

COURT OF APPEAL  
ILORIN JUDICIAL DIVISION  
15TH OCTOBER, 2010. CA/IL/EPT/GOV/1/10  
CORAM:- I. A. SALAMI, C. B. OGUNBIYI, O. ARIWOOLA, C. C.  
NWEZE, A. JAURO, JJCA

1. DR. JOHN OLUKAYODE FAYEMI ..... APPELLANTS/  
2. ACTION CONGRESS ..... CROSS-RESPONDENTS

AND

1. OLUSEGUN ADEBAYO ONI ..... RESPONDENT/  
CROSS-APPELLANT

2. PEOPLES DEMOCRATIC PARTY (PDP)  
3. THE INDEPENDENT NATIONAL” ..... RESPONDENTS  
ELECTORAL COMMISSION (INEC  
4. THE RESIDENT ELECTORAL  
COMMISSIONER, EKITI STATE

5. THE RETURNING OFFICER, ..... RESPONDENT/  
IDO-OSI LOCAL GOVT. AREA ..... CROSS-APPELLANTS  
6. THE RETURNING OFFICER,  
IJERO LOCAL GOVT. AREA

7. THE NIGERIA POLICE FORCE  
8. THE INSPECTOR GENERAL ..... RESPONDENTS  
OF POLICE

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PRACTICE & PROCEDURE - Notice of preliminary objection - Competence - Mere filing of such notice does not make it sustainable without more - The objector must move the notice - Else it is deemed abandoned (H1)

EVIDENCE - Civil cases - Proof beyond reasonable doubt - Applicability - It depends on the contents of pleadings - If allegation of crime is severable without destroying plaintiff's case - Then that standard of proof is inapplicable (H2)

ELECTION PETITIONS - Evidence - Standard of proof - The applicable standard is on balance of probabilities - As is the case in every civil case (H3)

ELECTION PETITIONS - Proof - "Whether or not elections were held" - Burden of proof - Incidence - The burden rests on the party who asserts the positive - To prove that the elections were held (H4)

ELECTIONS - Words & phrases - "Election" - Meaning - It denotes a process constituting accreditation - Through voting and collation - To recording and declaration of results (H5)

EVIDENCE - Proof - S. 149 (d) Evidence Act - Applicability - In view of the evidence that the election materials were in respondents' possession - Their failure to produce same raises presumption that their production - Would favour appellants (H6)

ELECTION PETITIONS - Claims - Nullification of elections - Propriety of refusal - The tribunal was wrong to have refused the claim - In view of compelling evidence of non compliance - With the Electoral Act (H7)

ELECTION PETITIONS - Issues - Relevance - Effect of civil nature of election petitions - The question of who set the INEC office ablaze is irrelevant - Since the petition is a civil matter (H8)

STATUTES - Interpretation - S. 145 (1) (b) of Electoral Act 2006 - "Or" used therein - It effectively separates "corrupt practices" - From "noncompliance" - Making each an independent ground for petition (H9)

APPEALS - Grounds - Not captured by appellant's issues - Fate - Such a ground is deemed abandoned - And respondents cannot formulate any issues therefrom (H10)

ELECTIONS - Police - Alleged abdication of duty - Whether proved - In view of the unchallenged evidence of observers - As confirmed by exhibit 16 - The allegation was proved (H11)

APPEALS - Notices of appeals - Competence - Absence of relief - Effect - Such a notice is an originating process - As such in the absence of a relief thereon - There is no cause of action to be adjudicated upon (H12)

APPEALS - Notices of appeals - Reliefs claimed - Language of - The language of the relief must be clear and specific - Else it amounts to no relief (H13)

APPEALS - Parties - Right of appeal - Limits - It is only an aggrieved party - Against whom a decision was made - That has the right to appeal against that decision (H14)

STATUTES - Interpretation - Provisos - Effect on main enactment - Though it generally restricts or extends the main enactment - Where it clearly contradicts it - It will nonetheless prevail over the main enactment (H15)

ELECTION PETITIONS - Defects on face of petition - Objections - When to raise - Such objections must be raised before the objector takes any further steps in the proceedings (H16)

### ***FACTS***

Following the general elections of 14th April 2007 in which the 1st respondent was declared and returned as the winner of the Gubernatorial seat in Ekiti State, 1st petitioner/1st appellant had challenged the return of 1st respondent before the election petition tribunal sitting in Ado-Ekiti. The tribunal had dismissed the petition necessitating an appeal to Court of Appeal by 1st appellant which appeal was allowed in part. Supplementary election was ordered in named sixty-three wards spreading across ten local government areas of the State while the results in the six uncontested local government areas were upheld. However, after the supplementary elections, the 1st respondent was again returned as the winner following the results of the local government areas earlier upheld. Aggrieved by the return of 1st respondent, 1st appellant filed another petition before the election petition tribunal challenging same on the ground

that the election and return is invalid by reason of corrupt practices and/or noncompliance with the provisions of the Electoral Act 2006.

The respondents on their part contended that the election was devoid of corrupt practices and was conducted in substantial compliance with the provisions of the Electoral Act 2006. After hearing, the tribunal, by a majority, dismissed the petition as it held inter alia that the allegations of noncompliance were largely unproven and that it was not shown how those proved affected the result of the election. Moreover, that the various criminal allegations were not proved beyond all reasonable doubt. Nonetheless, the tribunal annulled the results of the election in some units spread across six wards. Dissatisfied, appellants have brought this appeal against the majority decision of the tribunal. 1st, 5th and 6th respondents have also cross-appealed challenging the annulment of the results in some units.

#### **D ISSUES FOR DETERMINATION**

##### **MAIN APPEAL**

##### **1ST ISSUE**

Whether the majority of the judges of the trial tribunal were not totally wrong to have refused to nullify the election in all the polling units of Ipoti Wards A and B of Ijero Local Government Area and Ifaki Wards I and II, Orin/Ora Ward and Usi Ward of Ido-Osi Local Government Area of Ekiti State and declare the 1<sup>st</sup> Petitioner/Appellant as the winner of the election having regard to the compelling believable cogent and largely unrebutted oral and documentary evidence marshaled by the Appellants before the trial tribunal and having regard to the nature of the allegations made about non-compliance with the provisions of the Electoral Act and the Manual for Elections in the conduct of the rerun election in the affected wards.

2. Whether the majority of the judges of the trial tribunal were right by relying on the unreliable and unbelievable testimonies of RW99 and RW101 to come to conclusion that it was the agents of the Appellants that set fire to the INEC office at Ido, but curiously shut their eyes to the cogent and overwhelming testimonies and documents of PW1, PW36, PW37, PW38, PW39, PW40 and PW41 on the unabated violence that characterized the rerun election in the afflicted wards, thereby coming to the wrong conclusion that the appellants did not prove allegations of electoral violence beyond reasonable doubt.

3. *Whether the appellants (petitioners) proved by credible evidence the resignation of the 4<sup>th</sup> respondent as the Resident Electoral Commissioner of Ekiti State.*

4. *Whether the lower tribunal in its majority judgment was right in holding that the appellants (petitioners) did not prove dereliction of duty on the part of the 7<sup>th</sup> and 8<sup>th</sup> respondents.”* B

### **CROSS APPEAL**

Whether the Notice of Cross Appeal with issue four formulated thereon are incompetent and liable to be struck out in limine.

Whether the 5<sup>th</sup> and 6<sup>th</sup> respondents /cross-appellants had locus standi to bring the objection or file the cross-appeal. C

**HELD** (Unanimously allowing the appeal, striking out the 1st cross appeal and dismissing the other cross appeal per **SALAMI PCA**)

### **Notice of preliminary objection - Competence** D

1. It is needless to stress that the competence or not of a notice of preliminary objection is predicated on its sustainability. It must, in other words be validly sustained for purpose of serving the reason why it is raised. The mere filing of a notice of preliminary objection does not ipso facto make it competent and arguable. It must first satisfy the test relating to its sustainability. Plethora of authorities relating to this would explain and expatiate for better clarification. In the case of Agagu v. Mimiko (2009) 7 NWLR (Pt. 1140) page 342 for instance, this court per Abdullahi PCA at page 385 dealt at great extent on the subject, wherein he followed the decision of the Apex Court and had this to say:- E F

*“The notice of preliminary objection can be given in the respondent’s brief, but a party filing it, in the brief, must ask the court for leave to move the notice of objection before the oral hearing of the appeal commences . Otherwise, it will be deemed to have been waived and therefore abandoned. (p. 2463 H)* G

### **EVIDENCE - Civil cases - Proof beyond reasonable doubt**

2. Application of section 137(1) of Evidence Act to a civil case depends on the contents of the pleadings of each case. If averments alleging crime are severable and if after such severance there still remains in the pleadings of the petitioners sufficient averments which disclose a cause of action which is devoid of criminal imputation against any party to the H

proceedings then the burden of proof upon the petitioner or plaintiff is to establish his case within preponderance of evidence. This view is as observed in Arab Bank Ltd. v. Ross (1952) Q. B. 216, 229:

B *“Under the rules of pleading, as I have always understood therein, a pleader who has pleaded more than he strictly need have done can always disregard the unnecessary or surplus averments and rely simply on the more limited ones.”*

C Apart from the allegation of the commission of crime, the petitioners/appellants averred at paragraph 42 of their Petition that the first respondent was not duly elected by majority of lawful votes and his election was not valid for reason of non-compliance with the Electoral Act. These averments have already been cited in the Petition. They are severable and are sufficient grounds under section 145 of the Electoral Act. The excess is deemed abandoned.(pp. 2476 B/D 2477 E)

### ***ELECTION PETITIONS - Evidence - Standard of proof***

E 3. With the subject matter at hand being an election petition appeal, it is civil by nature and which needless to state but only obvious that the proof required is on balance of probabilities or preponderance of evidence. A number of judicial authorities are agreeable on this point.

In the case Buhari v. INEC for instance, Tobi JSC had this to say:-

F *“The standard of proof in Civil Cases, including election petitions, is on the preponderance of evidence or the balance of probabilities.”*

Also in Ajadi v. Ajibola this court per Adamu JCA held that:-

G *“Election cases which are sui generis ..... require liberal or lighted proof on the balance of probability or on the preponderance of evidence.....”* (p. 2478 C/E)

### ***Proof - "Whether or not elections were held"***

H 4. In the case of Agagu v. Mimiko supra, this court per Abdullahi, PCA dwelt at great extent on the question of burden of proof on issue joined as to whether or not elections were held. It is apt to refer to the pronouncements made by his Lordship at page 431 of the report:-

*“It was the first respondent’s case that there was no election held.*

*The Appellant who incidentally was the 1<sup>st</sup> Respondent to the petition responded that the election was conducted. The burden of introducing evidence otherwise known as evidential burden squarely rests on the party who substantially asserts the positive before the evidence is adduced. Thereafter the burden of proof rests on the party who will fail if no further evidence is produced. Where this is done, the burden of proof will shift on the other party to introduce evidence which if accepted, will then defeat the claim of the petitioners.....*

*The Appellant it seems to me who asserts substantially that election was conducted has the evidential burden of proving that it was held.”*

In the matter under consideration, it was the appellants' case that no election was conducted in the six disputed wards while the respondents asserted that there were elections in those wards. The onus in line with the case of *Agagu v. Mimiko* shift onto the respondents who asserted the positive and therefore submitted the contrary. I am aware and as rightly submitted by the 5<sup>th</sup> and 6<sup>th</sup> respondents that the principle of law is to place the general burden of proof on the appellants as the petitioners. However, it is also trite that the said principle is not static but that which could certainly shift depending on the circumstances as it is in the case at hand. (p. 2479 B/G)

### ***Words & phrases - "Election" - Meaning***

5. By the interpretation of section 146(1) of the Act, a credible election is that which must have been conducted substantially in accordance with the principles of this Act and also that the nature of the non compliance must not substantially affect the result. The outcome of the latter is dependent upon the former.

The next related question is: what should be the nature and extent of the expected non compliance before it could satisfy the phrase “substantially conducted in accordance with the accepted principles”? The answer to this would lie in the question: What elements constitute an election? Relevant and which could serve as a guiding factor is the case of *INEC v. Ray* (2005) All FWLR (Pt. 265) 1047 wherein this court at pages 1071-1072 had this to say:-

*“It is trite in law that the concept of “election” denotes a process constituting accreditation, voting, collation, recording on all relevant INEC forms and declaration of results. The collation of all results of the*

*polling units making up the wards and the declaration of results are the constituent elements of an election as known to law. The authority of Igodo v. Owulo (supra) at 77 C-E; 78 para. H, and 79 paras A-B; supports the contention. Also relevant are sections 40, 42, 43, 54, 55 and 56 of the Electoral Act 2002.”*

B Also and on the same principle is the recent decision of Osunbor v. Oshiomhole (2009) All FWLR (Pt. 463) 1363 at 1404, wherein the relevant corresponding sections quoted in the above cited authority under the 2002 Electoral Act are in pari materia with sections 43-53, 55, 58-60 and 70-77 of the Electoral Act, 2006. (p. 2480 G)

### ***EVIDENCE - Proof - S. 149 (d) Evidence Act - Applicability***

6. The witness PW43, whose name is Peter Oladosu was a subpoenaed witness by the petitioners. He is a member of the 2<sup>nd</sup> respondent (PDP) and an aide of the 1<sup>st</sup> Respondent. In his evidence in chief at paragraph 19, for instance he emphatically said:-

“19. Immediately the police carried away all the electoral materials and INEC officials there, Chief Femi Akinyemi (a.k.a. Falex) Ekiti State Chairman of Local Government Service Commission called  
E some of our PDP boys in my presence and gave them 10 liters of petrol to put the place on fire and they carried out the operation.”

There was no evidence on record that PW43 was ever cross-examined by any of the Respondents’ counsel. There is also no evidence that the police, as the 7<sup>th</sup> & 8<sup>th</sup> respondents, did call any evidence to contradict the allegation that its men carried away all the electoral materials and also the INEC officials.

F In view of the evidence by the witnesses PW43 and RW99 can it be rightly concluded that the Election materials were destroyed and therefore precluded the respondents from making them available? The answer in my opinion is in the negative and therefore calls for the invocation of section 149 (d) of the Evidence Act. In other words, the materials were purposefully withheld because their production would have been detrimental to the interest of the respondents. (p. 2483 A/H)

### ***Claims - Nullification of elections - Propriety of refusal***

7. Having regard to the judgment and findings by the majority tribunal judges, there is no indication that the said evidence of PW43 and



RW99, as well as the documents exhibits 147 and 47, were properly evaluated. In other words, I am of the view that had careful consideration been given to the pleadings and evaluation done of the evidence by all parties and taking into account both oral and documentary evidence, the majority Judges of the trial tribunal would have arrived at a different conclusion on this issue. B

On the totality of the 1<sup>st</sup> issue raised by the appellants, it is obvious and overwhelming that the majority of the judges of the trial tribunal were totally wrong to have refused to nullify the election in all the polling units of Ipoti wards A and B of Ijero Local Government, and the four wards of Ido-Osi Local Government of Ekiti State. C This is in view of the compelling, believable, cogent and largely un-rebutted and unchallenged oral and documentary evidence marshaled by the Appellants before the trial tribunal and also having regard to the nature of the allegations made about non compliance with the provisions of the Electoral Act and the Manual for Elections in the conduct of the rerun election in the affected wards. (p. 2488 A) D

### ***Effect of civil nature of election petitions***

8. The second issue, from all indications, has two legs, with the 1<sup>st</sup> not being a matter for determination in this appeal. In other words, the question as to who set the INEC office at Ido ablaze, is not relevant in view of the nature of the subject matter under consideration. While the question and issue have a criminal connotation, the subject at hand is civil in nature. What is of relevance therefore is whether election materials were in fact destroyed in the fire that gutted the INEC office. It is the materials that would serve our purpose and not the perpetrator of the act. With the determination of the 1<sup>st</sup> issue wherein evidence showed and confirmed that the materials were all evacuated before the fire incident, the said question relating to the fire culprit without much ado, is of no moment. This is not the forum to raise that leg of the issue. It is therefore a needless academic exercise which the court will not delve into. (p. 2489 F) E F G

H

### ***STATUTES - Interpretation - S. 145 (1) (b) of Electoral Act***

9. By the provision of section 145 of the Electoral Act, 2006:

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

(a) .....  
(b) *That the election was invalid by reason of corrupt practices or non-compliance with the provisions of the Act; .....* "

The interpretation of the said provision is significant and would be a subject of consideration in due course.

B            It is trite law that whenever the word ‘or’ is used in a statute, it bears a disjunctive meaning. Section 18(3) of the Interpretation Act is relevant. The use of the word ‘or’ is therefore a separating factor of preceding provisions from the coming under, and thus giving a sense of complete and an Independent identity.

C            In the light of the conclusion arrived at the determination of issue one, which had resolved the question of non-compliance with the provisions of the Electoral Act in favour of the appellants, issue two is also conveniently accommodated under the former. Suffice to D say therefore that for the court to dwell on the question of corrupt practices would certainly amount to double proof which would lead to academic exercise amounting to a waste of time, and serves no purpose. By the use of the word or the proof of one is sufficient and takes care of the other. (pp. 2490 H/ 2491 D)

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***APPEALS - Grounds - Not captured by appellant's issues***  
10. The 3<sup>rd</sup> issue is whether the appellants (petitioners) proved by credible evidence the resignation of the 4<sup>th</sup> respondent as the Resident Electoral Commissioner of Ekiti State.

F            It is pertinent to mention right away that the appellants even though they raised a ground of appeal No. 21 in respect of this issue they did not of themselves specifically formulate an issue relating to same. Therefore, the ground of appeal is deemed abandoned. The G issue formulated by the third and fourth respondents predicated on the appellants’ abandoned ground of appeal No. 21 is incompetent and is, therefore, struck out. (p. 2491 H)

***ELECTIONS - Police - Alleged abdication of duty***  
H 11. It is on record, per the evidence of PW37 and PW38, who were Independent Election observers, that the officers or agents of the 7<sup>th</sup> and 8<sup>th</sup> respondents remained adamant when they (the witnesses) were being assaulted and beaten up by thugs. The statement made on oath by PW37 is found at pages 2061 to 2067 of the record

which same was corroborated by PW38. By the provision of section 4 of the Police Act the said respondents owe the duty to protect lives and property. It is also evident that the testimonies of the observers were unchallenged. Exhibit 16 was also a confirmation as evidence.

In corroboration of the evidence of PW37 and PW38 are those of PW43 and PW46 which disclosed that there were many police officers at the scene of the assault inclusive of the commandant of the Mobile Police Force. The further evidence of Rw99 and Exhibit 147 tendered by him being a witness for the Respondent also confirmed the heavy presence of police officers at the scene. It is further in evidence that the INEC office was burnt down while the men of the 7<sup>th</sup> and 8<sup>th</sup> respondents stood by and did not see it relevant to have intercepted the act of arson and mischief. As a result of the violence the leg of PW42 was amputated. There is also no evidence of any arrest of the perpetrators of the heinous acts.

Following from the foregoing clear cut activities of the 7<sup>th</sup> and 8<sup>th</sup> respondents as revealed on the record before us, there is every reason to conclude that the said respondents had abdicated and neglected their duties and responsibilities as security and law enforcement agents. (p. 2493 F)

### ***Notices of appeals - Competence - Absence of relief - Effect***

12. The 1<sup>st</sup> leg of the preliminary objection raised, relates to the competence or not of the notice of cross-appeal by the cross appellant. It is trite and elementary to state that a notice of appeal/cross appeal is akin to a writ of summons which is an originating process.

It is the relief sought on such process that determines the nature of the claim or cause of action and also its competence. It follows without saying therefore that in the absence of a relief there cannot be any cause of action upon which the court is to adjudicate. In other words, a court's jurisdiction is exercisable where there is clear and identifiable relief upon which the action is anchored. (p. 2497 A)

### ***Notices of appeals - Reliefs claimed - Language of***

13. At page 5984 of the record of appeal volume VII, the relief sought at paragraph 4 states as follows:-

*“RELIEF SOUGHT FROM THE COURT OF APPEAL An order setting aside the various orders complained against in this cross appeal*

*by allowing the cross appeal.”*

Relevant to the determination of this subject is the case of Chief Uzokwu & Ors. V. Igwe Ezeonu 11 & Ors. (1991) 6 NWLR (Pt.200) 708 at 784-785 wherein Tobi JCA (as he then was) had the following to say:-

B            *The language of a relief must be precise, concise and simple. The language of a relief must be clear and terse.....”*

             Having regard to the relief as reproduced supra, does the phrase “an order setting aside the various orders complained against,”  
C            serve the bedrock function expected to a relief as sought to portray by the learned cross appellant’s senior counsel? The response to this question I hold is in the negative. This is in view of the authority of the case of Chief Uzokwu & Ors. V. Igwe Ezeonu II & Ors. supra. In other words, the purported relief sought on the cross appeal is nei-  
D            ther specific, precise nor concise as rightly submitted by the learned cross respondents’ senior counsel (p. 2497 D/G)

***Parties - Right of appeal - Limits***

14. At the hearing of the appeal, learned senior counsel for fifth and  
E            sixth respondents/cross-appellants, Tayo Oyetibo, Esq. addressed the court about incompetence of the objection as well as the appeal when the allegation was not made against his clients nor the ruling made against his clients who in any case had no locus standi to bring the  
F            objection nor file the appeal.

             The paragraphs they are complaining about contain allegation against some presiding officers and his clients were not one of such presiding officers. Indeed the fifth and sixth respondents are respectively returning officers for Ido-osi and Ijero Local Govern-  
G            ments. Both of them like the presiding officers are employee of the third respondent, the Independent National Electoral Commission. The position would have been probably different, without so deciding, if they were the masters of the presiding officers. They can therefore not appeal against the refusal of the tribunal to expunge some  
H            paragraphs of the petition imputing criminal malfeasance against the presiding officers because they are not aggrieved. It is only an aggrieved party that has constitutional right to appeal against the decision of the tribunal to this court. The appellants are not aggrieved party in the absence of an order being made against them.

***STATUTES - Provisos - Effect on main enactment***

15. Section 144(2) of the Electoral Act, 2006 unlike the similar provisions in section 133(2) of the Electoral Act 2002 contains a proviso. The essence of a proviso is to restrict the effect of the provision. But if the language of a proviso makes it plain that it was intended to have an operation more extensive than that of the provision it must be given such wider effect. If a proviso cannot be construed reasonably otherwise than as contradicting the main enactment, then the proviso will prevail on the principle that “it speaks the last intention of the makers”

The language of the proviso in section 144(2) of the Electoral Act, 2006 respectfully is clear and unambiguous. It speaks the mind of the Parliament. It is, therefore, the intention of the National Assembly to use the proviso therein to contradict the main enactment to the effect that a petitioner or petitioners who join Independent National Electoral Commission to their petition as in the instant proceedings, need not join an Electoral officer, a Presiding officer, a Returning officer or any other person who took part in the conduct of the election against whose conduct the petition complains. The joinder of the presiding officers being sought by the fifth and sixth respondents/cross-appellants is no longer necessary in view of the proviso to section 144(2) of the 2006 Electoral Act. (pp. 2500 F)

***Defects on face of petition - Objections - When to raise***

16. In the instant case, not only was the objection not brought, heard and determined before taking any further steps in the proceedings but it was also left for final judgment at which point the right to raise it had lapsed. The defect, the non joinder of the presiding officers in the two local governments where the fifth and sixth respondents served as returning officers is a defect on the face of the election petition. It is, therefore, my respectful opinion that failure of those respondents to raise the objection before filing their reply violates the express provisions of paragraph 49(2) and (5) already set out elsewhere in this judgment. A preliminary objection cannot be taken in a civil case, where the defendant has waived or acquiesced to any irregularity or informality or alleged incompetence. (p.2502 A/F)

**REPRESENTATION**

**FOR THE APPELLANT**

1. YUSUF O. ALI (SAN); 2. CHIFE ADENIYI AKINTOLA SAN; 3. ADEBAYO O. ADELODUN SAN; 4. CHIEF ANTHONY A. ADENIYI.;  
B 5. AYODEJI ODU ESQ.; 6. OWOSENI AJAYI ESQ.;  
7. DAYO AKINLAJA ESQ.; 8. NIYI IDOWU ESQ.;  
9. SOJI OLWOWOLAFE ESQ.; 10. K. K. ELEJA, ESQ.;  
11. M. O. ADEBAYO, ESQ.; 12. OLADELE GBADEYAN, ESQ.;  
C 13. BENJAMEN ONYEABO ESQ.' 14. YEMI GEORGE ESQ.;  
15. R. O. BALOGUN ESQ.; 16. ADETUNJI OSHO, ESQ.;  
17. IBRAHIM. K. OLANREWAJU ESQ.; 18. A. O. OKEYA, ESQ.;  
19. Y. L. AKANBI ESQ.; 20. MURITALA ADIO ESQ.  
21. OLADELE BELLO, ESQ.; 22. S. O. BABAKEBE, ESQ.,  
D 23. BAYO IDOWU 24. ABDULHAMID UMAR, ESQ.;  
25. PAUL. A. OMOTOSHO ESQ.; 26. BIODUN OGUNLEYE ESQ.;  
27. YEMI ADEBAYO, ESQ.; 28. S. O. AKINDELE (MISS)  
29. T. B. OLURODE (MISS) 30. T. E. AKINTADE (MISS)  
31. Y. A. ALAJO ESQ.; 32. E. O. OSUNWUYI (MISS)  
E 33. O.O. ABIFARIN ESQ.; 34. A. ABDULKAREEM ESQ.;  
35. B. B. ELEJA (MRS.) 36. M. A. ABDULMALIK (MISS)  
37. A. BELLO ESQ.; 38. A. T. LAWAL ESQ.;  
39. G. A. FALEYE (MRS.) 40. ADEKUNLE ATOLAGBE

F **FOR 1ST RESPONDENT**

- 1 ADEBAYO ADENIPEKUN, SAN 2. CHIEF DURO ADEYELE, SAN  
3. OTUNBA KUNLE KALEJAYE, SAN 4. DAYO ONAKOYA ESQ.  
5. OLUWOLE KUPOLUTI ESQ. 6. OLUWASINA OGUNGBADE ESQ.  
G 7. ADEWALE ADEGOKE ESQ. 8. ABIMBOLA AROWOSEGBE (MRS.)  
9. OLUSHOLA OLURUNFEMI ESQ. 10. SALIHU ADEBAYO ESQ.  
11. MADUKA CHUKS ESQ. 12. OLUMIDE ALIU ESQ. 13. ALEX  
OWOEYE ESQ.

H **FOR 2ND RESPONDENT**

1. OBAFEMI ADEWALE 2. YINKA OROKOTO  
3. CHIEF AFOLABI OJUAWO 4. CHIEF A. O. AJANA  
5. LEKAN OLATAWURA 6. EZEKIEL AGUNBIADE  
7. OLAJUMOKE OLUTE (MISS) 8. BUSUYI AYORINDE

9. N.J.EZIKE

FOR 3RD AND 4TH RESPONDENTS

ROLAND OTARU SAN WITH CHIEF R. A. LAWAL RABANA (SAN)

1. IWALOLA BELLO (MRS.) 2. TUNDE SALAKO ESQ.

3. KIZITO OJI ESQ. 4. KAYODE AKANDE ESQ.

5. O. O. JAMAL ESQ.

B

FOR 5TH AND 6TH RESPONDENTS

1. TAYO OYETIBO (SAN) 2. N. O. O. ORE (SAN)

3. MAUREEN ARINZE (MRS.) 4. A. O. OLADELE

C

FOR 7TH AND 8TH RESPONDENTS

1. CHIEF AMAECHI NWAIWU, SAN 2. S. B. OZOANA (JP)

3. O. UZOECHI ESQ.

D

**CASES REFERRED TO**

Nweke v. Ejims (1991) 1 NWLR (Pt. 625) 39

Onuaguluchi v. Ndu (2000) 11 NWLR (Pt.590) 204

Ukpo v. Imoke (2009) 1 NWLR (Pt. 1121) 90 at 143

Awuse v. Odili (2005) 16 NWLR (Pt. 952) 416 at 485

Chukwuma v. Anyakora (2006) All FWLR (Pt. 302) 21

Nwole v. Iwuagwu (2005) 16 NWLR (Pt. 952) page 543

Buhari v. INEC (2009) ALL FWLR (Pt. 459) 419 at 522

Adejie v. Nwaogu (2010) 12 NWLR (Pt. 1209) 419 at 473

Nsirim v. Nsirim (1990) 3 NWLR (Pt. 138) 285 at 296-297

Eweke v. Amodu (2010) 11 NWLR (Pt.1204) page 1 at 47

Terab v. Lawal on (1992) 2 NWLR (Pt.231) 569 at 587-588

Nwakanma v. Abaribe (2010) All FWLR (Pt. 505) 1767 at 1800

Mohammed v. Mohammed (2008) 6 NWLR (Pt. 1082) 73 at 86

Dina v. Daniel (2010) 11 NWLR (Pt.1204) page 137 at 156-158

E

F

G

**STATUTES & RULES REFERRED TO**

Court of Appeal Rules Order 17, Rules 4 & 5

Electoral Act, 2006, ss. 128, 129, 130 to 138 & 146

Evidence Act, ss. 137 & 149

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**LEAD JUDGMENT BY SALAMI PCA (OFR)**

This is an appeal against the majority judgment of the Ekiti State governorship and Legislative Houses Election Tribunal delivered by Hon. Justices Hamman Barka (Chairman), S. U. Dikko and M. B. Goji delivered on 5<sup>th</sup> May, 2010. In the judgment contained at pages 4631-5063 of the record of appeal, the learned majority judges  
B dismissed the petition of the Appellants herein. Dissatisfied with that judgment of the lower Tribunal, the appellants have appealed on 24 grounds of appeal in the Notice of appeal spanning pages 5948 to 5972 of the record, and contained in Volume VII.

C The complaint from which this appeal arose emanates from the supplementary elections conducted by the 3<sup>rd</sup> and 4<sup>th</sup> respondents on 25<sup>th</sup> April, 2009 and 5<sup>th</sup> May, 2009. The said supplementary elections are in respect of office of Governor of Ekiti State. For a clear understanding, it is important to give a succinct summary of the facts  
D leading to the above supplementary election.

It is common knowledge that gubernatorial elections were held throughout Nigeria on 14<sup>th</sup> April, 2007, Ekiti State inclusive. At the end of this election, the candidate of the Peoples Democratic Party (PDP), Olusegun Adebayo Oni was declared and returned as  
E the winner of the election by the 3<sup>rd</sup> and 4<sup>th</sup> respondents. Consequent upon this declaration and return, the 1<sup>st</sup> petitioner who is to be called the 1<sup>st</sup> appellant herein, challenged the election of Olusegun Adebayo Oni as the Governor of Ekiti State before the then National Assembly, Governorship and Legislative Houses Election Petition Tribunal  
F sitting in Ado-Ekiti diverse grounds. The Election Tribunal in its considered judgment of 28<sup>th</sup> August, 2008 dismissed the petition. Dissatisfied with the judgment of the Election Tribunal, the 1<sup>st</sup> Appellant appealed against the judgment to the Court of Appeal. The Court of  
G Appeal sitting in Ilorin in its penultimate judgment delivered on 17<sup>th</sup> February, 2009 allowed the appeal in part and ordered that a supplementary election be conducted in named sixty-three wards spreading across ten (10) Local Government Areas of Ekiti State. It added that the results of the election in the six (6) uncontested Local Governments (including Ilejemeje) would remain as declared by the Independent National Electoral Commission (INEC) and shall be added  
H to the result of the ordered supplementary elections when conducted.

In compliance with the order of the Court of Appeal, the Independent National Electoral Commission (3<sup>rd</sup> Respondent herein)



on 25<sup>th</sup> April, 2009 and 5<sup>th</sup> May, 2009 conducted supplementary elections in the 63 wards spreading across ten (10) Local Government Areas as contained in the judgment of the Court of Appeal. Both the 1<sup>st</sup> appellant (Dr. John Olukayode Fayemi) and the 1<sup>st</sup> Respondent (Olusegun Adebayo Oni) contested this supplementary elections. While the 1<sup>st</sup> appellant on the one hand contested under the platform of Action Congress B which is the second petitioner also to be known as the 2<sup>nd</sup> appellant herein, the said 1<sup>st</sup> respondent on the other hand contested under the platform of the Peoples Democratic Party (PDP). Eleven (11) other political parties participated and sponsored candidates at the said election. At the end of the supplementary elections, the 3<sup>rd</sup> and 4<sup>th</sup> respondents after adding the votes obtained by the respective political parties in the supplementary elections as well as that obtained in the six (6) Local Governments not affected by the supplementary elections, declared and returned the 1<sup>st</sup> respondent as the winner having said to have polled the highest votes of D 111,140. The 1<sup>st</sup> appellant came 2<sup>nd</sup> with total votes of 107,017.

Being aggrieved by the declaration and return of the 1<sup>st</sup> respondent as the Governor of Ekiti State, the appellants through their counsel, Mallam Yusuf O. Ali SAN filed a petition on the 2<sup>nd</sup> June, 2009. The grounds and facts upon which the petition was anchored are as adumbrated in paragraph 42 at page 49 Vol. 1 of the record wherein the petitioner alleged that: E

*“That 1<sup>st</sup> respondent is not duly elected by the majority of lawful votes cast at the election. The election and return of the 1<sup>st</sup> respondent is invalid by reason of corrupt practices and/or non compliance with the provisions of the Electoral Act 2006.”* F

Particulars were given predicating and supporting the grounds of the petition wherein the following reliefs were sought in paragraph 133 at pages 85 and 86 of the record of appeal. G

WHEREOF the petitioner prays:-

*“(i) That it may be determined and doth declared that the 1<sup>st</sup> respondent Olusegun Adebayo Oni who was the candidate of the 2<sup>nd</sup> respondent was not duly elected or returned by the majority of lawful votes cast at the Ekiti State supplementary elections held on 25<sup>th</sup> April, 2009 H and 5<sup>th</sup> May, 2009.*

*(ii) That it may be determined and doth declared that the said election and return of the 1<sup>st</sup> respondent, Olusegun Adebayo Oni are voided by acts which clearly violate and breach the provisions of the Elec-*

*toral Act, 2006.*

(iii) *That it may be determined and doth declared that the purported elections in Ifaki Wards I and II, Usi Ward and Orin/Ora Ward of Ido-Osi Local Governments and Ipoti Wards A & B of Ijero Local Government be nullified and cancelled.*

B (iv) *That it may be determined and doth declared that if the lawful votes cast at the said supplementary elections are added to the lawful votes already distilled and/or certified in the judgment of the Court of Appeal sitting in Ilorin in Appeal No. CA/IL/EP/GOV/25/2008, dated 17<sup>th</sup> February, 2009, your 1<sup>st</sup> petitioner ought to have been returned and should be returned as the elected Governor of Ekiti State having satisfied the requirements of section 70 of the Electoral Act 2006 and Section 179(2) of the Constitution of the Federal Republic of Nigeria, 1999.*"

D Upon being served the petition, all the respondents filed their respective replies debunking all the allegations contained in the petition. The 1<sup>st</sup> respondent further contended that the 1<sup>st</sup> petitioner was not qualified to contest as a Governor of Ekiti State having not fulfilled the constitutional requirement to that effect while all the respondents contended that the election was free, fair, devoid of corrupt practices and that it was conducted in substantial compliance with the provisions of the Electoral Act, 2006. Consequently, they therefore urged the tribunal to refuse the reliefs sought by the petitioners, dismiss the petition with substantial costs and affirm the declaration and return of the 1<sup>st</sup> respondent.

At the close of pleadings and pursuant to an application of the petitioners dated 29<sup>th</sup> June 2009, the petition proceeded to pre-hearing session in line with the provisions of the Election Tribunal and Court Practice Directions 2007 (as amended). During the pre-hearing sessions several applications filed by the parties to the petition were heard and disposed of. Issues were also narrowed down, and it was agreed that document not in dispute shall be tendered from the bar during trial while those in dispute shall be tendered through the appropriate witnesses. The Honourable Tribunal having considered the totality of the pleadings and the issues submitted for determination by the parties herein which are not totally dissimilar, formulated the following three issues thought as apt and germane for the determination in the report of the pre-hearing session.

*“1. Whether the supplementary election held on the 25<sup>th</sup> of April, 2009 and 5<sup>th</sup> May 2009 at Ifaki Wards I and II, Usi Ward, Orin Ora Ward of Ido-Osi Local Government and Ipoti Wards A and B of Ijero Local Government should be nullified for corrupt practices and/or non-compliance with the provisions of the Electoral Act, 2006 and the Manual for the Election made thereunder.* B

*2. Whether the 1<sup>st</sup> respondent ought not be returned as duly elected Governor of Ekiti State having regard to the lawful votes cast at the supplementary elections held on the 25<sup>th</sup> of April, 2009 and 5<sup>th</sup> of May, 2009 and the lawful votes already validated and certified by the Court of Appeal judgment in the case No: CA/IL/EP/GOV/25/08 between Dr. John Olukayode Fayemi v. Olusegun Adebayo Oni & 16 Ors. Delivered on the 17<sup>th</sup> February, 2009 and;* C

*3. Whether the petitioner proved any dereliction of duty against the 7<sup>th</sup> and 8<sup>th</sup> Respondents at the said elections.”* D

After reading the pre-hearing report on Wednesday, 12<sup>th</sup> August, 2009, the stage was then set for hearing of the petition which commenced on 27<sup>th</sup> August, 2009. At the hearing, the petitioners called forty-seven (47) witnesses five of whom were on subpoena and styled PW1 to PW47 in support of their petition and tendered numerous documents and marked Exhibits 1 to 46 respectively. They finally closed their case on 8<sup>th</sup> October 2009. The 1<sup>st</sup> respondent called sixty-seven (67) witnesses, 2<sup>nd</sup> respondent called thirty two (32) witnesses while 3<sup>rd</sup> and 4<sup>th</sup> respondents called thirty-seven (37) witnesses. On their own part, the 5<sup>th</sup> and 6<sup>th</sup> respondents called two (2) witnesses while the last set of respondents i.e. 7<sup>th</sup> and 8<sup>th</sup> called only one (1) witness. The witnesses called by the five sets of respondents were styled RW1 to RW139, while the exhibits tendered on their behalf were marked Exhibits 47 to 171. E F G

Upon the conclusion of hearing on the 15<sup>th</sup> March, 2010 and in compliance with paragraph 5(12), (13) and (14) of the Practice Directions, 2007, the tribunal ordered the filing and exchange of written final addresses. Consequently, the tribunal therefore adjourned the petition to 13<sup>th</sup> of April, 2010 for adoption of final addresses which same were duly complied with and the matter was adjourned sine die for judgment. On the 5<sup>th</sup> of May, 2010 the Tribunal delivered its judgment with that of the majority dismissing the petition and thereby made the following specific findings; H

(a) That the allegations of non-compliance with the provisions of Electoral Act, 2006 and the Election Manual were largely unproven and where acts of non-compliance with the Electoral Acts were established, the petitioners failed to show how the said acts of non-compliance affected the conduct and result of the election as stipulated by section 146 of the Electoral Act, 2006.

(b) That the Petitioners failed to establish beyond all reasonable doubt the criminal allegations including ballot box stuffing, ballot box snatching, manipulation of votes contained in several paragraphs of the petition.

(c) That the petitioners in the circumstances of the case had the onus to produce voters registers used in Ido Osi Local Government in order to rebut the presumption of regularity raised by the various forms EC 8A'S tendered by the 1<sup>st</sup> Respondent in counter to the original allegations of the petitioners that no election took place in the contested wards.

(d) That in all probability based upon the evidence including some provided by the petitioners themselves, the agents of the petitioners were responsible for the destruction of the Ido Office of the 3<sup>rd</sup> Respondent which served as the Local Government Collation Centre for Ido-Osi Local Government.

The Tribunal also annulled the results of the Election in some units spread across the six contested wards.

This appeal is against the majority judgment which same is also a subject of cross-appeal by the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> sets of respondents. The appellants notice of appeal which is contained and spanning at pages 5948 to 5972 of the record contained 24 grounds of appeal filed on the 24<sup>th</sup> May, 2010. The 1<sup>st</sup> respondent's notice of cross-appeal is also contained at pages 5973-5985 wherein 15 grounds of appeal were raised.

On behalf of the 5<sup>th</sup> and 6<sup>th</sup> respondents, their counsel Tayo Oyetibo, SAN also filed a notice of cross appeal dated 9<sup>th</sup> July, 2010 but which was by the leave of this court sought and obtained on the 19<sup>th</sup> July, 2010 deemed properly filed, the same raised only one ground of appeal.

In accordance with the rules of court, briefs were filed and exchanged by all parties and the appeal was heard on the 23<sup>rd</sup> September, 2010. At the hearing of the appeal, Mallam Yusuf O. Ali, SAN appeared with a number of senior colleagues and other counsel to represent

the appellants. Just before the said appellants' counsel could argue the appeal, the learned counsel Adebayo Adenipekun, SAN quickly interjected and sought to first argue a motion on notice filed on behalf of his client, the 1<sup>st</sup> respondent. The motion seeks an order striking out certain paragraphs of the appellants reply brief dated 23<sup>rd</sup> July, 2010 and which was filed in response to the respondent's brief. B

On the application of the learned appellants' counsel, the motion was sought to be taken along with the appeal. The learned senior counsel for the appellants also intimated the court of their notice of preliminary objection which argument thereon was embedded in their reply brief and which was to be taken at the appropriate time. C

Learned senior counsel for the purpose of arguing the appeal related to the appellants' brief dated and filed on the 11<sup>th</sup> June, 2010. Reference was also made on the one hand to the reply brief in response to the 1<sup>st</sup> respondent's brief filed 23<sup>rd</sup> July, 2010 contained at pages 4-51 of the harmonized appellants' replies to Respondents' Briefs of Argument; on the other hand, the replies to other respondents briefs - viz: 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> as well as 7<sup>th</sup> and 8<sup>th</sup> are also contained at pages 52-70, 71-79, 80-89 and 94-95 of the same reply brief respectively. The appellants brief as cross respondent on the cross appeal by the 5<sup>th</sup> & 6<sup>th</sup> respondents is further contained in the same appellants replies to Respondents' briefs of argument at pages 90-93. D E

In a separate response, to the 1<sup>st</sup> respondent's cross appeal however, the appellants filed a response, namely "Cross-Respondents' Brief" on the 23<sup>rd</sup> June, 2010, wherein a preliminary objection was raised as to the competence of the cross appeal. Argument advanced on the preliminary objection is contained at pages 2-8 of the said brief. The learned senior counsel for the appellants thereupon sought to adopt and rely on all the briefs of arguments, the reply briefs and also their cross respondents brief to the 1<sup>st</sup> respondent's cross appeal and that to the 5<sup>th</sup> and 6<sup>th</sup> respondents cross appeal. F G

For purpose of expatiating and highlighting the appeal before us, the learned appellants' senior counsel emphasized and lamented the failure of the majority decision by the tribunal to have taken advantage of their seeing and hearing of the witnesses, and hence inability to have properly evaluated the evidence both oral and documentary. That the evidence of PW43 at pages 2146-2147 confirmed that a member of the PDP did set ablaze the INEC Office. H

Hence, the trial Tribunal therefore wrongly somersaulted and arrived at a conclusion that it was a member of the 2<sup>nd</sup> appellant that was responsible. Further reference was also drawn to pages 4431-4432 of the record at the evidence of RW99 the respondents' witness whom the learned senior counsel argued confirmed the evidence of PW43.

B That the lower tribunal ought to have invoked section 149 (d) of the Evidence Act and which would have nullified the result of Ido-Osi. Learned counsel also referred to pages 5047-5048, volume 7 of the record of appeal. The senior counsel in the prevailing circumstance  
C impressed upon this court to allow the appeal of the appellants, dismiss the cross appeals and uphold their preliminary objections to the cross-appeal.

Representing the 1<sup>st</sup> respondent was also the learned senior counsel Chief Adebayo Adenipekun SAN assisted by a number of his  
D brothers silk as well as other counsel in their company. The said senior counsel adopted and relied on their brief dated and filed the 8<sup>th</sup> July, 2010. The cross appellants' brief of argument dated and filed 18<sup>th</sup> June, 2010 was also adopted and relied upon. A further brief namely cross appellants' reply brief dated and filed 8<sup>th</sup> July 2010 was  
E also adopted and relied upon. The learned senior counsel therefore urged this court to dismiss the appeal and allow the cross appeal.

The learned senior counsel for the 1<sup>st</sup> respondent also informed the court of their motion on notice dated and filed 6<sup>th</sup> September, 2010 which same, counsel moved in terms and urged that  
F the appellants' reply brief dated 23<sup>rd</sup> July, 2010 filed in response to the 1<sup>st</sup> respondent's brief of argument be struck out or in the alternative, that an order be made for purpose of expunging certain paragraphs of the said reply brief dated herein and listed in the schedule  
G attached as Exhibit A to the affidavit in support of the application.

In respect of the appeal, the counsel urged that the court should be guided by its decision in *Awuse v. Odili* (2005) 16 NWLR (Pt. 952) 416 at 485 where it is not open to this court except in exceptional circumstances to review the findings of the lower court.

H On the burden of proof, the senior counsel, while challenging the submission by the appellants, cited and recommended that the court should adopt the view held in the case of *Eweke v. Amodu* (2010) 11 NWLR (Pt. 1204) page 1 at 47 also the case of *Adejie v. Nwaogu* (2010) 12 NWLR (Pt. 1209) 419 at 473. Further reference on burden of

proof was also made to the appellants' petition at paragraph 57 (VIII) at page 54 of the record as well as other related numerous paragraphs.

On the question as to who burnt the INEC's office, the senior counsel submitted forcefully that the petition of the appellants did not in any way give a clue to this disclosure. However, that in the 1<sup>st</sup> respondent's reply to the petition, it was raised for the 1<sup>st</sup> time in paragraphs 111-114 at pages 934-936 of the record. That the evidence of PW43 was brought towards the close of hearing and which was not front loaded. Learned counsel urged the court not to attack the findings of the lower court at pages 5047-5048 of the record. That the issue relating to subpoena is not correct because the appellants were provided materials and which they said they did not need as evidenced at paragraph 21.4 of their reply to the 1<sup>st</sup> respondents reply at pages 1429-1430 of volume 2 of the record of appeal.

Learned counsel Obafemi Adewale Esq. also represented the 2<sup>nd</sup> respondent in company of several other counsel and adopted and relied on their brief dated 7<sup>th</sup> July 2010 and filed 8<sup>th</sup> July, 2010. Copious reliance was also made on all the authorities cited in support. In addition, the said counsel sought to align with the brief of arguments by the 1<sup>st</sup> respondent as well as the arguments advanced thereon. Substantiating on the issues raised in their brief, learned counsel applauded the conclusion arrived at by the learned majority tribunal judges which he argued was right in declaring the 1<sup>st</sup> respondent as the winner of the election based on the evidence adduced before it. That the appellants have failed to prove the allegation of crime beyond reasonable doubt and hence the reason why the court should uphold the majority findings of the tribunal. On the evidence of PW43, counsel submitted the absence of any evidence adduced and establishing that the witness PW43 was a registered member of the 2<sup>nd</sup> respondent contrary to the submission by the appellant. Reference was made to the ruling of the lower court at pages 4006-4009 volume 6 of the record where PW43 was not proved as being a member of the 2<sup>nd</sup> respondent. Furthermore and on the evidence of PW43, counsel related same to that of RW102 at pages 461 to 4463 where the evidence of the said witness was denied contrary to the submission by the learned senior counsel to the appellants. The counsel argued especially where the alibi by RW102 was never challenged. Learned counsel on the totality urged that the court uphold the principles of substantial compliance as enshrined in section 146(1) of the Electoral Act and to dis-

miss the appeal and uphold the majority judgment of the tribunal.

Mr. Rowland Otaru SAN led a number of counsel and in their representing the 3<sup>rd</sup> and 4<sup>th</sup> respondents, identified their brief filed on behalf of the said respondents which was dated 8<sup>th</sup> July, 2010 and filed on the 9<sup>th</sup> July, 2010. The said brief was by the order of this court made on the 19<sup>th</sup> July, 2010 regularized and deemed filed on the said same date. The brief was accordingly adopted and relied upon for purpose of arguing the appeal, which counsel urged, it should be dismissed. At this stage, the learned senior counsel intimated the court of a pending notice of preliminary objection which arguments in respect of same had been embedded in the main brief objecting to the competence of grounds 12,13, 18, 20 and 21 of the appellants' grounds of appeal. The senior counsel therefore sought also to adopt and rely on the submissions relating and connected to the said notice of preliminary objection. In further argument, the learned counsel affirmed the admission by the appellants at their paragraph 21 (IV) of their reply to 1<sup>st</sup> respondent's reply at page 1430 volume 2 of the record wherein they freed that INEC made available and gave them all the documents before they filed the petition. That the obtaining of the documents was sequel to a motion exparte supported by an affidavit of urgency to inspect the documents which order was made and granted on the 1<sup>st</sup> June, 2009. The documents were therefore obtained before the filing of the petition on the 2<sup>nd</sup> June, 2009.

On the issue of burning down of the INEC office, the senior counsel referred to paragraph 80 of the petition at page 64 of volume 1 of the record. That the tribunal at pages 5029 right through to page 5047 reviewed and evaluated the evidence of the witnesses before arriving at that conclusion. That the appellants at page 1400 paragraph 23, admitted that it was Saliu Adeoti PW46 and the other hoodlums that burnt the INEC office. That the court should therefore dismiss the appeal for being unmeritorious and an abuse of court process.

Next in line of consideration are the 5<sup>th</sup> and 6<sup>th</sup> respondents who were represented by the sets of counsel led by Mr. Tayo Oyetibo SAN. The senior counsel identified the brief of his clients which was dated and filed 9<sup>th</sup> July, 2010 but deemed properly filed pursuant to the order of this court sought and obtained on the 19<sup>th</sup> July, 2010. A notice of cross appeal dated and filed 9<sup>th</sup> July, 2010 was also filed



consequent to the order of this court made on the same 19<sup>th</sup> July, 2010. The arguments on the cross appeal is contained at pages 193-205 of the said brief which the learned senior counsel sought to adopt and rely thereon. That having regard to the said paragraphs 44-52, 57, 94, 95 and 107-109 at pages 49-74 of the record, volume 1, that they all raise criminal allegations against the presiding officers, who were not made parties to the petition. That even though the said paragraphs were sought to be struck out at the lower court, it was refused by the tribunal. That section 144(2) of the Electoral Act which deals with joinder of INEC does not cover allegations of Commission of Crime. Reference in support was made to the case of *Dina v. Daniel* (2010) 11 NWLR (Pt.1204) page 137 at 156-158. The counsel urged for the dismissal of this appeal while the cross appeal should be allowed.

The 7<sup>th</sup> and 8<sup>th</sup> respondents were represented by the counsel Chief Amaechi Nwaiwu SAN in company of other counsel with him. The said counsel in his submission related to the said respondents' brief of argument dated 2<sup>nd</sup> July 2010 and which was, pursuant to the order of this court, deemed filed and served on the 19<sup>th</sup> July, 2010. He sought to adopt and rely on same. That the tribunal below was right in holding that the appellants failed to prove their case before it and also the acts of dereliction of duty against the 7<sup>th</sup> and 8<sup>th</sup> respondents. Reference was made to volume 7 of the record of appeal at page 5067 lines 12-14, also page 5071 lines 1-3 where the totality of the appellants' case was reviewed and that no evidence of such allegation existed. The learned counsel urged that the specific findings of the tribunal should be upheld since it has not been impugned by the appellants. That both on proof beyond reasonable doubt and preponderance of evidence, the appellants have failed to prove the burden placed on them. That the court should therefore dismiss the appeal in its entirety and uphold and affirm the majority judgment of the learned lower tribunal.

Mallam Ali, SAN in further submission on points of law argued the significance of pleadings which should be taken as a whole and not in piecemeal or disjointedly. That the issue of burning was raised in the respondents' brief and that there was no admission by the appellants of the facts averred by the respondents especially the 7<sup>th</sup> and 8<sup>th</sup> respondents. That the case of *Igbeke v. Emodi* cited by the

1<sup>st</sup> respondent supra is completely upside down and does not apply to this case. That with the appellants' assertion of the absence of any election at Ido-Osi, the respondents who aver the contrary have the burden shifted unto them to prove. That the case of *Dina v. Daniel* is also not applicable in this case. That the law is also clear that it is only the person affected that can complain on the non joinder of parties. That it is not therefore open to the 5<sup>th</sup> and 6<sup>th</sup> respondents to lodge a complaint on behalf of the presiding officers who should have done so themselves. See, the case of *Mobil Oil Unlimited v. Lagos State Environmental Ltd.* (2002) 18 NWLR (Pt. 798) page 1 at 34-35 and 37.

Submitting on the motion by the 1<sup>st</sup> respondent, the learned senior counsel argued same as lacking in merit in view of the absence of anything to the contrary and outside the provision of order 17 rule 5 of the rules of court. Counsel urged for the dismissal of the cross appeal and in favour of allowing the appeal.

Oyetibo, Esq. SAN in further submission referred to the provision of Order 6 rule 4 of the rules of court wherein that the appellants/respondents require the leave of court in order to raise an objection on their right which seeks to raise the point that it is only the presiding officers who could come to this court on appeal. That with the 5<sup>th</sup> & 6<sup>th</sup> respondents having been affected by the complaints levied in the said paragraphs of the petition, the jurisdiction of this court is affected by the absence of all necessary parties mainly the presiding officers. The learned senior counsel on the totality urged that the court should uphold that it has no jurisdiction to entertain the new point.

At this juncture, I wish to state that the disposal of this appeal would demand that the series of preliminary objections raised by all parties to both the appeal and cross appeal ought and should first be disposed of before the hearing of the respective substantive appeals for purpose of allowing a free flow pathway to the hearing of the appeal and the cross appeal herein. I am fortified on the following authorities *S. B. N. Ltd. v. I. O. Corpr.* (2001) 1 NWLR (Pt. 693) p. 191, *Onyekwuluje v. Animashaun* (1996) 3 NWLR (Pt. 439) 637 at 644; *Onuoha v. N. B.* (1999) 13 NWLR (Pt. 636) 621 at 624 and *Onyemeh v. Egbuchulam* (1996) 5 NWLR (Pt. 448) p.255 at 262. In further vindication is also the case of *Ogboru v. Ibori* (2005) 13

NWLR (Pt. 942) p. 319 wherein a court is enjoined to determine pending applications before judgment is delivered. The existence of a preliminary objection in an appeal symbolizes a rough path way clogging the hearing of such appeal. Without first determining and disposing of same, the appeal cannot properly be set for determination. The next to be taken and following the preliminary objection is the motion by the 1<sup>st</sup> respondent/applicant. The appeal and the cross appeals predicated thereon are the central fulcrum of the subject matter and would subsequently serve a final determining bus stop. B

Chronologically, there appears to be three categories of preliminary objections needing determination. While two are formal and clear-cut, the third seeks to be smuggled in through the back door. In other words, the 1<sup>st</sup> respondent in his brief at paragraph 3.02 page 29 sought to raise objections against certain grounds of appeal filed by the appellants; that is to say grounds 18, 19, 20, 21 and 22 which he argued were not covered by the issues raised in their brief as the issues for determination. It is therefore argued that the said grounds should be struck out. Without having to belabour the point, the law is clear on the procedure to be followed where a respondent intends to rely upon a preliminary objection to the hearing of an appeal. In other words he must give a notice to that effect. This is not the case in the matter at hand. The court cannot invoke the 2<sup>nd</sup> arm of order 10 rule 3 of the Rules of this court. This is in view of sui generis nature of election appeal and also that it is likely to overreach the appellants. The said supposed objection having not been formerly raised submitted upon is hereby struck out. C D E F

It is also pertinent at this point and for convenience to next deal and dispose of the preliminary objection by the 3<sup>rd</sup> and 4<sup>th</sup> respondents and subsequent upon which that of the appellant as the cross-respondent to the cross appeal, should follow after the main appeal but just before determining the cross appeal. It is also significant and obvious to mention that the 1<sup>st</sup> respondents in his cross appellants' reply brief at page 3 paragraph 2.00 submitted in respect of Notice of Preliminary Objection. He did not however per se raise an independent objection but seeks to respond thereto the objection raised by the cross respondent in their brief. I shall return to this in the course of the judgment. ***It is needless to stress that the competence or not of a notice of preliminary objection is predi-*** G H

**cated on its sustainability. It must, in other words be validly sustained for purpose of serving the reason why it is raised. The mere filing of a notice of preliminary objection does not ipso facto make it competent and arguable. It must first satisfy the test relating to its sustainability. Plethora of authorities relating to this would explain and expatiate for better clarification. In the case of *Agagu v. Mimiko* (2009) 7 NWLR (Pt. 1140) page 342 for instance, this court per Abdullahi PCA at page 385 dealt at great extent on the subject, wherein he followed the decision of the Apex Court and had this to say:-**

***“The notice of preliminary objection can be given in the respondent’s brief, but a party filing it, in the brief, must ask the court for leave to move the notice of objection before the oral hearing of the appeal commences . Otherwise, it will be deemed to have been waived and therefore abandoned. In *Nsirim v. Nsirim* (1990) 3 NWLR (Pt. 138) 285 at 296-297 the Supreme Court, per Obaseki, JSC stated as follows:-***

***“The respondent in the instant appeal has contended that although the objection was stated in the brief, the court was not moved at the oral hearing of the appeal to strike out the grounds for failure of particulars of errors. He therefore submitted that the appellant herein should be taken to have abandoned the objection..... In my opinion there is substantial merit in the contention of the respondent. Being a preliminary objection, the objection should have been by motion on notice before the hearing of the appeal so that arguments on it can be heard by the court. While notice of objection may be given in the brief, it does not dispense with the need for the respondent to move the court at the oral hearing for the relief prayed for. The preliminary objection not having been raised and argued at the oral hearing the Court of Appeal cannot be condemned as having erred in allowing the then appellant (now respondent) to argue his appeals. In the circumstances, all the preliminary objections concerning the grounds of appeal filed by all the appellants are hereby disposed of.”***

Several other related authorities on the same point are the cases of:- *Ajide v. Kelani* (1985) 3 NWLR (Pt. 12) p. 248; *Abiola v. Olawoye* (2006) 13 NWLR (Pt. 996) p. 1; *Onochie v. Odogun* (2006) 6 NWLR (Pt. 975) p. 65; *Nsirim v. Nsirim* (1990) 3 NWLR (Pt. 138)

p. 285; Tiza v. Begha (2005) 33 WRN 158 at 171; Attorney General Rivers State v. Ude & Others (2006) 12 SCMR (Pt. 1) 72 at 83. Lastly is Ben v. State (2006) 12 SC MR (Pt. 2) 71 at 82 which was a criminal matter. The said objections by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents were not taken before the hearing of the appeal even though they were canvassed or argued in the respective briefs of arguments. While that of the 1<sup>st</sup> respondent was not formerly given on notice, it was also not referred to at all at the hearing of the appeal. In respect of the objection by the 3<sup>rd</sup> and 4<sup>th</sup> respondents however, it was only taken after the appellants had argued their appeal. The learned senior counsel, Mr. Otaru, SAN in the circumstance came too late in the day. Crying over spilt milk would serve no purpose. The said objections sought to raise are, on the authorities cited deemed abandoned.

The next of the preliminary objection is the one raised by the appellants in response to the 1<sup>st</sup> respondent's cross appeal as to the competence of the cross appeal. The learned senior counsel Mallam Yusuf Ali rightly advised himself early and therefore promptly informed the court of the said notice of preliminary objection and which was taken up timeously before the hearing of the appeal, unlike those of the respondents. The said notice which relates to the cross appeal of the 1<sup>st</sup> respondent would be dealt with appropriately at the determination of the said cross appeal.

The next in line is the motion on notice dated and filed 6<sup>th</sup> September 2010 by the 1<sup>st</sup> respondent/applicant for:-

*"1. AN ORDER striking out the Appellants Reply Brief dated 23<sup>rd</sup> July, 2010 filed in response to the 1<sup>st</sup> respondent's brief of argument.*

*ALTERNATIVELY*

*2. AN ORDER expunging the paragraphs of the Appellants' Reply Brief dated 23<sup>rd</sup> July, 2010 listed in the schedule attached as Exhibit A to the affidavit in support of this application.*

*AND for such further or other orders as this Honourable Court may deem fit to make in the circumstances."*

The three grounds predicated the application are as follows:-

*"1. The appellants' reply brief contravenes the provisions of Order 17 Rule 4 of the Rules of this Honourable Court as the arguments contained therein amount to a recapitulation of arguments already con-*

*tained in the Appellants' Brief of argument.*

*2. The Appellants' Reply Brief contravenes the provisions of Order 17 Rule 4 of the Rules of this Honourable Court as it is essentially devoted to facts and not new issues of law as contemplated by the Rules of court.*

B *3. The Appellants' Reply Brief as presently constituted is capable of overreaching of the 1<sup>st</sup> Respondent."*

In support of the motion is a twelve paragraph affidavit deposed to by one Chukwudi Maduka Esq. a legal practitioner in the law firm of Chief Afe Babalola SAN & Co., counsel to the 1<sup>st</sup> Respondent/Applicant in this appeal, who had the consent and authority of the said Applicant and his employers to depose to this affidavit. Also exhibited to the affidavit in support is Exhibit 'A' being the schedule of the offending paragraphs contained in appellants' reply brief and specifically deposed to at paragraph 10 of the affidavit in support. The learned counsel Chief Adenipekun SAN intimated the court of the motion filed and moved same in terms and urged that the court should strike out the said paragraphs.

E In response to the application, the learned silk Mallam Ali submitted same as unmeritorious and re-iterated the conformity of their reply brief with Order 17 Rule 5 of the Rules of court. The learned senior counsel therefore urged that the prayers be refused.

F Pertinent to resolving this application is Order 17 Rules 4 and 5 of the Rules of this court wherein Rule 5 is more relevant and appropriate; the reproduction which state as follows:- "17. ... 4(1) ....

G *(2) The respondent's brief shall answer all material points of substance contained in the appellant's brief and contain all points raised therein which the respondent wishes to concede as well as reasons why the appeal ought to be dismissed. It shall mutatis mutandis, also conform to Rule 3(1), (2), (3), (4) and (5) of this order.*

H *5. The appellant may also, if necessary within fourteen days of the service on him of the respondent's brief, file and serve or cause to be served on the respondent a reply brief which shall deal with all new points arising from the respondent's brief."*

With reference to the said Rule of court, it is clear that the essence of a reply brief is to be limited to new points which are raised in the respondent's brief. In other words, it is not a forum to either engage in arguments at large or re-argue the appellant's brief. It is

also not a repair kit for an otherwise damaged brief but purely to answer to the new points raised. Relevant in point are the authorities in the cases of:- OJo v. Okitipupa Oil Palm Plc. (2001) 9 NWLR (Pt. 719) p. 679 at 693; Ogboru v. Ibori (2005) 13 NWLR (Pt. 942) p. 319 for instance, where the court exhaustively dealt with the function and essence of reply brief. At page 380 this court had this to say: B

*“The function of reply brief and indeed oral reply, is for both to be used in addressing such new issues, particularly on points of law that the appellant did not envisage and treat in the appellant’s brief or initial argument in the oral prosecution of the appeal.”* C

Another related authority is the case of Cameroon Airlines v. Mike Otutuizu (2005) 9 NWLR (Pt.929) p. 202 wherein it was held that a nature of a reply should be limited to answering only new points arising from the respondent’s brief and therefore should not be used to proffer further arguments to those already made and contained in the appellant’s brief. The effect of non compliance is that the court will discountenance such argument. See also the cases of Onuaguluchi v. Ndu (2000) 11 NWLR (Pt.590) 204 and A. C. B. Ltd. v. Apugo (1995) 6 NWLR (Pt. 399) 65. D

By relating Order 17 Rules 4(2) and 5 of the Rules of Court reproduced supra and also to the authorities in support thereof, a critical analysis of the said appellants’ reply brief in question is not totally subsumed within relief 1 as sought to argue by the 1<sup>st</sup> respondent/applicant. I would however hasten to say that while certain aspects of the paragraphs contravene the provisions of Order 17 Rules 4(2) and 5, the totality of the paragraphs are not condemnable but could be saved under the alternative relief 2. In other words, a careful perusal of exhibit A attached to the affidavit in support of the motion paper would reveal that the following twenty three paragraphs which are offensive and therefore liable to be struck out are:- 2.09, 2.10, 2.11, 2.12, 2.14, 2.15, 2.16, 2.17, 2.19, 2.20, 2.21, 2.25, 2.26, 3.15, 3.19, 3.20, 3.22, 3.23, 3.35, 3.40, 3.48, 3.53 and 4.04. The rest surviving paragraphs are therefore competent. The motion is, in the result granted in part in terms of relief 2 in respect of the 23 stipulated paragraphs supra which are accordingly struck out. Relief 1 is refused. E  
F  
G  
H

Next to be considered is the merit of the main appeal whereupon argument had been advanced by all counsel on behalf of their respective clients.

From the totality of the 24 grounds of appeal raised by the appellants in their notice of appeal, two issues distilled for determination are as follows:-

### 1<sup>ST</sup> ISSUE

Whether the majority of the judges of the trial tribunal were not totally wrong to have refused to nullify the election in all the polling units of Ipoti Wards A and B of Ijero Local Government Area and Ifaki Wards I and II, Orin/Ora Ward and Usi Ward of Ido-Osi Local Government Area of Ekiti State and declare the 1<sup>st</sup> Petitioner/Appellant as the winner of the election having regard to the compelling believable cogent and largely unrebutted oral and documentary evidence marshaled by the Appellants before the trial tribunal and having regard to the nature of the allegations made about non-compliance with the provisions of the Electoral Act and the Manual for Elections in the conduct of the rerun election in the affected wards.

2. Whether the majority of the judges of the trial tribunal were right by relying on the unreliable and unbelievable testimonies of RW99 and RW101 to come to conclusion that it was the agents of the Appellants that set fire to the INEC office at Ido, but curiously shut their eyes to the cogent and overwhelming testimonies and documents of PW1, PW36, PW37, PW38, PW39, PW40 and PW41 on the unabated violence that characterized the rerun election in the afflicted wards, thereby coming to the wrong conclusion that the appellants did not prove allegations of electoral violence beyond reasonable doubt.

On the one hand, while grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 19, 20, 21, 23 and 24 relate to issue no. 1, issue 2 is distilled from grounds 10, 13, 14, 15, 16, 17, 18 and 22 of the grounds of appeal.

On behalf of the 1<sup>st</sup> respondent, their learned counsel reproduced the appellants' two issues and proceeded to raise objections to certain number of the grounds of appeal which he argued should be struck out. In the absence of a competent notice of preliminary objection as earlier found in the course of this judgment, the 1<sup>st</sup> respondent, I hold, has not shown the incompetence of those grounds raised by the appellants. The objection is therefore overruled.

In respect of the 2<sup>nd</sup> respondent, the two issues raised on its behalf do not appear to be different and or alien to those of the appellants but are also properly aligned in the same content and



direction.

On behalf of the 3<sup>rd</sup> and 4<sup>th</sup> respondents however, the six issues formulated and raised are as follows:-

*“1. Whether the lower tribunal vide its majority judgment was right in holding that the appellants (petitioners) failed to prove beyond reasonable doubt the criminal allegations of fraud, falsification electoral malpractices and corruption contained in their petition in accordance with the provisions of section 138(1) of the Evidence Act.*

*2. Whether the lower tribunal vide its majority judgment was right in holding that incidence of non-compliance, if any were not substantial enough to alter the declaration of the 1<sup>st</sup> respondent as the winner of the election.*

*3. Whether by the majority judgment of the lower tribunal having regards to the evidence of the parties adduced before it, it was right in holding that it was the agents of the Action Congress (AC) that burnt down the INEC office at Ido in Ido-Osi Local Government Area of Ekiti State.*

*4. Whether the lower tribunal was right in its majority judgment in holding that Exhibit EC 8D attached to the pleadings of the 3<sup>rd</sup> and 4<sup>th</sup> respondents cannot be used having regards to the provisions of paragraphs 1 (c), 4(1) (2) (2) and (4) of the Election Tribunal and Court Practice Directions 2007.*

*3. Whether the appellants (petitioners) proved by credible evidence the resignation of the 4<sup>th</sup> respondent as the Resident Electoral Commissioner of Ekiti State.*

*4. Whether the lower tribunal in its majority judgment was right in holding that the appellants (petitioners) did not prove dereliction of duty on the part of the 7<sup>th</sup> and 8<sup>th</sup> respondents.”*

The two issues raised on behalf of the 5<sup>th</sup> and 6<sup>th</sup> respondents are squarely within the ones formulated by the appellants. In respect of the 7<sup>th</sup> and 8<sup>th</sup> respondents also, their only issue on the question of dereliction of duty is subsumed within the issues raised by the 3<sup>rd</sup> and 4<sup>th</sup> respondents. The reproduction of same would only be repetitive.

From the totality of the issues raised on behalf of all parties therefore, and having related same to the grounds of appeal from the notice of appeal filed, by the appellants, there are four issues for the determination of this appeal. These are the two which have been

raised by the appellants themselves on the one hand and those of the 3<sup>rd</sup> & 4<sup>th</sup> respondents issues five and six on the other hand which would for convenience be re-numbered as issues three and four in addition to those by the appellants. The issues would be taken serially.

B Issue no. 1 has been reproduced earlier. It challenges the majority judgment of the trial tribunal in failing to declare the 1<sup>st</sup> petitioner/appellant as the winner of the election despite the overwhelming evidence both oral and documentary and establishing the allegation of non compliance with the provisions of the Electoral Act and the Manual for Elections in the conduct of the rerun election in the affected wards.

C The learned appellants senior counsel submitted at great extent in support of the issue raised and re-iterated in forceful terms and without mincing words that there was no election known to Electoral Act and the D Manual for Elections held in any of the six (6) disputed wards, the subject of this appeal. The learned senior counsel having xrayed the entire proceedings at the lower tribunal therefore submitted the grievous error in its conclusion that the appellants did not prove non compliance as pleaded and while electoral malpractices were also not proved. This, counsel submitted in view of the oral and documentary evidence tendered at E the trial, the majority judges, were, not even handed in the way and manner they reviewed and ascribed probative value to the testimonies of the witnesses called by the appellants vis-a-vis those called by the respondents'.

F Furthermore, that the discrepancies, alterations and unaccounted juggling of figures in many of the forms EC 8A tendered at the trial were enough on their own warranting the nullification of the elections in those polling stations. That on a proper appraisal of the evidence G tendered, it would irresistibly lead to the nullification of the election in all the polling units of Usi Ward, Ifaki wards I and II, and Orin/Ora ward of Ido-Osi Local Government Area.

Learned senior counsel in his further submission posed that, having regard to the testimonies of PW1, PW2, PW5, PW8, PW9, PW10, H PW11, PW14, PW16, PW39, PW40, PW41 and PW43 as to the level of violence in the wards that are in contention, the appellants have proved beyond reasonable doubt all the allegations of electoral violence pleaded in the petition. Also that having regard to the testimonies of PW37 and PW38, and the presence of evidence of vio-

lence on their bodies as demonstrated before the tribunal, it would not be right to say that the appellants did not prove the allegation of violence.

Furthermore and that having regard to the content of Exhibit 16 and Exhibit 20 and also the visual demonstration of those exhibits before the tribunal that stood un-contradicted, electoral violence was indeed proved beyond reasonable doubt. B

That if the majority judges had taken the same painstaking trouble like the minority judges and nullified all the results from the contested polling units, the appellants would have emerged victorious with majority of the lawful votes cast and would have been entitled to be declared the winner of the election. C

That from all parameters, the appellants led sufficient oral and documentary evidence that assailed the results from all the polling units from the six (6) wards on which parties joined issues and that this should have led to the success of the petition in all its ramifications. Several authorities were cited in support of the submission, a number of which would be considered later in the course of the judgment. That it is in the interest of justice therefore to allow the appeal in its entirety. D E

The 1<sup>st</sup> respondent in response to the 1<sup>st</sup> issue submitted extensively also and negating the arguments by the appellants. The deductive summary is largely anchored on the findings by the tribunal. In other words, that the allegations of non-compliance with the provisions of Electoral Act, 2006 and the Election Manual were largely unproven and that where acts of non-compliance with the Electoral Acts were established, the petitioners failed to show how the said acts of non-compliance affected the conduct and result of the election as stipulated by section 146 of the Electoral Act, 2006. F G

That the appellants failed to establish beyond all reasonable doubt the criminal allegations including ballot box stuffing, ballot box snatching, manipulation of votes contained in several paragraphs of the petition. Furthermore, that the appellants in the circumstances of the case had the onus to produce voters registers used in Ido Osi Local Government in order to rebut the presumption of regularity raised by the various Forms EC 8AS tendered by the 1<sup>st</sup> Respondent in counter to the original allegations of the petitioners that no elections took place in the contested wards. Cited in support and to buttress his submission. H

sion is the statement of this court in the case of *Obun v. Ebu* (2006) All FWLR (Pt. 327) 419 and where the appellants appeal was found to be devoid of any merit and therefore dismissed. The learned senior counsel urged therefore that the appeal should be dismissed.

Submitting also on behalf of the 2<sup>nd</sup> respondent, his learned  
B counsel, Adewale Esq. on the issue of whether the number of those  
who voted exceeded the number of accredited voters, argued that it  
is not the duty of the tribunal to look for such evidence but entirely  
that of the appellants, who had the burden and responsibility to proffer  
C such evidence through witnesses. The said counsel to buttress his  
submission cited a number of authorities by the apex court and also  
that of this court. An example is where this court in the case of *Terab*  
*v. Lawan* (1992) 3 NWLR (Pt. 231) p. 569 at 590 followed the apex  
courts' decision in *Onibudo & Ors. V. Akibu & Ors.* (1982) 13 NSCC  
D 199 at 211. That the Electoral Act 2006 never envisaged a perfect  
conduct from electoral officials being human, who are susceptible to  
making mistakes. Hence, the provision of section 146(1) of the Act  
which regulates the nature and degree of non-compliance which will  
affect the result of an election to be such that is substantial. The case  
E of *Wali v. Bafarawa* (2004) 16 NWLR (Pt. 898) p. 1 at 42 was further  
cited in support. That there is a presumption in favour of election  
result tendered in evidence as being correct and genuine until evi-  
dence to the contrary is adduced. Reference was made to the case  
of *Buhari v. INEC* (2008) 19 NWLR (Pt. 1120) page 246 at 354 per  
F Tobi JSC. Also the cases of *Omoboriowo v. Ajasin* (1984) 1 SC NLR  
10, *Jalingo v. Nyame* (1992) 3 NWLR (Pt. 231) 538, *Buhari v.*  
*Obasanjo* (2005) 13 NWLR (Pt. 941) 1.

Learned counsel in his further submission also cited a number of  
G authorities where in an election, allegations of malpractice or corrupt  
practices are the basis of an election petition. See; *Fayemi v. Oni* (2009)  
7 NWLR (Pt. 1140), 223 and *Wali v. Bafarawa supra*.

That in an election petition matter, it is settled law that a petitioner  
will only succeed on the strength of his own case and not on the weak-  
H ness of the respondents' case. Furthermore, he argued, that the totality  
of the evidence of the appellants in relation to this issue is speculative and  
falls below standard of proof required in cases of this nature. That  
there is nothing perverse and unsubstantiated by credible evidence  
in the findings of the lower tribunal and that nothing has been placed

before this court to disturb the unimpeachable findings of fact by the lower tribunal in relation to the issue thereof.

That from the totality of evidence adduced by both parties and as rightly found by the majority tribunal judges, counsel submitted that the findings of the trial court in relation to non-compliance is unassailable and urged that the majority decision appealed against should be upheld. That the election was conducted substantially in accordance with the provisions of the Electoral Act, and that the appellants' claims are predicated upon a full proof perfect election which counsel submitted is not envisaged under the Electoral Act, and hence the petition and the appeal arising in relation thereto.

The learned counsel urged that this appeal should be dismissed while the election of the 1<sup>st</sup> respondent, should be affirmed per the majority decision of the lower tribunal.

On behalf of the 3<sup>rd</sup> and 4<sup>th</sup> respondents, their learned senior counsel Otaru Esq. outlined the fulcrum of the various electoral malpractices alleged to have marred the re-run election. He submitted that from the tenor of the grounds of the petition coupled with the particulars supplied by the petitioners in support of those grounds, that there is no iota or scintilla of doubt that all the allegations of fraud, corrupt practices, stuffing of ballot boxes with ballot papers, multiple votes, concoction and manufacturing of election results, thuggery, and all other electoral heist alleged by the petitioners are criminal allegations which must be proved beyond reasonable doubt. That the averments of the petition which imputed the acts of criminality are punishable under sections 128, 129, 130, 131, 132, 133, 134, 135, 136, 137 and 138 of the Electoral Act, 2006. That with reference to the evidence of parties particularly that of the petitioners' witnesses in all the disputed wards and polling units, the petitioners have failed woefully to prove all the criminal allegations pleaded by them beyond reasonable doubt as required by law.

That in the absence of any explanation given by the petitioners/appellants in respect of polling units 001, 002, 003, 004, 007, 008, 010, 012, 013, 014 and 015 in Usi ward, this court was urged to invoke the provisions of section 149 (d) of the Evidence Act against the petitioners, that if they had given any evidence relating to the above units, the evidence would have been against them.

On the question of standard of proof by the appellants, the learned senior counsel submitted the absence of such as required by

section 138(1) of the Evidence Act relating to criminal allegations. Counsel cited a number of authorities in support, and which would be considered later on in the course of this judgment.

On the question of proof of substantial non compliance, counsel argued that the lower tribunal in its majority judgment was right in holding the absence of such proof by the appellants. Cited in support is the case of Buhari v. Obasanjo (2005) 2 NWLR (Pt. 910) p. 241 at 417.

That the appellants had therefore failed to show how the non-compliance, if any affected the election. Also on the importance of Form EC8A serving a foundation of an election, the learned counsel cited the case of Amgbare v. Sylva (2009) 1 NWLR (Pt. 1121) p. 1 at 63.

On behalf of the 5<sup>th</sup> and 6<sup>th</sup> respondents, their learned counsel Oyetibo, Esq. SAN sought to draw a distinction between an allegation that election did not hold in a particular ward and an allegation that the election which was held in that ward was marred by electoral malpractices or irregularities. That while in the former, it is understandable that the allegation that there was no election is a negative assertion and therefore, he who asserts the positive may have the onus /proof, in the latter, the positive assertion is that the election which took place de facto was not valid de jure because of alleged malpractices.

That the onus of proving the malpractices or non-compliance which would invalidate the de facto election rests squarely on the one who alleges the irregularities or non-compliance. That the provisions of the Evidence Act are clear on who has the burden of proof in our adversarial system of justice. Sections 135, 136 and 137 of the Evidence Act were cited in support.

That the appellants should not be allowed to blow both hot and cold but should be bound by their pleadings. The learned senior counsel cited the case of INIAMA v. AKPABIO (2008) 17 NWLR (Pt. 1116) 225 at 309. Also a Supreme Court authority in the case of Olufeogba & Ors. v. Abdur-Raheem & Ors. (2009) 18 NWLR (Pt. 1173) 1 at 432-433 on the need for a party to be consistent in his case. That based on the case of Buhari v. Obasanjo supra, the respondents herein have no corresponding duty to show that they conducted the elections in strict compliance with the law as erroneously

submitted by the appellants, when they have not proved their case to the requirement of the law. That the duty lies on the petitioners/appellants who allege non-compliance with the Act to show that the non-observance was so great as to amount to conducting of the election in a manner contrary to the principle of such election and that the non observance did affect the majority of the voters or the result of the election. Among the authorities cited in support is the case of *Abubakar v. Yar'Adua* (2008) 19 NWLR (Pt. 1120) p. 162-163 D-A, 163-164 H-B per Tobi JSC. That contrary to the allegation by the appellants of non election in the six wards, various Forms EC8A were tendered in proof of the holding of the election. That the production of form EC8A is a proof that election took place. See the case of *Agagu v. Mimiko* (supra).

On the submission by the appellants relating to the invocation of section 149 (d) of the Evidence Act, the learned senior counsel urged that the argument be discountenanced and rather operate the section against the appellants. That with Forms EC8A having been generated from the disputed wards, the tribunal rightly held that the presumption of regularity which inures in favour of those forms has not been rebutted by the appellants. Cited also in support is the case of *Abubakar v. Yar'Adua* (supra).

Counsel submitted the settled law that where a decision of a trial court centers on the credibility of a witness, an appellate court which did not have the opportunity of seeing and observing such a witness will be cautious in interfering with such finding of fact. See *Mohammed v. Mohammed* (2008) 6 NWLR (Pt. 1082) 73 at 86. That all the allegations of crime and non compliance were not proved beyond reasonable doubt.

The 7<sup>th</sup> and 8<sup>th</sup> respondents' brief which raises only one issue is centered on the last issue four relating to dereliction of duty. I shall return to it at the appropriate time.

Before proceeding with a consideration of the arguments of counsel, it may be pertinent to observe that the distinction which Oyetibo, SAN, sought to draw between de facto and de jure elections may be clever but not candid; fanciful, but untenable. It, indeed, betrays a misconception of the principal proposition of the appellants that no election as known to law was conducted.

On the question of burden of proof, the parties and the tri-

bunal seem to be tearing themselves apart. While the respondents strenuously contended that the burden of proof where criminality is alleged is proof beyond reasonable doubt, the appellants maintain that the standard of proof is on balance of probability just as in any civil matter, notwithstanding that election matters is sui generis, special in nature, character and class and are not considered to be identical with other civil proceedings. The tribunal too was torn into two.

There was no need for a divisive approach if there was a correct understanding of the rules of pleadings. **Application of section 137(1) of Evidence Act to a civil case depends on the contents of the pleadings of each case. If averments alleging crime are severable and if after such severance there still remains in the pleadings of the petitioners sufficient averments which disclose a cause of action which is devoid of criminal imputation against any party to the proceedings then the burden of proof upon the petitioner or plaintiff is to establish his case within preponderance of evidence. This view is as observed in Arab Bank Ltd. v. Ross (1952) Q. B. 216, 229:**

***“Under the rules of pleading, as I have always understood therein, a pleader who has pleaded more than he strictly need have done can always disregard the unnecessary or surplus averments and rely simply on the more limited ones.”***

In Omoboriowo v. Ajasin (1984) SCNLR 1 at pages 108,152-153, Eso JSC said:

***“Finally, once the figures are false, whether the falsification was done by the 2<sup>nd</sup> appellant or not, the fact remains that 1<sup>st</sup> appellant cannot and should not be elected on figures other than the majority of the votes cast at the election. Our Constitution provides for the election of a Governor who has the vote confidence of the electorate not the one who lives merely on technical confidence.***

***Even, to carry this issue further the pleading of criminal falsification, if there had been one, must, at least, include some falsification which may either be criminal or not. The pleading of the greater certainly includes the less and if in proving the less the case of a plaintiff is proved, he could not and should not be penalised for pleading the greater; see Arab Bank Ltd. v. Ross (1952) 2 Q.B. 216, per Denning, L.J., at p. 229.***

*Even with ordinary common sense, if I happen to find my lost coat*



with AB, and on a claim for the recovery thereof, I alleged that AB stole the coat, the fact that I could not prove AB to be the thief does not deny me the recovery of my coat once I establish the coat to be mine and not AB's. Once Chief Ajasin established he had the majority of the votes, the fact that he has failed to prove any crime that went behind the scene, should not deprive him of his otherwise legitimately proved case. He has eminently proved his claim that Chief Akin Omoboriowo was at the time of the election not duly elected by a majority of lawful votes at the election. And he has succeeded on his pleadings. The order of the High Court as confirmed by the Federal Court of Appeal is hereby affirmed."

Bello, JSC (as he then was) also had this to say at page 116 amongst others:

"It follows therefore that in so far as the petition was founded on those allegations it must be dismissed. However, if the averment alleging crimes against the 2<sup>nd</sup> respondent were excised from the petition, there still remained in the body of the petition sufficient averments without putting directly in issue the commission of a crime by a party to sustain the petition. I think it is essential for better appreciation of the issue to set out the averments relevant to the areas in dispute in the petition stripped of its allegations of crime....."

**Apart from the allegation of the commission of crime, the petitioners/appellants averred at paragraph 42 of their Petition that the first respondent was not duly elected by majority of lawful votes and his election was not valid for reason of non-compliance with the Electoral Act. These averments have already been cited in the Petition. They are severable and are sufficient grounds under section 145 of the Electoral Act. The excess is deemed abandoned.**

True, indeed, the case of the appellants on the pleadings is that no elections known to the Electoral Act, 2006 and the Manual for the Election were conducted in the six disputed enumerated wards of Ifaki I and II, Usi, Orin/Ora all in Ido/Osi Local Government area and Ipoti A and B of Ijero Local Government Area. The reasoning was premised on the sundry irregularities that beset the purported elections and for non compliance with the provisions of the electoral laws as provided. Cardinal amongst the acts of non-compliance pleaded bordered on lack of accreditation.

At paragraphs 47 to 52 of the appellants' petition all the steps alleged to be followed in a polling unit before lawful elections can be said to have been conducted are set out in the pleadings. The steps are evidenced at pages 50 to 52 of the record of appeal which the appellants contended were jettisoned in the six wards. In addition to the horror story, the appellants on the one hand also alleged that the results of the said wards were at no time collated and/or announced at the Local Government collation centre at Ido. That there was also no accreditation of voters but rather that the voters' registers were recklessly and arbitrarily ticked thereat. On the other hand however and to the contrary, the Respondents contended that elections were duly conducted in tandem with the conditions and procedures prescribed by the Electoral Act and the manual for Elections.

***With the subject matter at hand being an election petition appeal, it is civil by nature and which needless to state but only obvious that the proof required is on balance of probabilities or preponderance of evidence. A number of judicial authorities are agreeable on this point.***

The cases of Swen v. Dzungwe (1966) 1 SCNLR page 111 at 119, Buhari v. INEC (2009) ALL FWLR (Pt. 459) 419 at 522, Chukwuma v. Anyakora (2006) All FWLR (Pt. 302) 21 and Ajadi v. Ajibola (2004) 16 NWLR (Pt.898) 91 at 195 are all relevant and instructive. ***In the case Buhari v. INEC for instance, Tobi JSC had this to say:-***

***"The standard of proof in Civil Cases, including election petitions, is on the preponderance of evidence or the balance of probabilities."***

***Also in Ajadi v. Ajibola this court per Adamu JCA held that:-***

***"Election cases which are sui generis ..... require liberal or lighted proof on the balance of probability or on the preponderance of evidence....."***

The grounds upon which the election at hand are questioned are predicated upon non-compliance with the Electoral Act and allegation of electoral malpractices. The relief sought at paragraph 133 of the petition has been reproduced earlier in this judgment.

By the provision of section 145(1) of the Electoral Act 2006, the relevant and appropriate grounds upon which such petition could be brought are clearly stated in subsections (b) and (c) which reproduction state as follows:-

“145(1)..... (a).....

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

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

**In the case of Agagu v. Mimiko supra, this court per Abdullahi, PCA dwelt at great extent on the question of burden of proof on issue joined as to whether or not elections were held. It is apt to refer to the pronouncements made by his Lordship at page 431 of the report:-**

***“It was the first respondent’s case that there was no election held. The Appellant who incidentally was the 1<sup>st</sup> Respondent to the petition responded that the election was conducted. The burden of introducing evidence otherwise known as evidential burden squarely rests on the party who substantially asserts the positive before the evidence is adduced. Thereafter the burden of proof rests on the party who will fail if no further evidence is produced. Where this is done, the burden of proof will shift on the other party to introduce evidence which if accepted, will then defeat the claim of the petitioners.....***

***The Appellant it seems to me who asserts substantially that election was conducted has the evidential burden of proving that it was held.”***

The same principle was also applied in the cases of Amgbare v. Sylva (2009) (Pt. 1121) 1 at 60, Ukpo v. Imoke (2009) 1 NWLR (Pt. 1121) 90 at 143 and Hon. Alphonsus Uba Igbeke v. Senator Joy Emordi & Ors. (unreported) judgment of the Enugu Division of the Court of Appeal in Appeal No. CA/6/EPT/04/2009 delivered on 25<sup>th</sup> March, 2010 at page 45.

**In the matter under consideration, it was the appellants’ case that no election was conducted in the six disputed wards while the respondents asserted that there were elections in those wards. The onus in line with the case of Agagu v. Mimiko shift onto the respondents who asserted the positive and therefore submitted the contrary. I am aware and as rightly submitted by the 5<sup>th</sup> and 6<sup>th</sup> respondents that the principle of law is to place the general burden of proof on the appellants as the petitioners. However, it is also trite that the said principle is not static but**

**that which could certainly shift depending on the circumstances as it is in the case at hand.** That submission by the learned respondents' counsel does not therefore hold water.

By the provision of section 146(1) of the Electoral Act 2006:

B *"An election shall not be liable to be invalidated by reason of non compliance with the provisions of this Act if it appears to the Election Tribunal or Court that the Election was conducted substantially in accordance with the principles of this act and that the non compliance did not affect substantially the result of the election."*

C It follows from the foregoing provision therefore that for a party to establish acts of non compliance he must not only plead and prove the acts of such non compliance but also and further that the act of non compliance did substantially affect result of the election. Section 145 must be married to section 146 for the goal sought under the former to be achieved.

At paragraph 44 of the petition, the petitioners averred and said:-

E *"44. Your petitioners state that no elections known to the Electoral Act, 2006 and the Manual for Election or to any civilized clime were conducted in Ifaki wards I and II, Orin/Ora ward and Usi ward in Ido-osi Local Government Area, and Ipoti wards A and B in ijero Local Government Area and that the purported results concocted and brought forth from these wards are fake, manipulated and not borne out of any lawful electoral process."*

F The next relevant question to pose is whether it is correct as held by the majority tribunal judgment that having regard to the evidence adduced before it both oral and documentary, the appellants had failed to prove or substantiate the allegations of malpractices and non compliance complained of?

G ***By the interpretation of section 146(1) of the Act, a credible election is that which must have been conducted substantially in accordance with the principles of this Act and also that the nature of the non compliance must not substantially affect the result. The outcome of the latter is dependent upon the former.***

H ***The next related question is: what should be the nature and extent of the expected non compliance before it could satisfy the phrase "substantially conducted in accordance with the accepted principles"? The answer to this would lie in the question: What elements constitute an election? Relevant***

**and which could serve as a guiding factor is the case of INEC v. Ray (2005) All FWLR (Pt. 265) 1047 wherein this court at pages 1071-1072 had this to say:-**

***“It is trite in law that the concept of “election” denotes a process constituting accreditation, voting, collation, recording on all relevant INEC forms and declaration of results. The collation of all results of the polling units making up the wards and the declaration of results are the constituent elements of an election as known to law. The authority of Igodo v. Owulo (supra) at 77 C-E; 78 para. H, and 79 paras A-B; supports the contention. Also relevant are sections 40, 42, 43, 54, 55 and 56 of the Electoral Act 2002.”***

**Also and on the same principle is the recent decision of Osunbor v. Oshiomhole (2009) All FWLR (Pt. 463) 1363 at 1404, wherein the relevant corresponding sections quoted in the above cited authority under the 2002 Electoral Act are in pari materia with sections 43-53, 55, 58-60 and 70-77 of the Electoral Act, 2006.**

The six affected wards in question are located within Ijero and Ido-osi Local Government Areas where the appellants alleged the anomalies were carried out. In other words, that there was no proof that legitimate ballot papers were used and that the requisite procedures designed to ensure veracity of ballot papers via the filling of Forms EC40C was complied with. Paragraph 120 of their petition is relevant. The mere production by the respondents of Form EC8A without more is not prima facie evidence or proof that an election was conducted.

The notice given is for the production of Forms EC25, EC40C, EC8A, EC8B being used and unused ballot papers and their studs allegedly used at all the polling stations in Ipoti wards A & B. The appellants contended that while Forms EC8A, EC8B for Ipoti Wards A & B were produced and tendered, Forms EC25, EC40C, the used and unused ballot papers allegedly used in both wards were not. Exhibit 42 is a subpoena issued by the tribunal on the 6<sup>th</sup> Respondent as evidenced at page 2052 of the record. Also the order of the tribunal made ex parte at pages 14-17 of the record directing the 3<sup>rd</sup> respondent to issue and give to the petitioners all INEC forms and documents used for the conduct of the election in all the disputed wards are of material significance. The order made ex parte signifies that it related to all INEC forms and documents without exception. There is no evidence showing that the 3<sup>rd</sup> respondent in fact did produce the papers Forms EC40C and EC25 for the re-

run election in Ipoti wards A and B. Further still and to corroborate this deduction, reference can be made to paragraph 137 of the 1<sup>st</sup> respondent's reply and notice of preliminary objection wherein the said respondent at page 941 of the record volume 11 had this to say:-

B “137. The 1<sup>st</sup> respondent states in response to paragraphs 96-102 (both inclusive) of the petition that the petitioners were invited to INEC office Abuja on Thursday 11<sup>th</sup> of June 2009 to inspect and obtained certified true copies (CTC) of all the electoral documents, but deliberately chose not to honour the invitation. A copy of the letter of invitation shall be relied upon at the trial. The petitioners  
C and 3<sup>d</sup> respondent are hereby given notice to produce their copies.”

In response, the petitioners/appellants at paragraphs 21 (iv) and 24 of the reply to 1<sup>st</sup> respondent reply in respect of the notice to  
D produce and preliminary objection at pages 1430-1431 of volume II of the record stated thus:

“21. Your petitioners aver in response to paragraph 137 of the reply that:-

(iv) on being served with the order of the tribunal, he 3<sup>d</sup> respondent released all certified electoral documents and reports of the 3<sup>d</sup> respondent on the election to the petitioner.  
E

24. Your petitioners state further and in response to paragraphs 126-164 that in the purported elections in Ido-Osi Local Government Area, 3<sup>d</sup> - 5<sup>th</sup> Respondents, despite the order of this court to that effect cannot make available voters' register, ballot box, ballot papers, Form EC8A, EC17, EC25, EC40 and EC40D etc to the petitioners.”  
F

With further reference also made to paragraph 23 of the same pleadings, it is obvious on the allegation that all materials purportedly used for the Ido-Osi Local Government Area election could not be traced at all. Specific notice to produce the documents was given and the reason for non production was that the materials were destroyed in the fire that gutted the INEC office.  
G

H The witness, PW43, gave evidence that the respondents were responsible for burning the INEC office. Furthermore, the witness to the respondent RW99, in person of Bunmi Ojo, was called by 2<sup>nd</sup> respondent, and in his evidence he testified that the said office was burnt only after all the voting materials were evacuated by the police

before the inferno. The affirmation of the above is Exhibit '147'.

***The witness PW43, whose name is Peter Oladosu was a subpoenaed witness by the petitioners. He is a member of the 2<sup>nd</sup> respondent (PDP) and an aide of the 1<sup>st</sup> Respondent. In his evidence in chief at paragraph 19, for instance he emphatically said:-***

***"19. Immediately the police carried away all the electoral materials and INEC officials there, Chief Femi Akinyemi (a.k.a. Falex) Ekiti State Chairman of Local Government Service Commission called some of our PDP boys in my presence and gave them 10 liters of petrol to put the place on fire and they carried out the operation."***

***There was no evidence on record that PW43 was ever cross-examined by any of the Respondents' counsel. There is also no evidence that the police, as the 7<sup>th</sup> & 8<sup>th</sup> respondents, did call any evidence to contradict the allegation that its men carried away all the electoral materials and also the INEC officials.*** RW137 (the 5<sup>th</sup> Respondent) in his statement on oath also said that a convoy of four trucks of mobile policemen were seen to be advancing towards the INEC office, Ido at 6.00 pm at the time he left the collation Centre; and this was just before the alleged burning of the INEC office. There is certainly a close link between the evidence of PW43 and RW99. Both witnesses are also linked with the respondents.

Relevant also and in addition to the evidence of PW43 and RW99 is the Document Exhibit '40' which is titled "Report submitted to Operation Committee by the Result Verification and Assessment Team for Ekiti Governorship Re-run held on 25th April, 2009." With the report relating to the re-run election, it must have been subsequent after the said election.

From all deductions and for proper evaluation of the re-run election activities, the alleged destruction and absence of the election materials ought to have been a crucial fulcrum of the committee's report. The absence of such in my opinion leaves very much to be desired.

***In view of the evidence by the witnesses PW43 and RW99 can it be rightly concluded that the Election materials were destroyed and therefore precluded the respondents from making them available? The answer in my opinion is in the negative and therefore calls for the invocation of section 149 (d) of the***

***Evidence Act. In other words, the materials were purposefully withheld because their production would have been detrimental to the interest of the respondents.*** In the case of Nwole v. Iwuagwu (2005) 16 NWLR (Pt. 952) page 543 this court at page 594 said:-

B “..... the failure to produce this vital evidence, conclusive of the issue whether or not the Forms EC8A were supplied to any or many of all the wards in the Owerri Senatorial District, would operate against INEC and in favour of the petitioner/appellant.....”

C The effect of the failure to produce the voter’s register for the wards in question for instance is that, there cannot be any proof that the requirement of accreditation was complied with. Similarly, even with the production of Forms EC8B, EC8B for Ipoti Wards A & B, the withholding or absence of Forms EC25, EC40C being used and D unused ballot papers allegedly used in both wards would not give credence to the deficiency created in the Ipoti wards re-run election.

The same vice has also infected the re-run election in the four wards of Ido-Osi Local Government wherein the respondents tendered Forms EC8A for the majority of the units constituting the E four wards. At pages 14-17 of the record volume 1, on the 1<sup>st</sup> June 2009 the learned tribunal on a motion ex parte ordered that 3<sup>rd</sup> and 4<sup>th</sup> respondents should allow the appellants or their counsel and agents to inspect and take certified true copies of all the Forms EC8A, EC8B, F EC8C, EC25, EC40C, voters registers, ballot papers both used and unused and their stubs and other materials used for the conduct of the re-run election held on 25/4/2009 in the wards of the two Local Governments in question.

While the 3<sup>rd</sup> and 4<sup>th</sup> respondents gave the appellants the G CTC of the Forms EC8A and voters register used in Ipoti wards A & B, same was not the case in respect of the four wards in Ido-Osi Local Government. This is verified and confirmed by the averment of paragraph 24 of the appellants reply to the 1<sup>st</sup> respondent’s reply reproduced earlier in the course of this judgment, and hence the specific H reference made to the Ido-Osi Local Government. The 1<sup>st</sup> appellant also as PW47 gave evidence at pages 279-281 vide paragraph 110 of his written deposition in this respect. The said evidence was neither challenged nor contradicted under cross examination. Also at pages 2150-2151 of the record, at the trial, a subpoena was issued at the



request of the appellants on the 3<sup>rd</sup> to 5<sup>th</sup> respondents to produce the same said materials and which they failed to comply.

Again and on the authority of the case of INEC v. Ray (supra), by the 3<sup>rd</sup> to 5<sup>th</sup> respondents failing to produce the electoral materials, it cannot be said that election was properly conducted in the said four wards of Ido-Osi Local Government. The absence of the voters register for the wards signifies that there is no proof that the requirement of accreditation was complied with. It is only the examination of the voters' register that would serve to ascertain whether or not accreditation had taken place in a particular polling unit. The relevance of section 50(1) and (2) of the Electoral Act, 2006 and Chapter 3, paragraph 3.1 step 1.4 of the Manual for Election Officials, 2007 cannot be underrated as it serves a confirmation that accreditation is a most important step in the process or conduct of an election. In the case of Ajadi v. Ajibola (2004) 16 NWLR (Pt.898) 1 at 182-183. Adekeye, JCA (now, JSC) had this to say:-

Accreditation is an important step in the conduct of the election that should be done by the presiding officer before a voter casts his vote. Only accredited voters would be allowed to vote. A ballot without accreditation cannot be a valid ballot paper, without a valid paper there can be no valid election. Any votes returned without an accreditation for a particular voting unit such votes cannot be said to have been obtained through due electoral process. Nweke v. Ejims (1991) 1 NWLR (Pt. 625) 39. The importance of accreditation was stressed in the case of Terab v. Lawan (1992) 2 NWLR (Pt.231) 569 at 587-588 where it was held that accreditation of voters and the actual voting are only extreme sign posts for determining whether malpractice has occurred.

The authority in the case of Fayemi v. Oni (2009) 7 NWLR (Pt. 1140) 223 at 291 is also relevant where this court on the same reason i.e. lack of accreditation nullified the elections in the same wards in contention in this matter arising from the election of 14/4/07.

Also in the case of Nwakanma v. Abaribe (2010) All FWLR (Pt. 505) 1767 at 1800 on the issue of accreditation, Galadima, JCA, (as he then was) had this to say:-

*"It is not even enough for the appellant to produce spurious unit results as proof of the holding of the election in the disputed*

*wards, he ought to have produced and tendered voters registers duly accredited and also called as witnesses, persons who actually voted in the various units of those wards. Nweke v. Ejims (1999) 11 NWLR (Pt. 625) 39 and Awuse v. Odili. ”*

B On the same principle and upholding voters register as pri-  
mary evidence to ‘establish whether election was held or not in a  
polling unit, this court again in the case of Remi v Sunday (1999) 8  
NWLR (Pt. 613) 92 at 107 re-iterated the significance. The case of  
Awuse v Odili (2005) 16 NWLR (Pt. 952) 416 at 471 is also relevant  
C wherein Salami JCA (as he then was, now PCA) affirmed its impor-  
tance. As rightly submitted by the learned senior counsel for the ap-  
pellants, in the absence of accreditation, the purported results for the  
various polling units, in Forms EC8A and tendered by the Respondents  
are seriously plagued and vitiated. This is so because as it has been held,  
D election is a process, see, INEC v Ray also Osunbor v Oshiomhole (su-  
pra).

Furthermore and in confirmation of the importance of a vot-  
ers’ register for purpose of establishing whether or not an election  
was held in a particular polling unit, the majority lower tribunal judges  
E themselves at page 5020 had this to say:-

*“To establish lack of accreditation the voters register has to be  
produced,....”*

It is amazing that despite the above finding of the tribunal,  
F the same tribunal judges veered off, goofed and eventually somer-  
saulted as can be seen at page 5048 of the record. In other words, in  
turning around, they held that Form EC8A, without more, was suffi-  
cient proof and thus negating the importance of the voters’ register.  
Specifically at page 5051 their Lordships had this to say:-

G *“It is our opinion therefore the Forms EC8A tendered by the  
1<sup>st</sup> and 2<sup>nd</sup> Respondents are acceptable and form the basis of this  
election notwithstanding the absence of the voters register which has  
been burnt by the petitioners agents and supporters. ”*

H One wonders, what could have been the reason for the ob-  
vious and deliberate change of direction. This attitude by their Lord-  
ships, I hold with all respect, is very unfortunate and amounts to a  
great error as rightly submitted by the learned Senior counsel for the  
appellants.

In other words, the senior counsel argued that the majority

judgment by the tribunal was wrong in holding that the elections in the disputed wards were valid on the basis of the Forms EC8A produced and thus invoking the presumption of regularity. It is not the filing of Form EC8A alone that confers validity on an election. All other processes must be established without which it cannot be said that there was a valid election. The benefit of electoral material serves to confirm the validity. Therefore, in the absence of voters register, evidence of accreditation, collation it cannot be said that the process of election has been complete. The tribunal was merely speculating on citing Form EC8A on the conclusion that an election was conducted. The tribunal cannot therefore speculate, see, the cases of *Adefulu v. Okulaja* (1996) 9 NWLR (Pt. 475) 668 at 675 and *O. B. M. C. Ltd. v. M. B. A. S. Ltd.* (2005) All FWLR (Pt. 261) 216 at 234. B C

The absence of the voters' register despite the notice to produce and the order by the tribunal to produce same would warrant the invocation of section 149 (d) of the Evidence Act against the respondents. The evidence of PW43, a PDP stalwart, and RW99, (the Personal Assistant) of the 1<sup>st</sup> respondent, are both in point. The effect of the unchallenged nature of the evidence of PW43 is that same is deemed admitted and should be acted upon, see, the case of *Agagu v. Mimiko* (supra) E and also *Egom v. Eno* (2008) 11 NWLR (Pt. 1098) 320 at 336.

Under cross examination at page 4432 of the record, RW99 admitted that he (PW43) was involved in campaigning for the 1<sup>st</sup> respondent. RW99 did confirm fact that PW43 was an aide of the 1<sup>st</sup> Respondent. The implication, as rightly submitted by the learned appellants' counsel, is that the evidence of PW43 on the burning of INEC office and removal of the electoral materials before the burning constitute an admission against interest for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and hence all the respondents. The said PW43 was never declared a hostile witness. It is trite that admission of this nature is fatal. Relevant in support is the case of *Ojukwu v. Onwundiwe* (1984) 1 SC NLR 247 at 286-287 also *Nwawuba v. Enemuo* (1988) 1 SC 264 at 286-287. F G

RW99, also, under cross-examination, and, in his statement to the police, Exhibit 147, said that the police had rescued the results before the INEC Office was burnt. The witness did confirm under cross examination that the results started from Form EC8A and run through Forms EC8B and EC8C etc. Page 4432 (lines 17 and 18 of the record) is evident wherein the witness under cross examination stood by the H

content of Exhibit 147, his statement as read to him.

***Having regard to the judgment and findings by the majority tribunal judges, there is no indication that the said evidence of PW43 and RW99, as well as the documents exhibits 147 and 47, were properly evaluated. In other words, I am of the view that had careful consideration been given to the pleadings and evaluation done of the evidence by all parties and taking into account both oral and documentary evidence, the majority Judges of the trial tribunal would have arrived at a different conclusion on this issue.***

***On the totality of the 1<sup>st</sup> issue raised by the appellants, it is obvious and overwhelming that the majority of the judges of the trial tribunal were totally wrong to have refused to nullify the election in all the polling units of Ipoti wards A and B of Ijero Local Government, and the four wards of Ido-Osi Local Government of Ekiti State. This is in view of the compelling, believable, cogent and largely un-rebutted and unchallenged oral and documentary evidence marshaled by the Appellants before the trial tribunal and also having regard to the nature of the allegations made about non compliance with the provisions of the Electoral Act and the Manual for Elections in the conduct of the rerun election in the affected wards.***

From the deductive summary of the above, what beats the imagination was the prevaricating conduct of the fourth respondent. This was the Resident Electoral Commissioner who protested against the results of the four wards of Ido-Osi which she declared as fake. She refused to announce those results as to do so would amount to an affront on her Christian conscience. She, in consequence, abandoned her duty post. Somewhat, intriguingly, and to the consternation of the whole world, she, subsequently, emerged. Without offering any explanation whatsoever, she accepted and announced the self-same results which she had earlier impugned as being repulsive to her conscience.

The absence of evidence, therefore, explaining the change of heart by the 4<sup>th</sup> respondent in the light of all that transpired, in my humble view, leaves very much to be desired of the 3<sup>rd</sup> and 4<sup>th</sup> respondents who, by the nature of responsibility reposed in them, held the entire key of ensuring that a free and fair elections are conducted

for the Nigerian people. The betrayal of this confidence will have a devastating and lasting effect. The cumulative outcome is to lend a corroborative credence to the allegations of non compliance levied by the appellants. The said issue without more is also resolved in favour of the appellants against the respondents. Election matters are very sensitive as they are of paramount significance to all parties concerned: the electorates in particular, who are directly involved; as well as the generality of the Nigerian Populace. It should not therefore be treated as if it were a matter of private concern and only limited to the inner caucus of political parties. By its very nature, the subject is that which ought to be treated with all utmost transparency, openness, honesty and seriousness.

The said issue is therefore resolved in favour of the appellants. By this, issue number one in this appeal is hereby disposed of in favour of the appellants. The resolution of this issue, effectively, disposes of the entire appeal. However, this notwithstanding, the other issues would still be examined, albeit, cursorily.

The 2<sup>nd</sup> issue for determination relates to the question as to who was responsible for the fire that gutted the INEC office and whether the majority tribunal judges were not wrong in coming to a conclusion that the appellants failed to prove allegations of electoral violence beyond reasonable doubt. The appellants in their submission challenged the conclusion arrived at by the majority of the judges of the trial tribunal whom they submitted focused in a wrong direction in identifying the culprits and hence arriving at a deduction that the appellants did not prove allegations of electoral violence beyond reasonable doubt.

***The second issue, from all indications, has two legs, with the 1<sup>st</sup> not being a matter for determination in this appeal. In other words, the question as to who set the INEC office at Ido ablaze, is not relevant in view of the nature of the subject matter under consideration. While the question and issue have a criminal connotation, the subject at hand is civil in nature. What is of relevance therefore is whether election materials were in fact destroyed in the fire that gutted the INEC office. It is the materials that would serve our purpose and not the perpetrator of the act. With the determination of the 1<sup>st</sup> issue wherein evidence showed and confirmed that the***

**materials were all evacuated before the fire incident, the said question relating to the fire culprit without much ado, is of no moment. This is not the forum to raise that leg of the issue. It is therefore a needless academic exercise which the court will not delve into.**

B However, the second leg which relates to the findings of the majority tribunal's decision on the need for proof of the allegations of electoral violence beyond reasonable doubt is a point which would briefly be considered. The findings of the lower tribunal in its majority judgment would be reproduced as relevant wherein it said:-

C *"The allegations made by the petitioner witnesses, failed the quality of evidence required by law. Even, where the allegation would be said to have been established, there is no evidence linking the 1<sup>st</sup> Respondent with the offences alleged. We do note that while the*  
D *witness mentioned names of certain individuals and or mentioned the name of the 2<sup>nd</sup> Respondents, it was not stated how PDP members or thugs were identified. Moreover, the named persons having denied the allegation made against them, and the proof required being beyond doubt there is no such evidence. The allegations are*  
E *therefore not proved. We have similarly looked at the documents placed before us viz a viz the non compliance alleged in the documents and or irregularities therefrom. We have earlier rested the law in the resolution of such issues in respect of Ipoti Wards A & B; we*  
F *apply the law against the documents listed and produced for Usi ward and hold that acts or incidences of non compliance has not been proved in the entire ward and we so hold."*

Also at page 4978, the learned tribunal said:-

G *"The law is settled that where a petitioner makes electoral malpractices and or electoral irregularities, the bases of his complaint, the proof is beyond doubt as same raises elements of crime. The burden of proof lies on he who asserts."*

H The tribunal's findings set out above are misconceived, to say the least, in view of the plethora of authorities cited and considered earlier in this judgement that the burden of proof on the appellants on the pleadings is on the preponderance of evidence. The pleading in this case is severable and having severed the criminal allegations there were sufficient facts left to support the appellants' cause of action.

***By the provision of section 145 of the Electoral Act,***

**2006:**

***“145(1) An election may be questioned on any of the following grounds: (a) .....***

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

***The interpretation of the said provision is significant and would be a subject of consideration in due course.***

At the tribunal the 2<sup>nd</sup> respondent objected to the competence of ground (ii) of the petition as contained in paragraph 42 (ii) as being incompetent in breach of the provision of section 145 (1) (b) of the Electoral Act, 2006, which has been reproduced supra. Ground (ii) of the petitioners grounds of petition at page 49 vol. 1 of the record as couched in paragraph 42 (ii) of the petition reads thus:- C

***“(ii) The election and return of the 1<sup>st</sup> respondent is invalidated by reason of corrupt practices and/or non-compliance with the provisions of the Electoral Act 2006.”*** D

***It is trite law that whenever the word ‘or’ is used in a statute, it bears a disjunctive meaning. Section 18(3) of the Interpretation Act is relevant. The use of the word ‘or’ is therefore a separating factor of preceding provisions from the coming under, and thus giving a sense of complete and an Independent identity.*** See the cases of Obasse v. National Judicial Council (2008) All FWLR (Pt. 434) 1637 at 1657 and Rim v. Emefo (2001) FWLR (Pt. 66) 792 at 813. E F

***In the light of the conclusion arrived at the determination of issue one, which had resolved the question of non-compliance with the provisions of the Electoral Act in favour of the appellants, issue two is also conveniently accommodated under the former. Suffice to say therefore that for the court to dwell on the question of corrupt practices would certainly amount to double proof which would lead to academic exercise amounting to a waste of time, and serves no purpose. By the use of the word or the proof of one is sufficient and takes care of the other.*** G H

***The 3<sup>rd</sup> issue is whether the appellants (petitioners) proved by credible evidence the resignation of the 4<sup>th</sup> respondent as the Resident Electoral Commissioner of Ekiti State.***

**It is pertinent to mention right away that the appellants even though they raised a ground of appeal No. 21 in respect of this issue they did not of themselves specifically formulate an issue relating to same. Therefore, the ground of appeal is deemed abandoned. The issue formulated by the third and fourth respondents predicated on the appellants' abandoned ground of appeal No. 21 is incompetent and is, therefore, struck out.** At page 5054 of the record of appeal, the tribunal in its majority judgment held as follows:-

*"In the case before us, none of the parties led evidence as to whether or not the 4<sup>th</sup> respondent actually resigned her duty during the re-run election. The Allegations were pleadings of the parties. The evidence of PW47 did not prove the resignation of the 4<sup>th</sup> respondent. Moreover, even if such a resignation of the 4<sup>th</sup> respondent was proved by the petitioners, we are still bound by the authority of Mark v. Abubakar (supra) cited by the Respondents to the effect that the 4<sup>th</sup> Respondent does not have the power to cancel or annul results of the various level of any election."*

The said issue in question relates to the competence or not of the resignation by the 4<sup>th</sup> respondent. I wish to state categorically that whether or not the said respondent resigned her position as the Resident Electoral Commissioner for Ekiti State is not of relevance in the determination of this appeal. In other words what is of significance is that which can be deduced from the pleadings of parties in particular paragraphs 26-28 of the petitioners' petition at pages 37-43 Vol. 1 of the record of appeal, and the reply thereof by the 3<sup>rd</sup> and 4<sup>th</sup> respondents at pages 448-452 at paragraphs 7, 17, 18 and 19 as well as the evidence adduced on the record.

The 4<sup>th</sup> and last issue is whether the lower tribunal in its majority judgment was right in holding that the appellants (petitioners) did not prove dereliction of duty on the part of the 7<sup>th</sup> and 8<sup>th</sup> respondents.

At page 5067 of the record, the tribunal in its majority decision held thus on the allegation of dereliction of duty and said:-

*"We hold therefore that the evidence of PW1 did not establish the breach of duty or dereliction on the part of the 7<sup>th</sup> and 8<sup>th</sup> respondents."*

Also at page 5068 the learned tribunal Judges continued and said:-

*"Moreover, PW37 and PW38 who are senior members of*



*staff of the institutions where they worked never petitioned to the higher authorities of the 7<sup>th</sup> and 8<sup>th</sup> Respondents or to the umbrella of the monitoring body under which they came to monitor or observe the election. We again resolve that these piece of evidence offered by the PW36, PW37 and PW38 never established issue of dereliction of duty on the part of 7<sup>th</sup> and 8<sup>th</sup> respondents.”* B

It is pertinent to say that the respondents, in particular, the 3<sup>rd</sup> and 4<sup>th</sup> also 7<sup>th</sup> and 8<sup>th</sup> respondents, made this point a specific issue wherein they out-rightly denied the allegation levied in that respect.

For instance, the 7<sup>th</sup> and 8<sup>th</sup> respondents in their submission strongly argued that by the very nature of the allegation, they are criminal and therefore ought to have been proved beyond reasonable doubt. That the petitioners had woefully failed to prove same and are therefore deemed to have slept over their responsibility in proving it before the tribunal. Their learned counsel in substantiating this argument cited the authorities in the cases of:- Fayemi v. Oni also Buhari v Obasanjo, Yusuf v. Obasanjo (supra) as well as sections 137 and 134 of the Evidence Act and Electoral Act 2002 respectively. C D

That from the totality of the pleadings and evidence led at the tribunal, the appellants have failed to prove any allegation of dereliction of duty against the said 7<sup>th</sup> and 8<sup>th</sup> respondents as required by law. That there is no proof of crime established beyond reasonable doubt. The learned counsel urged that the appeal be dismissed forthwith in its entirety. E

***It is on record, per the evidence of PW37 and PW38, who were Independent Election observers, that the officers or agents of the 7<sup>th</sup> and 8<sup>th</sup> respondents remained adamant when they (the witnesses) were being assaulted and beaten up by thugs. The statement made on oath by PW37 is found at pages 2061 to 2067 of the record which same was corroborated by PW38. By the provision of section 4 of the Police Act the said respondents owe the duty to protect lives and property. It is also evident that the testimonies of the observers were unchallenged. Exhibit 16 was also a confirmation as evidence.*** F G H

***In corroboration of the evidence of PW37 and PW38 are those of PW43 and PW46 which disclosed that there were many police officers at the scene of the assault inclusive of the commandant of the Mobile Police Force. The further evi-***

***dence of Rw99 and Exhibit 147 tendered by him being a witness for the Respondent also confirmed the heavy presence of police officers at the scene. It is further in evidence that the INEC office was burnt down while the men of the 7<sup>th</sup> and 8<sup>th</sup> respondents stood by and did not see it relevant to have intercepted the act of arson and mischief. As a result of the violence the leg of PW42 was amputated. There is also no evidence of any arrest of the perpetrators of the heinous acts.***

***Following from the foregoing clear cut activities of the 7<sup>th</sup> and 8<sup>th</sup> respondents as revealed on the record before us, there is every reason to conclude that the said respondents had abdicated and neglected their duties and responsibilities as security and law enforcement agents.*** This should not and cannot be viewed with levity but of a great concern. In a nutshell, I hold that the said issue has militated against the said respondents and therefore cannot be resolved in their favour, but that of the appellants.

The next point for consideration having determined all the four issues raised in the main appeal is the cross appeal by the 1<sup>st</sup> respondent.

The cross appeal is against the ruling of the tribunal dated 23<sup>rd</sup> July 2009 which upheld the appellants/cross respondents application and struck out paragraphs 166-183 of the cross appellants' reply containing its objection to the votes of the petitioners. The tribunal essentially based its decision on the following:-

(a) That the cross-appellant's objection brought under paragraph 50 of the First Schedule of the Electoral Act, 2006 was incompetent as the said objection failed to particularize the votes forming the basis of the objection on a unit by unit basis. The tribunal was of the view that the cross appellant should not simply have lumped together the votes credited to the Appellants/Cross Respondent in the Local Governments.

(b) That the objection in respect of the votes credited to the Appellants/Cross Respondents in Ado-Ekiti Local Government after the conduct of the 14th April, 2007 election was belated as the said votes had been validated by the Court of Appeal in *Fayemi v. Oni* (2009) 7 NWLR (Pt. 1140) 223.

(c) That as the tribunal was set up to determine the validity of the re-run election ordered by the Court of Appeal, its jurisdiction could not be extended to cover the validity of the elections held in

2007.

Briefly and for purpose of recapitulation, upon the conclusion of the hearing of the petition forming the subject matter of this appeal the tribunal on the 5<sup>th</sup> May 2010, delivered its majority judgment dismissing the petition. However, the tribunal in the said majority decision made some findings which ultimately led to the annulment of the results of the election in certain units which are the contested wards. B

Being dissatisfied with these decisions the cross-appellant filed his Notice of cross-Appeal dated 24<sup>th</sup> day of May, 2010 challenging the decisions contained in judgment of the tribunal delivered on 5<sup>th</sup> May, 2010 and the interlocutory decision delivered on 23<sup>rd</sup> July, 2009. C

From the fifteen grounds of appeal raised in the notice of cross appeal, the cross appellant formulated four issues from fourteen grounds with the exception of the fifteenth which I hold is deemed abandoned. The four issues as reproduced are as follows:- D

*"1. Whether the tribunal was right when it held that the cross appellant failed to state the particulars of votes objected to in Igbemo Ward of Irepodun/Ifelodun Local Government and Ado-Ekiti Local Government of Ekiti State.* E

*2. Whether the tribunal in dismissing the Cross-Appellants objection to the votes credited to the 1<sup>st</sup> and 2<sup>nd</sup> Cross Respondent's in Ado-Ekiti Local Government did not wrongly interpret the decision of the Court of Appeal in Fayemi v. Oni 2009 7 NWLR Pt. 1140 223 thereby coming to a wrong conclusion that the said objection was belated.* F

*3. Whether the nullification of the elections in unit 001, Ipoti Ward A, unit 001 Ipoti Ward B, unit 003 Ipoti B, Unit 005 Ipoti Ward B, unit 006 Ipoti Ward B, Unit 009, Ifaki Ward 1, Unit 001 of Orin/ Ora Ward, unit 004 Orin Ora Ward and Unit 006 Ifaki Ward 1 on the ground of over-balloting and sundry allegations of non-compliance with Electoral Act was not wrong having regard to section 146 of the Electoral Act, 2006.* G

*4. Whether the tribunal was not wrong when it held that declaratory reliefs can be granted based on admission in pleadings without evidence being led on such reliefs."* H

While issue 1 was formulated from grounds 13 and 14 of the grounds of appeal, issue 2 was from ground 12, with issue 3 from grounds 1,

2, 3, 4, 5, 6, 7, 8, 9 and 10 also and lastly issue 4 from ground 11.

At the hearing of the appeal on the 23<sup>rd</sup> September, 2010, the learned senior counsel, Mallam Yusuf O. Ali, representing the cross respondents, timeously, in intimated the court of their notice of preliminary objection to the effect that the cross-appeal and ground eleven  
B in the Notice of Cross Appeal with issue four formulated thereon are incompetent and liable to be struck out in limine. The three grounds predicated the objection raised are as follows:-

i. The Cross-Appeal amounts to an academic exercise in the  
C final analysis.

ii. Ground eleven of the Notice of Cross-Appeal does not arise from the judgment appealed against; it is vague and the particulars subjoined to it are not wholly compatible with the ground.

iii. Issue four in the Cross-Appellant's Brief predicated on the  
D ground eleven is incompetent

Submitting to substantiate the 1<sup>st</sup> objection on the point, the learned senior counsel, Mallam Ali, pointed out the absence of clarity and the inchoate nature of the relief sought on the notice of cross-appeal; that the hearing of the said cross-appeal would only amount  
E to an academic exercise; that the situation is tantamount to asking for no relief and the consequence which is fatal to the cross-appeal.

The senior counsel for appellant urged therefore that the preliminary objection be sustained consequently upon the entire cross-appeal should be struck out as it amounts to an academic exercise in  
F the ultimate sense; also the ground eleven of the notice of cross-appeal with issue four of the cross-appellant formulated thereon for being incompetent.

The cross appellant in his reply brief and submitting against  
G the objection raised, argued that the relief contained in paragraph 4 of the Notice of Cross appeal specifically seeks an order setting aside the findings of the tribunal referred to above and which are the subject of the grounds contained in the Notice of Cross-Appeal. That contrary to the submission by the cross-respondent's counsel, the  
H relief claimed, as sought to portray, is not such as leaves any doubt with regards to what is asked for from this court. The learned senior counsel thereupon concluded that the resolution of the issues formulated from the grounds in favour of the cross/appellants would vitiate the findings by the tribunal relating to the subject matters of the cross-

appeal. Senior counsel on the 1<sup>st</sup> objection concluded therefore that same is misconceived as the relief contained therein is precise and affords of no ambiguity.

***The 1<sup>st</sup> leg of the preliminary objection raised, relates to the competence or not of the notice of cross-appeal by the cross appellant. It is trite and elementary to state that a notice of appeal/cross appeal is akin to a writ of summons which is an originating process.*** B

***It is the relief sought on such process that determines the nature of the claim or cause of action and also its competence. It follows without saying therefore that in the absence of a relief there cannot be any cause of action upon which the court is to adjudicate. In other words, a court's jurisdiction is exercisable where there is clear and identifiable relief upon which the action is anchored.*** C D

The question to ask at this point is, what is the nature of the relief sought on the cross-appellant's notice of cross appeal? ***At page 5984 of the record of appeal volume VII, the relief sought at paragraph 4 states as follows:-***

***“RELIEF SOUGHT FROM THE COURT OF APPEAL***  
***An order setting aside the various orders complained against in this cross appeal by allowing the cross appeal.”*** E

***Relevant to the determination of this subject is the case of Chief Uzokwu & Ors. V. Igwe Ezeonu 11 & Ors. (1991) 6 NWLR (Pt. 200) 708 at 784-785 wherein Tobi JCA (as he then was) had the following to say:-*** F

***“And that takes me sequentially to the reliefs sought by the appellants. They are seven in number. Relief is the life wire of an action. Relief puts in specific demanding language the cause of action. Where there is no relief sought in an action, there is nothing for the court to grant. It is really the bedrock of the entire action. The action can either stand or fall by the relief sought..... The language of a relief must be precise, concise and simple. The language of a relief must be clear and terse.....”*** G H

***Having regard to the relief as reproduced supra, does the phrase “an order setting aside the various orders complained against,” serve the bedrock function expected to a relief as sought to portray by the learned cross appellant's***

**senior counsel? The response to this question I hold is in the negative. This is in view of the authority of the case of Chief Uzokwu & Ors. V. Igwe Ezeonu II & Ors. supra. In other words, the purported relief sought on the cross appeal is neither specific, precise nor concise as rightly submitted by the learned cross respondents' senior counsel.**

Furthermore and with the 1<sup>st</sup> issue in the main appeal having established the allegations made against the respondents of non compliance with the provisions of the Electoral Act and the Manual for Elections, the very nature of the cross appeal is in a dilemma as to what effect it would have in the circumstance of this case as rightly submitted by the learned cross respondents senior counsel; hence the inability of the cross appellant in failing to seek a relief. A prayer seeking to allow an appeal without more is grossly insufficient. The preliminary objection predicated on an academic exercise raised by the cross respondent therefore succeeds. The overall implication is to render the other legs (ii) & (iii) of the preliminary objection of non effect and the totality which is to sustain the objection so raised.

In the result therefore the entire cross appeal ought to be struck out as it would amount to a mere academic exercise to consider same.

It is trite law and elementary that a court of law does not engage in an exercise in futility. This has been pronounced in a plethora of authorities; for example see the cases of *U. B. N. Ltd. v. Edionseri* (1988) 1 NSCC 603 at 610 and *Bhojwani v. Bhojwani* (1996) 7 SCNJ 16 at 20-21. The entire cross appeal of the 1<sup>st</sup> respondent as the cross appellant is therefore struck out for incompetence. The next and last to be considered is the cross appeal by the fifth and sixth respondents.

The fifth and sixth respondents sought and obtained leave to cross appeal against the judgment of the tribunal to the effect that presiding officers against whom allegations of criminal nature were made were not joined as necessary parties. The sole ground of appeal in this cross-appeal, shorn of its particulars reads as follows:-

*“The learned trial judges erred in law when they dismissed the 5<sup>th</sup> and 6<sup>th</sup> cross-appellants’ objection challenging the incompetence of some paragraphs of the petition listing criminal allegations against the presiding officers who took part in the conduct of the*

*election but were not made respondents to the petition.”*

**At the hearing of the appeal, learned senior counsel for fifth and sixth respondents/cross-appellants, Tayo Oyetibo, Esq. addressed the court about incompetence of the objection as well as the appeal when the allegation was not made against his clients nor the ruling made against his clients who in any case had no locus standi to bring the objection nor file the appeal.**

**The paragraphs they are complaining about contain allegation against some presiding officers and his clients were not one of such presiding officers. Indeed the fifth and sixth respondents are respectively returning officers for Ido-osi and Ijero Local Governments. Both of them like the presiding officers are employee of the third respondent, the Independent National Electoral Commission. The position would have been probably different, without so deciding, if they were the masters of the presiding officers. They can therefore not appeal against the refusal of the tribunal to expunge some paragraphs of the petition imputing criminal malfeasance against the presiding officers because they are not aggrieved. It is only an aggrieved party that has constitutional right to appeal against the decision of the tribunal to this court. The appellants are not aggrieved party in the absence of an order being made against them:** see Chief D. T. Akinbiyi in *Inspector General of Police v. Adegoke Adelabu* (1956) SCNLR 109 where the only issue for determination was whether the appellant in the case was an aggrieved person to appeal against the judgment given in the said proceedings. In delivering the lead judgment Foster-Sulton, F.C.J. at page 111 amongst others held thus and said:-

*“The only person entitled to appeal is a person aggrieved. In Ex parte Sidebotham, 14 Ch. D. 465 James L. J. said a “person aggrieved” must be a man who has suffered a legal grievance”..... It means a person against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something which he has a right to demand. .... Lord Bramwell L. J., in his judgment in Ex parte Sidebotham said “but certainly the general rule is that an appeal must be brought by the party.” (meaning one of the parties to the dispute which is brought before the court for its decision) .....*

*We had no difficulty in reaching the conclusion that the words in question clearly means one of the parties to the proceedings.”*

The appellant in that case was held to have no locus standi to appeal in the said case and consequent upon which his appeal was accordingly struck out. Be that as it may and in any case the issue raised herein respectfully seems to have been laid to rest by the provisions of section 144(2) of the Electoral Act, 2006 which provides as follows:-

2. *“The person whose election is complained of, is in this Act, referred to as the Respondent, but if the petitioner complains of the conduct of an Electoral officer, a Presiding officer, a Returning officer or any other person who took part in the conduct of an election, such officer or person shall for the purpose of this act be deemed to be a Respondent and shall be joined in the election petition in his or her official status as a necessary party PROVIDED that where such officer or person is shown to have acted as an agent of the commission, his non-joinder as aforesaid will not on its own operate to void the petition if the commission is made a party.”*

In the conduct of an election prima facie, an electoral officer, a presiding officer, a returning officer, polling officer or any other person who took part in the conduct of the election is an agent of the commission otherwise the commission may find it well nigh impossible for handing electoral material over to him or her. If the intention is to the contrary, it is a matter peculiarly within the knowledge of the commission and is only the commission or other parties that are privy to the transaction to show the reason which takes such officers out of the presumption that they are agents of the commission. Certainly, such knowledge cannot be imputed to the appellants.

**Section 144(2) of the Electoral Act, 2006 unlike the similar provisions in section 133(2) of the Electoral Act 2002 contains a proviso. The essence of a proviso is to restrict the effect of the provision. But if the language of a proviso makes it plain that it was intended to have an operation more extensive than that of the provision it must be given such wider effect. If a proviso cannot be construed reasonably otherwise than as contradicting the main enactment, then the proviso will prevail on the principle that “it speaks the last intention of the makers”** Attorney General vs Chelsea Water-works 1731 Fitzg 195 and NDIC v. Okem Enterprises Ltd. (2004) 10 NWLR (Pt. 880) 107. **The language of the proviso in section 144(2) of the Electoral Act, 2006 respectfully is clear**



***and unambiguous. It speaks the mind of the Parliament. It is, therefore, the intention of the National Assembly to use the proviso therein to contradict the main enactment to the effect that a petitioner or petitioners who join Independent National Electoral Commission to their petition as in the instant proceedings, need not join an Electoral officer, a Presiding officer, a Returning officer or any other person who took part in the conduct of the election against whose conduct the petition complains. The joinder of the presiding officers being sought by the fifth and sixth respondents/cross-appellants is no longer necessary in view of the proviso to section 144(2) of the 2006 Electoral Act.*** The cases cited in support of the proposition were decided under section 133(2) of 2002 Electoral Act. They are, therefore, irrelevant and unhelpful. The provisions of the two legislations are not *impari materia*. It is only where legislations are *impari materia* that decisions on one are applicable to the interpretation of the other. The words “if the petition complains of the conduct” make no distinction between civil or criminal allegations or averments. It is therefore my respectful view that the learned senior counsel for the fifth and sixth respondents/cross-appellants have made a mountain out of a mole hill. Going by the proviso of section 144(2) of the Act the joinder of fifth and sixth respondent themselves is superfluous. Their presence or otherwise does not detract nor add to the validity of the petition.

Be that as it may, it seems to me that the objection was not timely raised. The joint reply of the fifth and sixth respondents to the petition was dated and filed on 23<sup>rd</sup> June, 2009. There is no material on record before the tribunal and this court that the objection was raised prior to filing the said joint reply. Consequently the objection offends against paragraph 49(2) and (5) of the First Schedule to the Electoral Act 2006. Sub-paragraphs (2) and (5) of paragraph 49 provide as follows:-

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

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

*the defect on the face of the election petition is noticed.”*

***In the instant case, not only was the objection not brought, heard and determined before taking any further steps in the proceedings but it was also left for final judgment at which point the right to raise it had lapsed. The defect, the non joinder of the presiding officers in the two local governments where the fifth and sixth respondents served as returning officers is a defect on the face of the election petition. It is, therefore, my respectful opinion that failure of those respondents to raise the objection before filing their reply violates the express provisions of paragraph 49(2) and (5) already set out elsewhere in this judgment.*** I am strengthened in this view by the decision of this Court in *Agagu v. Mimiko* (2009) 7 NWLR (Pt. 1140) 342, 390-3, (2009) All FWLR (Pt. 492) 1192 wherein Abdullahi D (P. C. A.) at pages 390-393 said thus:-

*“The jurisdiction of a special court, indeed of all courts, is circumscribed by the statute creating such court or tribunal. In African Newspapers of Nigeria Ltd. v. Federal Republic of Nigeria (1985) 2 NWLR (Pt. 6) 137,159-160 the Supreme Court held inter alia as follows:-”*

*“Although the courts have great powers yet these powers are not unlimited. They are bound by some lines of demarcation.... Courts are creatures of statutes and the jurisdiction of each court is therefore confined, limited and circumscribed by the statute creating it.”*

The jurisdiction of the tribunal is confined, limited and restricted by the provisions of paragraph 49(2) and (5) of the First Schedule to the Electoral Act, 2006. ***A preliminary objection cannot be taken in a civil case, where the defendant has waived or acquiesced to any irregularity or informality or alleged incompetence.*** See *Odivo v. Obor* (1974) 1 SC 23, 37 where the Supreme Court held as follows:-

*“We think that the learned trial judge was clearly in the wrong when he decided to uphold the preliminary objection of counsel for the defendants at the particular stage of the proceeding when the statement of defence has already been filed and the issue joined between the two parties. The learned trial judge should have pointed out to counsel for the defendant that the preliminary objection should have been made after the delivery to him of the statement of claim. Another impor-*

*tant point in this appeal is that once issues had been joined between the parties including an allegation by the 1<sup>st</sup> defendant that the marriage between him and 2<sup>nd</sup> defendant had been made under customary law, it was wrong to entertain a preliminary objection without any further evidence on the merits.”*

In the unreported decision of this court in appeal NO.CA/J/EP/GOV/ 419A/2007 - Murtala Nyako v. Action Congress delivered on 26<sup>th</sup> February 2008, (now reported as INEC v. Action Congress (2009) 2 NWLR (Pt. 1126) 524, this court considered in extenso the import of paragraph 49 of the First Schedule to the Electoral Act, No. 2 of 2006. The relevant part of the judgment reads as follows:-

*“I concur. There is no merit in the submission of the learned senior counsel for sixth respondent/appellant that even if the objection were raised at the close of the trial, paragraph 49(2) and (5) of the First Schedule to the Electoral Act do not shut out the appellants from raising objection against the petition after the close of trial. The provisions do not merely enjoin that an objection should be brought timeously, but also mandated that they should be heard and determined before any further steps are taken in the proceedings. Paragraph 49(2) and (5) read as follows:*

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

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

(Italics mine)

*A reading of the two sub-paragraphs recited above together shows that the objection must be brought within reasonable time and when the party making the application had not taken any fresh step in the proceedings since acquiring knowledge of the defect. The tribunal is enjoined to hear and determine the objection before any further step in the proceedings provided the application is brought timeously. It is not in dispute that the application was brought within reasonable time before the applicant took further steps. But the same*

was not heard and determined before further steps were taken. The applicant apparently filed his reply and the matter proceeded to hearing at his instance. The request that the hearing and determination of the application be deferred was a move, could be tactical, made by learned counsel for sixth respondent/appellant. He cannot blame the tribunal for giving effect to clear and unambiguous words of the provisions of paragraph 49(2) and (5) of the First Schedule of the Electoral Act having goaded it to take the step it took.

The non-compliance with the rules of procedure alleged cannot be raised on appeal. The party, having participated in the hearing of the petition, cannot complain or raise objection now. He has acquiesced in the validity of the procedure and will not be permitted to otherwise contend at this stage. See *Ogbonna v. A-G Imo State* (1992) 1 NWLR (Pt. 220) 647; *Noibi v. Fikolati* (1987) 1 NWLR (Pt.52) 619; *Effiong v. Ikpeme* (1999) 6 NWLR (Pt. 606) 260, 272; *Adene v. Dantunbu* (1994) 2 SCNJ 130; (1994) 2 NWLR (Pt. 328) 509, 528. The appropriate place to raise objection, in the circumstance of the instant appeal, is at the tribunal where it was filed. The decision to postpone the argument at the tribunal was fatal. Because it is settled principle of law that whenever a preliminary objection is raised as to the competence of the trial court to hear a matter, as in the instant case, such a court is duty bound to determine the objection, one way or the other, before examining the substantive case even where the objection is or appears frivolous. *Onyekwuluje v. Animashaun* (1996) 3 NWLR (Pt. 439) 637, 644; *Onyemeh v. Egbuchulam* (1996) 5 NWLR (Pt. 448) 255, 262; *Onuoha v. N.B.N.* (1999) 13 NWLR (Pt. 636) 621, 624; *Tambco Leather Works Ltd. Abbey* (1998) 12 NWLR (Pt.579) 548, 554-5.

I agree with the learned counsel for the first - third petitioners/cross-appellants that the intendment of paragraph 49 of the First Schedule to the Electoral Act is to enshrine the principle of waiver. What then is a waiver? It has been held in *Kudu v. Aliyu* (1992) 3 NWLR (Pt. 231) 615, 621 per Akanbi, JCA (as he then was) thus -

'Where a person having full knowledge of his rights, interests, profits or benefits conferred or accruing to him by and under the law but he intentionally decides to give up all these or some of them, he cannot be heard to complain afterwards that he has not been permitted the exercise of his rights. He should be held to have waived

*those rights. Therefore a person will generally not be allowed to complain of an irregularity he has himself accepted and condoned.'*

*See also Odu'a Investment Co. v. Talabi (1991) 7 SCNJ 600, 653, (1991) 1 NWLR (Pt.170) 761; Tsokwa Oil Co. Ltd. v. Bank of the North (2002) 5 SCNJ 176,192; (2002) 11 NWLR (Pt. 777) 163; Kossen (Nig.) Ltd. v. Savannah Bank (1995) 12 SCNJ 29; (1995) 9<sup>B</sup> NWLR (Pt. 420) 435; Ojomo v. Ijeh (1987) 4 NWLR (Pt. 64) 216, 244-5 and K. T. L v. Umar (1994) 1 NWLR (Pt.319) 143.*

*See also Saude v. Abdullahi (1989) 4 NWLR (Pt. 116) 387, Ibeanu v. Ogbeide (1994) 7 NWLR (Pt.359) 697, 716; Ngwu v. Mba (1999) 3 NWLR (Pt. 595) 400. The tribunal at the time it entertained the issue of competence of the petition had lost vires to do so. Thus, its decision is a nullity ab initio."*

Having lost the right to raise the objection, any order of refusal to enforce the right cannot be a subject of appeal, notwithstanding that the trial tribunal heard and determined the petition. <sup>D</sup>

At the point, apparently at address stage, Oyetibo, learned senior counsel, took objection to paragraphs 44, 45, 46, 47, 48, 49, 50, 51, 52, 94, 95, 107, 108, and 109; it was rather late in the day. The horse had bolted and was no longer necessary to lock the stable. <sup>E</sup> The tribunal was bereft of jurisdiction to entertain the objection. The cross-appeal of fifth and sixth respondents fails and is dismissed.

With the two cross appeals by the 1<sup>st</sup> respondent also that of the 5<sup>th</sup> and 6<sup>th</sup> respondents therefore having been struck out and dismissed respectively, we are now left only with the main appeal by the appellants which on the totality herein and as concluded earlier in the judgment, the issues 1, 2 and 4 were resolved in their favour, issue 3 having been struck out. In other words, the appellants from all ramifications as earlier advanced in this judgment, had made out and proved on the balance of probability the allegations of non-compliance against the respondents, with the provisions of the Electoral Act and the Manual for Elections in the conduct of the re-run election in the affected wards. The consequential effect of this finding is to render the entire purported results declared in respect of the contested six wards of the Ijero and Ido-Osi Local Governments of Ekiti State, null and void. As a result therefore, this court will now be expected to undertake the mathematical calculation and computations of the disputed wards and hence deduct same from the totality <sup>F</sup> <sup>G</sup> <sup>H</sup>

of the declared results. This is extant because there is no dispute in respect of the other Local Government areas which were not covered by the petition. The overall results in the election are contained in Form EC8D which was one of the documents relied upon by the 3<sup>rd</sup> and 4<sup>th</sup> respondents themselves. The minority decision of the tribunal in its judgment had beautifully analysed and worked out the computation and calculation of the overall votes credited and subtracted the cancelled or nullified votes in respect of both parties in the said six disputed wards. The votes credited to the appellants and 1<sup>st</sup> respondent in Ipoti wards A & B in the re-run elections were as follows:-

	AC	PDP
Ipoti A	171	1201
Ipoti B	244	1826
D Total	415	3027

The total above represents the nullified votes in Ipoti Wards A and B. Accordingly, the said results will be deducted from the total votes credited to both parties in Ijero Local Government as follows:-

Ijero Local Government Area:- The total votes credited to AC and PDP.

	AC	PDP
	5359	9110
Less nullified		
F Votes in 2 wards	415 3027	
	4944	6083

The results of both parties in the 4 wards of Ido-Osi Local Government Area are also as follows:

	AC	PDP
G	971	12,937

The above figures will also be deducted from the scores of both parties in Ido-Osi Local Government and the calculation would be as follows:

	AC	PDP
H Scores	3793	15,939
Less the 4	971	12,937
Wards nullified	2,822	3,002

In Ido-osi therefore, the scores for purpose of computation would be as follows:-

AC  
2,822

PDP  
3,002

It is these votes, that is to say, 2,822 and 3,002 that will now take the place of the votes 3,793 and 15,939 recorded for the AC and PDP respectively in Form EC8D attached to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents reply and as contained in paragraph 45 of the 1<sup>st</sup> B petitioner's (PW47) written statement on oath at page 253 vol. 1 of the record of appeal which was adopted in his evidence in chief.

Having arrived thus far, I shall therefore adopt the table of calculation as computed by the minority judgment of the lower tribunal at pages 5931-5932 of the record of appeal volume VII, with same having meticulously worked out the votes scored by each of the parties. I wish to however state that the figures in respect of Ijero for Action Congress (AC) should be 4,944 as against 4,924 which must have been an error in calculation. D

In other words, with the deduction of the votes nullified in the two Local Government Areas of Ido-Osi and Ijero, the correct result shall be as per the following stated in this table.

TABLE 'A'

S/N	LGA	AC	PDP	E
1.	Ado-Ekiti	16,612	9,700	
2.	Efon	CANCELLED	CANCELLED	
3.	Ekiti East	7, 829	8,717	
4.	Ekiti West	7,617	8,671	F
5.	Ekiti South West	7,106	7,556	
6.	Emure	3,645	2,925	
7.	Gbonyin	5,962	5,975	
8.	Ido-Osi	2,822	3,002	
9.	Ijero	4,944	6,083	G
10.	Ikere	6,971	6,214	
11.	Ikole	6,153	6,861	
12.	Ilejemeje	2,122	3,405	
13.	Irepodun/Ifelodun	9,926	5,665	
14.	Ise/Orun	4,221	3,864	H
15.	Moba	8,364	7,792	
16.	Oye	11,337	8,746	
		105,631	95,176	

From the resultant outcome of table A it is apparent that

the 1<sup>st</sup> appellant (Dr. John Olukayode Fayemi) (the candidate of 2<sup>nd</sup> Appellant, Action Congress (AC) is leading the 1<sup>st</sup> Respondent (Olusegun Adebayo Oni) the candidate of the 2<sup>nd</sup> Respondent- (Peoples Democratic Party (PDP)) with majority votes of 10,455. Relevant in this respect and to this exercise is the case of Amadasun v. B Ativie (2010) All FWLR (Pt. 505) 1728 wherein this court at page 1751 had this to say:-

*“Adjudication in election matters would normally revolve around documentary evidence in most cases. It is part of the resolution of election disputes to cancel unlawful credited votes in appropriate circumstance.”*

The appellants by their notice of appeal had sought for the following reliefs by their paragraph 4 at page 5969 of the record of appeal, Volume VII in the following terms:-

**“4. RELIEFS SOUGHT FROM THE COURT OF APPEAL**

*(i) An order allowing the appeal.*

*(ii) An order granting the reliefs of the appellants in the petition.*

*(iii) An order nullifying the election and the return of the 1<sup>st</sup> Respondent as the Governor of Ekiti State and withdrawing the Certificate of Return issued to him.*

*(iv) An order declaring the 1<sup>st</sup> appellant as the duly elected Governor of Ekiti State having satisfied the constitutional provisions in that regard.”*

For the consideration of the totality of the foregoing reliefs sought for, the provision of section 146(1) of the Electoral Act, 2006 is relevant and same also reproduced states as follows:-

*“An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election Tribunal or Court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election.”*

The apex court in the case of Buhari v. Obasanjo (2005) All FWLR (Pt. 273) 1 has interpreted a similar provision of section 135(1) of the Electoral Act, 2002 wherein Belgore, JSC (as he then was) said:-

*“It is manifest that an election by virtue of section 135(1) of the Act shall not be invalidated by mere reason it was not conducted substantially in accordance with the provisions of the Act, it must be shown clearly by evidence that the non-substantiality has affected*



*the result of the election. Election and its victory is like soccer and goals scored. The petitioner must not only show substantial non-compliance but also the figures i.e. votes that the compliances attracted or omitted. The elementary evidential burden of "The person asserting must prove" has not been derogated from by section 135(1). The Petitioners must not only assert but must satisfy the court that the non-compliance has so affected the election result to justify nullification."* B

The same principle was also applied in the case of Buhari v. INEC (supra) page 419 at 530. The expectant interpretation of the Electoral provision is that the petitioners must not only prove non-compliance, but it must in addition establish that the non-compliance has so affected the result of the election. In my opinion and having regard to all that transpired at the conduct of the re-run election, it cannot be said that the conduct of the election was in substantial compliance with the provisions of this Act. C

In other words, the appellant, from all deductions have proved the non-compliance in the conduct of the election which has greatly affected the said overall result of the election in the context of the six disputed wards. See the cases of Oputa v. Ishida (1993) 3 NWLR (Pt. 279) 34 at 63; Biyu v. Ibrahim (2006) 8 NWLR (Pt. 981) 1 at 50, Sorunke v. Odeunmi (1960) SCNLR 414; and Bassey v. Young (1963) 1 SCNLR 61. D

In further reference to the provision of section 179(2) of the 1999 constitution same reproduced states as follows:-

*"A candidate for an election to the office of Governor of a State, shall be deemed to have been duly elected where, there being two or more candidates* F

*(a) he has the highest number of votes cast at the election; and*

*(b) he has not less than one-quarter of all the votes cast in each of at least two-thirds of all the local government areas in the State."* G

From the foregoing provisions of the constitution, a candidate can only be declared and returned as a Governor if he scores the highest number of votes cast at the election and has not less than one quarter of all the votes cast in each of the at least two thirds of the Local Governments in the State. No doubt the first appellant has scored the highest number of votes cast and has not less than one quarter of all the votes cast in at least two thirds of all the Local Governments in the State. H

The first appellant, from all that is laid before the court, has satisfied the two constitutional requirements to be returned as the duly elected Governor of Ekiti State. The consequential effect of the foregoing is, that the 1<sup>st</sup> Respondent Olusegun Adebayo Oni, who was returned as the elected Governor of Ekiti State by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, was not validly elected on the ground that he did not score the majority of the valid votes cast at the election and therefore, he did not satisfy the provision of section 179 (2) (a) of the 1999 Constitution.

Section 147(2) of the Electoral Act is at this point also relevant wherein the reproduction states:-

*“147(1).....*

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

( Emphasis is mine)

The first appellant, Dr. John Olukayode Fayemi, having been shown to have scored the majority of the lawful votes cast at the election as provided by section 147(2) of the Act and having also fulfilled the constitutional requirements of section 179 (2) (a) and (b) of the 1999 Constitution of the Federal Republic of Nigeria, is hereby declared as the winner of the Election held on the 14<sup>th</sup> April, 2007 and also the supplementary elections of 25<sup>th</sup> April and 5<sup>th</sup> May, 2009 in Ekiti State. See also the case of Ejioru v. Irona (2005) All FWLR (Pt. 442) 1066 at 1093-1094.

On the whole and based on the foregoing conclusions arrived at, the appellants’ appeal has merit and succeeds on all the reliefs (i) - (iv) as sought for in their notice of appeal dated and filed 24<sup>th</sup> May, 2010.

In the result, the majority judgment of the tribunal is hereby set aside and, in its place, the minority judgment is, hereby, affirmed. It is hereby ordered as follows:

1. That the return of the 1<sup>st</sup> Respondent, Olusegun Adebayo Oni as the Governor of Ekiti State at the Governorship election of

14<sup>th</sup> April, 2007 and the supplementary elections of 25<sup>th</sup> April 2009 and 5<sup>th</sup> May, 2009 be and is hereby nullified, he having not been duly elected by the majority of the lawful votes cast at the elections.

2. That the first appellant, Dr. John Olukayode Fayemi having satisfied the requirements of section 179 (2) (a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999 and by virtue of section 147(2) of the Electoral Act, 2006 be and is hereby declared the duly elected Governor of Ekiti State of Nigeria. B

3. That the certificate of return issued to Olusegun Adebayo Oni as the elected Governor of Ekiti State is hereby cancelled. C

4. The Independent National Electoral Commission, the third Respondent is hereby ordered to issue to Dr. John Olukayode Fayemi a certificate of return as the duly elected Governor of Ekiti State of Nigeria.

There shall be no order as to costs; each party is to bear his/ her costs. In parenthesis, I wish to commend the judgment of the minority for its exemplary industry and lucidity. I also commend counsel for all the parties. D

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**OGUNBIYI JCA**

I agree

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**ARIWOOLA JCA**

I agree

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**NWEZE JCA**

I agree

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**JAURO JCA**

I agree

E

F

G

H