

SUPREME COURT OF NIGERIA
16TH JULY, 2010 SC. 3/2010,
SC. 51/2010, SC. 54/2010, CONSOLIDATED
CORAM:- M. MOHAMMED, W. S. N. ONNOGHEN,
F. F. TABAI, I. T. MUHAMMAD,
C. M. CHUKWUMA-ENEH, JJSC

CHIEF IKEDI OHAKIM APPELLANT
(Governor, Imo State)

V.

1. CHIEF MARTIN AGBASO
2. INDEPENDENT NATIONAL
ELECTORAL COMMISSION RESPONDENTS
3. RESIDENT ELECTORAL
COMMISSIONER, IMO STATE

AND

SENATOR IFEANYI ARARAUME APPELLANT

V.

1. INDEPENDENT NATIONAL
ELECTORAL COMMISSION
2. RESIDENT ELECTORAL
COMMISSIONER, IMO STATE RESPONDENTS
3. CHIEF IKEDIM OHAKIM
4. CHIEF MARTIN AGBASO

JUDGMENTS - Setting aside - On ground of error - Propriety - An error that could result in setting aside - Must be substantial - So as to affect the justice of the case (H1)

ADMINISTRATIVE LAW - Judicial review - Federal High Court - Application procedure - O. 47 r. 3 (2) of the Federal High Court Rules 2000 - Must be complied with - Otherwise such application will be incompetent (H2)

COURT PROCESSES - Service - Complaint against - Propriety - Such complaint against non or improper service - Can only be properly raised - By the party affected thereby (H3)

ADMINISTRATIVE LAW - Judicial review - Federal High Court - Scope of remedies - By virtue of O. 47 r. 1 (2) of the Federal Court Rules 2000 - Remedies may include prerogative orders - Together with private law remedies (H4)

ACTIONS - Reliefs - Mandatory injunction - Nature of - It is an order requiring a party to do specific acts - And is usually restoratory in nature - Requiring the undoing of what had been done - Unlike relief (e) herein sought (H5)

ADMINISTRATIVE LAW - Judicial review - Order of mandamus - Conditions for application - Applicant must show among others - That he made a prior demand on respondent - Yet respondent had refused to act (H6)

ADMINISTRATIVE LAW - Judicial review - Mandatory injunction - Whether mandamus - A claim for mandatory injunction without the claim for mandamus - In an action for judicial review - Amounts in law to a claim for mandamus (H7)

COURTS - Jurisdiction - Elections - Matters relating to - By S. 285 (2) of the 1999 Constitution - Such matters are within the exclusive jurisdiction of Election Tribunals (H8)

ELECTIONS - Matters relating to - Common law remedies - Applicability - Election matters being statutory - Common law orders of certiorari etc. - Are not applicable thereto (H9)

FACTS

These are three judgments in one, given in respect of three consolidated appeals, to wit, SC. 3/2010; SC. 51/2010 and SC. 54/2010. The plaintiff/1st respondent in the first appeal had sued the appellant and the rest of the respondents therein as defendants, before the Federal High Court holden at Abuja, by way of judicial review claiming sundry reliefs by which he challenged the cancellation by 2nd and 3rd respondents of the Imo State gubernatorial election held on 14th April, 2007. It was undisputed that at the conclusion of the Governorship and State House of Assembly elections held in Imo

State on the said date, 2nd and 3rd respondents upheld and validated the results of the State House of Assembly election while they cancelled the election in relation to governorship for alleged violence and thuggery in 9 out of the 27 Local Government Areas of the State. The results upheld in respect of the State House of Assembly election included those of the 9 Local Government Areas, notwithstanding that in both elections, the same ballot boxes and electoral officers were used. Aggrieved, 1st respondent who had contested the gubernatorial election with appellant among others instituted the action resulting in these appeals on 19th April, 2007 contending that 2nd and 3rd respondents ought to have upheld and validated the results of the gubernatorial election as they did to those of the House of Assembly.

Meanwhile 2nd and 3rd respondents rescheduled the gubernatorial election for 28th April, 2007. All the candidates who had contested in the earlier election also contested in the rescheduled election at the end of which appellant was returned as the winner. Following the declaration of the result of the rescheduled election, the trial court struck out 1st respondent's suit on the ground that it no longer had jurisdiction to continue with the matter. Dissatisfied, 1st respondent appealed to Court of Appeal against the ruling on 14th May, 2007 and also filed an election petition against the return of appellant in the rescheduled election on the ground that the earlier election was valid and the second unlawful. Objections were raised to the competence of the petition which were upheld and the petition dismissed. 1st respondent unsuccessfully appealed against the dismissal to Court of Appeal. So, he came back to pursue his appeal against the Federal High Court ruling that its jurisdiction has abated. Again, appellant and others challenged the jurisdiction of Court of Appeal to hear that appeal. However, the court overruled them and eventually gave judgment in favour of 1st respondent. The 1st appeal herein is an appeal against the ruling of the Court of Appeal in respect of the appellant's objection thereat while the 2nd and 3rd appeals are appeals against the decision of that court on the merits of the appeal before it. By the 1st appeal, appellant contends *inter alia* that the procedure of judicial review, by which 1st respondent came before the trial court made his action incompetent as he was actually praying for an order of mandamus though he couched his prayer in

the form of a prayer for mandatory injunction.

ISSUES FOR DETERMINATION

- B *(i) Whether the Court of Appeal considered all the issues submitted to it by the Appellant and, if it did not, whether its failure to consider all the issues submitted by the Appellant did not occasion a breach of the Appellant's right to fair hearing?*
- C *(ii) Whether the Court of Appeal was in law right to have rendered decisions or made pronouncements at an interlocutory stage, in respect of matters the Federal High Court, Abuja would adjudicate on, if the appeal to the Court of Appeal succeeds?*
- (iii) Whether the Court of Appeal was right in law to have treated a complaint on issue Estoppel as one based on Res Judicata?*
- D *(iv) Whether the Court of Appeal was right in its application of the doctrine of lis pendens against the 2nd and 3^d Respondents?*
- (v) Whether the Court of Appeal was right in holding that the objection did not establish a case of abuse of court process against the 1st Respondent?*
- (vi) Whether the appeal in the Court of Appeal was not caught by the doctrine of waiver?*
- E *(vii) Whether the application for Judicial Review upon which the appeal in the Court of Appeal was predicated was not incompetent.*

F **HELD** (Unanimously allowing the 1st appeal and striking out the 2nd and 3rd appeals per **ONNOGHEN JSC**)

JUDGMENTS - Setting aside - On ground of error - Propriety

1. I confirm that the lower court did not consider arguments on appellant's ground (a) supra.
- G I hold the considered view that the non consideration of ground (a) of the grounds of objection can only lead to a miscarriage of justice if the grounds are substantial and if resolved in favour of the appellant could have resulted in the objection being sustained. The lower court, by not considering the grounds in question committed an error, but
- H it is settled law that it is not every error committed by a court that would lead to the decision of that court being set aside by an appellate court. To result in the decision being set aside, the error so committed must be substantial so as to affect the justice of the case and must, as a result, lead to a miscarriage of justice except rectified by an

appellate court. (p. 2533 G)

Judicial review - Federal High Court - Application procedure

2. The provisions of Order 47 Rule 3 (2) of the Federal High Court (Civil Procedure) Rules 2000 earlier reproduced in this judgment are very clear and unambiguous. It requires an applicant for judicial review to file a statement in which he is to set out the name and description of the applicant, the relief(s) sought and the grounds on which the said relief(s) is/are claimed. In addition to the above, an applicant must also file, along with the application, an affidavit verifying the facts on which the applicant relies in making the application. B C

I hold the considered view that the provisions of Order 47 Rule 3 (2) supra is mandatory and that any application for judicial review not so accompanied is grossly incompetent and is liable to be struck out as the court would have no jurisdiction to entertain same. D (p. 2534 B)

COURT PROCESSES - Service - Complaint against

3. As regards Rules 5(3) supra, it is not the contention of the appellant that he was not served with the notice of motion in the application in issue neither is he contending that the other respondents to the application were not so served. It should also be noted that the other respondents to the application for judicial review, who did file objections to the competence of the application and the lower court to entertain the appeal arising therefrom, never complained of either non service of the originating process or improper mode of service on them. Appellant is not the 2nd Respondent and learned Senior Counsel for the appellant cannot complain on its behalf not having been retained by the 2nd respondent to conduct the appeal or matter. I therefore hold the view that the ‘complaint’ against the mode of service of the motion on notice on the 2nd respondent is a ‘complaint’ by a busy body, which is consequently discountenanced by me. (p. 2535 B) E F G

H

Judicial review - Federal High Court - Scope of remedies

4. From the above provision of Order 47 rule 1(2), it is clear that on an application for judicial review, any relief mentioned in rule I (1) or (2) of the order may be claimed by an applicant as an alternative or

in addition to any other relief so mentioned if it arises from or relates to the same matter. It should be noted that the injunction that can be claimed under sub-rule 2 of Rule 1 of Order 47 is any other injunction excepting the one specifically mentioned under Order 47 (1) (i) (b), which may include an order for mandatory injunction.

B It should be noted that before the reform which introduced sub-rule (2) of Order 47 Rule 1, one was not allowed to claim a prerogative order along with private law remedies like damages and injunction other than the injunction mentioned in Rule 1 (1) (b) of Order 47 which was basically in the nature of the order Quo Warranto. (pp. 2539 D/2540 A)

Mandatory injunction - Nature of

5. Mandatory Injunction, which is our concern in this judgments, on the other hand, is an order of court requiring a party to do a specific act or acts. It is often seen as a restorative order invoked by the court to deal with a defendant who has no respect for the court of law. In most cases, a mandatory injunction is granted to undo what has already been done, that is why it is usually referred to as restoratory injunction.

F It is clear from the above and I hold the view that relief (e) couched as above shares common features with or is akin to an order of mandamus particularly when it is realised that the said relief (e) is claimed in an application for judicial review and is directed at the 2nd and 3rd respondents who are public bodies to perform their public duties. It does not seek restoration properly so called. (pp. 2540 F/2541 B)

Order of mandamus - Conditions for application

6. In an application for judicial review by way of an order of mandamus, the applicant is expected to fulfil certain conditions such as that which requires the applicant to first and foremost request the public body to perform the duty in question and that body must fail and or refuse to do so before an application for mandamus is presented at the High Court to compel performance of the said duty.

The reason why a request for the performance of the official duty has first to be made before issuance of the order of mandamus is to offer the public body or person concerned the opportunity of mak-

ing amends or performing the duty. (p. 2541 C/E)

Judicial review - Mandatory injunction - Whether mandamus

7. I hold the considered view that a claim for an order of mandatory injunction in an application for judicial review in which there is no claim for mandamus amounts, in law, to a claim for an order of mandamus and must comply with all the pre-conditions necessary for the invocation of the jurisdiction of the Court for the order of mandamus including a prior request for the performance of the duty sought to be enforced by the order of mandamus or mandatory injunction, and that failure to do so will render the initiation of the proceeding and the competence of the court to entertain same, fundamentally defective. (p. 2542 B)

Jurisdiction - Elections - Matters relating to

8. Section 285(2) of the 1999 Constitution provides as follows:-

"There shall be established in each state of the Federation one or more election tribunals to be known as the Governorship and Legislative Houses Election Tribunals which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor or as a member of any legislative house."

When one asks the question, which public duty does the 1st respondent want the court to compel, it is very clear that it relates to the election of 14th April, 2007 the result of which 1st respondent wants the 2nd and 3rd respondents to collate and declare of which the 1st respondent claims by paragraph 13 and 14 of his supporting affidavit to have won 24 out of the 27 local government areas of the state having polled 87% of the total votes cast which is a matter within the exclusive jurisdiction of the Governorship and Legislative Houses Election Tribunal as provided for in section 285(2) of the 1999 Constitution supra and over which the Federal High Court has no jurisdiction. (p. 2542 G)

ELECTIONS - Common law remedies - Applicability

9. That apart, and in addition to what had been said so far on the issue as to whether a claim for mandatory injunction by way of judi-

cial review of administrative actions is the same thing as an order of mandamus, this Court has held in the case of A.M.P.P. vs. Returning Officer, Abia State (2007) 11 NWLR (pt. 1045) 431 at 434-435 as follows:-

B *"Election matters are in a class of their own and are entirely statutory. The writs of certiorari and mandamus being Common Law remedies cannot be invoked in a purely election matter and where they are invoked, they cannot change the character of the matter as election matter clearly belongs to the election tribunal and clearly outside the jurisdiction of the Federal High Courts "*

C That is the law on the matter!

Election matters being statutory, the common law writs or orders of certiorari, mandamus, prohibition, declaration, damages and or injunction are not applicable as they cannot change the character D of election matters which belong, by Constitutional arrangement, to election tribunals and outside the jurisdiction of the High Courts under any guise. (pp. 2543 D/2544 B)

NOTABLE POINT OF INTEREST

E **ONNOGHEN JSC**

Election Tribunals are not ad hoc under the constitution

2. It is important to state that the Election Tribunals established under section 285 of the 1999 Constitution are not meant to be ad hoc but permanent in nature that is why the jurisdiction conferred on the F National Assembly Election Tribunal under section 285(1) of the said 1999 Constitution include the power to determine whether the term of office of any person under the Constitution has ceased, and whether the seat of a member of the House of Representatives has become G vacant. These are not strictly speaking election matters arising from the conduct of an election into the relevant offices and which usually takes place at specified times or periods. (p. 2544 D)

REPRESENTATION

H Chief Bon-Nwakama, SAN for the Appellant in SC. 3/2010 and SC 54/2010 with him are Messrs. Livy Uzoukwu SAN; Chief Chris Uche SAN; J. T. U. Nnodum SAN; Joe Agi SAN, Chief Eze Duru-Iheoma SAN and others as per the list of appearance and the 3rd Respondent in SC. 51/2010

L. O. Fagbemi, SAN for the Appellant in SC. 51/2010 with him are Messrs B. C. Nzimako, D. O. Madu; D. O. Afolabi; Sikiru Adewoye; K. O. Fagbemi; A. O. Popoola and the others as per list of appearance. Also for 4th Respondent in SC. 3/2010 & SC. 54/2010

B

Chief Wole Olanipekun, SAN for 1st Respondent in SC. 3/2010 & SC. 54/2010 while in SC. 51/2010 for the 4th Respondent with him are Messrs P.I. N. Ikwueto, SAN; Chief U. I. Dim; Chief B. E. Okemilii; G. Adeyemi; O. Olanipekun; Chief C. C. Onyeagbako & others as per list of appearance

C

Alhaji Abdullahi Ibrahim, SAN for 2nd & 3rd Respondents in SC.3/2010 & SC.55/2010 & for 1st and 2nd Respondents in SC.51/2010 with him are Olabisi O. Soyebo, SAN, Dr. Bello Fadile, Lami Jibrin D (Miss), Anthony Obuna, Coxon Dappa, Femi Adegboyega, O. O. Ladeinde and O. O. Oyesanya

CASES REFERRED TO

Okoro vs. State (1988) 5 NWLR (pt. 94) 255

E

Odofin v. Agu (1992) 2 NWLR (Pt. 229) 350 at 365

Otapo vs. Sumonu (1987) 2 NWLR (pt. 58) 587 at 605

Amaechi vs. INEC (2007) 18 NWLR (pt. 1065) 42 at 48

Amah vs. Nwankwo (2007) 12 NWLR (pt. 1049) 552 at 572

F

Owhonda vs. Ekpechi (2003) 17 NWLR (pt. 879) 326 at 335

Unity Bank Plc. vs. Bokari (2008) 7 NWLR (pt. 1086) 372 at 401

Amayo vs. Evinmuingbe (2006) 11 NWLR (pt. 992) 669 at 689

Uzundu vs. Union Bank of Nigeria Plc. (2009) 5 NWLR (pt. 1133) 1 at 12

G

ANPP vs. Returning Officer, Abia State (2007) 11 NWLR (pt. 1045) 431

Tukur v. Government of Gongola State (1989) 4 N.W.L.R. (Pt. 117) 517 at 549

A.M.P.P. vs. Returning Officer, Abia State (2007) 11 NWLR (pt. 1045) H 431 at 434-435

Wema Bank Plc. vs. Christrock Lab. Ind. Ltd (2002) 8 NWLR (pt. 770) 614 at 628

Abubakar vs. Jos Metropolitan Development Board (1997) 10 NWLR

(pt. 524) 242 at 251

Western Steel Works v. Iron and Steel Workers Union (No. 2) (1987)
1 N.W.L.R. (Pt. 49) 248

STATUTES & RULES REFERRED TO

- B Constitution of the Federal Republic of Nigeria, 1999, s. 285
Electoral Act, 2006, S. 164
Federal High Court Rules, 2000, O. 47 rr. 1-5

LEAD JUDGMENT BY ONNOGHEN JSC

- C There are three appeals involved in this judgment. Appeal No.
SC/3/2010 concerns the ruling of the Court of Appeal, Holden at
Abuja, in appeal No. CA/A/244/2007 on the preliminary objections
D filed by the appellant, the 2nd, 3rd and 4th respondents herein chal-
lenging the jurisdiction of the Court of Appeal in the appeal filed by
the 1st respondent herein. The ruling was delivered on the 26th day of
February, 2009, dismissing the said objections.

- After overruling the objections, the lower court proceeded to
hear and determine the appeal on the 16 day of December, 2009 by
E allowing same and remitting the matter to the Federal High Court for
hearing and determination on the ground that the court has jurisdic-
tion to entertain same. Appeal NOS. SC/51/2010 and SC/54/2010
are therefore against the judgment on the merit of the appeal, deliv-
F ered on the 16th day of December, 2009.

The facts giving rise to this appeal are simple and straight for-
ward. They include the following:

- On the 14th day of April, 2007 Governorship and State House
of Assembly elections were conducted in Nigeria, including Imo State,
G by the 2nd respondent (INEC) which has the Constitutional responsi-
bility to do so. At the conclusion of the election, the 2nd and 3rd re-
spondents upheld and/or validated the results of the State House of
Assembly election in Imo State while the election in relation to the
Governorship of Imo State was cancelled. The reasons for the al-
H leged cancellation were given by the 3rd respondent to include vio-
lence, thuggery, etc. in 9 out of 27 local Government Areas of Imo
State. The election results upheld by the 2nd and 3rd respondents in
respect of the State House of Assembly of Imo State also held on 14th
April, 2007 included the results declared in the 9 Local Government

Areas allegedly affected by thuggery, violence and other electoral offences. In both elections, the same ballot boxes, officials etc, were used in the conduct of the elections of 14th April, 2007. Appellant, 1st respondent and other candidates contested the Imo State Governorship election of 14th April, 2007 which, as earlier stated, was cancelled by the 2nd and 3rd respondents for being inconclusive. B

Meanwhile, the 2nd and 3rd respondents rescheduled Imo State Governorship election for the 28th day of April, 2007.

On the 19th day of April, 2007, the 1st respondent instituted an action at the Federal High Court, Abuja by way of judicial review, in which he claimed the following reliefs:- C

“(a) A DECLARATION that the Respondents lack the power to cancel the Imo State gubernatorial elections under the Electoral Act, 2006.

(b) A DECLARATION that the Respondents lack the power to cancel the Imo State Gubernatorial election results and/or the election held on 14th April, 2007; while upholding the House of Assembly elections conducted simultaneously with the said gubernatorial election.

(c) A DECLARATION that the cancellation of the said gubernatorial election conducted by the Respondents in Imo State on 14 April, 2007 is unreasonable, unlawful, illegal, arbitrary, unconstitutional, null and void.

(d) AN ORDER setting aside the cancellation of the said gubernatorial election by the Respondents. F

(e) AN ORDER OF MANDATORY INJUNCTION directing the Respondents to forthwith continue and complete the process of conducting the Imo State gubernatorial elections where the Respondents stopped and in accordance with the provisions of the Electoral Act 2006 and Constitution of the Federal Republic of Nigeria 1999; to wit, to collate and declare the results at the state level.” G

Meanwhile, the 1st respondent together with other contestants, including the appellant, participated in the rescheduled Imo State Governorship election held on the 28th day of April, 2007 in which the appellant was returned or declared elected by the 2nd and 3rd respondents. Following the declaration of the above result, the Federal High Court struck out suit NO. FHC/ABJ/M/269/2007, the action for judicial review, on the 30th day of April, 2007 on the ground H

of lack of jurisdiction, an election having been held and the result declared in relation to the matter.

1st respondent was dissatisfied with that ruling and consequently appealed against same to the Court of Appeal, Holden at Abuja, on the 14th day of May, 2007. In addition to the appeal, the B 1st respondent filed an election petition on the same 14th May, 2007 at the Election Tribunal in which he claimed the following reliefs:-

“i. A declaration of the Honourable Tribunal that the 2nd and 3rd Respondents have no powers or jurisdiction to cancel or nullify the result of the Governorship election held in Imo State on 14th April, 2007 and fix another election for 28th April, 2007. C

ii. A declaration of the Honourable Tribunal that the cancellation by the 2nd and 3rd Respondents of the result of the Governorship election held in Imo State on 14th April, 2007 is unlawful, illegal, null D and void and the subsequent fixing and holding of another election on 28th April, 2007 is unlawful, illegal, null and void.

iii. A declaration of the Honourable Tribunal that the petitioner is the elected Governor of Imo State having won the majority of lawful votes cast at the election of returned by the 3rd Respondent. E

iv. A declaration that the cancellation of the Gubernatorial election held in Imo State on 14th April, 2007 and the fixing and holding of another Gubernatorial election for Imo State on 28th April, 2007 were invalid and not in compliance with the provisions of the Electoral Act, 2006. F

v. An order of the Honourable Tribunal setting aside the election of 28th April, 2007 into the office of Governor of Imo State and the returning the 1st Respondent thereby made.

v. An order of the Honourable Tribunal that the Petitioner has G fulfilled all the Constitutional requirements for the election into the office of Governor of Imo State and has been indeed so elected on 14/4/2007.”

Objections were raised by the respondents in the petition resulting in a ruling delivered by the Tribunal on the 26th day of July, H 2007 as a result of which the petition was dismissed. The 1st respondent's appeal to the Court of Appeal against the said dismissal was also dismissed.

Having exhausted his rights by way of election petition, the 1st respondent turned his attention to the pursuit of his action by way of

judicial review, to wit, the appeal against the order of the Federal High Court, Abuja, striking out his suit on 30th April, 2007 for lack of jurisdiction.

At the Court of Appeal, appellant and the other respondents therein challenged the jurisdiction of the court to hear and determined the appeal against the ruling of the Federal High Court of 30th April, 2007 which was overruled in a ruling delivered by that court on 26th February, 2009. There was an appeal to this Court against that ruling. It was appeal No. SC/59/2009 which was later withdrawn and this Court directed the lower court to determine the matter expeditiously. It is the final judgment of the lower court on the appeal that was delivered on 16th December, 2009 which forms the basis of appeal NOS. SC/51/2010 and SC/54/2010 while SC/3/2010 is based on the interlocutory ruling of that court delivered on 26th February, 2009 on the objection of the appellant as to the jurisdiction of the lower court to entertain the appeal.

The issues formulated by learned Senior Leading Counsel for the appellant, in SC/3/2010, CHIEF BON NWAKAMMA, SAN in the brief of argument filed on 31/3/2010 are as follows:-

“(i) Whether the Court of Appeal considered all the issues submitted to it by the Appellant and, if it did not, whether its failure to consider all the issues submitted by the Appellant did not occasion a breach of the Appellant’s right to fair hearing? (Grounds 1 and 3 of Appeal).”

“(ii) Whether the Court of Appeal was in law right to have rendered decisions or made pronouncements at an interlocutory stage, in respect of matters the Federal High Court, Abuja would adjudicate on, if the appeal to the Court of Appeal succeeds? (Grounds 4, 6 and 7 of Appeal).”

“(iii) Whether the Court of Appeal was right in law to have treated a complaint on issue Estoppel as one based on Res Judicata? (Ground 9 of the Appeal).”

“(iv) Whether the Court of Appeal was right in its application of the doctrine of lis pendens against the 2nd and 3rd Respondents? (Grounds 4, 5, 8 and 10 of the Appeal)”

“(v) Whether the Court of Appeal was right in holding that the objection did not establish a case of abuse of court process against the 1st Respondent? (Grounds 2 and 12 of the Appeal).”

(vi) *Whether the appeal in the Court of Appeal was not caught by the doctrine of waiver? (Ground II of Appeal).*

(vii) *Whether the application for Judicial Review upon which the appeal in the Court of Appeal was predicated was not incompetent (Ground 13 of Appeal)."*

B On his part, Learned Senior Counsel for the 1st respondent, CHIEF WOLE OLANIPEKUN, SAN in the brief of argument filed on 28/4/2010 submitted the following four issues for the determination of the appeal:-

C "a. *Was the court below under a duty to specifically determine all the points raised by the appellants in the motion to strike out the appeal for lack of jurisdiction (See grounds 1, 2 and 3 in the Notice of Appeal dated 11 January 2010)*

D b. *Did the Court of Appeal by the Ruling determine the live issues in the substantive appeal (See Grounds 4, 5, 6, 7 and 8 of the Notice of Appeal dated 11 January 2010.*

E c. *Did the Court of Appeal Correctly resolve the issue raised in the Preliminary Objection challenging the jurisdiction of the Court to entertain the Appeal before it.*
(See Grounds 9, 10, 11 and 12 in the Notice of Appeal dated 11 January 2010).

F d. *Did the Court of Appeal correctly assume the jurisdiction to hear and determine the appeal (See Ground 13 of the Notice of Appeal)."*

Learned Senior Counsel for the 4th respondent, L.O. FAGBEMI ESQ. SAN submitted the following issues for determination in the brief of argument filed on the 28th day of April, 2010:-

G "1. *Whether having regard to the peculiar facts and circumstances of this case, the appeal before the Court of Appeal has become an academic exercise?*

2. *Whether the appeal before the Court of Appeal has been caught by any rule of estoppel?*

H 3. *Whether the appeal before the Court of Appeal is an abuse of court process."* And

4. *Whether the action of the 2nd and 3^d Respondents in conducting the election of the 28th April 2007 during pendency of this suit is not caught by the doctrine of lis pendens?"*

I have to point out that no brief of argument was filed on

behalf of the 2nd and 3rd respondents though at the oral hearing of the appeal on the 13th day of May, 2010, learned Senior Counsel for the 2nd and 3rd respondents, ALHAJI ABDULLAH IBRAHIM, SAN informed the court that the 2nd and 3rd respondents are not contesting the appeal and urged the court to allow same.

The issues for determination in SC/51/2010 as formulated by the learned Senior Counsel for the appellant, L.O. FAGBEMI ESQ, SAN in the appellant's brief filed on the 13th day of April, 2010 are as follows:-

“1. Whether the Court of Appeal was not in error in failing to pronounce on the propriety of during the pendency of law suit? Ground 2; and

2. Whether the election of 28th April 2007 should stand, same having been conducted during the pendency of a law suit? (Ground 1).”

It should be noted that the above issues are said to arise from the decision of the lower court allowing an appeal against the decision of the trial court made on the 30th day of April, 2007, striking out the action instituted by the 4th respondent for judicial review on the ground that the said trial court had no jurisdiction in the matter, an election having taken place. The appeal, before the lower court therefore, was simply whether the trial court had jurisdiction to entertain the suit as constituted or not. It had nothing to do with the merit of the action before the trial court which the lower court, in fact, ordered the trial court to proceed to hear having found/held that the court had jurisdiction to hear the matter.

The issue is clearly the substance of the case put forward by the 4th respondent herein before the trial court, and which the court is yet to determine, yet learned Senior Counsel for the appellant wants this Court, to determine it even when the lower court made no decision thereon. It is unfortunate because if one is not careful, he can be misled by learned Senior Counsel to do what is clearly not permissible by law. I wonder the motive.

In respect of S.C/54/2010, the issues identified in the appellant's brief of argument filed by learned Senior Counsel, CHIEF BON NWAKAMMA, SAN are as follows:-

“1. Did the Lower Court not misdirect itself when it held that parties including the Applicant did not dispute the jurisdiction of the

Federal High Court to hear the Application for Judicial Review by the 1st Respondent in this Appeal? (Ground one of the Appeal).

2. *In all the circumstances of this matter, was the lower court correct when it held that the Trial Court was in error to have struck out the Application for Judicial Review on the ground that the matter B injured in favour of an election Tribunal? (Ground two of the Appeal)."*

However, in view of the fact that SC/51/2010 and SC/54/2010 are appeals against the judgment of the lower court on the merit of C the appeal against the decision of the trial court rendered on the 30th day of April, 2007 striking out the application for judicial review while appeal No. SC/3/2010 deals with the ruling of the lower court on an application challenging the jurisdiction of the lower court to hear and determine the appeal in question, it is my considered view that in the D circumstances of the appeals, it is more convenient to start with appeal No. SC/3/2010 before proceeding any further, if need be, to deal with or consider the other appeals.

When one looks at the issues for determination in SC/3/2010, it is obvious that some of them challenge the jurisdiction of the lower E court to hear and determine the appeal while others relate to the merit of the ruling on the other grounds canvassed in argument of the preliminary objections. It is settled law that jurisdiction is the live blood of any adjudication without which no proceeding, however F brilliantly conducted by the court or tribunal can be valid. It is really a threshold matter or sometimes referred to as a periphery matter to be dealt with once raised or challenged in any proceeding. Without jurisdiction, the whole trial or proceeding of the court is a nullity however well conducted, that is why jurisdiction is very vital and fundamental to administration of justice in any judicial system. See Madukolu G vs. Nkemdilim (1962) 2 SCNLR 341; Ike vs. Nzekwe (1975) 2 SC 1.

For a court of law or tribunal to have jurisdiction to hear and determine any matter before it, it must satisfy the now settled conditions or have the following ingredients:-

- H (a) it must be properly constituted as to the number or qualification of its membership;
- (b) any condition precedent to its exercise of jurisdiction must have been fulfilled;
- (c) the subject matter of the case must be within its jurisdiction;

and,

(d) the case or matter must have been brought to the court by the due process of the law. See *Madukolu vs. Nkemdilim* supra, etc.

It is also settled law that the jurisdiction of the court is determined by the plaintiff's claim as disclosed in the writ of summons and/or endorsed in the statement of claim, rather than the defendant's Statement of Defence. See *Tukur vs. Govt. of Gongola State* (No.2) (1989) 4 NWLR (pt. 117) 517 etc.

In the instant appeal, part of arguments on issue I and the argument on issue VII challenge the jurisdiction of the court by contending that the action as instituted is incompetent thereby robbing the court of the jurisdiction to entertain same. The same issues are argued by the learned Senior Counsel for the 1st respondent in his issues (a) and (d) respectively. It is therefore appropriate to begin the consideration of the appeal by resolving the above issues being very fundamental to the competence of both the action and the court to entertain same.

In arguing issue 1, learned Senior Counsel for the appellant submitted that the originating motion filed by the 1st respondent at the Federal High Court, Abuja was incompetent in that 1st respondent failed to comply with the provisions of the Federal High Court Rules; that the lower court noted the argument preferred to support the issue but made no decision on the issue; that the 1st respondent as applicant, did not comply with the provisions of Order 47 Rule 3(2) of the Federal High Court (Civil Procedure) Rules 2000 in that he failed to specify the grounds and facts of the application, contrary to the provisions of Order 47 Rule 5(3) of the said Rules of court, the Notice of Motion was not served on the 2nd respondent directly; that the motion papers were served more than three days after filing contrary to the orders of the court upon grant of the ex parte order of leave to present the application; that applicant failed to file an affidavit giving the names and addresses of and the places and dates of service on all persons who have been served with the Notice of Motion before the motion was entered hearing, contrary to the provisions of Order 47 Rules 5(6) of said Rules of court, etc; that failure of the lower court to solve the issue touching on the validity of the originating process robbed the appellant of his right to fair hearing by having his case fully determined by the court, relying on the case of

Otapo vs. Sumonu (1987) 2 NWLR (pt. 58) 587 at 605; Titiloye vs. Olupo (1991) 7 NWLR (pt. 205) 519 at 529.

On his part, learned Senior Counsel for the 1st respondent, CHIEF WOLE OLANIPEKUN SAN, submitted that it is within the province of a court to formulate and reformulate issue(s) formulated by a party or parties in order to give clarity to the issues to be determined, relying on Okoro vs. State (1988) 5 NWLR (pt. 94) 255; Awojugbagbe Light Industries Ltd. vs. Chinukwe (1995) 4 NWLR (pt. 390) 372; Registered Trustees of Cherubim and Seraphim Church of Zion of Nigeria vs. Ugbobia (2003) 2 NWLR (pt. 804) 399; Unity Bank Plc vs. Bokari (2008) 7 NWLR (pt. 1086) 372 at 401; Dada vs. Dosunmu (2006) 18 NWLR (pt. 1010) 134 at 156; Amah vs. Nwankwo (2007) 12 NWLR (pt. 1049) 552 at 572; that the appellant's complaint is frivolous as an appellate court can prefer any issue(s) formulated by any of the parties; that the grounds of objection relied on by the appellant are the same with those of the other respondents to the appeal; that the striking out of the proceedings by the trial court was not due to defects in the institution of the action but on grounds of absence of jurisdiction; that the issue of incompetence of the application for judicial review on which applicant's ground (a) of the objection was based is completely outside the decision of the trial court in striking out the action.

By way of an alternative to the above, learned Senior Counsel submitted that the failure of the lower court to consider the issue arising from the said ground (a) has not affected the merit of the decision of the lower court in assuming jurisdiction to entertain the appeal, as it is not every error by a court that would lead to the setting aside of the decision, relying on Amayo vs. Evinmuingbe (2006) 11 NWLR (pt. 992) 669 at 689; Mora vs. Nwalus (1962) All NLR (pt. 2) 675; Bankole vs. Peru (1991) 8 NWLR (pt. 211) 523; Ali vs. Aleshinloye (2000) 6 NWLR 660 at 177, Ow'honda vs. Ekpechi (2003) 17 NWLR (pt. 879) 326 at 335; Uzundu vs. Union Bank of Nigeria Plc. (2009) 5 NWLR (pt. 1133) 1 at 12.

It is the further contention of learned Senior Counsel that mere non consideration, non pronouncement on an issue will not be sufficient to upset a decision appealed against except it is shown that a miscarriage of justice had resulted there from; that since the merit of the action had not been determined, no miscarriage of justice can be

said to have been occasioned thereby; that appellant did not file a cross appeal or respondent's notice at the lower court and can therefore not be heard on the competence of the application before the trial court; that the reliance of the appellant on Order 47 Rule 3 (2) of the Federal High Court (Civil Procedure) Rules 2000 is unfortunate as the same is reliance on technicality; that contrary to the contention of his learned friend, the grounds and reliefs sought were clearly stated on the application for judicial review as required by the Rules of court; that there is prima-facie evidence of service of the processes on the parties particularly 2nd and 3rd respondents who have not complained anyway; that the issue of non filing of an affidavit of service of the motion papers before the listing of the motion for hearing is not relevant as the matter was struck-out without any hearing and that the decision in Appolos Udo supra is irrelevant as well as Order 47 Rule 5(6) of the Federal High Court (Civil Procedure) Rules, 2000. Finally, it is the contention of learned Senior Counsel that the issue not pronounced upon was neither crucial nor relevant, nor competent for the determination of the subject matter of the appeal before the lower court and as such no miscarriage of justice has been occasioned thereby.

On his part, learned Senior Counsel for the 4th respondent, L.O. FAGBEMI ESQ, SAN agreed with his learned friend for the 1st respondent that in a consideration of any matter, a court is not bound by the issue(s) submitted for its consideration as the court has the power to predicate its decision on what matters it perceived to be the relevant issue for consideration, relying on the case of Fabiyi vs. Adeniyi (2000) 5 SC 31 at 41; that the lower court addressed fully the issue of competence of the action as raised in the objection; that the action as instituted being a pre-election matter, the subsequent conduct of an election does not affect the future of the action, relying on Amaechi vs. INEC (2007) 18 NWLR (pt. 1065) 42 at 48; Adeogun vs. Fashogbon (2008) 17 NWLR (pt. 1115) 149 at 173-174; that jurisdiction of a court is statutory as parties cannot remove the jurisdiction which a court has or confer jurisdiction when the court has none, relying on Ijebu Ode L.G. vs. Balogun & Co. Ltd. (1991) 1 NWLR (pt. 166) 136 at 153; Wema Bank Plc vs. Christrock Lab. Ind. Ltd (2002) 8 NWLR (pt. 770) 614 at 628; that whether 1st respondent participated in the election of 28th April, 2007 is irrelevant in deter-

mining whether the court has jurisdiction to entertain the action.

In the reply brief deemed filed on 13th May, 2010, learned senior Counsel for the appellant submitted that learned Counsel for the 1st respondent having conceded that appellant's ground (a) of the objection challenged the competence of the application for judicial review, it was wrong in law for the 1st respondent to countermand that concession by submitting that the said issue of incompetence of the application was not ripe for determination at the interlocutory stage of the proceeding; that the competence of an originating process raised an issue of jurisdiction, relying on *Kida vs. Oganmola* (2006) 13 NWLR (pt. 997) 377 at 394 - 395 which can be raised at any stage in the proceedings; that an issue of jurisdiction or competence of an action is a live issue which must be determined by the court.

It is not in dispute that the lower court, in considering the issue for determination arising from the grounds of preliminary objection raised by the Senior Counsel for the appellant failed to consider all the issues submitted for determination of the said objection. The particular ground of objection not considered by the lower court is said to be ground (a) which complained, in effect, thus:

(a) The said appeal is incompetent because it is founded on a motion on notice which itself is incurably defective for the following reasons.

(i) the applicant did not comply with the provisions of Order 47 Rule 3(2) of the Federal High Court (Civil Procedure) Rules 2000 in that he did not specify the grounds and facts of the application.

(ii) Contrary to the provisions of Order 47 Rule 5(3) of the aforesaid Rules, the Notice of Motion was not served on the 2nd respondent directly.

(iii) The motion paper were served more than three days after filing contrary to the express orders of the Honourable Court.

(iv) Contrary to the provisions of Order 47 Rules 5(6) of the aforesaid Rules, and the decision in *Re: Appolos* (1987) 4 NWLR (pt. 63) 120 the applicant did not file an affidavit giving the names and addresses of and the places and dates of service on all persons who have been served with the Notice of Motion before the motion was entered for hearing.

Order 47 Rules 3(2); 5(3) and 5(6) of the Federal High Court

(Civil Procedure) Rules 2000 cited and relied upon by learned Senior Counsel provide as follows:-

“3(2) An application for leave shall be made ex parte to the court, except during vacation when it may be made to a Judge in Chambers and shall be supported by-

(a) a Statement, setting out the name and description of the applicant, the relief sought and the grounds on which it is sought; and

(b) affidavit to be filed with the application, verifying the facts relied on.”

While Rule 5(3) states thus:

“The notice of motion or summons shall be served on all persons directly affected and where it relates to any proceedings in or before a court and the object of the application is either to compel the court or an officer of the court to do any act in relation to the proceedings or to quash them or any order made therein, the notice or summons shall also be served on the clerk or registrar of the court and, where any objection to the conduct of the judge is to be made, on the Judge.”

Finally Rule 5(6) provides as follows:-

“An affidavit giving the names and addresses of, and the places and dates of service on, all persons who have been served with the notice of motion or summons shall be filed before the motion or summons is entered for hearing and, if any person who ought to be served under this rule has not been served, the affidavit shall state that fact and the reason for it, and the affidavit shall be before the court on the hearing of the motion or summons.”

I have gone through the record and the arguments of both counsel on this matter. **I confirm that the lower court did not consider arguments on appellant’s ground (a) supra.** The question that follows is whether the non-consideration of the ground in the decision of the lower court resulted in a miscarriage of justice or amounts to a denial of the right of fair hearing of the appellant. **I hold the considered view that the non consideration of ground (a) of the grounds of objection can only lead to a miscarriage of justice if the grounds are substantial and if resolved in favour of the appellant could have resulted in the objection being sustained. The lower court, by not considering the grounds in**

question committed an error, but it is settled law that it is not every error committed by a court that would lead to the decision of that court being set aside by an appellate court. To result in the decision being set aside, the error so committed must be substantial so as to affect the justice of the case and must, as a result, lead to a miscarriage of justice except rectified by an appellate court.

The provisions of Order 47 Rule 3(2) of the Federal High Court (Civil Procedure) Rules 2000 earlier reproduced in this judgment are very clear and unambiguous. It requires an applicant for judicial review to file a statement in which he is to set out the name and description of the applicant, the relief(s) sought and the grounds on which the said relief(s) is/are claimed. In addition to the above, an applicant must also file, along with the application, an affidavit verifying the facts on which the applicant relies in making the application.

I hold the considered view that the provisions of Order 47 Rule 3(2) supra is mandatory and that any application for judicial review not so accompanied is grossly incompetent and is liable to be struck out as the court would have no jurisdiction to entertain same.

The question that follows is simply whether the application of the 1st respondent for judicial review under consideration complied with the above requirement? If it does not, the non consideration of the ground in question by the lower court in its decision on the preliminary objection would have resulted in a miscarriage of justice as the issue is substantial as it affects the competence of not only the action but of the court to entertain same.

I have carefully gone through the record of appeal and I agree with the submission of learned Senior Counsel for the 1st respondent that the application in issue was accompanied with the required statement as can be seen at pages 5-9 of vol. 1 of the record in SC/54/2010 prepared by the appellant, and pages 68-72 of vol. 1 of the record of appeal in S.C/51/2010. I do not need to reproduce them in this judgment as that would serve no useful purpose. Since the applicant complied with Order 47 Rule 3(2) supra, it is clear that the objection in relation thereto as no merit whatsoever and its non consideration by the lower Court has not led to any miscarriage of jus-

tice, or breach of appellant's right to fair hearing. To say that something is not there when in fact it is, is to say the least very unfortunate as it amounts to being economical with the truth. It amounts to an attempt at misleading the court which the court frowns upon. I need not say more.

As regards Rules 5(3) supra, it is not the contention of the appellant that he was not served with the notice of motion in the application in issue neither is he contending that the other respondents to the application were not so served. It should also be noted that the other respondents to the application for judicial review, who did file objections to the competence of the application and the lower court to entertain the appeal arising therefrom, never complained of either non service of the originating process or improper mode of service on them. Appellant is not the 2nd Respondent and learned Senior Counsel for the appellant cannot complain on its behalf not haven been retained by the 2nd respondent to conduct the appeal or matter. I therefore hold the view that the 'complaint' against the mode of service of the motion on notice on the 2nd respondent is a 'complaint' by a busy body, which is consequently discountenanced by me.

On the non-compliance with Rule 5(6) of the Rules of court supra, it should be remembered that the case was never heard by the trial court. On the 30th day of April, 2007 when the matter came up before that court, it was never heard. All the court did was to, suo motu, strike out the case for lack of jurisdiction. There was no hearing of any kind. The ground of objection, therefore, had no substance whatsoever.

It is very obvious, from the above, that the sub-issue as to whether the non consideration of the relevant issue(s) by the lower court occasioned a breach of appellant's right to fair hearing is a non issue. I therefore have no hesitation in resolving issue 1 against the appellant.

On issue 7, it is the submission of learned Senior Counsel for the appellant that an examination of the reliefs sought in the application reveals that the application is by way of mandamus; that 1st respondent is seeking an order to compel the 2nd and 3rd respondents to carry out a public duty to wit, collate and declare the result of Imo

State Gubernatorial election held on 14th April, 2007; that the relief cannot be granted without 1st respondent first making a demand for the performance of that duty which demand is turned down, relying on De Smith on Judicial Review of Administrative Action, 8th Ed. Page 556; R. Vs. Commonwealth Court of Conciliation and Arbitration; EX PARTE Ozone Theatres (Australia) Ltd (1949) 78 C.L.R 389; R vs. Bristol and Exeter RY. (1843) 4 PB 162; r VS Westminster (city), Ex-Parte Canadian Wirvision Ltd. (1965) 48 DLR (2D) 210; that the only exception to the rule is where the respondent or person originally responsible for the performance of the duty has ceased to have legal authority, power to comply; that 1st respondent did not make any prior demand for the performance of the duty before instituting the action and as such the trial court had no jurisdiction to entertain the action, relying on Madukolu vs. Nkemdilim (1962) All D NLR 581 at 589 -590.

Secondly learned Senior Counsel submitted that from the reliefs claimed, it is clear that 1st respondent went to the court so that the court would return him as the duly elected Governor of Imo State; that a decision declaring the 1st respondent as the duly elected Governor of Imo State at the election in question will run counter to section 285(2) of the Constitution of the Federal Republic of Nigeria, 1999 hereinafter referred to as the 1999 Constitution); learned Senior Counsel also cited and relied on the case of ANPP vs. Returning Officer, Abia State (2007) 11 NWLR (pt. 1054) 4341 at 434-435 in submitting that the trial court has no jurisdiction to entertain the incompetent process, which incompetence affects the jurisdiction of the lower court to hear the appeal arising from the said proceeding.

On his part, Learned Senior Counsel for the 1st respondent submitted that it is erroneous to contend that the application before the trial court is by way of mandamus; that under the provisions of Order 47 Rule 2, of the Federal High Court (Civil Procedure) Rules, 2000, an application for a declaration or an injunction may be made to the court by way of Judicial Review which may be granted by the court. Learned Senior Counsel acknowledges that relief (e) seeks the relief of mandatory injunction to compel the 2nd and 3rd respondents to complete the process of the Imo State Governorship election held on 14th April, 2007; that a prayer for mandatory injunction cannot be classified with the common law remedy of mandamus - as man-

datory injunction targets completed acts as in this case, relying on the case of Abubakar vs Jos Metropolitan Development Board (1997) 10 NWLR (pt. 524) 242 at 251; Kwankwaso vs. Governor, Kano State (2007), All FWLR (pt. 363) 179 at 179; that in the light of the circumstances of this case, mandatory injunction is appropriate remedy “to compel the 2nd and 3^d respondents who are public officers to act within their statutory powers.” B

By way of an alternative submission, learned Senior Counsel urged the court to hold that the submission that there must be prior demand and refusal to perform a public function is totally untenable in this case; that though it is conceded that it is desirable to demand performance, “the law is entrenched that any failure to fulfil a public duty or violation of statutory/constitutional power may be subject to a mandatory order”; that the requirement of demand to perform and its refusal cannot be applicable in all cases, relying on R vs. Hanley D Revising Barrister (1012) 3 KB 518 at 531 - 532; R vs. Secretary of State for the Home Department ex-parte Phansopkr (1976) QB 606; R vs London Borough of Tower Hamlets Council Ex parte Kanye - Levenson (1975) 1 All ER 641 at 653; 657; that “mandamus has been held to lie so as to prevent an apprehended breach of duty and as such the desirability to call for the public body in question to fulfil its duty ought not to be insisted upon as any failure to fulfil a public duty may in principle be the subject of a mandatory order”; that the situation in which a governorship election was outrightly cancelled and another one to scheduled is an exceptional circumstance; that the authorities of Layanju vs Araoye (1959) S.C.NLR 416 and ANPP vs Returning Officer, Abia State (2007) 11 NWLR (pt. 1045) 431 relied upon by the appellant are not applicable to the instant case. F The court is urged to resolve the issue against the appellant. G

The 4th respondent’s brief of argument is of no use to this Court in the consideration of the issue under consideration as it never addressed same. It is consequently discountenanced by me.

In the case of Layanju vs Araoye (1959) SCNLR 416 at 420, this Court held, per BRETT FJ as follows:- H

“As I have already pointed out, it is well settled an application for a ‘writ of mandamus the court must be satisfied, first that the respondent has a duty of a public nature to perform, and secondly that he has refused, on demand to perform it”.

The above is the law on the issue but the question remains whether the present action for judicial review is in the nature of mandamus. The above question has to be determined before proceeding to decide whether it complies with the conditions precedent to invoking the jurisdiction of the court in an action of that nature or it qualifies for an exception to the general principle of prior demand and refusal of performance of the public duty by a public body or officer.

What are the cases that are appropriate for application for judicial review? The answer is in Order 47 Rule 1 of the Federal High Court (Civil Procedure) Rules 2000 (hereinafter called the High Court Rules or the Rules), which provides as follows:-

“(1) *An application for-----*
 (a) *an order of mandamus, Prohibition or certiorari; or*
 (b) *an injunction restraining a person from acting in any office*
 D *in which he is not entitled to act, shall be made by way of an application for judicial review in accordance with the provision of this order.”*

It is clear from the above provisions that the main cases where a party can or may apply for judicial review are four, viz:-

- E (a) Where he wants an order for mandamus,
 - (b) Prohibition, or
 - (c) Certiorari or
 - (d) an injunction restraining a person from acting in any office
- F in which he is not entitled to act.

The above are the primary cases where an applicant may adopt the process of judicial review in initiating an action in the court of law - the High Court in particular. It should be noted that under the above rule, an application for injunction by way of judicial review G can only be made where it is intended to restrain a person from acting in any office in which he is not entitled to act. It is therefore clear that an injunction for any other purpose cannot stand on its own by way of judicial review since Order 47(1) (b) has limited strictly the scope or nature of an injunction that can be applied for by way of H judicial review to that which seeks to restrain a person from acting in an office in which he is not entitled to act. It is an exception to the general rule that an injunction cannot be claimed as a substantive claim in an action without tying same to a main claim, usually by way of declaration, damages etc. The order of injunction talked about

supra is in the nature of the former order of QUO WARRANTO.

However, Rule 2 of Order 47 provides as follows:-

“(2) An application for a declaration or an injunction (not being an injunction mentioned in sub-rule (i) (b) of this rule) may be made by way of an application for judicial review and on such an application, the court may grant the declaration or injunction claimed if it considers that having regard to -

(a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari;

(b) the nature of the persons and bodies against whom relief may be granted by way of such an order; and

(c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.”

From the above provision of Order 47 rule 1 (2) it is clear that on an application for judicial review, any relief mentioned in rule 1 (1) or (2) of the order may be claimed by an applicant as an alternative or in addition to any other relief so mentioned if it arises from or relates to the same matter. It should be noted that the injunction that can be claimed under sub-rule 2 of Rule 1 of Order 47 is any other injunction excepting the one specifically mentioned under Order 47 (1) (i) (b), which may include an order for mandatory injunction. However, by the operation of Rule (2) (a) supra, the mandatory injunction claimed in this application may be granted having regards to the nature of the order of mandamus.

What then is mandamus, and, mandatory injunction?

MANDAMUS is simply an order issued by a court of law, usually the High Court to compel the performance of a public duty in which the person applying for same (mandamus) has sufficient legal interest. In the case of Shitta-Bay vs Federal Public Service Commission (1981) 1 SC 40, IDIGBE JSC described it as follows:-

“The order of mandamus, of course, only issues to a person or corporation, requiring him or them to do some particular thing therein specified, which appertains to his or their office, and is in the nature of public duty.”

MANDATORY INJUNCTION on the other hand is defined by BLACKS LAW DICTIONARY 8th Edition page 800 as follows:-

“An injunction that orders an affirmative act or mandates a specified course of conduct.”

It should be noted that before the reform which introduced sub-rule (2) of Order 47 Rule 1, one was not allowed to claim a prerogative order along with private law remedies like damages and injunction other than the injunction mentioned in Rule 1 (1) (b) of Order 47 which was basically in the nature of the order Quo Warranto.

“In a general sense today, every order of a court which commands or forbids is an injunction; but in its accepted legal sense, an injunction is a judicial process or mandate operating in parsonam by which, upon certain established principles of equity, a party is required to do or refrain from doing a particular thing. An injunction has also been defined as a writ framed according to the circumstances of the case, commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience....” See Babalola on injunctions and Enforcement of Orders, 2nd Ed. Page 3.

Injunctions are however classified according to the nature of the order given by the court or sought by the parties. We therefore have mandatory injunctions and prohibitory injunctions as two broad classifications.

Under prohibitory injunctions you have Perpetual injunction; Interlocutory injunction; Interim injunction; Quia Timet injunction; Mareva injunction and Anton Piller orders. Generally Prohibitory injunctions restrain the person to whom they are directed from doing specific act or acts.

However, **Mandatory Injunction, which is our concern in this judgments, on the other hand, is an order of court requiring a party to do a specific act or acts. It is often seen as a restorative order invoked by the court to deal with a defendant who has no respect for the court of law. In most cases, a mandatory injunction is granted to undo what has already been done, that is why it is usually referred to as restorative injunction.**

Now relief (e) of the claims of the 1st respondent before the trial court is as follows:-

“An order of Mandatory Injunction directing the Respondents

to forthwith continue and complete the process of conducting the Imo State Gubernatorial elections where the Respondents stopped and in accordance with the provisions of the Electoral Act, 2006 and Constitution of the Federal Republic of Nigeria, 1999, to wit collate and declare the results at the state level."

It is clear from the above and I hold the view that relief (e) couched as above shares common features with or is akin to an order of mandamus particularly when it is realised that the said relief (e) is claimed in an application for judicial review and is directed at the 2nd and 3rd respondents who are public bodies to perform their public duties. It does not seek restoration properly so called. It would have made a lot of difference if the claim had been made in a purely private law setting without being made under the procedure of judicial review. **In an application for judicial review by way of an order of mandamus, the applicant is expected to fulfil certain conditions such as that which requires the applicant to first and foremost request the public body to perform the duty in question and that body must fail and or refuse to do so before an application for mandamus is presented at the High Court to compel performance of the said duty.** However, in an ordinary claim for mandatory injunction, such a precondition does not exist though the intention is clearly to compel the public body to perform its duties statutory or otherwise imposed on it. **The reason why a request for the performance of the official duty has first to be made before issuance of the order of mandamus is to offer the public body or person concerned the opportunity of making amends or performing the duty.** It is only when the person or body fails or refuses to do so that he or they can be compelled by an order of mandamus to do so. The prior demand for performance is to offer the public body the needed opportunity to perform the public duty in question or make amends.

If one agrees with learned Senior Counsel for the 1st respondent that the mandatory injunction claimed in an application for judicial review has no trappings of an order of mandamus, it means that the 2nd and 3rd respondents would have been denied of the opportunity offered them by the procedure for an order of mandamus to put their house in order or right the perceived wrong, which would

be very unfair. In any event, the order of mandatory injunction being of the nature of an order of mandamus, it follows that its grant has to be in accordance with Order 47 Rule (2) (a) supra.

Secondly it would amount to granting an order of mandamus through the back door, as the effects of both orders are the same, on the public body or authority or officer.

It is for the above reasons that ***I hold the considered view that a claim for an order of mandatory injunction in an application for judicial review in which there is no claim for mandamus amounts, in law, to a claim for an order of mandamus and must comply with all the pre-conditions necessary for the invocation of the jurisdiction of the Court for the order of mandamus including a prior request for the performance of the duty sought to be enforced by the order of mandamus or mandatory injunction, and that failure to do so will render the initiation of the proceeding and the competence of the court to entertain same, fundamentally defective.***

I have not been able to see the exceptional circumstances in this case that would make it unnecessary for the court to insist on prior demand for performance of the duty in question. This is a clear case of an applicant trying very hard to get an order of mandamus through the back door by christening the claim “Mandatory Injunction”, and should not be encouraged. To do so would be oppressive on the 2nd and 3rd respondents.

From the reliefs earlier reproduced in this judgment, the grounds on which they are claimed as stated in the statement filed along with the application as well as the affidavit in support thereof, there is no doubt that the 1st respondent’s application at the Federal High Court seeks the court’s assistance to return him as the duly elected Governor of Imo State in the election of 14th April, 2007 by way an application for judicial review. See the declaratory reliefs earlier reproduced in this judgment.

Section 285(2) of the 1999 Constitution provides as follows:-

“There shall be established in each state of the Federation one or more election tribunals to be known as the Governorship and Legislative Houses Election Tribunals which shall, to the exclusion of any court or tribunal, have original juris-

diction to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor or as a member of any legislative house."

When one asks the question, which public duty does the 1st respondent want the court to compel, it is very clear that it relates to the election of 14th April, 2007 the result of which 1st respondent wants the 2nd and 3rd respondents to collate and declare of which the 1st respondent claims by paragraph 13 and 14 of his supporting affidavit to have won 24 out of the 27 local government areas of the state having polled 87% of the total votes cast which is a matter within the exclusive jurisdiction of the Governorship and Legislative Houses Election Tribunal as provided for in section 285(2) of the 1999 Constitution supra and over which the Federal High Court has no jurisdiction.

That apart, and in addition to what had been said so far on the issue as to whether a claim for mandatory injunction by way of judicial review of administrative actions is the same thing as an order of mandamus, this Court has held in the case of A.M.P.P. vs Returning Officer, Abia State (2007) 11 NWLR (pt. 1045) 431 at 434-435 as follows:-

"Election matters are in a class of their own and are entirely statutory. The writs of certiorari and mandamus being Common Law remedies cannot be invoked in a purely election matter and where they are invoked, they cannot change the character of the matter as election matter clearly belongs to the election tribunal and clearly outside the jurisdiction of the Federal High Courts"

That is the law on the matter!

It is therefore my view that since the matter went to the Federal High Court by way of judicial review with a prayer for mandatory injunction which is akin to mandamus in the circumstance of this case, and, having regard to the fact that the 1st respondent failed to make a prior demand on the 2nd and 3rd respondents to perform the duty now sought to be compelled, the application for judicial review was consequently fundamentally defective which defect affected the competence of the court to entertain same. By the authority of *Madukolu vs. Nkamdili*, supra, a court is competent inter alia, when

the case comes before it initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction. It is also settled law that any defect in competence is fatal for the proceedings are a nullity however well conducted and decided; the defect being extrinsic to the adjudication.

B Secondly, ***election matters being statutory, the common law writs or orders of certiorari, mandamus, prohibition, declaration, damages and or injunction are not applicable as they cannot change the character of election matters which belong, by Constitutional arrangement, to election tribunals and***
 C ***outside the jurisdiction of the High Courts under any guise.***

It follows therefore that since the Federal High Court lacks the jurisdiction to entertain the matter as constituted, the lower court had no jurisdiction to entertain the appeal arising therefrom.

D There is, as a result, no reason to go into the merits of the other issues raised in SC/3/2010 in view of the consequence of the resolution of issues 1 and 7 in the appeal.

It is important to state that the Election Tribunals established under section 285 of the 1999 Constitution are not meant to be ad
 E hoc but permanent in nature that is why the jurisdiction conferred on the National Assembly Election Tribunal under section 285(1) of the said 1999 Constitution include the power to determine whether the term of office of any person under the Constitution has ceased, and whether the seat of a member of the House of Representatives has
 F become vacant. These are not strictly speaking election matters arising from the conduct of an election into the relevant offices and which usually takes place at specified times or periods. The issue as to whether the term of office of any person has expired, or seat of a member of
 G the Senate or House of Representative has become vacant are post election issues which by the present ad hoc arrangements in respect of constitution of Election Tribunals, may arise after the said tribunals might have rounded up.

Secondly, having regards to the facts of this case, there is the
 H need to take a closer look at the jurisdiction of the Election Tribunal with regard to election related matters such as what took place or gave rise to the institution of the present action on appeal. Election is not an event but a process leading to an event. It is necessary that everything connected with the process leading to the election includ-

ing the actual election and its aftermath come within the jurisdiction of the Election Tribunal. That will stem the tide of parties trying to pursue election related matters in parallel courts which will only result in confusion, a gleams of which can be seen in the Sokoto State Gubernatorial elections petition saga. In any event, it is my considered view that since the action concerned an election conducted on 14th April, 2007 by the appropriate authority whether inchoate or not, the proper court with jurisdiction to entertain any action arising therefrom or relating thereto is the relevant Election Tribunal established by the Constitution of this Country as the matter is not a pre-election matter neither can it be accommodated under the procedure of judicial review. Section 164 of the Electoral Act, 2006 defines election as meaning "..... any election held under this Act and includes a referendum". It is therefore beyond doubt that what took place on 14th April, 2007 in Imo State in particular was an election and as such any action relating to the processes leading thereto including the actual conduct of the event or its cancellation fall within the jurisdiction of the Election Tribunal by operation of law and no other court or tribunal is clothed with jurisdiction to entertain it in any guise.

This appeal is however meritorious and is allowed by me. The judgment of the lower court is set aside while that of the Federal High Court delivered on the 30th day of April, 2007 to the effect that the court had no jurisdiction to entertain the action is hereby restored and affirmed by me.

In view of the fact that appeal NOS. SC/51/2010 and SC/54/2010 are on the merits of the judgment of the lower court on the resultant appeal from the decision of the said Federal High Court rendered on 30th April, 2007, which decision of the lower court has, in S.C/3/2010 been found to have been reached without jurisdiction, it follows therefore that it would be an exercise in futility to go into the merits or otherwise of the said appeals.

I therefore enter the following judgments in respect of the consolidated appeal:-

(1) SC/3/2010 - appeal allowed for being meritorious. The judgment of the lower court is hereby set aside and in its place I enter an order striking out the appeal for lack of jurisdiction while the decision of trial court of 30th April, 2007 is hereby restored and affirmed.

I make no order as to costs.

(2) SC/51/2010 - appeal is struck out for being incompetent the same haven arisen from a decision of an incompetent court, with no order as to costs.

(3) SC/54/2010 - appeal struck out for being incompetent the same having arisen from a decision of an Incompetent court. There shall be no order as to costs.

I hereby order as above.

C

MOHAMMED JSC

These consolidated appeals were taken on 13th May, 2010 and reserved for judgments today. The judgments just delivered by my learned brother Onnoghen, JSC in the determination of the appeals were read by me before today. I am entirely with him in his reasoning and conclusions in the determination of the appeals allowing the appeal No. SC. 3/2010 resulting in the setting aside the judgment of the Court of Appeal and the restoration of the judgment of the trial Court declining jurisdiction to entertain the action in the first instance. I also agree that following the judgment in appeal SC. 3/2010, the other two appeals numbers SC. 51/2010 and SC. 54/2010 arising from the same decision of the trial Court and the Court Appeal, have no legs to stand upon and therefore ought to be struck-out.

However, from the circumstances giving rise to the appeals, the matters can also be looked at from another angle. What really happened between the parties before finding themselves at the Federal High Court Abuja, is not at all in dispute. The 1st Respondent in the two appeals who is also the 4th Respondent in the 3rd Appeal, Chief Martin Agbaso is the leading party and key player in the dispute from which the appeals arose. Chief Agbaso with the Appellants and other candidates contested the election for the office of the Governor of Imo State conducted on 14th April, 2007. The election was not concluded due to the alleged gross violence in some parts of the State. The election was cancelled by I.N.E.C on 15th April, 2007 which rescheduled the same election for 28th April, 2007. Meanwhile Chief Agbaso who was not happy with the cancellation of the election conducted on 14th April, 2007, rushed to the Federal High Court, Abuja to stop the conduct of the rescheduled election for 28th April, 2007,

through an Application for Judicial Review asking the Court to set aside the cancellation of the election of 14th April, 2007 and to compel I.N.E.C. to collate and declare the results of that election which Chief Agbaso claimed to have won. The Federal High Court in the application for leave, granted the leave on 19th April, 2007 but refused to stay further action in the matter to stop the conduct of the rescheduled election for 28th April, 2007. There is no appeal against that refusal order by the Federal High Court. B

However, on 25th April, 2007, Senator Ifeanyi Ararume joined the Judicial Review proceedings as a Plaintiff seeking the same reliefs. While the Application for Judicial Review was pending and the Respondents have been served on 19th and 23rd April 2007 respectively, the rescheduled election in which Chief Agbaso also participated with the Appellants and other candidates, was conducted. After that election, Chief Agbaso's action for Judicial Review at the Federal High Court Abuja, was struck-out on 30th April, 2007 on the ground that with the holding of the election, the Federal High Court had ceased to have jurisdiction in the matter. Although Chief Agbaso filed an appeal against the order of the Federal High Court of 30th April, 2007, on 15th May, 2007, he had earlier also gone ahead to take part in the election of 28th April, 2007. In the meantime the results of the election was declared by I.N.E.C. and Chief Ikedi Ohakim, one of the Appellants, emerged the winner of the election and was sworn in as the Governor of Imo State on 29th May, 2007. Chief Agbaso with other candidates who lost at that election challenged the result of the election before the Election Tribunal of the State. His Election Petition was filed on 15th May, 2007, the same day he also filed his appeal against the decision of the Federal High Court of 30th April, 2007. His election petition was heard and determined against him by the Election Tribunal. His appeal against the decision of the Election Tribunal was also dismissed by the Court of Appeal. It was after his failure to succeed in the Election Tribunal and the Court of Appeal where he challenged the return in the election that Chief Agbaso returned to the Court of Appeal to pursue his appeal filed on 15th May, 2007 against the decision of the Federal High Court of 30th April, 2007 striking out his action for Judicial Review for lack of jurisdiction. It was at the Court of Appeal that the Appellant Chief Ikedi Ohakim also joined the appeal as a Respondent and raised a Prelimi C D E F G H

nary Objection to the appeal claiming that the Court of Appeal had no jurisdiction to entertain the appeal. This preliminary Objection to the jurisdiction of the Court of Appeal was heard and dismissed by that Court which proceeded to hear the appeal on the merit. At the conclusion of the hearing of the appeal, the appeal was allowed in the judgment of the Court which ordered the Federal High Court to proceed with the hearing of the application for Judicial Review which was earlier struck-out. This final judgment was given on 16th December, 2009.

The Appellant, Chief Ikedi Ohakim who was aggrieved by not only the Ruling of the Court of Appeal dismissing his Preliminary Objection but also by the judgment on the merit, promptly appealed against both to this Court in appeals numbers SC/3/2010 and SC/54/2010 respectively. The other Appellant Senator Ifeanyi Ararume on the other hand who was not happy with the judgment of the Court of Appeal on the merit, had also appealed against it in appeal number SC.51/2010.

Having carefully considered the Appellant's briefs of argument, the Respondents' briefs of argument and the Appellants Reply briefs of arguments filed by the parties in these appeals, it is quite clear that the issue of jurisdiction is a common factor in the appeals. In other words the central or pivot question is whether or not the Federal High Court has jurisdiction to entertain the Plaintiffs' action as couched in the statement in support of Chief Agbaso's application for Judicial Review. It is fundamental principle of our laws that jurisdiction is determined by the claim of the Plaintiff without even looking at the statement of defence. That is to say, it is the claim before the Court that has to be examined or looked at in ascertaining whether or not it falls within the jurisdiction conferred on the Court by the Constitution or any statute establishing the Court and prescribing its jurisdiction. See *Izenkwe v. Nnadozie* 14 W.A.C.A. 361 at 363; *Adeyemi v. Opeyori* (1976) 9-10 SC. 31 at 51; *Western Steel Works v. Iron and Steel Workers Union (No. 2)* (1987) 1 N.W.L.R. (Pt. 49) 248 and *Tukur v. Government of Gongola State* (1989) 4 N.W.L.R. (Pt. 117) 517 at 549. Now, what was the claim of Chief Agbaso in his application for Judicial Review filed at the Federal High Court? These claims as contained at pages 5 -6 of the record are -

“(a) A DECLARATION that the Respondents lack the power to

cancel the Imo State Gubernatorial Election Under the Electoral Act, 2006.

(b) A DECLARATION that the Respondents lack the power to cancel the Imo State Gubernatorial election Result and/or the election held on 14th April, 2007; while upholding the House of Assembly elections conducted simultaneously with the said Gubernatorial election.

(c) A DECLARATION that the cancellation of the said Gubernatorial election Conducted by the Respondents in Imo State On 4th April, 2007 is unreasonable, unlawful, illegal, arbitrary, unconstitutional, null and void.

(d) AN ORDER setting aside the cancellation of the said Gubernatorial election by the Respondents.

(e) AN ORDER OF MANDATORY INJUNCTION directing the Respondents to forthwith continue and complete the process of conducting the Imo State Gubernatorial election where the Respondents stopped and in accordance with the provisions of the Electoral Act 2006 and Constitution of the Federal Republic of Nigeria 1999; to wit to collate and declare the result at the State level."

Indeed on the face of the above quoted claims, it is true as stated by the Respondents that they are merely declaratory claims and injunction against the Respondents who are agents of the Federal Government which are consequently within the ambit of the provisions of Section 251(1)(r) of the 1999 Constitution and therefore within the jurisdiction of the Federal High Court in line with the decision of this Court in NEPA v. Edeghero (2002) 18 N.W.L.R. (Pt. 798) 79 at 98. However, the fact that the action was against the Respondents who are no doubt agents of the Federal Government of Nigeria, does not ipso factor bring the case within the jurisdiction of the Federal High Court, unless and until the other requirement of the law touching on the subject matter of the claims, is also satisfied. In other words, the subject matter of the action must also fall squarely within the jurisdiction of the Federal High Court before that Court can assume jurisdiction in a case against the Federal Government or any of its agencies. This is because before a Court or Tribunal can exercise jurisdiction to hear and determine any matter that is brought before it, the now well settled conditions or principles of law must be satisfied, that is to say -

1. The Court must be properly constituted as to the number and qualification of its members;

2. Any condition precedent to the Court's exercise of jurisdiction must have been fulfilled;

B 3. The subject matter of the case must be within the jurisdiction of the Court; and

4. That the case or matter must have been brought to the Court by the due process of the law.

C These conditions to the exercise of jurisdiction by any Court were laid down by this Court in *Madukolu & Ors. v. Nkemdelim & Ors.* (1962) 1 All N.L.R. 587 at 595. Therefore one of the principal attributes of jurisdiction as decided in that case is that the subject matter of the case must be within the jurisdiction of the Court as jurisdiction also implies the power or authority of a Court to adjudicate over a particular subject matter. See also the case of *Tukur v. Government of Gongola State* (1989) 4 N.W.L.R. (Pt. 117) 517 at 549 where Obaseki JSC explained the position of the law regarding the relationship between jurisdiction and the subject matter of the action when he said -

E *"Judges have no duty and indeed no power to expand the jurisdiction conferred on them but they have a duty and indeed jurisdiction to expound the jurisdiction conferred on them. (See The African Press of Nigeria & Ors. v. The Federal Republic of Nigeria (1985) 1 All N.L.R. 50 at 175; (1985) 2 N.W.L.R. (Pt. 6) 137 at 165.*

F *In the process of expounding the jurisdiction conferred on them the Courts have always emphasized the need to decline jurisdiction where its exercise will determine issues it has no jurisdiction to hear and determine."*

G Applying these leading decisions of this Court to the present case, the result in my view, is quite obvious. The learned trial Judge of the Federal High Court was merely applying the law in declining jurisdiction to entertain and determine the application for Judicial Review since the exercise of jurisdiction in the matter would have led H to the determination of issues arising out of the conduct of gubernatorial election in Imo State by I.N.E.C in exercise of its powers under the 1999 Constitution and the Electoral Act, 2006, which issues clearly the trial Court has no jurisdiction to entertain and determine in an application for Judicial Review within its jurisdiction. It is quite plain

therefore from the claims in the action for Judicial Review brought before the trial Federal High Court by Chief Agbaso that the cause of action arose out of the conduct of the Gubernatorial election in Imo State on 14th April, 2007. Certainly, any dispute arising out of the conduct of any election under the 1999 Constitution and the Electoral Act 2006, between the parties that contested or participated in the election, such a dispute is not a subject matter of the jurisdiction of the Federal High Court or any other Court for that matter other than the Election Tribunals specifically established and conferred with jurisdiction under Section 285(2) of the 1999 Constitution and Section 140(1)(2) and (3) of the Electoral Act, 2006. For the avoidance of any doubt I quote below the relevant provisions of the Constitution and the Electoral Act. Section 285(2) of the Constitution states -

“285(1) xxxxxxxxxxxxxxxxxxxxxxxxx

(2) There shall be established in each state of the Federation one or more election Tribunals to be known as Governorship and Legislative Houses Election Tribunals which shall to the exclusion of any Court or Tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor or as a member of any legislative house.

In Part IX of the Electoral Act where provisions for the determination of election petitions arising from elections were made, Section 140 states -

“141(1) No election and return at an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or undue return (in this Act referred to as an ‘election petition’) presented to the competent Tribunal or Court in accordance with the provisions of the Constitution or this net, and in which the person elected or returned is joined as a party.

(2) In this Section ‘tribunal or Court’ means:

(a) in the case of Presidential election, the Court of Appeal; and

(b) in the case of any other elections under this Act, the Election Tribunal established under the Constitution or by this Act.

(3) The Election Tribunals provided for under the Constitution and this Act shall be constituted not later than 14 days before the election.”

It is quite clear from the contents of Section 285(2) of the Constitution that any complaint by any person who participated in an election that any person has not been validly elected to the office of the Governor or Deputy Governor of any State in Nigeria, it is to the Election Tribunal that such complaint should be lodged for determination. The jurisdiction of the Election Tribunal to entertain and determine such a complaint is to the exclusion of any Court or other Tribunal in this Country.

Coming down to the provisions of Section 140 of the Electoral Act 2006 on the other hand, the Section has made clear distinction between “an election” and “a return at an election”. In the same vein the Section has also spelled out what it described as “an undue election” and “undue return.” The distinction between the two words “election” and “return” is further affirmed by Section 164 of the Electoral Act where the two words are separately defined. The word “election” is defined as -

“any election held under this Act and includes a referendum”

The word “return” on the other hand is defined as -

“the declaration by a Returning Officer of a candidate in an election under this Act as being the winner of that election.”

From the cause of action or claims framed in the Application for Judicial Review in the present case, the picture is very clear that the complaint relates to the Governorship Election to the office of the Governor of Imo State that was conducted by I.N.E.C in exercise of its powers under the 1999 Constitution and the Electoral Act, 2006, on 14th April, 2007. That election was clearly conducted under the Act but was not concluded to the point of making a return by the Returning Officer declaring the winner of that election before it was cancelled by the Respondents. Although there was no return in that election, the fact that the election was conducted by allowing eligible registered voters to cast their votes at the election, is not at all in dispute. The claim of the applicant in the application for Judicial Review to compel I.N.E.C to conclude the election conducted on 14th April, 2007 and declare the result of the election, in my considered view, could only have been made to the Election Tribunal duly constituted for Imo State in accordance with the provisions of the Constitution and the Electoral Act and not to the Federal High Court which rightly held that it has no jurisdiction to entertain the application.

There is need to emphasis here and now that where I.N.E.C in exercise of its powers under the Constitution and the Electoral Act had conducted any election under the Constitution and the Electoral Act, no Court in Nigeria has jurisdiction to compel I.N.E.C to conclude the election and declare the results thereof other than an election Tribunal duly constituted under the Constitution and Electoral Act. B

Finally, I must also stress that the subject matter of the application for Judicial Review in the instant case is definitely not a pre-election dispute coming within the jurisdiction of the High Court/Federal High Court under Section 32(4) and (5) of the Electoral Act, 2006, under which cases such as *Ugwu v. Araraume* (2007) 12 N.W.L.R. (Pt. 1048) 367 and *Amaechi v. I.N.E.C & Ors.* (2008) 5 N.W.L.R. (Pt. 1080) 229, were entertained and determined by the Federal High Court, the Court of Appeal and ultimately this Court. C

For the foregoing reasons and in addition to the fuller reasons D given in the lead judgment of my learned brother Onnoghen JSC, I am of the view that the trial Federal High Court was well guided in declining jurisdiction in the application for Judicial Review and in proceeding to strike out the same. The Court below was therefore wrong in restoring the application for hearing and determination on the merit when the trial Court has no jurisdiction to entertain and determine issues arising out the conduct of elections conducted by I.N.E.C under the Constitution and the Electoral Act. In this respect I fully agree and endorse all the orders made in the leading judgments including the order on costs. E F

MUHAMMAD JSC

Three appeals: SC.3/2010; SC.51/2010 and SC.54/2010 were G consolidated and heard simultaneously by this court on the 13th day of May, 2010. The parties in SC.3/2010 are Chief Ikedi Ohakim (Governor Imo State) against Chief Martin Agbosa & 3 Ors.

In SC.51/2010, Senator Ifeanyi Ararume is the appellant. The respondents are (i) INEC (2) Resident Electoral Commissioner Imo State; (3) Chief Ikedi Ohakim and (4) Chief Martin Agbaso. In SC.54/2010, Chief Ikedi Ohakim (Governor Imo State) is the appellant. The respondents are: (i) Chief Martin Agbaso (2) INEC (3) Resident Electoral Commissioner, Imo state and (4) Senator Ifeanyi Ararume. H

My learned brother, Onnoghen, JSC permitted me to read in advance the judgment he has just delivered. He has determined the appeal in 5C.3/2010 in which he allowed the appeal and set aside the judgment of the court below as it decided the appeal before it without jurisdiction. He accordingly made an order striking out the appeal before the court below and restored the trial court's decision. This lack of jurisdiction afflicted the other two appeals before this court i.e. SC.51/2010 and SC.54/2010. These two appeals were struck out by my learned brother as they arose from the decision of a court that lacked the initial jurisdiction to treat same.

I am in agreement with my learned brother Onnoghen, JSC in his lead judgment. Issue of jurisdiction of courts are replete in our law reports requiring no further elaboration. For the sake of emphasis however, permit me to say, my Lords, that jurisdiction of court is the basis, foundation and life wire of access to court in adjudication under our civil process. Courts are set-up by different statutes ranging from the Constitution, Acts, Laws etc, which cloak the courts with the powers and jurisdiction to adjudicate between litigants and on the subject matter in litigation. Where such statutes do not grant jurisdiction to a court or tribunal, the court and the parties cannot by agreement endow the court with jurisdiction, no matter how well intentioned and properly the proceedings have been conducted and once it is incompetent, it is a nullity and an exercise in futility. Jurisdiction is the fulcrum, centre pin, or the main pillar upon which the validity of any decision of any court stands and around which other issues rotate. It cannot therefore be assumed or implied as it cannot be conferred by consent or acquiescence of parties. See: *Shell Petroleum Development Company Nigeria Ltd. v. Isaceh* (2001) 5 SC (Pt. 11) 1; *A-G Federation v. Sode* (1990) 1 NWLR (Pt. 126) 500 at 541; *Okolo v. Union Bank Nig. Plc* (2004) 1 SC (Pt.1) 1; *National Bank of Nigeria Ltd. v. Shoyote* (1979) 5 SC 181; *Achineku v. Ishagba* (1988) 4 NWLR (Pt.89) 411; *Enugwu v. Okefi* (2000) 3 NWLR (Pt. 650) 620; *Ogunmokun v. Milad Osun State* (1999) 3 NWLR (Pt. 594) 261 at 265. In *Ibrahim v. INEC* (1999) 8 NWLR (Pt. 614) 334, it was emphatically observed that jurisdiction to entertain and determine an action including an election petition is one conferred expressly by the Constitution or by other statutes. There must be jurisdiction on the subject matter and the person or an instrument establishing the

court. An election petition can only be valid or competent if it complies strictly with the statute conferring jurisdiction on the tribunal empowered to entertain or hear the matter. That, of course, is the true position of the law.

In addition, all law courts or tribunals, while exercising their powers, must be guided by the general determinants of jurisdiction: B

- a) the statute establishing the Courts/Tribunal
- b) the subject matter of litigation
- c) the litigating parties
- d) the procedure by which the case is initiated
- e) proper service of process C

f) territory where the cause of action arose or, as the case may be, where the defendant resides

g) composition of Court/Tribunal.

If any of the above is lacking, then the subject matter, the parties or the composition of the court/tribunal is defective which may lead to a nullity. See *Tukur v. Govt. of Gongola State* (1989) 4 NWLR (Pt. 117) 517. D

The important and necessity of jurisdiction in a court of law/tribunal is likened to blood in an animal. Bello, CJN (of blessed memory), in the case of *Utih v. Onyiuwe* (1991) 1 NWLR (Pt. 166) 166 at 206, gave a graphic picture of the whole thing: E

"Moreover, jurisdiction is blood that gives life to the survival of an action in a court of law, and without jurisdiction the action will be like an animal that has been drained of its blood. It will cease to have life and any attempt to resuscitate it without infusing blood into it would be an abortive exercise. Since the Court of Appeal have (sic) no jurisdiction to entertain the suit, and it was right in so holding, hearing the submission of counsel on the cross-appeal by that court would not only be an abortive and unfruitful academic exercise but it would also have unnecessarily wasted the valuable time of the court." F

Thus, in our adversarial system of adjudication, the question of jurisdiction is very fundamental. In fact, it is so fundamental that the adjudicating Court/Tribunal should first determine the issue of jurisdiction before starting any proceedings. If the court proceeded and it was ultimately found that the court/tribunal had no jurisdiction in the matter, all the proceedings however well conducted will amount to nothing but a nullity. See: *Katto v. CBN* (1991) 9 NWLR (Pt. 214) G H

2556 Ohakim v. Agbaso (2010) 7-12 KLR Muhammad JSC
126 at 148; Odofin v. Agu (1992) 2 NWLR (Pt. 229) 350 at 365;
Madukolu v. Nkemdilim (1962) 1 All NLR 587.

The issues formulated by the appellant in SC.3/2010 for resolution by this court read as follows:

- B *i. Whether the Court of Appeal considered all the issues submitted to it by the appellant and, if it did not, whether its failure to consider all the issues submitted by the appellant did not occasion a breach of the appellant's right to fair hearing? (Grounds 1 and 3 of Appeal)*
- C *ii. Whether the Court of Appeal was in law right to have rendered decisions or made pronouncements at an interlocutory stage, in respect of matters the Federal High Court, Abuja would adjudicate on, if the appeal to the Court of Appeal succeeds? (Grounds 4, 6 and 7 of Appeal)*
- D *iii. Whether the Court of Appeal was right in law to have treated a complaint on issue Estoppel as one based on Res judicata? (Ground 9 of the appeal)*
- E *iv. Whether the Court of Appeal was right in its application of the doctrine of lis pendens against the 2nd and 3^d respondents? (Grounds 4, 5, 8 and 10 of the appeal)*
- v. Whether the Court of Appeal was right in holding that the objectors did not establish a case of abuse of court process against the 1st respondent? [Grounds 2 and 12 of the Appeal]*
- F *vi. Whether the appeal in the Court of Appeal was not caught by the doctrine of waiver? [Ground 11 of appeal]*
- vii. Whether the application for Judicial Review upon which the appeal in the Court of Appeal was predicated was not incompetent? [Ground 13 of Appeal]*

G The resolution of these issues is dependent solely, in my view, on the resolution of issue (vii) which challenges the competence of the application for Judicial Review at the trial court. I think, anytime, the word "competence" or "incompetence", is used against a process/proceedings or even the membership of a court of law/tribunal

H that poses a challenge against the validity of the process/proceedings or even parties being brought before the court/tribunal. It may also raise a challenge against the legality of the membership of that court/tribunal.

In the appeal on hand, my learned brother Onnoghen, JSC

had already made a finding that the application for judicial review before the Federal High Court was fundamentally defective as the applicant before the trial court failed to comply with some conditions which are precedent to the exercise of jurisdiction by the trial court and that, ipso facto, robbed the trial court of jurisdiction to try the matter. Thus, any party affected by any decision made by the trial court, may have, *stricto sensu*, no right of appeal because of the nullity of the whole proceedings, as no one should be expected to put something on nothing and expect it stay. It will certainly collapse. See: *Macfoy v. UAC* (1961) 3 MLR 1405 at 1409. Any appeal by any of the parties except on challenge of jurisdiction to the Court of Appeal cannot stand. The two appeals in this court: SC.51/2010 and SC.54/2010 emanated from the decision of the court below. Both appeals have no legs to stand on. They must collapse. They are both, hereby struck out for incompetence.

Coming back to SC.3/2010, this appeal must capture my attention because it poses a challenge to the jurisdiction of the trial court and its consequences on the court below.

I agree with the lead judgment that the court below lacked jurisdiction and its decision which gave birth to appeal No. SC.3/2010, is hereby set aside. I too, hereby, make an order striking out the appeal before the court below. I make another order restoring and affirming the decision of the trial court of 30/04/2007. I make no order as to costs in all the three appeals.

CHUKWUMA-ENEH JSC (DISSENTING)

The three appeals filed before this court in this matter are to wit: Appeals Nos. SC. 3/2010 on the one hand and, SC.54/2010 on the other have arisen from the decisions of the Abuja Division of the Court of Appeal (i.e. Lower Court) given on 26/2/2009 and 16/12/2009 respectively firstly overruling the preliminary objections taken particularly by the 2nd, 3rd and 4th respondents hereof before the lower court challenging the jurisdiction of the lower court to entertain the appeal filed by the 1st respondent herein and secondly the lower court's decision given on 16/12/2006 (i.e. after overruling the preliminary objections) albeit in the course of disposing of the main appeal itself by remitting the entire case to Federal High Court that is

the trial court to be heard on the merits.

I have before now read the lead judgment in this matter as prepared by my learned brother Onnoghen JSC and as just delivered by him. And I respectfully disagree with his findings leading to the resolution of issue 7 in the appeal No. SC.3/2010 in the appellant's
 B favour. It is upon resolving the sole issue 7 in that appeal against the lower court's decision in favour of the appellant that has led to the appeal before this court being allowed.

I should start my discussion of this matter by observing that in
 C disposing of the preliminary objection on 26/2/2007 the lower court has concluded finally as at page 715 (the last two paragraphs) through page of volume II of the record as follows:

*"In view of the foregoing it is then clear that there was no decision on the merit on the main issue which is the legality of the
 D administrative action of the 1st and 2nd respondents purporting to cancel the Imo State Gubernatorial Election held on 14th April, 2007 while upholding and validating the State House of Assembly Election held on the same day, with the same materials, at the same venue and time and by the same officials.*

*It is settled that a ruling striking out a suit for lack of jurisdiction is not a decision on the merit. See the following cases. Din. V. A. G. of the Federation (1986) 1 NWLR (pt. 17) 471; Onyeabuchi v. INEC (2002) 8 NWLR (Pt. 769) 417 at 439; Dike Ogu v. Amadi & Ors (2008) 12 NWLR (Pt. 1102) 650 at 686; Ukachukwu v. U.B.A. (2005) 18
 F NWLR (Pt. 958) 1 at 63.*

*In view of the foregoing, the inevitable conclusion which I arrived at is that the applications of each of 1st and 2nd respondents, 3^d respondent and the 4th respondent respectively lacks merit and the
 G applications are accordingly dismissed. The appellant is entitled to costs which I fix at (N15,000.00) Fifteen thousand naira against 1st and 2nd respondents jointly and each of 3^d and 4th respondents."*

And I couldn't agree more with the foregoing reasoning and conclusions.

H I think I should also interpose here some of the crucial antecedent facts as have happened in the court on 19/4/2007 even as the applicant (Chief Martin Agbaso) has been granted leave to apply for judicial review in terms of the reliefs set out in the accompanying statement to the application for the same. On 30/4/2007 the trial

court suo motu in striking out the suit has declared thus: "Election has taken place on Saturday. Suit is now for Election Tribunal and so struck out." With these words the suit for the said judicial review has been brought to an abrupt end.

In his appeal to this court, i.e. as per appeal No. SC.3/2010 the appellant (Chief Ikedi Ohakim) has specifically challenged the ruling of 26/2/2009 dismissing the preliminary objections filed by the afore-named respondents at the lower court that is to say, challenging its jurisdiction to entertain the appeal before it. The lower court, if I may repeat, has proceeded subsequently to determining the main appeal as per pages 2343 to 2344 of Volume III of the record has thus concluded the same in these clear terms;

"The straightforward answer to the issue for determination as couched by me therefore is that it was wrong of the lower court to have held that the Appellant's action as constituted inured to the Election Tribunal consequent to the election conducted by the 1st and 2nd respondents on 28/4/2007. I have hereinbefore reviewed the various submissions of the parties in relation to the order to be made upon arriving at the conclusion that the lower court was not right in holding that the Appellant's action inured to the Election Tribunal consequent to the holding of the election of 28/4/2007. The various submissions which are to the effect that the court should declare the Appellant the winner of the election of 14/4/2007 in question; and that urging the court to order fresh election into the office of the Governor of the Imo State and to preclude the 4th respondent from participating in the said election are hinged on the assumption that this court will exercise its general powers in the appeal. This court before now has said to the effect that the instant appeal is not deserving of the invocation of its general powers. The submissions in the above state vein therefore need no further consideration.

The issue for determination having been resolved in favour of the Appellant the reliefs that will be granted in the instant appeal shall be in line with those sought in the Notice of Appeal that forms its basis.

In conclusion, the appeal succeeds and is hereby allowed. The Ruling and/order of the lower court delivered on 30th April, 2007 is hereby set aside. The appellant's substantive application for Judicial Review is remitted to the Chief Judge of the Federal High Court for

assignment to another judge for hearing. In line with the directive of the Supreme Court that this appeal be heard expeditiously, this court too directs that the Appellant's case shall be given expeditiously hearing by the Federal High Court. I make no order as to cost."

(underlining for emphasis.)

B The lower court for the above reasons on the appeal lodged by the applicant, has allowed the appeal. What is worth noting from both foregoing extracts of the decisions of the lower court is anchoring of the final orders in both matters to remitting of the main case to the trial court to be heard on the merits.

C The 3 appellants in the suits No.SC.3/2010 and SC.54/2010 have appealed to this court by their respective Notices of Appeal to reverse the decision of the lower court in this matter. Applicant (Chief Martin Agbaso) at the trial court in challenging the administrative D action of INEC in canceling the gubernatorial election of 4/4/2007 by way of judicial review has claimed the following reliefs.

"(a) A declaration that the respondents lack the power to cancel the Imo State gubernatorial elections under the Electoral Act 2006.

E *(b) A declaration that the respondents lack the power to cancel, the Imo State Gubernatorial election results and/or the election held on 14th April, 2007; while upholding the House of Assembly elections conducted simultaneously with the said gubernatorial election.*

F *(c) A declaration that the cancellation of the said gubernatorial election conducted by the respondents in Imo State on 14th April, 2007 is unreasonable, unlawful, illegal, arbitrary, unconstitutional, null and void.*

G *(d) An ORDER setting aside the cancellation of the said gubernatorial election by the respondents.*

H *(e) An ORDER of Mandatory Injunction directing the respondents to for with continue and complete the process of conducting the Imo State gubernatorial elections where the respondents stopped and in accordance with the provisions of the Electoral Act 2006 and Constitution of the Federal Republic of Nigeria 1999 to wit, to collate, declare the result at the State level."*

Aggrieved by the said decisions, the appellants namely Senator Ararume, Chief Ikedi Ohakim have filed their respective appeals as per Appeals No.SC.51/2010 and SC.54/2010 to this court against

the lower court's main decision in allowing the 1st respondent's appeal on 16/12/2009. In the Appeal No. SC. 3/2010, if I may emphasise, Chief Ikedi Ohakim has challenged the ruling of the lower court dismissing the preliminary objections on 26/2/2009. At this juncture, this case being an action in which the applicant (Chief Martin Agbaso) has asked for the reliefs of declarations and mandatory injunction by way of judicial review it is most appropriate as I have done above bringing into the picture the substantive reliefs as claimed as per the said Originating Motion. B

In respect of the appeal No. SC. 3/2010 the appellant (Chief Ikedi Ohakim) in his brief of argument has raised for determination the following issues to wit: C

(i) Whether the Court of Appeal considered all the issues submitted to it by the Appellant and, if it did not, whether its failure to consider all the issues submitted by the Appellant did not occasion a breach of the Appellant's right to fair hearing? (Grounds 1 and 3 of Appeal). D

(ii) Whether the Court of Appeal was in law right to have rendered decisions or make pronouncements at an interlocutory stage, in respect of matters the Federal High Court, Abuja would adjudicate on, if the appeal to the Court of Appeal succeeds? (Grounds 4, 6 and 7 of Appeal). E

(iii) Whether the Court of Appeal was right in law to have treated a complaint on issue Estoppel as one based on Res Judicata? (Ground 9 of the Appeal). F

(iv) Whether the Court of Appeal was right in its application of the doctrine of lis pendens against the 2nd and 3rd Respondents? (Grounds 4, 5, 8 and 10 of the Appeal).

(v) Whether the Court of Appeal was right in holding that the objection did not establish a case of abuse of court process against the 1st Respondent? (Grounds 2 and 12 of the Appeal). G

(vi) Whether the appeal in the Court of Appeal was not caught by the doctrine of waiver? (Ground II of Appeal).

(vii) Whether the application for Judicial Review upon which the Appeal in the Court of Appeal was predicated was not incompetent (Ground 13 of Appeal). H

The 1 respondent herein (i.e. Chief Martin Agbaso) in his brief of argument in respect of Appeal No.SC.3/2010 has raised the follow-

ing issues for determination:

“a. Was the court below under a duty to specifically determine all the points raised by the appellants in the motion to strike out the appeal for lack of jurisdiction. (See grounds 1, 2 and 3 in the Notice of Appeal dated 11th January 2010).

B *b. Did the Court of Appeal by the Ruling determine the life issues in the substantive appeal. (See Grounds 4, 5, 6, 7 and 8 of the Notice of Appeal dated 11th January 2010.*

C *c. Did the Court of Appeal correctly resolve the issue raised in the Preliminary Objection challenging the jurisdiction of the Court to entertain the Appeal before it. (See Grounds 9, 10, 11 and 12 in the Notice of Appeal dated 11th January 2010).*

D *d. Did the Court of Appeal correctly assume the jurisdiction to hear and determine the appeal. (See Ground 13 of the Notice of Appeal).”*

The 4th respondent (i.e. Senator Araraume) herein on his part in his brief of argument has raised the following issues:

E *“1. Whether having regard to the peculiar facts and circumstances of this case, the appeal before the Court of Appeal has become an academic exercise?*

2. Whether the appeal before the Court of Appeal has been caught by any rule of estoppel?

F *3. Whether the appeal before the Court of Appeal is an abuse of court process; and*

4. Whether the action of the 2nd and 3^d Respondents in conducting the election of the 28th April, 2007 during pendency of this suit is not caught by the doctrine of lis pendens?”

G The 2nd and 3rd respondents (i. e. INEC and Resident Electoral Commissioner, Imo State) have not showed any interest whatsoever in the foregoing appeal and so have not bothered to file their composite brief of argument. But with leave of court at the oral hearing of the appeal they have been allowed to address the court on points of law only. In order to have a clear view of the synergy of these H matters I also have set out alongside the above appeal the issues formulated for decision in the Appeal No.SC.51/2010 as it is intended to examine it hereinafter (i.e. even though all the appeals have emanated indeed have been predicated on the same substratum and as consolidated). The appellant in that regard is Senator Araraume, in

his brief of argument he has formulated two issues thus:

“1. Whether the Court of Appeal was not in error in failing to pronounce on the propriety of the election conducted during the pendency of law suit? Ground 2; and

2. Whether the election of 28th April, 2007 should stand, same having been conducted during the pendency of a law suit? Ground 1.”

The 3rd respondent (Chief Ikedi Ohakim) in the same appeal in his respondent's brief of argument has identified the following issues for determination:

“Whether the Court of Appeal was in error when it held that the grounds of appeal before it did not admit of any challenge to the propriety of the election concluded on 28th April 2007? (Ground 1 of Appeal); 9.2 whether the conduct of the governorship election of 28 April 2007 by the 1st and 2nd respondents was in breach of the principle of lis pendens? (Ground 2 of Appeal).”

The 4th respondent in his brief of argument in this appeal has adopted the issues for determination as set out in the appellant's brief of argument hereof

These issues seem to stem from the grounds of appeal complaining of the failure of the lower court invoking its coercive power even so suo motu mandating the cancellation of the election of 28/4/2007 which, with respect, has not been in issue as such in the matter but has been brought in as copiously reflected in these proceedings to the notice of the lower court. However, the lower court in its judgment of 26/2/2009 at pp.1346 - 1395 of record has made significant references to that question and I quote:

“The question now is while there is a pending case in court on the legality of cancellation of the election of 14th April, 2007 is it competent for the 1st and 2nd respondents to ignore the case and proceed to conduct another election, I do not think so. In the instant case since the cancellation of the said election of 14th April, 2007 and the Re-scheduled election for 28th April, 2007 are in dispute, it is therefore not appropriate for 1st and 2nd respondents to proceed and Re-schedule another election. They ought to have waited for the outcome of the Appeal in this court”.

The lower court has gone further at p. 1385 *ibid* to say and to hold:

“The purported election on 28th April, 2007 by the 1st and 2nd

respondents in Imo State was in disregard of the pending judicial review.”

And at p. 1387 *ibid* as follows:

“Furthermore, it is evident that whilst this suit was pending, the 1st and 2nd respondents went to create the state of affairs which the 4th respondent now waves as having rendered this appeal academic——. In view of the foregoing, it is my view that the precipitate election held on 28th April 2007, was in disregard of the pending suit, brought by the appellant.”

“The foregoing extracts of the lower court’s judgment have nailed on the head the incompetence of the gubernatorial election of 28/4/2007 in Imo State and they represent logical deductions I must confess from its findings. The appellant seems to be saying that the lower court having arrived at the above conclusions ought to have taken the decisive step of pronouncing the 28/4/2009 election as void and as that which cannot confer any benefit. In that regard they refer and rely on *Amaechi v. INEC (2008) 5 NWLR (Pt. 1080) 227 at 445-46, Ezegbu v. F.A.T.B. Ltd. (1992) 1 NWLR (Pt.220) 699*. It is therefore against this background that the Appellant i. e. Senator Araraume has challenged the said lower Court’s Decision by Appeal No. SC.51/2010. I have set out the Issues raised by the Appellant and these should be complemented by stating the two Grounds of Appeal from which they have been raised by the Appellant i. e. Senator Araraume so as to appreciate the perspectives of his argument here. The two Grounds of Appeal raised in that regard are as follows:

“Ground one - Error in law:

The Learned Judge erred in law when he declined Jurisdiction over the Appellant’s substantive Application for Judicial Review of the act of the 1st Respondent in canceling the Imo State Gubernatorial Election held on 14th April, 2007, and struck out same on the grounds that the Action is a subject matter for Election Tribunal, and thereby came to a wrong Decision which has occasioned a Miscarriage of Justice.

Ground Two - misdirection:

The Learned Judge misdirected himself when he failed to proceed to hear and determine the Appellant’s Application on the grounds that it is a post Election complaint and thereby came to a wrong Decision which has occasioned a Miscarriage of Justice.”

In the final analysis as is within the power of the lower Court to do, it has formulated a single Issue for Determination in the main Appeal as follows:

“The Issue for Determination which I shall therefore consider is whether the lower Court was right to have held that the Appellant’s Action as constituted inured to the Election Tribunal consequent to the Election conducted by the 1st and 2nd respondents on 28/4/2008 (sic).” B

It should be noted that the appellant (Chief Ikedi Ohakim) has by preliminary objection challenged the above decision. In the appeal SC.No.51/2010 the 3rd respondent hereof (i.e. Chief Ikedi Ohakim) in his respondent’s brief has raised a three pronged preliminary objection against the appeal as per Appeal SC. No.51/2010; in the alternative has also argued the appeal of Senator Araraume. And since the issues raised in the preliminary objection are very fundamental having touched on the competence of the appeal itself it is only proper to treat the matter at once. His preliminary objection as premised has ranged on three grounds, firstly, that none of the grounds of Appeal in SC.51/2010 has challenged any of the Rationes decidendi of the judgment appealed from; secondly, that the appellant is seeking a relief the lower court has no power to grant; and thirdly, that it is an abuse of process. D E

The 1st and 2nd respondents in their brief of argument in the Appeal No.51/2010 are saying in vehement opposition that the substantive appeal to the lower court by Chief Agbaso has not been on the propriety of the conduct of the 28th April 2007 elections vis-à-vis the application for review also as per the Notice of Appeal filed by him and that the decision could not have delved into the substance and merits of the 4th respondent’s case (Senator Araraume) before the trial court bearing in mind the nature of the final orders made by the lower court. See; Kotoye v. C.B.N. (1989) 1 NWLR (Pt. 98) 419 at 449, Omakegbu v. Ibrahim (1997) 3 NWLR (Pt. 491) 110 at 125. F G

The 4th respondent (i.e. Chief Martin Agbaso) in appeal SC. 51/2010 on this question of lis pendens in his brief of argument has relied on the pronouncement of this court in Amaechi v. INEC (2008) 5 NWLR (Pt. 1080) 227 in submitting to the effect that “the election of 28 April 2007 having been conducted during the pendency of the suit predicated on the election of 14 April 2007, the court has a duty H

to nullify that election in order to instill discipline in the polity”. And furthermore that the lower court has the power to determine this suit on the merits in spite of the election of 28 April, 2007.

Having considered all the submissions in this regard on the question vis-a-vis the purport of *lis pendens* in this matter, I think that there is merit in both the preliminary objection and on the substantive application that the appeal cannot stand on any basis. It must be noted that none of the respondents in the lower court has filed a respondent’s notice to affirm the trial court’s decision on other grounds nor has any cross-appealed. It is settled law that in such circumstances a respondent is precluded from questioning the decision appealed from. The question then is whether he, Senator Araraume can really challenge the decision here as he has done? The answer is definitely in the negative. See *Comptoir Commercial & Ind. S.O.P. Ltd. v. Osun State Water Board Corporation* (2002) 9 NWLR (Pt. 773) 629 at 659. The appellant’s (i. e. Senator Araraume) grounds of appeal and the issues raised therefrom to say the least are both out of the realm of the real facts and the law on the issue in the context of the complaints and questions for resolution raised therefrom vis-a-vis the decision in regard to the subject-matter of the appeal at the lower court. It is important to note that the appeal before the lower court is not on the propriety of the 28/4/2007 gubernatorial election vis-a-vis the judicial review and the Notice of Appeal and so the appellant i.e. Senator Araraume even more so as the 4th respondent in the applicant’s appeal in the lower court cannot be seen to quarrel with the decision of the trial court. And where this is the case the appeal cannot stand. That is to say, in the sense that none of the Ground of Appeal in SC.51/2010 has flowed or is related to the decision appealed from as they should be seen as attacking the *ratio decidendi* of the said judgment. See: *Ode v. Federal Republic of Nigeria* (2008) All FWLR (Pt. 424) 1590 and *Jemide v. Nwanne* (2008) All FWLR (Pt. 430) 752. This is more so where the trial court without more has pre-emptorily struck out the matter and even so where the lower court as here has directed that the matter been heard *de novo* on the merits. Again, the appellant appears to have lost sight of the implication of the suit for judicial review being struck out meaning that it is not a decision on the merits. And so the basic fundamental question on appeal firstly is the correctness of its being struck out. Before now

I have set out the crucial segments of the Ruling and Judgment of the lower court of 26/2/2009 and 16/12/2009 respectively, and so, the answer to the question whether the appellant in SC.51/2010 i.e. Senator Araraume, can really be heard on the peculiar facts of this case to challenge the ruling of 26/2/2009 as well as decision of 16/12/2007 in any shape or form on the grounds as he has done here is surely in my view, in the negative. See *Comptoir Commercial Ind. Ltd. S.O.P. v. Osun State Water Corporation* (supra).

“The trial court has rightly assumed jurisdiction in the judicial review proceedings by proceeding to grant an initial leave to file and serve on the respondents the substantive originating motion. Despite the pendency of the judicial review the 1st and 2nd respondents in this appeal on 28/4/200 conducted another gubernatorial election in Imo State. On 30/4/2007 the judicial review recommenced for hearing when the trial court suo motu struck out the judicial review action for the reason that, if I may repeat, Election has taken place on Saturday, Suit is now for election Tribunal and so struck out”. And thus, the matter has been brought to an abrupt end. It is even very aggravating that he seeks a relief in this court, a relief rightly not even then available to him in the lower court and in that regard has misconceived the place of a respondent vis-a-vis the decision appealed from, that is to say, to defend the decision with all his might. His primary duty as a respondent as prescribed by the rules is to support the decision appealed from as clearly expounded in *Errington v. Errington* (supra) and *Atanda v. Ajani* (1989) 3 NWLR (Pt. 111) 511 at 543-544 per Nnaemeka-Agu JSC also See *Imoniyame Holdings Ltd. V. Sonet Enterprises Ltd.* (2002) 4 NWLR (Pt. 758) 618 at 648, B - D. There is, therefore, no merit in his appeal.

I cannot but agree that the No.SC.51/2010 constitutes in the circumstances an abuse of process. There is merit in the preliminary objection taken by Chief Ohakim which I uphold and I dismiss the appeal No.3C.51/2010 in its entirety.

I now come to the Appeal No.SC.54/2010 in which the appellant Chief Ikedi Ohakim in his brief of argument has raised the following issues:

“1. Did the lower court not misdirect itself when it held that parties including the applicant did not dispute the jurisdiction of the Federal High Court to hear the application for judicial Review by the

1st Respondent in this Appeal? (Ground one of the Appeal).

2. In all the circumstances of this matter, was the lower court correct when it held that the Trial Court was in error to have struck out the Application for Judicial Review on the ground that the matter inured in favour of an Election Tribunal? (Ground, two of the Appeal)”

The 1st respondent i. e. Chief Martin Agbaso in his brief of argument has raised the issue for determination as follows:

“a. Did the court below adequately appreciate the issues before it and correctly resolve same (Ground 1 on the Notice of Appeal).

b. Was the order made by the court before allowing the appeal against the Ruling of the learned trial court dated 30th April 2007 and remitting the suit to the learned trial court for hearing on the merits consistent with established principles and thereby valid/legitimate. (Grounds 2 in the Notice of Appeal). ”

The 4th respondent (i.e. Senator Araraume) has raised a sole issue as follows:

“1) Whether the trial court has jurisdiction on the claim of the applicant.

In the lead judgment of my learned brother Onnoghen JSC, the case of appeal No. SC. 54/2010 has been struck out. Even in that vein, I do not think it is a fruitless and wasteful exercise embarking on scrutinizing the issues set out above as I hold pre-emptorily that I see no merit in the appeal No.SC.54/2010 and that it should rather be dismissed.

The facts are these: The gubernatorial and State House of Assembly elections conducted in Imo State of 14/4/2007 have been regulated by the Electoral Act 2006 and the subsidiary enactments that have been made thereof to wit - “The Guidelines and Regulation for the conduct of the 2007 Election” and “Manual for Election Officials 2007.” The same ballot boxes have been used by the same officials of INEC for the conduct of the said elections on 14/4/2007. The same officials of INEC have counted the votes collated the same as prescribed by law for the Gubernatorial and State House of the State House of Assembly elections. Strangely enough, the results of the State House of Assembly election held on 14/4/2007 have been declared by the same officials that have conducted both election. But

the 2nd and 3^d respondents have refused to perform their statutory duty as prescribed by the Electoral Act 2006 and Article 26 of the Guidelines and Regulations despite having received the results of the said election but has purported to cancel the Gubernatorial Election by an announcement put out on 15/4/2007 alleging violence, thug-gery and election malpractices in 9 of the Local Government Areas. The 2nd and 3^d respondents notwithstanding the pendency of the instant suit have proceeded defiantly to conduct another Gubernatorial election in Imo State on 28/4/2007; on 30/4/2007 when this matter recommenced at the trial court, it suo motu has been struck out on the ground that "Election has taken place on Saturday. Suit is now for Election tribunal and so struck out."

I have set out the above facts and circumstances in order to make it abundantly clear why I have opted to discuss the instant appeal on the so issue for determination as raised by the 4th respondent hereof, aptly to the effect - "whether the trial court has the jurisdiction on the claim of the appellant?" It has encompassed the issues as raised by the appellant and 1st respondent hereof.

The 1st respondent it must be added rightly has in paragraph 4.2 (iv) of his brief of argument contended, inter alia that the issue raised by ground 2 of the grounds of appeal as canvassed by the appellant in the appeal hereof having also dealt with the matters that have been ventilated exhaustively in Appeal No.SC.3/2010 is thereby grossly incompetent. It is my view that even the two issues hereby distilled for discussion in this appeal by the instant appellant having raised substantially the same issues as in No.SC.3/2030 are obviously improper. However, bearing in mind that circumstance I intend to deal with this matter howbeit not in an detail under the banner of the issue as I have adopted here rather than strike out the two issues and the appeal itself to show that in any event that the appeal has no merit otherwise. The lower court dealing with the main appeal at page 2343 of Volume III of the record has found that:

"The default or refusal of the respondents in question to perform to completion their statutory duty in respect to the election of 14/4/2007 notwithstanding the conduct of the election of 28/4/2008 (sic) remains a continuing one until the lower court (trial court) resolves the entitlement of the appellant to the reliefs that he is seeking in his action. The lower court clearly missed the purport, or misap-

prehended the action of the appellant when it said ‘Suit is now for Election Tribunal and so struck out’. It is definitely not possible in the face of our laws for the appellant’s suit for Judicial Review ‘to be’ for Election Tribunal. In other words when the case came up on 30/4/2007 before the lower court, the court ought to have proceeded to
 B *hear it,.....”*

The foregoing findings have been arrived at after a clear understanding of the event of 14/4/2007. In that vein the lower court is loudly saying that the suit has been properly initiated and that the
 C trial court is competent and duly constituted to hear and determine the matter; clearly that it is not an election matter and so cannot inure to the Election Tribunal for determination. See: *Madukolum v. Nkemdilig* (1962) ANLR 581 per Bairamain F.J. 589-590.) Thus recognizing that the cause of action upon which the instant suit is
 D predicated is not the same as the cause of action which has accrued to the 1st respondent (Chief Martin Agbaso) arising from the 2nd and 3rd respondents (i.e. INEC and Resident Electoral Commissioner Imo State) defiantly conducting the election of 28/4/2007. The two causes of action stand out distinct and separate. I know of no law proscrib-
 E ing or Restricting in the circumstances a plaintiff as the applicant here from commencing these actions on the events of 14/4/2007 and 28/4/2007 even though different procedures and in different courts have to be adopted in enforcing the actions. See: *Trucks Nig. Ltd. V. Pyne* (1999) 6 NWLR (Pt. 607) 514, *Egbuonu v. Bornu Radio T.V.* (1997)
 F 120 NWLR (Pt. 531) 29. A cause of action has been defined as the aggregate of facts that gives a person the right to judicial relief. See: *Mohammed v. Dantata* (1992) 5 NWLR (Pt. 240) 228. The appellant hereof in raising the issue of jurisdiction, he is, in other words,
 G deemed as having admitted the facts as set out by the 1st respondent in the statement of facts supporting the application.

Coming to this question, it is settled law and the authorities are galore on the point that it is the plaintiffs claim as here that deter-
 H mines the jurisdiction of the court that is, where as here it is challenged on that ground. See: *Ikin v. Edjerode* (2001) 18 NWLR (Pt. 745) 446 at 499 and *CBN v. SAP (Nig) Ltd.* (2005) 3 NWLR (Pt. 911) 152. Earlier on in this judgment the reliefs sought in the judicial review have been set out as per the statement in support of the application and I have scrutinized them. Consistent with this prin-

ciple, in my view, the 1st respondent at the lower court has raised the sole issue which reads; “whether the lower court (trial Court) was right in striking out the suit on the ground that the subject matter was fit for an Election Tribunal.” I do not think that on the premise I have just adumbrated above that the lower court has erred in any way in so finding that while this suit is pending in the trial court on the propriety or otherwise of cancellation of the election of 14/4/2007 it is competent for the 2nd and 3rd respondents here to totally ignore the case and to have proceeded to conduct the election of 28/4/2007; also I so uphold. This court has made it abundantly clear in such cases as Ladoja v. INEC (2007) 12 NWLR (Pt. 1047) 119 at 164-165, Obi v. INEC (2007) 11 NWLR (Pt. 1046) 565 at 691-692, Amaechi v. INEC (2008) 5 NWLR (Pt. 1080) 277 that INEC should as a law abiding institution desist from foisting on the court a position of helpless, by rendering nugatory the outcome of a matter before it. I think it behoves INEC in the context of a fair and impartial umpire to at all times provide level playing ground for all candidates in the matters covered by the Electoral Act 2006 by strict adherence to due process and respect for the rule of law which enjoins it not to stifle decisions of the court on election and related matters by pre-empting their outcome thus rendering them nugatory.

On another crucial point which is fairly evident from the case of the appellant in the court below and which has dictated the 1st issue raised by the appellant in this suit hereof; the appellant has made heavy weather of the lower court’s finding as a misdirection in law when it held thus, “I do not understand any of them as disputing the fact that the proper court seised of the jurisdiction to entertain the action of the appellant for Judicial Review is the lower court” (i.e. trial court). The appellant has challenged the same for not having correctly and adequately represented the “submissions” of the Parties. This is a serious allegation which I think the Senior Counsel representing the appellant should have gone further to substantiate in a proper manner as he is seen in so many words to be challenging the record. Even moreso, he has improperly represented the views of other parties as they have not so challenged the record. To lay to rest that contention, it is evident from the stance each of the parties has taken in the lower court on the question of jurisdiction that the appellants have not attacked the jurisdiction of the lower court simplic-

iter or that the 1st respondent prima facie on the said reliefs as stated has not made out a cause of action particularly as it is settled that having taken the issue of jurisdiction the appellant is deemed to have admitted the facts as per the statement filed in support of the 1st respondent case in this matter if I may repeat. There appears respectfully to be a misapprehension of the distinction between attacking the jurisdiction of the court simpliciter in a suit and applying to dismiss an action as the instant one in limine as in an application to dismiss a suit on grounds of abuse of process, being an academic exercise or caught by the doctrine of estoppel or for non compliance with Order 47 of the Federal High Court (Civil Procedure) Rules 2000 that is to say, as the instant appellants have done before the lower court in this matter. In that case, they have not necessarily attacked the jurisdiction of the court simpliciter; in that they have simply raised several applications respectively to dismiss the action in limine for one or the other of the grounds as I have stated above. See *Ege Shipping and Trading Ind. v. Tiger Lutt Corporation* (1999) 14 NWLR (Pt. 632) 70. Thus it has become necessary to make or point out this distinction as above on the issue of jurisdiction not only because of how all the appellants in this matter have couched their respective prayers in their respective applications challenging the jurisdiction of the lower court as set out by the lower court in the Ruling of 26/2/2007 but also to put the above finding of the lower court that none of the appellants have seriously challenged the jurisdiction of the lower court to hear this matter in proper perspective. And so going by their respective applications before the lower court on the question of jurisdiction none of them have attacked the jurisdiction of the lower court simpliciter if I may repeat. And so, the appellant's complaint that the lower court has misdirected itself on the point as per the above quote from its judgment cannot be sustained.

As a follow up, I do not understand any of the appellants in this matter as contending on the aggregate of the facts of the event of the 14/4/2007 election vis-a-vis the reliefs sought by the applicant herein in the suit that it does not constitute a cause of action distinct and separate from the cause of action in regard to the matter relating to the election of 28/4/2007. However, it must be emphasized that they (i.e. the appellants hereof) seem to contend that it is a matter for the Election Tribunal and as so ordered by the trial court. Nonetheless

less, I can find no ground upon which such a contention can be founded. The question is whether that conclusion is sustainable. I do not think so. Firstly, the re-scheduled election of 28/4/2007 has been rightly questioned by the applicant in the Election Tribunal under Section 145(1) of the Electoral Act 2006 and has lost. On the election of 14/4/2007 it is common ground that the election is inconclusive and has been cancelled. Without mincing words there is no way an inconclusive election as the one of 14/4/2007 can be subject to the jurisdiction of the Election Tribunal as it is not amenable to the provisions of Section 145(1) and (2) of the Electoral Act 2006 nor Section 285(1) of the 1999 Constitution as I set them out hereunder section 145 (1) provides as follows:

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

(a) that a person whose election is questioned was, at the time of the election, not qualified to contest the election.

(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; or

(c) that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.

(2) An act or omission which may be contrary to an instruction or directive of the Commission or of an officer appointed for the purpose of the election but which is not contrary to the provisions of this Act shall not of itself be a ground for questioning the election”.

The foregoing provisions are free of any ambiguity and on a close examination none of its subsections can accommodate the facts and circumstances of the event of 14/4/2007 which in the main is concerned with the power of INEC to cancel the 14/4/2007 election or indeed postpone the same as against canceling an election conducted under the Electoral Act 2006. And so, the applicant's suit on the decision of 14/4/2007 cannot inure to the Election Tribunal for questioning as it is not an election matter.

Section 285(1) provides as follows:

“(1) There shall be established for the Federation one or more election tribunals to be known as the National Assembly Election Tribunals which shall, to the exclusion of any court or tribunal, have

original jurisdiction to hear and determine petitions as to whether -
(a) any person has been validly elected as a member of the
National Assembly.

(b) the term of office of any person under this Constitution has
ceased

B *(c) the seat of a member of the Senate or a member of the*
House of Representatives has become vacant; and

(d) a question or petition brought before the election tribunal
has been properly or improperly brought. ”

C (2) There shall be established in each State of the Federation
one or more election tribunals to be known as the Governorship and
Legislative Houses Election Tribunals which shall to the exclusion of
any court or tribunal have original jurisdiction to hear and determine
petitions as to whether any person has been validly elected to the
D office of Governor or Deputy Governor or as a member of any leg-
islative house.”

Also from whatever angle the event of 14/4/2007 is construed it does
not concern the tenure or vacancy of any public officer elected or
otherwise. It is clear that none of the subsections of Section 285(1)
E (supra) can apply to the circumstances of 14/4/2007 election and so
the election of 14/4/2007 cannot be amenable to the jurisdiction of
the Election Tribunal, the trial court therefore has erred to so declare.

It all boils down to the simple conclusion that a careful exami-
F nation of the peculiar event of the election of 14/4/2007 vis-a-vis the
foregoing provisions leaves no one in any doubt that there is no way
the instant suit could properly be initiated pursuant to either or both
enactments, that is to say, on a claim for declarations and injunctions
against the respondents including the 2nd and 3rd respondents for the
G cancellation of the 14/4/2007 election. On the other hand the 2nd
and 3rd respondents being agents of the Federal Government it can-
not be disputed pursuant to Section 251(1) ® of the 1999 Constitu-
tion that the jurisdiction to entertain the matter has inured to the
Federal High Court; as the only court having exclusive jurisdiction in
H the matter both as to the subject-matter of the suit as well as the
respondents thereof. And so the instant suit has been properly initi-
ated before the Federal High Court which rightly has assumed juris-
diction in the matter. See: NEPA v. Edegbenro (2002) 18 NWLR (Pt.
798) 79 at 98 and so Sections 145(1) (supra) and 285(1) (supra)

are non-sequitur. There can be no sustainable argument that the principle that has informed the decisions of this court in *A.D. v. Fayose* (2005) 10 NWLR (Pt. 932) 151 and *PD.P. v. INEC* (1999) 11 NWLR (pt. 626) 200 is applicable here as it is beyond argument that the instant suit is clearly founded on the impropriety of having cancelled the 14/4/2007 election nor is it otherwise an election matter being improperly prosecuted under the guise of judicial review- as a civil matter before the Federal High Court pursuant to Section 251(1) of the 1999 Constitution. And so the appellant's assertion that the lower court has no jurisdiction over the matter being an election matter simpliciter is baseless. I am satisfied that the instant suit is not an election matter for the Election Tribunal. The trial Court rightly is seised of the jurisdiction to deal with this matter and I so hold. B C

For the above reasons, I have not the slightest hesitation that the justice of this case dictates that the appeal No.SC.54/2010 should be dismissed and I so dismiss it and I affirm the decision of the lower court which has painstakingly dealt with the matter exhaustively. D

Issue 7 Appeal No. 3/2010 is whether the application for Judicial Review upon which the appeal in the Court of Appeal was predicated was competent? (grounds 13 of Appeal). Before settling down on Issue 7 in Appeal No. SC.3/2010, I think I should say that issues (1) to (6) have been comprehensively dealt with in the lead judgment and I couldn't agree more in their being resolved against the appellant. That said, I now come to the final segment of this judgment. Issue 7, it must be observed is the only issue that has been resolved in favour of the appellant as per Appeal No.SC.3/2010 and is the only basis for allowing the appeal as per the lead judgment. In view of my stance in this appeal it is of great moment that it should be dealt with exhaustively being, the only crucial area of my disagreement with the lead judgment. E F G

The appellant has contended that by relieve (e) of the application for a Judicial Review that is, an order for mandatory injunction is in the nature of mandamus and so is amenable to all the technical rules regulating the enforcement of mandamus and more importantly that it is subject to a condition precedent that there must be a demand on the public officials as the 1st and 2nd respondents here to perform the public duty thrust on them and the refusal thereof by the said public officials to so perform as a sine-qua-non pre-condition H

to properly ground a competent application of mandamus or mandatory injunction. See the case of *Laganju v. Araoye* (1989) SCNLR 46 at 420 per Brett F.J. Relying on *Madukolum v. Nkemdilim* (1962) ANLR 581 at 589-550 per Bairamain F.J. on the factors that must exist to give jurisdiction to a court to hear and determine any matter before it. The appellant in consequence to the said pronouncement has submitted that the instant case has not been initiated by due process as the instant suit is not preceded by the demand on INEC officials i.e. in this case 2nd and 3rd respondents to perform their public function as prescribed under Electoral Act 2006 and their refusal so to perform. In other words, the relief of mandatory injunction via judicial review is everything as order of mandamus excepting in name and so is subject to all the technicalities that circumscribe mandamus. To my mind if I may state at once, this will amount to an over reading what is not so provided into the provisions of Order 47 (2) which has provided for an application for a declaration or an injunction not being an injunction in Rule (1) (b) of Order 47 to be made by way of judicial review subject to the nature of the subject-matter and persons against whom the order is being directed. The makes the supposition that the ultimate effect of the instant relief (e) is for the 1st respondent to be returned as winner of the election as deposed to in paragraphs 13 and 14 of the 1st respondent's supporting affidavit to the Originating motion and that to be so declared will run counter to the provisions of Section 285 (1) (a) of the 1990 Constitution which has given such power to so declare a winner pursuant to the Electoral Act exclusively to the Election Tribunals . See *ANPP v. Declaring Officer Abia State* (2997) 1 NWLR (pt. 1045) 431, 434-485 per Musdapha JSC.

Finally he has submitted that the trial court has no jurisdiction to entertain an incompetent process - and in so far as this is a legal assertion it couldn't be more true.

The 1st Respondent (Chief Martin Agbaso) in his brief of argument he has contended that the appellant's submission that the instant mandatory injunction is akin to mandamus, should be rejected as not entirely properly founded and on a proper examination of the provisions of Order 47 Rule 3 of the Federal High Court (Civil Procedure) Rules 2000; and has further submitted that the relief of mandatory injunction as claimed is well grounded. In that regard he

has highlighted the features of injunction as distinct and distinguishable from mandamus; and so has made the point that by the nature of the suit and the persons to be so affected that the instant remedy of mandatory injunction has been rightly sought for against completed acts of the 1st and 2nd respondents in cancelling the election of 14th April 2007. See *Abubakar & Ors. v. Jos Metropolitan Development, Broad & Anor.* (1997) 10 NWLR (Pt. 524) 242 at 257 paragraphs G-H and *Kwakwonso v. Governor Kano State* (2007) All FWLR (Pt. 363) 179 at 179 paragraphs D-F, *Military Governor of Lagos State & Ors. V. Ojukwu* (1986) 1 NWLR (Pt. 18) 62 and *Modile v. Governor of Lagos State & Ors.* (2004) 12 NWLR (pt. 887) 354 at 388 paragraphs E-F. He further has maintained that the trial court rightly has assumed jurisdiction in the matter on 19/4/2007 when the order granting leave to come by way of judicial review has been granted.

On the question that there must be a demand to perform and the refusal thereof to perform the public duty as enjoined by the Electoral Act 2006 before an order of mandamus can properly be invoked otherwise it will not lie, he submits although it is not in all cases have the said pre-condition been applied and he has relied on *R. v. Hanley Revising Barrister* (1912) 3 KB 518 at 575 and *R. v. Secretary of State for the Home Development Exparte Rhansopkr* (1976) Q.B. 606 and *R. v. London Brough of Tower Hamletts Council Exparte Kany Levenson* (1925) 1 AER 641 at 653 and 677 for in support. He has urged the court to discountenance the cases relied upon by the appellant here as inapplicable to the peculiar facts of this case and therefore, that the appeal should be dismissed.

It seems to me that the arguments as premised on this issue by the appellant have been wrongly predicated.

I think I should come to the crucial area of my disagreement with the lead judgment that is, whether as a pre-condition in an application for mandatory injunction by way of judicial review the applicant has to demand for the performance of the public duty and the refusal of the same before the order of mandamus can be invoked. I say respectfully, firstly that the relief of mandamus and mandatory injunction belong to two separate and distinct heads of remedies even though mandatory injunction is a relief now claimable under Order 47 of the Rules and the question is whether in the elabo-

rate provisions of Order 47 (supra) it has been expressly provided for such demand and refusal to perform a public duty as a pre-condition to exercise of mandatory injunction. On this contention the court must be careful not read into the rule what is not so provided under Order 47 (supra). For ease of reference Order 47(2) provides

B as follows:

“(1) (1) An application for:

(a) an order of mandamus, prohibition or certiorari, or

C *(b) an injunction restraining a person from acting in any office in which he is not entitled to act shall be made by way of an application for judicial review in accordance with the provisions of this order.*

(2) An application for a declaration or an injunction (not being an injunction rule (1) (b) of this rule) may be made by way of an application for judicial review, and the court may grant the declaration or injunction if it deems it just and convenient to grant it by way of judicial review, having regard to -

(a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition certiorari.

E *(b) the nature of the persons and bodies against whom relief may be granted by way of such an order; and*

(c) all the circumstances of the case.

(3) (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this matter.

F *(2) An application for leave shall be made ex parte to the Judge and shall be supported by:*

(a) a statement setting out the name and description of the applicant, the reliefs sought and the grounds on which they are sought.

G *(b) an affidavit verifying the facts relied on, and*

(c) a written address in support of application for leave.”

H The foregoing provisions can hardly be said to be anything but clear and plain and free from any ambiguity and so ought to be literally construed. Let me say in construing Order 47 (supra) that it contemplates, the court’s exercise of supervisory jurisdiction over public acts of public officials whether in the exercise of their judicial or administrative duties, that is, subject to the nature of the subject-matter and the persons the order is sought to be directed. Specifically, Rule 1 (2) deals with the mode/method of application for judi-

cial review and foreshadows seeking firstly leave to apply for judicial review as per Rule 1 (2), in this case by way of judicial review seeking the reliefs of declarations and mandatory injunction. Rule 3, on the other hand, has enjoined the applicant as a matter of obligation to accompany the application for judicial review with a statement setting out the name and description of the applicant and the reliefs sought as well as the grounds on which they are sought; an affidavit verifying the facts relied on as well as a written address in support of the application for leave. Subject to the foregoing processes accompanying the application for judicial review the court may grant leave for an originating motion to be served on the respondents accompanied by the above processes duly exhibited to the supporting affidavit. Nowhere is there expressly provided for a demand and refusal to perform by the public officials of their official duty a condition precedent to granting leave for an application under judicial review. The submission has no basis and is rejected.

Construing the provisions of Order 47 (supra) there are no express provisions for demand on a public officials by an applicant to perform their public duty nor for refusal to so perform their public duty as a fundamental pre-condition for the application for judicial review to be properly grounded. The pre-condition, in every respect, in my view, is not part of our law, practice and procedure surrounding the application for judicial review. I, therefore, pre-emptorily reject the argument in that regard.

And even then such cases as *R. v. Hanley* Revising Barrister (supra), *R. v. Secretary of State for Home Development* Exparte Rhansopkr (supra) and similar cases show that the pre-condition is not of a general application.

For the court to be properly seised of this matter initiated by way of judicial review there must be in place certain factors including that:

“(1) it (i.e. the court) must be properly constituted as to numbers and qualifications of the members of the court and not suffering from any disqualification.

(2) the subject-matter of the case must necessarily be within the jurisdiction of the court and there is no feature of the case affecting the court in the exercise of its jurisdiction.

(3) the action must be initiated by due process and upon ful-

fillment of every condition precedent to the exercise of its jurisdiction."

The necessary implication of the above requirements which must co-exist for the court to exercise its power is that any defect with regard to any of them will deprive the court of its jurisdiction even moreso in this case to entertain the application. It is against the background of the foregoing stated factors that I must consider the decisive question in this matter of whether the lower court correctly assumed jurisdiction to hear and determine the matter as jurisdiction is the enabling power of the court to entertain a matter as without it a court labours in vain. See *Madukolum v. Nkedilim* (supra), *Attorney-General of Anambra State v. Attorney-General of the Federation* (1993) 6 NWLR (Pt. 302) 692 and *Bronik Motors v. Wema Bank Ltd.* (1983) 1 SCNLR 296.

It follows that given the presence of the other two factors (above) for the exercise of the court's jurisdiction as present in the matter, for the instant application for judicial review to be competently founded it must be initiated by due process and upon fulfillment of any conditions precedent to the exercise of the court's jurisdiction over the instant application for judicial review. Thus narrowing the appellant's contention only to the third factor on the jurisdiction of the court as stated above.

By the nature of judicial review it requires that the rules of procedure governing its practice must be strictly obeyed and adhered to otherwise the application is incompetent ab initio. This has to be so as it is the means by which the court exercises supervisory jurisdiction over public acts or omissions of inferior tribunals and public authorities and officials. I have in this judgment expatiated on the public functions of the 2nd and 3rd respondents under the Electoral Act 2006 and the Constitution. It is not being denied that the 2nd and 3rd respondents who are public agents and officers of the Federal Government are required to perform their public duty within the ambit of their statutory powers as per the Electoral Act 2006 and the 1999 Constitution. They i.e. 2nd and 3rd respondents are amenable to the exercise of judicial review in the circumstances of this matter. And so, the lower court is eminently positioned to exercise its supervisory powers over the performance of their public duties including in this instance checking the administrative duties of the 2nd and 3rd respon-

dents as to the cancellation of the Imo State Gubernatorial Election of 14/4/2007, that is to say, whether their act in canceling 14/4/2007 election comes within Section 27 of the Electoral Act 2006 and even then whether the 2nd and 3rd respondents also are equally compellable by mandatory order to perform their public duties under the said law particularly in regard to the said cancellation of 14/4/2007 election in Imo State. B

The primary question that has to be addressed here is the contention by the appellant that in an application for mandamus it must be shown that there has been a prior demand and refusal to perform a public duty as a fundamental requirement and without which the court is denied the power to hear the application. Although at Common Law there is the requirement that before the court will issue a mandamus there must have been a prior demand to perform the act sought to be enforced and a refusal to perform it. It is certainly not of a general application as borne out in the case of *R. v. Hanley* Revising Barrister (1912) 3 K.B. 518 at 531-532, *R. v. Secretary of State for the Home Department* *Ex-parte Phansopkr* (1976) Q.B. 606, and *R. v. London Borough of Towel Hamlets Council, Ex-parte Kanye-Levenson*(1975) 1 AGR 641 at 653 and 657. C D E

These cases being relied upon are all foreign cases and have been cited to this court on the basis that order of mandamus at common is the same as mandatory injunction under Order 47 (supra) that is, as the relief sought in this matter - a proposition I do not subscribe to. It is my respectful view that that requirement has no legitimate application in this country. I say so as it is my view that since the promulgation of the provisions on the special practice and procedure relating to applications for judicial review under Order 47 of the Rules that one cannot now look beyond those provisions as per Order 47 in dealing with matters relating to applications for judicial review in this country. Order 47 has adequately provided that an application for judicial review should be initiated in the court by way of certain processes i.e. originating motion or summons as the case may be upon observing all the conditions precedent so as to give the court the necessary jurisdiction to entertain the matter. See: Rules 1 (2), (a), (b), (c), 3(1), (2), (a), (b) and (c) of Order 47 Federal High Court (Civil Procedure) Rules 2000. What must be said is that there is no Rule(s) under Order 47 (supra) governing applications for judi- F G H

cial review requiring an applicant for judicial review to make a prior demand and refusal for the performance of a public duty talkless making it a fundamental requirement to determining the competency of an application in that regard. This is reading into the law what is not there and thus assuming the function of the lawmaker. It is settled law that no court is permitted in regard to a question covered by our Rules and laws to look beyond the borders of this country and thereby to import into our law or Rules of court what is not so expressly provided for. For the above reason there is no basis whatsoever in the claim that demand and refusal to perform a public duty has to precede the institution of the instant suit. The application for leave initiating the instant application is competently founded. The said contention is without foundation and it is unacceptable.

I therefore find no merit in the appeal No.SC.3/2010 having resolved all the issues against the appellant. In the result, I dismiss each of the three appeals i.e. severally as I have already done herein. I affirm the decision of the lower court as well as the order remitting the case to the Federal High Court for hearing and determination before another Judge. I make no order as to costs.

Appeals dismissed.

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