<sup>st</sup> plaintiff by the 1<sup>st</sup> defendant from the list of National Assem-*  
*bly candidates dated 15<sup>th</sup> March, 2007 to contest election into the*  
*Senate of the Federal Republic of Nigeria, particularly as represent-*  
 G *ing Akwa Ibom North East Senatorial District in the April, 2007 Gen-*  
*eral Elections does not constitute a gross violation of the 1<sup>st</sup> plaintiff's*  
*constitutional right to fair hearing, and by extension his right to con-*  
*test election into the Senate of the Federal Republic of Nigeria as a*  
*Nigerian citizen, having regard to the clear provisions of the Electoral*  
*Act, 2006 and the Constitution of the Federal Republic of Nigeria,*  
 H *1999.*

6. *Whether in the light of the fact that the Peoples Democratic*  
*Party had submitted the name of the 1<sup>st</sup> plaintiff for substitution with*  
*the name of the 3<sup>rd</sup> defendant by several correspondences, the 1<sup>st</sup>*  
*and 2<sup>nd</sup> defendant can validly decline such substitution, having re-*

gard to the Electoral Act, 2006 and this 1999 Constitution of the Federal Republic of Nigeria.

7. Whether in view of the clear provisions of the Electoral Act, 2006, the 1<sup>st</sup> and 2<sup>nd</sup> defendants are in a position to decline to act upon the representation of a political party vis-a-vis its choice of candidate to contest for an office in the April, 2007 General Elections, more so when the candidate is not otherwise disqualified.” B

After having considered the preliminary objections raised by the defendants before it, the trial court proceeded to treat the questions posed by the learned counsel for the plaintiffs/appellants. In its findings and decision, the trial court held as follows: C

*“The case at hand appears to deal with documents basically which of the correspondences is the 1<sup>st</sup> Defendant bound by.*

*I have read the affidavit and counter affidavit and further affidavit. I have read the addresses of parties and the questions that appear for determination are who amongst the 1<sup>st</sup> plaintiff and the 3<sup>rd</sup> defendant is the authentic candidate for the Peoples Democratic Party for the Senatorial election question and (2) is the 1<sup>st</sup> defendant empowered to effect any change so requested by the party?*

*By exhibit EDB 5 filed by 3<sup>rd</sup> defendant, the matter appears settled that the 1<sup>st</sup> plaintiff and not the 3<sup>rd</sup> defendant is the party's candidate by the wish of the party. The question is, was the name of the 1<sup>st</sup> plaintiff properly submitted to the 1<sup>st</sup> Defendant? By Exhibit H the name of the 1<sup>st</sup> plaintiff was properly submitted in place of the 3<sup>rd</sup> defendant for the reason given therein. None of the parties is alleging that the reason is neither cogent nor verifiable. Consequently, I find and hold that the name of the 1<sup>st</sup> plaintiff was properly substituted with in place of the 3<sup>rd</sup> defendant.”* E F

Without further adumbration, **can it seriously be contended, as did the learned counsel for the appellant, that issue 1, placed before the court below for determination by the 5<sup>th</sup> respondent/cross-appellant, did not arise from the decision of the trial court? I think the answer to this question is No, but let me go further to say that whatever has been placed before a trial court and which is transmitted to an appeal court for a decision, the appeal court will be rightly exercising its powers to give a holistic consideration thereof. Failure to do that will certainly be a failure in the discharge of its statutory re-** G H

**sponsibilities.** Section 15 of the Court of Appeal Act, Cap. (C36 LFN, 2004 as amended), makes adequate provision to that effect and it states:

*“the Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal, and may make an interim order or grant any injunction which the court below is authorised to make or grant and may direct any necessary inquiries or accounts to be made or taken, and, generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purposes of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in the case of an appeal from the court below, in that court’s appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction.”*

Further, Order 4 Rules 1, 3 and 4 of the Court of Appeal Rules 2007 (as amended) provide as follows:

*“1. In relation to an appeal, the court shall have all the powers and duties as to amendment and otherwise of the High Court, including without prejudice to the generality of the foregoing words, in civil matters, the powers of the High Court in civil matters to refer any question or issue of fact arising on the appeal for trial before, or inquiry and report by, an official or special referee.*

*2. In relation to a reference made to an official or special referee, anything, which can be required or authorised to be done by, to, or before the High Court, shall be done by, to, or before the court.*

*3. The court shall have power to draw inferences of fact and to give any judgment and make any order, which ought to have been given or made, and to make such further or other order as the case may require, including any order as to costs.*

*4. The powers of the court under the foregoing provisions of this Rule may be exercised notwithstanding that no notice of appeal or respondent’s notice has been given in respect of any particular*

*party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the court may make any order, on such terms as the court thinks just, to ensure the determination of the merits of the real question in controversy between the parties.”*

These Rules amended, and improved upon the provisions of Order 3 Rules 23 of the Court of Appeal Rules 2002. B

In its findings, the court below had occasion to state, among other things as follows:

*“The questions posed for the determination of the lower court and reliefs claimed have been set out in this judgment before now. Given the same as well as his various affidavits I have also stated before now, to the effect that the 1<sup>st</sup> plaintiff clearly based his claim for substitution for the appellant on the ground that he won the primary. Indeed the 1<sup>st</sup> plaintiff clearly understands his case when he urged this court to hold that the lower court had the jurisdiction to entertain the matter which bordered essentially on the substitution of a candidate by a party for another as contained in the Electoral Act and the right of such a person to have the substitution effected by INEC.* C  
D  
E

*A claim for the resolution of the question as to whether or not one candidate of a political party has been properly substituted for another is, in my respectful view, different from a claim calling for the resolution of which one out of two candidates was nominated and sponsored by a political party for an election. A claim for substitution admits of the fact that the two candidates involved in the dispute were at different times nominated and sponsored by the political party, but that the political party after having nominated and sponsored the candidate first in time has decided to change him with the one nominated and sponsored second in time. The instant suit is primarily seeking for the determination of the question as to whether or not the 1<sup>st</sup> plaintiff has been properly substituted for the appellant as the candidate of the PDP for Akwa Ibom North East Senatorial District given the affidavit evidence of the parties before the lower court. There is nothing therein that could not be effectually and completely determined by the said court without the presence of the PDP. In other words, the presence of the PDP as a party to come and canvass before the lower court who its nominated and sponsored by the* F  
G  
H

*PDP, had been properly substituted with the 1<sup>st</sup> plaintiff and the resolution of the question definitely cannot be based on what the PDP says, but on whether or not the provisions of the relevant law in that regard have been satisfied or complied with in the light of the documentary evidence that must be placed before the court. ”*

B In all the references set out above, the focal point in discussion has been substitution of one candidate by another to an Election for Akwa Ibom North East Senatorial District.

C **Now, if one examines the appellant’s claim as set out earlier, it is quite clear and easy for one to see that it was the appellant himself who ignited the discussion at the court of trial on the provisions of the Electoral Act.** Although the PDP as 5<sup>th</sup> respondent/cross-appellant had been joined as a Party at appeal level, I quite agree with the court below when it held that:

D *“There is nothing therein that could not effectually and completely be determined by the said court without the presence of PDP. In other words, the presence of the PDP as a party to come and canvass before the lower court who its nominated and sponsored candidate for the election was, was not the question for determination in the suit but whether the candidate earlier nominated and sponsored by the PDP, had been properly substituted with the 1<sup>st</sup> plaintiff and the resolution of the question definitely cannot be based on what the PDP says, but on whether or not the provisions of the relevant law in that regard have been satisfied or complied with in the light of the documentary evidence that must be placed before the court. ”*

F (underlining for emphasis) For a valid and legal substitution to be effected by a party for any election, the Electoral Law has made provisions under section 34 of the Electoral Act, 2006. These provisions must be fully complied with otherwise the substitution will be declared invalid and not in compliance with the provisions of the Electoral Act. The trial court, in that respect held as follows:

G *“I have read the affidavit and counter affidavit and further affidavit. I have read the addresses of parties and the questions that appear for determination are who amongst the 1<sup>st</sup> plaintiffs and the 3<sup>rd</sup> defendant is the authentic candidate for the Peoples Democratic Party for the Senatorial election in question and (2) is the 1<sup>st</sup> defendant empowered to effect any change so requested by the party? By exhibit EDB is filed by 3<sup>rd</sup> defendant, the matter appears settled*



*that the 1<sup>st</sup> plaintiff and not the 3<sup>d</sup> defendant is the party's candidate by the wish of the party. The question is was the name of the 1<sup>st</sup> plaintiff properly submitted to the 1<sup>st</sup> defendant? By exh. H the name of the 1<sup>st</sup> plaintiff was properly submitted in place of the 3<sup>d</sup> defendant for the reason given therein. None of the parties is alleging that the reason is neither cogent nor verifiable. Consequently, I find and hold that the name of the 1<sup>st</sup> plaintiff was properly substituted (with) in place of the 3<sup>d</sup> defendant."* (underlining for emphasis)

On the same issue of substitution still, the court below held as follows:

*"In conclusion and for the foregoing reasons, issue 2 is resolved against the 1<sup>st</sup> plaintiff/respondent and I hold that the learned trial judge was wrong to have found that the 1<sup>st</sup> plaintiff (i.e. 1<sup>st</sup> respondent) was properly substituted for the 3<sup>d</sup> defendant (i.e. the appellant). The said issue 2 is accordingly resolved in favour of the appellant thereby resulting in the appeal succeeding in part. By the resolution of issue in favour of the appellant, he therefore remained the authentic candidate of the PDP for Akwa Ibom North East Senatorial District in the 2007 General Elections as the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent was not properly substituted for him, contrary to the finding of the lower court in that regard. In the circumstances, the declarations and reliefs granted by the lower court, particularly the directive issued to the 3<sup>d</sup> respondent (i.e. INEC) and which was predicted on the wrong finding of the lower court that there was proper substitution must collapse or crumble. The appeal is therefore meritorious. The same succeed."*

What else can I say? If the 5<sup>th</sup> respondent/cross-appellant's issue No. 1 did not arise from the decision of the trial court, could it then be said to have arisen in NUBIBUS from the skies? It is certainly not possible. In my humble view, the court below was right to have entertained 5<sup>th</sup> respondents/cross-appellant issue No.1 without the necessity of seeking and obtaining leave to raise same before the court below. I resolve this part of appellant's issue 3 against the appellant.

Appellants issue 3 (b) is on the decision of the trial court that none of the parties raised the issue of cogent and verifiable reason was not appealed against. Learned counsel for the appellant argued

this issue extensively that the court of trial in its judgment found that the question of cogent and verifiable reason did not arise for consideration in the matter and this was conceded by other cross appellant in the appeal. That all the parties that participated in the proceedings at the court of trial agreed that the question of cogent and verifiable reason did not at all feature in that court and that issue, it is further contended, cannot properly arise for decision in the Court of Appeal. The cases of Moses v. State (2006) 4 SCNJ 190 at 224; Veepe Industries Ltd. v. Locva Industries Ltd. (2008) 4 SCN 482 AT 495 were cited. In order to raise that issue, the 5<sup>th</sup> respondent/cross-appellant required leave of court which it did not obtain. He supported his submission by citing the cases of Dodo Dabo v. Ikra Abdullahi (2005) SCNJ 76 at 75. Learned counsel for the appellant submitted that a finding as distinct as the question of cogent and verifiable reason can only be challenged by a distinct ground of appeal. He cited the case of Bhojsons Plc v. Kaho (2006) 2 SCNJ 156 at 169; Ademola v. Sodipo (1992) 7 NWLR (Pt.253) 251 at 260 - 261. He urged this court to resolve this issue in favour of the appellant.

I already set out 5<sup>th</sup> respondent's/cross-appellant's issue No.1 for determination by the court below. Now ground 1 of the Notice of Cross-appeal upon which it was predicted reads as follows:

**"GROUND 1**

*The learned trial judge erred in law when she held that the plaintiff/1<sup>st</sup> respondent was properly substituted for the 3<sup>rd</sup> defendant/appellant when no cogent nor verifiable reasons were given for the substitution as demanded by section 34(2) of the Electoral Act, 2006.*

**PARTICULARS**

*A. There was no evidence at the court below that the mandatory requirement of section 34(2) of the Electoral Act, 2006 enjoining parties to state cogent and verifiable reasons for substituting one candidate for another was complied with by the cross appellant in substituting the plaintiff/1<sup>st</sup> appellant for the 3<sup>rd</sup> defendant/appellant.*

*B. The 1<sup>st</sup> and 2<sup>nd</sup> defendant/3<sup>rd</sup> and 4<sup>th</sup> respondents denied ever receiving the name of the plaintiff/1<sup>st</sup> respondent as the candidate, of the cross appellant. Consequently, the 1<sup>st</sup> respondent's substitution could not have satisfied the cogent and verifiable reasons test under section 34(2) of the Electoral Act, 2006 in the first place."*

The only known and legitimate way/method of laying a complaint before a higher court or tribunal to show the grievance(s) of an aggrieved party against a decision taken by an inferior court or tribunal is by filing a Notice of Appeal which shall contain the grounds of appeal against that decision. This is what the 5<sup>th</sup> respondent/cross-appellant and indeed other appellants before the court below did. ***Ground one of the 5<sup>th</sup> respondent/cross-appellant got its legal backing through the leave granted to it by the court below. The court below observed that in the following words:***

***“It would appear that the requisite leave having been granted the 5<sup>th</sup> respondent then it is definitely not in the province of the 1<sup>st</sup> plaintiff now complain about the grounds.”***  
***Thus, both the 1<sup>st</sup> ground of the cross-appellant and issue one tied to it did not come through the back door. They enjoyed legal backing from the court below. Accordingly, the issue of cogency and verifiable reasons were validly appealed against by the 5<sup>th</sup> respondent/cross-appellant and that the issue stemming from it i.e. issue 1 as I observed earlier, cannot by any stretch of imagination, be said to be a fresh issue on appeal. Thus, issues 3 (b) and (c) fail and are resolved against the appellant.***

#### APPELLANT’S ISSUES 4 AND 5

In view of my earlier holding on the incompetence of the grounds of appeal 4, 6, 7 8 and 9, all issues arising therefrom are incompetent. The trite position of the law is that an incompetent ground of appeal cannot give birth to a competent issue for determination. See: Amadi v. Orisakwe (1997) 7 NWLR (Pt.511) 161 at 170; Fagunwa & Anor v. Adibi & Ors (2004) 7 SCNJ 322.

It is needless for me dissipating energy on these incompetent issues. They are, accordingly, hereby struck out along with any submissions based on them.

In the final result, the main appeal filed by the appellant lacks merit and I hereby dismiss it. I affirm the decision of the court below. I make no order as to costs, looking at the nature of the appeal. I now proceed to consider the cross-appeal by the 2<sup>nd</sup> plaintiff /cross-appellant.

#### CROSS APPEAL

Learned counsel for the 2 plaintiff/respondent/cross-appellant

(cross-appellant for short) filed his brief of argument on 2/11/09 but deemed duly filed on 17/12/09. He also filed a reply brief on 8/1/2010. The following issues were distilled:

1. *“Whether the learned justices of Court of Appeal were right when they held that the suit filed by the 1<sup>st</sup> respondent does not relate to the domestic affairs of a political party, (encompassing ground 2 of the notice of appeal).*

2. *Whether the learned justices of the court of Appeal were right when they held that the Peoples Democratic Party was not a necessary party to the suit filed by the 1<sup>st</sup> respondent at the trial court and that the said suit can be effectually and completely determined without the presence of the Peoples Democratic Party. (encompassing grounds 1, 3 and 4 of the Notice of appeal).*

Learned counsel for the cross-respondent filed his brief of argument in which he distilled the following issue:

*“Whether the court below was right when it held that contrary to the 2<sup>nd</sup> plaintiff's argument, the plaintiffs' suit was essentially an action founded on substitution and can be determined effectively and completely without the presence of the PDP (from Grounds 1, 2, 3 and 4 of the Notice of Appeal.)”*

The salient facts giving rise to this cross-appeal do not differ in any material particular from the fact which gave rise to the main appeal, which I already set out much earlier. I will only call in aid any such facts wherever and whenever it is expedient.

It is to be noted that the learned counsel for the 1<sup>st</sup> plaintiff/respondent/cross-respondent (cross-respondent for short) raised a Preliminary Objection to the competence of the cross-appellant's Notice of Cross-appeal and urged this court to dismiss or strike out the cross-appeal.

Below are grounds upon which the objection is hinged:

1. *“Ground 1 of the Notice of cross appeal contravenes the provisions of section 233(5) of the 1999 Constitution of the Federal Republic of Nigeria as the cross appellant has no right to lodge appeal on behalf of another party, i.e. the Peoples Democratic Party without leave of court.*

2. *Ground 1 of the Notice of cross appeal is incompetent, being a ground of mixed law and facts filed without leave of court in contravention of the provisions of section 233(3) of the 1999 Con-*

stitution.

3. Particulars of error (i), (ii), (iv), (v) and (vi) in Ground 1 of the cross appeal are not related to the complaint in the ground of appeal. See *Bassey v. Robertson* at 589.

4. Ground 2 of the Notice of Appeal is incompetent because its particulars of error have no bearing with the main ground of appeal. B

5. Ground 3 of the Notice of Appeal being a ground of mixed law and fact is incompetent since it was filed without leave of court.

6. Ground 4 is also ground of mixed law and fact and filed without leave of the court C

7. Issues 1 and 2 arising from the said incompetent ground are also incompetent and ought to be struck out.

8. The cross appeal being an appeal by a party seeking to take a stance different from his stance at the trial court is an abuse of court process. " D

Learned senior counsel for the cross-appellant filed a cross-appellant's reply brief in answer to the objection raised as above.

Each of the counsel for the respective parties argued copiously the preliminary objection raised. I have considered meticulously all the submissions in respect of each of the grounds raised by the cross-respondent and the reply made by the learned SAN for the cross-appellant to each point raised thereby. I am quite satisfied that there is no merit in the objection. The objection is hereby overruled. The cross-appeal, I think, should better be examined from the point of its merit or lack of it. I now proceed to consider the cross-appeal. E  
F

Learned senior counsel for the cross-appellant in his submissions on issue No.1 stated that the court below erred in law when it held that the suit filed by the cross-respondent at the trial court does not relate to the domestic affairs of a political party and therefore not justiciable, relying on the ground whether the suit of the cross-respondent relates to whether or not a candidate of a political party has been properly substituted. He argued further that the aforesaid ground relied upon by the court below to arrive at its decision is wrong in law as same is not borne on record. G  
H

Learned SAN further submits that a critical appraisal of the reliefs claimed by the cross-respondent and the facts of the case clearly showed the issue deducible from his suit clearly have nothing to do

with the determination of the question as to whether or not the cross-respondent has been properly substituted for the cross-appellant herein as to bring the action of the cross-respondent at the trial court within the purview of section 34(2) of the Electoral Act, 2006 as wrongly held by the court below. That from the affidavit evidence the cross-respondent had all along, been PDP candidate. Paragraph 17 of cross-respondent's affidavit portrayed substitution, which infact it wasn't as it was the 5<sup>th</sup> respondent's name that was first in time. That the letters of substitution attached to the cross-respondent's affidavit in support of his originating summons were not pleaded and go to no issue. The case of *Ogunsina v. Matanmi* (2001) 9 NWLR (Pt.718) 286 at 294 - 295 B - A was cited in support. The court below fell into grave error by relying on the purported letters of substitution referred to above. Learned SAN alleged that for the court below to have embarked on a fresh case different from the one presented by the cross-respondent at the trial court. He relied on the case of *Akinlagun v. Oshoboja* (2006) 12 NWLR (Pt.993) 60 at 81E; among others. It was further argued for the cross-appellant that the suit of the cross-respondent relates to sponsorship and nomination of a candidate which is a domestic affairs of a political party which is non-justiciable and the courts should without equivocation not determine the matter. That the law on justiciability of domestic affairs of a political party and section 34(2) of the Electoral Act, 2006, are not the same. The cases of *Ugwu v. Ararume* (2007) 12 NWLR (Pt.1048) 367; *Onuoha v. Okafor* (1983) 2 SCNJ 244 were referred to. Learned SAN submitted that this case has nothing to do with section 34(2) of the Electoral Act, 2006 and that since cross-respondent is the nominated and sponsored candidate of the Peoples Democratic Party for the 21 April, 2007 Senatorial Election in Akwa Ibom North East Senatorial District, the issues before the trial court related to the domestic affairs of a political party, and are not justiciable. Further references were made to the cases of *Dalhatu v. Turaki* (2003) 15 NWLR (Pt.843) 310 at 335 E. F; *Jang v. INEC* (2004) 12 NWLR (Pt.886) 46 at 75 - 76 H - A, both Court of Appeal decisions but commended to this court. Learned SAN urged us to determine this issue in the negative and set aside the decision of, the court below and allow the appeal on this ground.

ISSUE NO. 2

“Strong” submissions were made on behalf of the cross-appellant by the learned SAN. That considering the circumstances of the case, PDP is a necessary party and that the failure of the cross-respondent to join PDP as a party to the suit is fatal to the case of the cross-respondent. The court below erred in law when it held that the cross-respondent’s suit could be effectively and completely determined without PDP. The case of the 1<sup>st</sup> respondent at the trial court related principally to his nomination to the PDP which was sent to INEC first in time. The principal issue at the trial court did not encompass section 34(2) of the Electoral Act, but limited to section 32(1) of Electoral Act, 2006. Thus, PDP is a necessary party in the case and the cross-respondent lacked the locus to have instituted the action without PDP. And it was the appellant as chairman PDP Akwa Ibom State who sued as cross-respondent at the trial court whereas the said appellant has no capacity to sue as an officer at the state level of the party on the matter that concerns the headquarters of the party. It is only PDP that can sue in the circumstance of this case. Sections 221, 222 (a) of the 1999 Constitution as well as section 32(1) of the Electoral Act, 2006 were cited and relied on. The cross-respondent’s claim relates to nomination and sponsorship of candidate of PDP for the said election which is not justiciable. Cases such as *NNN Ltd. V. Ademola* (1992) 6 NWLR (pt.507) 76 at 83D; *Buhari v. Obasanjo* (2005) 13 NWLR (pt. 941) 58; *Arubo v. Aiyelleru* (1993) 3 NWLR (pt.280) 126 at 146 D – E; *Ugwu v. Ararume* (supra); *Ameachi v. INEC* (supra) were cited in support. This court is urged finally, to allow the appeal, set aside the decision of the court below and strike out/dismiss the suit at the trial court.

Learned counsel for the cross-respondent made a “concise” argument in respect of the sole issue he formulated on the cross-appeal. His submission is summarised as follows: Questions 3, 4, 5, 6 and 7 of the originating summons have nothing to do with domestic affairs of a political party. He posed questions for interpretation by the trial court. Learned counsel cited and distinguished the cases of *Onuoha v. Okafor* (supra); *Dalhatu v. Turaki & Ors* (supra). The cross-appellant has a duty to show from the reliefs sought how PDP is a necessary party to the suit which he woefully failed to show. The case of *Re-Mogaji* (1986) 1 NWLR (Pt.19) and Order 12 Rule 3 of the Federal High Court Rules, 2000 were cited in support of the

proposition that a person can only be joined as a defendant if there is a claim or relief against him. It was argued further that the cases of *Buhari v. Obasanjo* (supra); *NNN Ltd. v. Ademola* (supra) and sections 221 and 222 of the 1999 Constitution as well as section 32(1) of the Electoral Act, 2006 are completely irrelevant to the present case. Further, the 1<sup>st</sup> plaintiff lacks the power to make PDP a co-plaintiff in an action. The cases of *Ugwu v. Ararume* (supra); *Amechi v. INEC* (supra) were re-visited. Order 12 Rules 1 and 5 of the Federal High Court Rules, 2000 were cited. It was the finding of the trial court that the case borders on substitution and that all the submissions of the cross-appellant's counsel on non-justiciability, lack of locus, non-joinder of PDP shows a misapprehension of the case put forward him. Learned counsel submitted that the court below was right in this particular instance. He urged this court to dismiss the cross-appeal.

The learned SAN for the cross-appellant answered points which he considered new as raised by the cross-respondent. He summarised his answers as follows: that the list of candidates released by INEC was not termed interim; the name of the 5<sup>th</sup> respondent did not strangely surface in INEC list of candidates as same together with other candidates were sent by the national leadership to INEC at the same time. The Notice of Preliminary Objection served on the cross-appellant's counsel by the cross-respondent was filed on 28<sup>th</sup> December, 2009, as against 14<sup>th</sup> December, 2009; Ground 1 of the 1<sup>st</sup> cross-respondent's Preliminary Objection lacks merit and should be dismissed. Cross-respondent has waived his right to raise the said objection to the competence of ground 1 of the cross-appellant's cross-appeal as it was strenuously canvassed before the court below by the cross-appellant and the cross-respondent at that time in the court below did not challenge the competence of this ground of the cross-appellant to raise it. The cross appellant was granted leave by the court below to raise the said issue. The issue raised in ground 1 of the cross appeal relates to jurisdiction challenging the competence of the action filed by the cross-respondent at the trial court. Section 233(5) of the 1999 Constitution does not support the argument of the cross-respondent in paragraphs 4.05 - 4.06 at pages 9 - 10 of his brief of argument. This court is urged to reject the contention of the cross-respondent in this regard. The case cited by the cross-respon-



dent: Obasanjo v. Yesufu (supra) is grossly inapplicable to the facts and circumstances of this case. The cross-appellant's grounds of appeal are not of mixed law and facts. They relate to application of law to the existing facts. Ogbechie v. Onochie (1986) 2 NWLR (Pt.23) 484 referred. Cross-respondent's submission in support of his ground 8 of his preliminary objection constitutes a gross abuse of court process. Equally, arguments canvassed thereon in the court below were refused by that court. Cross-respondent is estopped from raising same before this court. Learned SAN insisted that the facts in the cross-respondents suit at the trial court related to nomination as the said questions related to who between the cross-respondent and the 5<sup>th</sup> cross-respondent is the candidate of PDP Akwa Ibom North East Senatorial District April, 2007 senatorial election. Thus, it is PDP that can only claim the reliefs in the suit filed by the cross-respondent at the trial court. The authorities cited in Re-Mogaji (supra), Buhari v. Obasanjo (supra); NNN Ltd. v. Ademola (supra) and Order 12 Rule 3 of the Federal High Court Rules 2000, relied upon by the cross-respondent are completely inapplicable. The nature of the reliefs claimed makes it mandatory for PDP to be a plaintiff in the suit considering section, 221, 222 (a) of the 1999 Constitution and section 32(1) of the Electoral Act. Learned SAN urged this court, once more, to allow the cross-appeal.

An appeal, generally, including a cross-appeal is a resort to a superior court to review the decision of an inferior court and find out whether on the facts placed before it, and applying the relevant and applicable law, the inferior court comes to a right or wrong decision. See: A - G Oyo & Anor. v. Fairlakes Hotel Ltd. (1988) 5 NWLR (Pt.92) at 56; Oredoyin & Ors v. Arowolo & Ors (1987) 3 NWLR (Pt.114) 172 at 187; Chief F. R. A. Williams v. Daily Times of Nig. Ltd. (1990) 1 NWLR (Pt.124) 1 at 54.

A cross-appeal is, intact, a separate and independent appeal and not an appendage to the main appeal. It can be initiated by any of the parties whether as plaintiff/appellant/defendant/respondent, once he is dissatisfied with any part of the decision of the court from which the cross-appeal stems. This reminds me to draw the attention of learned counsel for the cross-appellant to label their processes in respect of the cross-appeal, clearly, legibly and unmistakably such as would leave no one in doubt or in trouble of identifying whether the

processes are really meant for the cross-appeal. I must be bold to mention that I felt very uncomfortable with the way learned SAN for the cross-appellant neglected, refused or omitted to label the processes he filed in respect of the cross-appeal, including the initiating process i.e. the Notice of Appeal. This omission gave me some confusion and difficulties. Counsel in any given case are expected to render maximum assistance in reducing the rigour under which a judge finds himself while writing his judgment/ruling.

The contention of learned SAN for the cross-appellant is that there was a finding by the learned trial judge that the suit laid before him bordered on nomination and sponsorship of the candidate and not substitution under the Electoral Act, 2006 and that there was never an appeal against that finding by the cross-respondent.

Issue 1 of the cross-appellant's issue as contained in its brief of argument, herein before adopted by the party before this court is said to have been tied to ground 1, 3 and 4 of the cross-appellant's grounds of appeal.

It would be unnecessary for me to reproduce all these grounds in this judgment. But for the sake of clarity and certainty, I will reproduce the 1<sup>st</sup> ground of the cross-appeal and it reads as follows:

*"GROUND 1*

*The learned justices of the Court of Appeal erred in law when they held:*

*The instant suit is primarily seeking for the determination of the question as to whether or not the 1<sup>st</sup> plaintiff has been properly substituted for the appellant as the candidate of the PDP for Akwa Ibom North East Senatorial District given the affidavit evidence of the parties before the lower court. There is nothing therein that could not be effectually and completely determined by the said court without the presence of the PDP.'*

**PARTICULARS OF ERROR**

i. There was a finding by the learned trial judge that the suit borders on nomination and sponsorship of the candidate and not substitution under the Electoral Act, 2006 which finding was never appealed against by the 1<sup>st</sup> respondent to the appeal.

ii. The issue of nomination and sponsorship are still within the exclusive preserve of the sponsoring political party.

iii. The sponsoring political party is a necessary party in the

suit bordering on nomination and sponsoring of candidate.

iv. Appellant was only the state chairman of the Peoples Democratic Party at the period he sued through his then counsel in his personal capacity as shown in the originating processes.

v. The appellant suing as state chairman of the peoples Democratic Party was non-juristic and cannot sue and be sued in that capacity. B

vi. Failure of the lower court to appreciate the above leads to a miscarriage of justice.

The remaining grounds to which this issue is tied to, bear almost same complaint in different modes of expression. The gist of the complaints is that the suit before the trial court was based on NOMINATION and SPONSORSHIP and NOT SUBSTITUTION under the provisions of the Electoral Act, 2006. I remember treating a like issue in the main appeal which was couched by the appellant D therein and now the cross-respondent under issue 3 for determination.

There is no iota of doubt from the legion of decisions from this court and the court below, as well as from the Electoral laws that the question of nomination and sponsoring of candidates for a political office by a political party is purely within the domestic domain of the political party in respect of which the court cannot adjudicate. That was the cardinal point rested upon by this court in Onuoha v. Okafor (1983) 2 SCNLR 244. E

In this respect, it is pertinent for me to set out hereunder the holding of the trial court as follows: F

*"I have read the affidavit and counter affidavit and further affidavit. I have read the addresses of parties and the questions that appear for determination are who amongst the 1<sup>st</sup> plaintiffs and the 3<sup>rd</sup> defendant is the authentic candidate for the Peoples Democratic Party for the Senatorial election in question and (2) is the 1<sup>st</sup> defendant empowered to effect any change so requested by the party? By exhibit EDB is filed by 3<sup>rd</sup> defendant, the matter appears settled that the 1<sup>st</sup> plaintiff and not the 3<sup>rd</sup> defendant is the party's candidate by the wish of the party. The question is, was the name of the 1<sup>st</sup> plaintiff properly submitted to the 1<sup>st</sup> defendant? By exh. H the name of the 1<sup>st</sup> plaintiff was properly submitted in place of the 3<sup>rd</sup> defendant for the reason given therein. None of the parties is alleging that the* G H

*reason is neither cogent nor verifiable. Consequently, I find and hold that the name of the 1<sup>st</sup> plaintiff was properly substituted (with) in place of the 3<sup>d</sup> defendant.” (underlining for emphasis)*

It is clear from the above excerpt of the judgment that nowhere did the trial court use the words “nomination” or “sponsorship” of any of the two candidates in contention, as submitted by the learned SAN. **The main questions upon which the trial court made pronouncement, to my understanding, are:**

**i. Who amongst the 1<sup>st</sup> plaintiff and the 3<sup>rd</sup> defendant is the authentic candidate for the PDP?**

**ii. Is the 1<sup>st</sup> defendant empowered to effect any CHANGE so requested by the party?**

**iii. Was the name of the 1<sup>st</sup> plaintiff properly submitted to the 1<sup>st</sup> defendant? The above questions were answered by the trial court in favour of the 1<sup>st</sup> plaintiff; having considered and relied on Exhs. EDB and H. It is this decision which the court below did not agree with and set aside. The issue thus, transcends beyond mere nomination and sponsorship, it purely rested on CHANGE OR SUBSTITUTION.** And, as I stated

in the main appeal, for a valid and legal substitution to be effected by a party for any election, the Electoral law has made provisions under section 34 of the Electoral Act, 2006. These provisions must be fully complied with otherwise the CHANGE or substitution will be declared invalid and not in compliance with the provisions of the Electoral Act. Inferences, which courts of law are permitted to draw, indicate to us that references being made by the parties in the claims, affidavits and counter affidavits, reliefs and the pronouncements of the court, that the suit before the trial court was based on substitution of one party with another intended by the party to which both candidates belong.

I agree fully with what the court below said in that respect:

*“A claim for the resolution of the question as to whether or not one candidate of a political party has been properly substituted for another is, in my respectful view, different from a claim calling for the resolution of which one out of two candidates was nominated and sponsored by a political party for an election. A claim for substitution admits of the fact that the two candidates involved in the dispute were at different times nominated and sponsored by the politi-*

*cal party, but that the political party after having nominated and sponsored the candidate first in time has decided to change him with the one nominated and sponsored second in time. The instant suit is primarily seeking for the determination of the question as to whether or not the 1<sup>st</sup> plaintiff has been properly substituted for the appellant as the candidate of the PDP for Akwa Ibom North East Senatorial District given the affidavit evidence of the parties before the lower court.”* B

The provisions made by the Electoral Act, 2006, specially in section 34 thereof, is aimed at controlling the excesses or high handedness of some political parties in approbating and reprobating election processes. Section 34 of the Act is part of the law which must be complied with by the political parties, the candidates and the INEC itself. I resolve issue No. 1 against the cross-appellant. C

#### ISSUE NO. 2 D

Whether PDP was a necessary party before the trial court.

***I think I need not to add anything on what the court below said on this question, that:***

***“The instant suit is primarily seeking for the determination of the question as to whether or not the 1<sup>st</sup> plaintiff has been properly substituted for the appellant as the candidate of the PDP for Akwa Ibom North East Senatorial District given the affidavit evidence of the parties before the lower court. There is nothing therein that could not be effectually and completely determined by the said court without the presence of the PDP. In other words, the presence of the PDP as a party to come and canvass before the lower court who its nominated and sponsored candidate for the election was, was not the question for determination in the suit but whether the candidate earlier nominated and sponsored by the PDP, had been properly substituted with the 1<sup>st</sup> plaintiff and the resolution of the question definitely cannot be based on what the PDP says, but on whether or not the provisions of the relevant law in that regard have been satisfied or complied with in the light of the documentary evidence that must be placed before the court. The PDP, in the circumstances of this case, in my respectful view, does not necessarily have to be a party.”*** E F G H

(underlining supplied for emphasis)

***By the above finding, failure to join PDP at the trial***

***court could not be fatal to the plaintiff's case as all issues could effectually, completely and meaningfully be decided upon by the affidavit evidence made available by the parties to the court.*** I resolve this issue as well against the cross-appellant.

In the final result, the cross-appeal lacks merit and it is dismissed by me. I make no order as to costs.

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### **MUSDAPHER JSC**

I have read before now the judgment of my Lord Muhammad, JSC just delivered in this matter, for the same reasons so comprehensively set out in the judgment, I too, dismiss both the appeal and the cross appeal. I abide by the order for costs proposed in the aforesaid judgment.

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### **ONNOGHEN JSC**

This is an appeal against the judgment of the Court of Appeal, Holden at Abuja, in appeal No. CA/A/97/2007 delivered on the 30<sup>th</sup> day of March, 2009 reversing the judgment of the Federal High Court, Holden at Abuja, in suit No. FHC/ABJ/CS/161/2007 delivered on the 18<sup>th</sup> day of April, 2007 in favour of the present appellant, then plaintiff.

Appellant and 1<sup>st</sup> respondent are members of the Peoples Democratic Party (PDP) in Akwa Ibom State of Nigeria who contested the primary election of the party to elect the candidate of the party for the Akwa Ibom North-East Senatorial District in the general election scheduled for April, 2007.

It is the contention of the appellant that he won the said primary election as a result of which appellant's name was allegedly sent by the 2<sup>nd</sup> respondent, the State Chairman of the Peoples Democratic Party, to the headquarters of the party for onward transmission to INEC as the party's sponsored candidate for the said election. Appellant alleges that a dispute later arose as to who, between appellant and the 1<sup>st</sup> respondent, is the candidate of the party for the said election resulting in appellant instituting an action in the Federal

High Court, Abuja claiming the following reliefs:-

*"1. A declaration that the omission of the name of the 1<sup>st</sup> plaintiff by the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the List of Candidates for National Assembly General Election dated 15<sup>th</sup> March, 2007 particularly as it affects Akwa Ibom North East Senatorial District constitutes a gross violation of the 1<sup>st</sup> plaintiff's Constitutional rights.* B

*2. A declaration that the refusal of the 1<sup>st</sup> defendant to comply with the several directives issued by the 1<sup>st</sup> plaintiff's Political Party i.e. Peoples Democratic Party to the effect that the 1<sup>st</sup> plaintiff's name be listed as its candidate for the Akwa Ibom North East Senatorial District in the April, 2007 General Election constitutes a wrongful and unlawful removal/substitution or exchange of a validly nominated candidate i.e. the 1<sup>st</sup> plaintiff.* C

*3. A declaration that the inclusion of the 3<sup>d</sup> defendant's (sic) as the Peoples Democratic Party's candidate representing Akwa Ibom North East Senatorial District in the forth-coming April, 2007 General Election is wrongful as it is against the position wishes and regulations of the Peoples Democratic Party.*

*4. An order setting aside the inclusion of the name of the 3<sup>d</sup> defendant in the list of the National Assembly candidates for the April 2007 General Election for Akwa Ibom North East Senatorial District.* E

*5. An order of mandatory injunction directing the 1<sup>st</sup> and 2<sup>nd</sup> defendants to forthwith place the name of the 1<sup>st</sup> plaintiff on the list of candidates for the April 2007 National Assembly General Election as the candidate representing the Peoples Democratic Party in Akwa Ibom North East Senatorial District in the said election.* F

*6. An order of perpetual injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from further removing the candidature of the 1<sup>st</sup> plaintiff as the candidate representing Akwa Ibom North East Senatorial District on the platform of the Peoples Democratic Party in the said election.* G

*7. An order of perpetual injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from placing the name of the 3<sup>d</sup> defendant on the ballot for the forth coming election into the National Assembly as the candidate representing Akwa Ibom North East Constituency on the platform of the Peoples Democratic Party in the said election."* H

It is important to note that appellant was the 1<sup>st</sup> plaintiff while the 2<sup>nd</sup> plaintiff is the present 2<sup>nd</sup> respondent in respect of the appeal filed by the appellant. The defendants in the trial court are: INEC as

1<sup>st</sup> defendant, Prof. IWU as 2<sup>nd</sup> defendant and Senator Bob as the 3<sup>rd</sup> defendant.

The questions that appellant sought to be determined by the trial court vide the Originating Summons are stated as follows;-

B “1. *Whether having regard to the clear provisions of sections 65 and 66 of the Constitution of the Federal Republic of Nigeria, 1999 the 1<sup>st</sup> Plaintiff is qualified to contest election into the senate of the Federal Republic of Nigeria.*

C 2. *Whether as a member of the Peoples Democratic Party and having contested the primaries of the said party seeking nomination as the party’s candidate for the April, 2007 General Elections in respect of Akwa Ibom North East Senatorial District, and having polled over 60% of the total votes cast at the said primaries which led to his being declared as the winner of the said primary election and consequently issued with a Certificate of Return by the Peoples Democratic Party with a further correspondence from the People Democratic Party directing the 1<sup>st</sup> and 2<sup>nd</sup> defendants to list the 1<sup>st</sup> plaintiff as its candidate for the National Assembly Elections in respect of Akwa Ibom North East Senatorial District Constituency, the 1<sup>st</sup> defendant is at liberty not to enforce the directive of the party to wit: listing him i.e. the 1<sup>st</sup> plaintiff as the Party’s Senatorial Candidate in Akwa Ibom North East for the April, 2007 General Elections, having regard to the relevant provisions of the Electoral Act, 2006 and the Constitution of the Federal Republic of Nigeria, 1999.*

F 3. *Whether in the face of the several representations/correspondences made by the Peoples Democratic Party on behalf of the 1<sup>st</sup> plaintiff to the defendant demanding that the name of the 1<sup>st</sup> plaintiff be placed on the list of the National Assembly candidates with the 1<sup>st</sup> defendant, as the Peoples Democratic Party’s Candidate for the Akwa Ibom North East Senatorial District in the April, 2007 General Elections, the 1<sup>st</sup> defendant is at liberty to decline the endorsement of such directives, having regard to the clear provisions of the Electoral Act, 2006 and the Constitution of the Federal Republic of Nigeria, 1999.*

H 4. *Whether in the absence of any positive explanation from the 1<sup>st</sup> defendant, having regards to the several representations made by the Peoples Democratic Party on behalf of the 1<sup>st</sup> plaintiff to the 1<sup>st</sup> defendant demanding that the 1<sup>st</sup> plaintiff’s name be placed on the*



*list of National Assembly candidates, the 1<sup>st</sup> defendant is at liberty to remove the name of the 1<sup>st</sup> plaintiff unilaterally after having screened him and verified his credentials, having regards to the relevant provisions of the Electoral Act, 2006 and the 1999 Constitution of the Federal Republic of Nigeria.*

5. *Whether the omission, substitution or removal of the name of the 1<sup>st</sup> plaintiff by the 1<sup>st</sup> defendant from the list of National Assembly candidates dated 15<sup>th</sup> March, 2007 to contest election into the Senate of the Federal Republic of Nigeria, particularly as representing Akwa Ibom North East Senatorial District in the April, 2007 General Election does not constitute a gross violation of the 1<sup>st</sup> plaintiff's Constitutional right to fair hearing, and by extension his right to contest election into the senate of the Federal Republic of Nigeria as a Nigerian Citizen, having regard to the clear provisions of the Electoral Act, 2006 and the Constitution of the Federal Republic of Nigeria, 1999.*

6. *Whether in the light of the fact that the Peoples Democratic Party had submitted the name of the 1<sup>st</sup> plaintiff for substitution with the name of the 3<sup>rd</sup> defendant by several correspondences, the 1<sup>st</sup> and 2<sup>nd</sup> defendant can validly decline which substitution, having regard to the Electoral Act, 2006 and the 1999 Constitution of the Federal Republic of Nigeria.*

7. *Whether in view of the clear provisions of the Electoral Act, 2006, the 1<sup>st</sup> and 2<sup>nd</sup> defendant are in a position to decline to act upon the representation of a Political Party vis-a-vis its choice of candidate to contest for an office in the April, 2007 General Elections, more so when the candidate is not otherwise disqualified.* “

From the above questions and earlier reliefs reproduced in this judgment, it is clear that appellant's claims are contradictory. In one breath appellant claims to be the candidate who contested and won the party's primary election as a result of which his name was sent by the party to INEC as its candidate for the election in question and was duly screened by INEC while on the other hand, appellant claims his right of candidature for the same election as have arisen from substitution of his name for the 3<sup>rd</sup> defendant. Appellant's candidature for the said election, can only arise from either of the two modes, not from both. What I am trying to say is that appellant's candidature for the election can only be as a result of his name and

particulars being sent by the party to INEC 120 days to the election as its candidate for that election or by way of substituting a candidate whose name was sent by the party to INEC 120 days to the election but the substitution must be within 60 days to the said election; definitely not from both.

B However, at the end of the hearing, the trial court held, inter alia, at pages 282 - 283 as follows:-

*".....I find and hold that the name of the 1<sup>st</sup> plaintiff was properly substituted with in place of the 3<sup>rd</sup> Defendant.*

C *Where a substitute (sic) is properly made by the authority of all the recent cases, the 1<sup>st</sup> Defendant has only one duty and that is to comply. In this light the 1<sup>st</sup> Defendant is hereby directed to include the name of the 1<sup>st</sup> plaintiff as the candidate of the party in place of that of the 3<sup>rd</sup> Defendant.... "*

D The respondent was not satisfied with the above decision as a result of which he appealed to the Court of Appeal. In a judgment delivered by the lower court on the 30<sup>th</sup> day of March, 2009, the court reversed the above decision of the trial court and held, inter alia, as follows:-

E *"In conclusion as the main appeal and cross appeal of the 5<sup>th</sup> Respondent respectively succeed, all the reliefs granted by the lower court in its judgment delivered on 18/4/07 and particularly its finding that the 1<sup>st</sup> Plaintiff/Respondent/Cross-Respondent was properly substituted for the Appellant and the directive to the 1<sup>st</sup> Defendant (now 3<sup>rd</sup> Respondent) predicated on the finding to wit: "to include the name of the 1<sup>st</sup> plaintiff as the candidate of the party (i.e. PDP) in place of that of the 3<sup>rd</sup> Defendant (now Appellant) " are set aside.*

F

*The 1<sup>st</sup> Plaintiff/Respondent/Cross-Respondent was not properly substituted for the Appellant; therefore the Appellant remained the proper or authentic candidate of the PDP for Akwa Ibom North East Senatorial District in the 2007 General Elections.*

G

*The claims/reliefs of the 1<sup>st</sup> Plaintiff/Respondent/Cross-Respondent in the Originating Summons are accordingly dismissed.*

H *Main appeal and cross-appeal of the 5<sup>th</sup> Respondent/Cross-Appellant succeed. Cross-Appeals of the 2<sup>nd</sup> Plaintiff/2<sup>nd</sup> Respondent/Cross Appellant and 3<sup>rd</sup> and 4<sup>th</sup> Respondents/Cross-Appellants respectively, are dismissed. " - See page 1127 of the record.*

The present appeal and cross appeal are against the above

decision of the lower court.

In the appellant's brief of argument filed on 23/7/09 and adopted in argument at the hearing of the appeal, learned counsel for the appellant, SOLOMON E. UMOH ESQ, submitted the following issues for the determination of the appeal.

*"1. Whether it was proper for the Court of Appeal to have countenanced and considered "ARGUMENTS" in support of issue No. 2 as formulated by the main appellant when the said arguments had been struck out along with issue No. 3 same having been argued together. (Distillable from Ground 1)* B

*2. Having resolved issue No. 1 in the main appeal before the Court of Appeal in favour of the 1<sup>st</sup> respondent and having struck out all arguments in support of issues Nos. 2 & 3, was the Court of Appeal right in not dismissing the main appellant's appeal. (Distillable from grounds 2 & 3)* C

*3. Was it proper for the Court of Appeal to have entertained the 5<sup>th</sup> respondent's/cross appellant's issue No. 1 when;* D

*(a) It did not arise from the decision of the trial court and,*

*(b) The decision of the trial court that none of the parties raised the issue of cogent and verifiable reason was not appealed against and,* E

*(c) The 5 respondent/cross appellant never sought let alone obtained leave to raise a fresh issue on appeal (Distillable from ground 5).*

*4. What is the effect of the notice of withdrawal of appeal filed by the 5<sup>th</sup> respondent/cross appellant on its appeal. (Distillable from 4, 6 & 7).* F

*5. Was it proper for the Court of Appeal to have ignored the notice of withdrawal of appeal filed by the 5<sup>th</sup> respondent/cross appellant and proceed to enter judgment in favour of the 5<sup>th</sup> respondent. (Distillable from grounds 8 & 9)."* G

In the views of learned Senior Counsel for the 1<sup>st</sup> respondent, CHIEF ASSAM E. ASSAM, SAN, only two issue call for determination in the appeal. The issues he identified are the following:- H

*"(1) Whether it was proper for the Court of Appeal to have countenanced and considered "arguments" in support of issue No. 2 as formulated by the main appellant when the said arguments had been struck out along with issue No. 3, same having been argued.*

*(2) Having resolved issue No. 1 in the main appeal before the Court of Appeal in favour of the 1st Respondent and having struck out all arguments in support of issues Nos. 2 & 3 was the Court of Appeal right in not dismissing the main appellant's appeal."*

B On the other hand, learned Senior Counsel for the 2<sup>nd</sup> respondent, DR ALEX A. IZINYON, SAN submitted four issues as arising for determination in the brief of argument... filed on 17/12/2009.

C In respect of the 3<sup>rd</sup> and 4<sup>th</sup> respondents, WOLE ADEBAYO, ESQ counsel for 3<sup>rd</sup> and 4<sup>th</sup> respondents formulated 3 issues for determination in the brief of argument deemed filed on 17/12/2009.

The two issues formulated for determination by CHIEF OLUSOLA OKE, counsel for 5<sup>th</sup> respondent in the brief of argument deemed filed on 17/12/2009 are the same as those formulated by senior counsel for the 1<sup>st</sup> respondent and reproduced supra.

D Apart from the issue for determination, almost all the parties raised preliminary objections to the appeal. There is also a cross appeal filed by the 2<sup>nd</sup> respondent. In the cross appellant's brief also deemed filed on 17/12/2009, learned Senior Counsel, DR. ALEX A. IZINYON, SAN, identified the following two issues for determination.

E These are as follows:-

F *"1. Whether the Learned Justices of the Court of Appeal were right when they held that the suit filed by the 1<sup>st</sup> respondent does not relate to the domestic affairs of a Political Party. (Encompassing ground 2 of the notice of appeal).*

G *2. Whether the Learned Justices of the Court of Appeal were right when they held that the Peoples Democratic Party was not a necessary party to the suit filed by the 1<sup>st</sup> respondent at the trial court and that the said suit can be effectually and completely determined without the presence of the Peoples Democratic Party. (Encompassing grounds 1, 3 and 4 of the Notice of Appeal)."*

H In arguing issue 1, the learned counsel for the appellant submitted in the brief of argument that the lower court was in error when it considered arguments in support of issue 2 in the main appeal after it had struck same out along with issue No. 3 therein following a preliminary objection thereto; that where an issue for determination is struck out, all arguments relating thereto must of necessity go along with it, relying on *Borishade vs NBN Ltd* (2007) NWLR (pt. 1015) 217. *Christaben Group Ltd vs Oni* (2008) 11 NWLR (pt.

1097) 84 at 108; Ngige vs Obi (2006) 14 NWLR (pt. 999) 1 at 165 all judgments of the Court of Appeal without urging on this Court to be persuaded by same; that the lower court haven discountenanced arguments in support of issue No. 3 which argument also supported issue No. 2, it follows, according to learned counsel, that the issue together with ground 2 of the main appeal should be deemed abandoned and consequently struck out, relying on Unity Bank PLC vs Bouan (2008) 7 NWLR (pt. 1036) 372 at 402; that the lower court by deciding, suo motu, which arguments related to issue 2 without giving the other party opportunity to react thereto amounted to denial of fair hearing as the court proceeded to base its judgment on the issue and urged the court to resolve the issue in favour of the appellant. B C

On his part, learned senior counsel for the 1<sup>st</sup> respondent argued issues 1 & 2 together as they relate to the main appeal before the lower court. It is the submission of learned senior counsel in relation to appellant's issue 1, that issue 1 and 2 are fanciful and do not disclose any arguable appeal because a judge setting on appeal cannot be said to have erred in law by discountenancing arguments in support of an issue struck out and limiting himself to submission in the appellant's brief relating to the valid issues in the appeal as it is his duty to so act; that such an act by the court cannot be said to have occasioned a miscarriage of justice; that the facts of the cases cited and relied upon by counsel for the appellant are distinguishable from the facts of the instant case, particularly as in the other cases the issue was the formulation of issues from both competent and incompetent grounds of appeal or raising issues which do not arise from the decision of the lower court, whereas in the instant case, the issue borders on what happens to a valid issue for determination which was argued together with an issue found to have been incompetent and consequently struck out together with arguments relating thereto, while considering the arguments relating to the valid issue, relying on Olumessan vs Ogundepo (1996) 2 NWLR (pt. 433) 628. D E F G

On his part, Learned Senior Counsel for the 2 respondent, DR ALEX A IZINYON, SAN, submitted that the lower court was right, considering the circumstance of the case, in relying on the joint argument in support of issue 2 and 3 to determine issue 2 even though issue 3 and the argument in support thereof was struck out, that the H

case of *Borishade vs N.B.N. Ltd* (2007) 1 NWLR (pt. 1015) 217 cited and relied upon by learned counsel for the appellant in support of his argument on the issue under consideration was decided on its peculiar facts and circumstances which are different from the facts of the instant case; that the decision in the earlier case was based on the fact that the court has no duty “to sieve through the argument and fish out which aspect of the argument is preferred in support of which issue”, whereas in the instant case, the two issues argued together are related though issue 3 is general in nature; that it is illogical to argue that the striking out of issue 3 and arguments relating thereto left issue 2 without supporting argument; that the lower court was right, haven resolved issue 1 in favour of the appellant to have proceeded to uphold issue 2 in favour of the 1<sup>st</sup> respondent instead of dismissing the appeal of the 1<sup>st</sup> respondent; that the lower court never struck out the argument in support of 1<sup>st</sup> respondent’s issue 2 and urged the court to resolve issues 1 and 2 against the appellant.

On his part, learned counsel for the 3<sup>rd</sup> & 4<sup>th</sup> respondents, WOLE ADEBAYO ESQ, submitted that the appeal and the issue 1 therein are based on technicalities which should not be encouraged by the court as the appellant and the lower court were in no way misled by the formulation of the 3<sup>rd</sup> issue and the argument of counsel thereon and urged the court to resolve the issue against the appellant.

Learned Counsel for the 5<sup>th</sup> respondent, CHIEF OLUSOLA OKE in effect presented no argument properly so called in relation to the issue under consideration which he identified as his issue No. 2 in his brief of argument deemed filed on 17/12/2009. The brief is therefore not relevant to the determination of the issue in the appeal.

From the facts of the case, it is not in doubt that the 1<sup>st</sup> respondent, as appellant before the lower court filed two grounds of appeal but formulated three issues out of the two grounds; that of the three issues so formulated, issues 2 & 3 were argued together; that a preliminary objection was raised by learned counsel for the appellant, then 1<sup>st</sup> respondent at the lower court, as to the competence of issue 3, which objection was sustained and the issue struck out and the argument in support thereof discountenanced by that court.

It is however, the case of the appellant that the lower court,

haven struck out issue 3 and the argument relating thereto there was nothing left by way of argument in support of issue 2, which was argued together with the said issue 3 and consequently the lower court was in error in sieving arguments to sustain the said issue 2. It should be noted that the objection against the said issue 3 by the present appellant was based on the fact that it did not arise from any ground of appeal. It was therefore an objection against proliferation of issues which is frowned upon by law and was consequently sustained by the lower court, which proceeded further to discountenance argument preferred in the brief in support of the said issue. However issues 2 and 3 were argued together that is why the present appellant has argued that since issue 3 and argument in support thereto was struck out having regards to the fact that issues 2 & 3 were argued together, the striking out of argument in support of issue 3 left the lower court with no argument in support of issue 2, which ought, consequently to have been struck out.

In the first place, it is not correct that the arguments in support of issue 2 was struck out by the lower court along with issue 3, "the same having been argued together" as contended by the appellant in issue 1 under consideration. In striking out issue 3, the lower court, at page 1084 of the record state, inter alia, as follows:-

*"..... Accordingly, the objection of the 1<sup>st</sup> Respondent in relation to issue No. 3 formulated by the Appellant in the Brief of Argument succeeds and is upheld. The said issue 3 is hereby struck out and all arguments in the Appellant's brief in support of it are to be discountenanced....."*

Later in the judgment, the lower court stated, inter alia as follows:-

*"..... Issues 2 and 3 formulated by the Appellant were argued together."*

*Before now, issue 3 had been struck out given the success of the 1<sup>st</sup> plaintiff's preliminary objection attacking the same. I will therefore limit myself to submissions in the Appellants brief that related to issue 2."*

From the above passages from the judgment of the lower court, it is clear that the court did not strike out argument relating to issue 2 when it struck out issue 3 and ignored arguments relating thereto contrary to the impression given by the appellant in his issue No. 1 herein. It should be pointed out that it was not the contention

of learned counsel for the 1<sup>st</sup> respondent in the court below that issue 2 was in any way incompetent and ought to have been struck out. The two grounds of appeal at the lower court, without their particulars are as follows:-

B “1. *The learned trial judge erred in law when he proceeded to hear and determine the suit which was commenced by way of Originating Summons, holding that by the provisions of Order 2 rule 2 of the Federal High Court (Civil Procedure) Rules the matter was properly commenced by Originating Summons as it involved the construction of documents only.*

C **GROUND 2**

*The learned trial judge erred in law in holding that the 1<sup>st</sup> plaintiff was the bonafide candidate of the Peoples Democratic Party for the election into the National Assembly to represent Akwa Ibom North East Senatorial District when there was no proof that he was ever nominated by the party and that in compliance with the Electoral Act and the Party’s guidelines he was within the period and in the manner allowed by law substituted as the party’s candidate.”*

E The three issues submitted for determination by the appellant at the lower court are as follows:-

F “(1) *Whether the learned trial judge was right in holding that by the provisions of order 2 rule 2 of the Federal High Court (Civil Procedure) Rules this matter was properly commenced by Originating Summons as it involved the construction of documents only.*

*(2) Whether exhibits EDB5 and H complied with the provisions of S. 34(2) of the Electoral Act to bind the 3<sup>d</sup> and 4<sup>th</sup> respondents and to predicate the order of substitution made by the learned trial judge in this action.*

G *(3) Whether in the circumstances of this case the plaintiffs/respondents made out a case deserving of any hearing on the merit.”*

The grounds of the preliminary objection are as follows:-

H “1. *The address for Service of Notice of Appeal on the Respondent is no endorsed thereon as mandatorily required by Order 6 Rule 2(1);*

*2. That ground 2 of the ground of appeal and the particulars offend the provisions of order 6 Rule 2(2) & (3);*

*3. The particulars of the grounds of appeal are clearly argumentative;*



4. *That the Appellant fell into the error of proliferation by distilling three issues from his two grounds of appeal and that the said issues being incompetent ought to be struck out, and*

5. *That issues two and three are at large as they do not arise from either of the grounds of appeal; and*

6. *Alternatively, that the said issues two and three having been distilled from an incompetent ground of appeal ought to be struck out."*

It is clear from ground 6 of the preliminary objection, which is rendered in the alternative, that learned counsel for the then 1<sup>st</sup> respondent wanted issues 2 and 3 to be struck out for haven "been distilled from an incompetent ground of appeal." That, however, was not the case as it is not correct that the two issues were distilled from an incompetent ground. The correct position is that issue 3 had no ground of appeal to support it, which is not the same thing as issues 2 and 3 being distilled from the same ground of appeal.

However, looking at the brief of argument by the learned senior counsel for the appellant at the lower court, it is very clear that the argument in support of issue 2 are clearly stated in that brief and does not need any effort by the court to differentiate them from arguments presented in support of issue 3 therein. It is therefore clear that the striking out of issue 3 and arguments in support thereof does not affect the arguments in support of issue 2 which are clearly presented in the said brief even though stated to be presented in support of both issues.

An appellate court has the duty to do substantial justice between the parties before it, not to be bugged down by technicalities. In the instant case, the justice of the case demanded the lower court striking out issue 3 for proliferation and discountenancing arguments relating thereto while, relying on arguments presented therein in support of the valid issue 2 to arrive at the justice of the case between the parties. I hold the considered view that it is not a miscarriage of justice for the court to discountenance arguments in support of an invalid issue which it has struck out while relying on arguments submitted in relation to a valid issue for consideration. It is in fact the duty of the court to so act so as to attain substantial justice.

There is no law against arguing two or more issues together in a brief of argument. The practice is encouraged for its conve-

nience to both the parties and the court as it is designed to save time and avoid repetition of arguments.

In the process of arguing many issues together there can be the error of arguing valid issues together with invalid issues, such as arguing issues not arising from the grounds of appeal together with those that arise from the grounds of appeal or arguing an issue on a ground of appeal not arising from the judgment appealed against, etc, etc. Where such a situation arises, the law is settled that the invalid issue together with the argument preferred in support thereof must be struck out, as happened in the instant case.

However, where the argument in support of the surviving valid issue(s) is clearly identifiable from the argument in support of the struck out issue and argument in support of same, as in the instant case, the Court is enjoined to do substantial justice between the parties having regards to the facts and circumstances of the case by relying on the argument preferred in support of the valid surviving issue in resolving the issue in controversy between the parties particularly where to do so would not result in a miscarriage of justice, as in the instant case. To do otherwise amounts to doing justice according to technicalities which is frowned upon by the Court.

On issue 2, it should be noted from the onset that it is not correct to say that arguments in support of issues 2 and 3 were struck out by the lower court. It is therefore clear that issue 2 is based on a fallacy. The lower court, as had been demonstrated in this judgment only struck out issue 3 and discountenanced arguments relating thereto in its judgment. The court never struck out issue 2 nor arguments in relation thereto. The learned counsel for the appellant's issue is therefore based on an assumption that arguments in relation to issue 2 were struck out by the lower court when in fact the court struck out issue 3 and discountenanced arguments in the appellant brief in relation thereto.

The lower court can only dismiss the appeal of the appellant before it after striking out issue 3 and discountenancing arguments relating thereto if it found no merit in issue 2. In the instant case the court found merit in issue 2 and resolved same in favour of the appellant and consequently allowed the appeal. It should be noted that issue 2 challenged the finding/holding by the lower court that the substitution of the appellant for the 1<sup>st</sup> respondent herein is valid by

positing thus:

*“(2) Whether Exhibits “EDB5” and H complied with the provisions of S. 34(2) of the Electoral Act to bind the 3<sup>rd</sup> and 4<sup>th</sup> Respondent and to predicate the order of substitution made by the learned trial judge in this action.”*

Clearly a resolution of the above issue in favour of the appellant, as was done in the instant case, must result in the court allowing the appeal. B

To me the appeal is very simple and straight forward having regards to the questions raised for determination at the trial court and the reliefs claimed before that court, both of which had earlier been reproduced in this judgment. The case is simply that of substitution of one candidate for the other despite the attempt by the appellant to cloth it in borrowed robes. Appellant cannot claim to be the nominated candidate of the party when his name was not the one sent to INEC 120 days to the election but that of the 1<sup>st</sup> respondent. It should be noted that one of the documents relied upon by the trial court to enter judgment for the appellant is exhibit H attached to the affidavit of the appellant in support of the Originating Summons particularly paragraph C D E

14 thereof which is as follows:-

*“14 That I know as a fact that as a follow up to my party’s letter dated 5<sup>th</sup> February, 2007 my Party’s National Chairman also personally addressed another letter to the 1<sup>st</sup> and 2<sup>nd</sup> defendants insisting that I am the Peoples Democratic Party candidate for Akwa Ibom North East Senatorial District. Copies of the said letters are attached hereto and marked Exhibits “H”.* F

The letters dated 5<sup>th</sup> & 12<sup>th</sup> February, 2007 are at pages 34 and 37 of the record respectively. They simply state as follows:- G  
*“February 5, 2007*

*Prof. Maurice Iwu*

*Chairman*

*INEC*

*Abuja* H

*SUBSTITUTION: PDP CANDIDATE FOR AKWA IBOM NORTH EAST SENATORIAL DISTRICT, AKWA IBOM STATE*

*This is to confirm that Chief Ime Albert Akpan is the PDP Candidate for Akwa Ibom North East Senatorial District, Akwa Ibom*

State.

*Chief Ime Albert Akpan substitutes the earlier name for the aforementioned constituency which was submitted without enough information.*

*This is for your necessary action.*

B .....  
 SEN. (DR.) AMADU ALI, GCON                      OJO MADUEKWE, CFR  
                  National Chairman                      National Secretary”

The underlining mine for emphasis.

C  
 February 12, 2007  
 Prof. Maurice Iwu Chairman  
 INEC  
 Abuja

D *SUBSTITUTION: PDP CANDIDATE FOR AKWA IBOM NORTH EAST SENATORIAL DISTRICT, AKWA IBOM STATE*

*This is to confirm that Chief Ime Albert Akpan is the PDP Candidate for Akwa Ibom North East Senatorial District, Akwa Ibom State.*

E *Chief Ime Albert Akpan substitutes the earlier name for the aforementioned constituency which was submitted without enough information. This letter verifies, authenticates and confirms the original substitution letter which was endorsed to you by the National Secretary. (copies enclosed).*

F *This is for your necessary action.*  
 SEN. (DR.) AMADU ALI, GCON  
 National Chairman. ”

Underlining also mine for emphasis.

G        It follows therefore from exhibit H that all arguments as to whether the issue before the court is nomination of a candidate for a political party for which the courts have no jurisdiction is not borne out of the record and the case presented by the appellant who was one of the plaintiffs at the court of trial. The issue before the court  
 H clearly is simply that of substitution of the appellant for the 1<sup>st</sup> respondent. It must be emphasized that you cannot talk of substituting one candidate for another except there had been a candidate duly nominated by the party to stand for an election and whose names and relevant particulars had been sent by the political party concerned to

INEC 120 days to the election in question. If appellant were the nominated candidate of the party whose name was originally sent to INEC as the party's candidate for the election in issue, exhibit H *supra* cannot be talking of substituting the appellant for the 1<sup>st</sup> respondent. The importance of exhibit H is clearly that the 1<sup>st</sup> respondent was the original candidate of the party which the party sought to be substituted with the appellant period. B

It is now settled law that for a substitution to be successful, the party must satisfy the conditions laid in section 34 of the Electoral Act, 2006; that it must give cogent and verifiable reasons for seeking the substitution else the venture is a failure. Did exhibit H satisfy the legal requirements? The lower court, rightly in my view held that they did not and consequently held that the 1<sup>st</sup> respondent remained the candidate of the party for the election in issue. There is nothing on the facts and the applicable law to fault that finding/holding which is accordingly sustained by me. C

The cross appeal is the most worthless appeal I have ever come across so far. The cross appeal is by the 5<sup>th</sup> respondent, PDP, who was originally represented by the 2<sup>nd</sup> plaintiff in the action in the trial court. The issues it raises for resolution are that the action being in the domain of the domestic affairs of a political party, the courts have no jurisdiction to entertain same, and secondly that the failure of the cross respondent to join PDP as a party to the action is fatal to the case of the cross-respondent and that the lower court was in error when it held that PDP was not a necessary party. E

Clearly from the facts of the case and the reliefs claimed by the cross respondent which had earlier been reproduced in the judgment, it is very clear that the action is not concerned with the determination of the issue as to which one of two candidates for an election was nominated and sponsored by a political party, which is an issue within the domestic affair of a political party and clearly outside the jurisdiction of the courts - See *Dalhatu vs Turaki* (2003) 15 NWLR (pt. 843) 310; *Onuoha vs Okafor* (1983) 2 SCNLR 244, etc, etc F

However, the issue before the court as contained in the claims and reliefs of the appellant is mainly whether or not a candidate of a political party – the appellant in this case – has been properly substituted for another candidate - the 1<sup>st</sup> respondent in this case. The above issue is clearly within the jurisdiction of the courts and has H

been decided in many cases including *Amechi vs INEC* (2007) 9 NWLR (pt. 1040) 504; *Ugwu vs Ararume* (2007) 12 NWLR (pt. 1048) 437; *Ehinlawo vs Oke* (2008) 16 NWLR (pt. 1113) 357.

It follows therefore that the issue being that of substitution as highlighted in exhibit H produced by the appellant and relied upon by the trial court, the courts have jurisdiction and it is clear that the question as to whether appellant was properly or validly substituted can be determined without the PDP being made a party particularly when the reasons for the application for substitution have been stated clearly in the application - exhibit H, as required by section 34 of the Electoral Act, 2006. What the court is required to do in the circumstance is to determine whether the reasons given for the substitution are cogent and verifiable. The presence of the political party is therefore not needed at all.

I have had the benefit of reading in draft the lead judgment of my learned brother, I.T. MUHAMMAD, JSC just delivered and I have no hesitation whatsoever in agreeing with his reasoning and conclusion that the appeal and cross appeal have no merit and ought to be dismissed.

I accordingly dismiss both appeals and abide by the consequential orders made therein including the order as to costs. Appeal and cross appeal dismissed.

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### ***FABIYI JSC***

I have had a preview of the judgment just delivered by my learned brother, I. T. Muhammad, JSC. I agree with the lucid reasons therein advanced to arrive at the conclusion that the main appeal as well as the cross-appeal are devoid of merit and should each be dismissed.

I seek leave to chip in just a few words of my own. The real contest in this matter is between the appellant and the first respondent in the main appeal. As manifest on pages 107 - 111 of the record of appeal, the 5<sup>th</sup> respondent sent the name of the 1<sup>st</sup> respondent to the 3<sup>rd</sup> and 4<sup>th</sup> respondents as its candidate from Akwa Ibom State. The vital letter is dated 21<sup>st</sup> of December, 2006. The name of the appellant is not contained therein. By a letter dated 5<sup>th</sup> February, 2007, the 5<sup>th</sup> respondent wrote another letter to the 3<sup>rd</sup> respondent

seeking to substitute the 1<sup>st</sup> respondent's name with that of the appellant. This letter is Exhibit "H" herein. It reads as follows:-  
"February, 5 2007

Prof. Maurice Iwu, Chairman,  
INEC,  
Abuja.

B

**SUBSTITUTION: PDP CANDIDATE FOR AKWA-IBOM NORTH EAST, SENATORIAL DISTRICT, AKWA IBOM STATE**

This is to confirm that Chief Imeh Albert Akpan is the PDP candidate for Akwa Ibom North East Senatorial District, Akwa Ibom State.

C

Chief Imeh Albert Akpan substitutes the earlier name for the aforementioned constituency which was submitted without enough information.

This is for your necessary action.

D

SEN. (DR.) AMADU ALI, GCON  
National Chairman

OJO MADUEKWE, CFR  
National Secretary."

The 3<sup>rd</sup> and the 4<sup>th</sup> respondents refused to accede to the request of the 5<sup>th</sup> respondent. The appellant, as plaintiff, along with the respondent, subsequently filed their originating summons at the Federal High Court. The trial court found in favour of the plaintiffs. The 1<sup>st</sup> respondent herein appealed to the court below which found that Exhibit "H" failed to comply with the dictates of Section 34(2) of the Electoral Act, 2006 and allowed the appeal. The appellant, has appealed to this court while the 2<sup>nd</sup> respondent in the main appeal also filed a cross appeal.

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A clear reading of Section 34(2) of the Electoral Act, 2006 depicts that a party must inform Independent National Electoral Commission in writing of its intention to effect a change of its candidate within 60 days to election. The information must be in the form of an application which must unequivocally state the reason(s) for the substitution and such reason(s) must be cogent and verifiable. See: Ugwu v. Ararume (2007) 12 NWLR (pt. 1048) 437; Amaechi v. INEC (2007) 9 NWLR (pt. 1040) 504, Ehinlanwo v. Oke (2008) 16 NWLR H (pt. 113), at 357.

Exhibit "H" as reproduced above failed to state any reason for the desired substitution. The 3<sup>rd</sup> respondent (INEC) had no reason to verify or determined its cogency. The 3<sup>rd</sup> respondent, in my

considered view did the right thing by not recognising the appellant as the candidate of the 5<sup>th</sup> respondent for the Senatorial District.

The above is the substance of the main appeal. All other points canvassed bordered on technicality. The current vogue is that substance should have priority over technicality. The court below was right when it allowed the 1<sup>st</sup> respondent's appeal before it. The appellant's appeal herein, has no merit.

The cross appellant was the 2<sup>nd</sup> plaintiff at the trial court. In a chameleonic fashion, he filed his cross-appeal and attempted to change the claim before the trial court to a contest as to who was the candidate of the 5<sup>th</sup> respondent for the election. Perhaps, I need to remind the cross appellant that parties are bound by the pleadings and claim before the court. See: *Kalio v. Daniel Kalio* (1975) 2 SC 15. In the same fashion, parties should be consistent in prosecuting their case at the trial court as well as in the appellate court. There should be no somersault. See: *Ajide v. Kelani* (1985)3 NWLR (Pt. 12) 248. At the end of the day it can be seen that the fuss generated by him was to no avail after all is said and done.

For the above reasons and the detailed ones adumbrated in the judgment of my learned brother, I too, hereby come to the conclusion that the main appeal as well as the cross appeal are devoid of merit. I hereby dismiss both of them. I endorse all the consequential orders including my learned brother's view on costs.

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