

**SUPREME COURT OF NIGERIA**  
17TH DECEMBER, 2010. SC. 302/2010  
**CORAM:- M. MOHAMMED, W. S. N. ONNOGHEN, J. A.**  
**FABIYI, O. O. ADEKEYE, S. GALADIMA, JJSC**

1. HON. GABRIEL YUNISA OLOFU  
(The Chairman, Olamaboro Local Govt.)
  2. THE PEOPLES DEMOCRATIC PARTY ..... APPELLANTS
  3. MR. ENEJO SOLOMON MUSA  
AND
  1. MR. MICHAEL ADEJOH ITODO
  2. KOGI STATE INDEPENDENT ..... RESPONDENTS  
ELECTORAL COMMISSION  
AND  
KOGI STATE INDEPENDENT  
ELECTORAL COMMISSION ..... APPELLANT  
AND
  1. HON. GABRIEL YUNISA OLOFU
  2. THE PEOPLES DEMOCRATIC PARTY
  3. MR. ENEJO SOLOMON MUSA ..... RESPONDENTS
  4. MR. MICHAEL ADEJOH ITODO
- 

JURISDICTION - Source & purpose - Being conferred on Courts by Constitution - It is fundamental to adjudication - As foundation on which courts exercise judicial powers (H1)

ACTIONS - Jurisdiction - How determined - In order to determine Jurisdiction - Court has to look at plaintiff's statement of claim and not the defence (H2)

ELECTIONS - Pre election matters - Substitution of candidate - Propriety - Only political party can nominate candidate for election - But in event of substitution of such candidate - Party must fulfil certain conditions (H3)

STATUTES - Interpretation - Of the word 'may' - In s. 23 of Kogi State Local Government Election Law, 2004 - By appellant as not being mandatory is wrong - For same does not relate to time within

which to substitute candidates (H4)

COURTS - Jurisdiction - How activated - Failure of political party to comply with Electoral law - Confers jurisdiction on court - To protect rights of candidates - As to ensure order in the society (H5)

ELECTIONS - Courts - Jurisdiction - Basis of - The Constitution confers exclusive jurisdiction - In concluded elections as in this case on tribunals - And pre-election matters on High Courts (H6)

ELECTIONS - Post election matters - Propriety - Where respondent alleged undue return of candidate - Such is post election matter - As confirmed by the reliefs sought in his originating summons (H7)

COURTS - Jurisdiction - Absence of - Effect on appellate court - Where trial court has no jurisdiction to hear a matter - As in this case - Court of Appeal will be without jurisdiction (H8)

### **FACTS**

4th respondent as claimant, initiated an action by originating summons at Kogi State High Court against 1st - 3rd respondents. The claimant contested and won election into the office of councillor representing Ogugu ward II Olamaboro Local Government Council, in the election conducted on 26th July, 2008. He was eventually substituted by the 1st and 2nd respondents with 3rd respondent. At the trial court, 4th respondent sought to establish that his substitution was illegal, unconstitutional, null and void, violation of his rights and provisions of s. 56 of Kogi State Local Government Electoral Law, 2004. He sought for an order directing that he be returned as councillor representing Ogugu ward II Olamaboro Local Government Council and to be sworn into office.

Consequently, 1st - 3rd respondents filed a preliminary objection, praying the court to strike out the suit for want of jurisdiction. In its considered ruling, trial court upheld the objection that it lacks jurisdiction to entertain the matter. The above decision led to an appeal to the Court of Appeal which upturned the decision of the trial court and entered judgment in terms of the reliefs sought by the 4th respondent. Dissatisfied with the decision, appellant has come on ap-

peal to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*i. Whether the trial court has jurisdiction to hear and determine the action as constituted.*

*ii. Whether the lower court was right in invoking its powers under Section 15 of the Court of Appeal Act to hear and determine the matter.”*

### **HELD** (Unanimously allowing the appeal per **ONNOGHEN JSC**) **JURISDICTION - Source & purpose**

1. It is settled law that Jurisdiction is fundamental to adjudication and it is usually conferred on the court by the Constitution or Statute; it is really the foundation on which the court exercises judicial powers. A proceeding, however well conducted remains a nullity if the court lacks the requisite jurisdiction to hear and determine the matter.  
(p. 3111 D)

### **ACTIONS - Jurisdiction - How determined**

2. Also settled is the principle of law that in order to determine whether a court before which a matter is pending, has the jurisdiction to entertain same, the court has to look at the plaintiff’s statement of claim before it and not the defence put forward by the Defendant to the action. The claim of the plaintiff in an action includes the originating summons and the Affidavit(s) in support of same where the action is instituted by originating summons as was decided by this court in the case of Inakoju v. Adeleke (2007) 1 S.C. (Pt. I) 1; 4 NWLR (Pt. 1025) 427 at 588-589 (p. 3113 E)

### **Pre election matters - Substitution of candidate - Propriety**

3. It is not disputed that a political party has the power to nominate a candidate for any election without interference from the court, the matter being strictly within the domestic jurisdiction of the political parties.

However, when it comes to the question of substituting another person (candidate) for the nominated candidate, the law now lays down certain conditions which the political party seeking the said substitution has to fulfill to make the venture a success.

Under section 34 of the Electoral Act, 2006, the political party

has to inform INEC of the change in writing not later than sixty (60) days to the election in question and must give cogent and verifiable reasons for desiring the change or substitution. (p. 3116 D)

**STATUTES - Interpretation - Of the word 'may'**

- B 4. Whereas section 34 (1) of the Electoral Act, 2006, stipulates that the substitution must be made within sixty (60) days to the election, section 23 of the Kogi State Local Government Elections Law, 2004 stipulates that for the intended substitution to be effective or legal, it should be made within five (5) days to the election in question.

C The argument of the Appellants is that the said provision is not mandatory but permissive. I do not agree with that interpretation. Even though the word “may” is used in Section 23 supra, the word does not relate to the time within which the substitution is to be effected (which is stated therein to be five (5) days) but relates only to the intention of the political party concerned which desires the change or substitution. Such a political party “may” signify its intention within the stipulated time, if it so desires or aborts same. The section does not mean that a political party is at liberty to effect a substitution of a nominated candidate less than five days to the election or even after the election. (p. 3116 H)

**COURTS - Jurisdiction - How activated**

- F 5. Any political party that fails to comply with section 23 of the law has by that act conferred or activated the jurisdiction of the court to protect the right conferred on the nominated candidate earlier submitted to the electoral body. To hold otherwise is to engineer a return to the dark days when substitution could be made even during the election or thereafter. We must always remember that our laws are meant to be obeyed for the benefit of the society since that is the only way to ensure certainty, peace and progress, equity, fair play, and the rule of law. (p. 3117 D)

H **ELECTIONS - Courts - Jurisdiction - Basis of**

6. By constitutional arrangements, election matters are the exclusive concern of Election Tribunals and not the regular courts. However, where the matter involves issues of pre-election, the regular High Courts have jurisdiction to handle them.

From the record, particularly Exhibit “2”, election had been concluded and the name of the candidate who won same is the 1st Respondent. It follows therefore, that appropriate venue for the trial of the issues arising from that concluded election is the appropriate Election Tribunal, not the regular High Courts. It is at the Tribunal that the electoral body concerned is to tell Nigerians why the Respondent who contested and won the election in issue, is refused a certificate of return which certificate it rather issued to a total stranger, 3rd Appellant. (pp. 3117 H/3118 D) B

### ***ELECTION PETITIONS - Post election matters - Propriety*** C

7. From the above facts it is very clear that this is a post election matter as there was an election duly conducted by the appropriate authority on the 26th day of July, 2008 and which by Exhibit “2”, the certified true copy of the result of the Election, the 1st Respondent won. At that stage, it is too late to be talking of nomination of a candidate for the election in question, which is purely a pre-election matter. It should be noted that nomination is either by the original act of the party or by way of substitution. D

This clearly is a case of undue return of the 3rd Appellant who was not even a candidate at the election, by the case of the 1st Respondent, not wrongful substitution. If there was any such substitution in accordance with the provisions of section 23 of the law, the name of the 1st Respondent would not have been reflected in Exhibit “2”. F (p. 3118 B/F)

### ***Jurisdiction - Absence of - Effect on appellate court***

8. It follows therefore that since the High Court has no jurisdiction in the matter, the lower court lacks jurisdiction to hear and determine the matter under section 15 of the Court of Appeal Act, 2004 and that any purported exercise of that power in the circumstances of this case is nullity. G

It is very clear from the above provisions that the reviews of the Court of Appeal provided therein is dependent on the trial court either sitting as a court of first instance or exercising its appellate jurisdiction, having the requisite jurisdiction to entertain and determine the matter in the first place. Where the trial court has no jurisdiction to hear and determine the matter, as found in the instant case, the H

Court of Appeal will be without Jurisdiction to invoke and act on its powers under the said section of the Act. (p. 3119 B/G)

**NOTABLE POINT OF INTEREST**

**ONNOGHEN JSC**

- B 1. *Need to set up Local Government Election Tribunal in Kogi State*  
 It is important to state that it is in the interest of democracy that urgent steps be taken by the Government of Kogi State to set up a Local Government Election Tribunal to urgently resolve the issues involved in this case to sustain the continued confidence of the electorate in the system. On the other hand the Government of Kogi State, Peoples Democratic Party, and the State INEC should put their heads together to put things right in the interest of the growth of democracy in this nation and to save all of us the embarrassment, before the community of nations, of having a person who was not nominated nor properly substituted for a nominated candidate let alone contesting and winning an election being forced on the people as their representative; that will be making a mockery of our democratic institutions and should not be encouraged. We need to strengthen the confidence of our people in our democratic process which must begin from within the political parties themselves and at the grass roots Government. We must learn to always do the right thing no matter what, else, we will fail in the process. (p. 3120 B)

F **REPRESENTATION**

- B. Dambo, with T. Muhammadu, for the 1st, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants/ Respondents.  
 Oluwakemi Balogun, for the Appellant/2nd Respondent.  
 G A. M. Aliyu, with Abdullahi Sani and S. O. Alhassan, for the 1<sup>st</sup> Respondent in the 1<sup>st</sup> Appeal and 4<sup>th</sup> Respondent in 2<sup>nd</sup> Appeal.

**CASES REFERRED TO**

- Amaechi v. INEC (2008) 1 S.C. (Pt. I) 36  
 H Jang v. INEC (2004) 1 NWLR (Pt. 886) 146  
 Garuba v. FCSC (1988) 1 NWLR (Pt. 71) 449  
 Ojokolobo v. Alamu (1987) 3 NWLR (Pt. 61) 377  
 Okorie v. Ejiofor (1996) 3 NWLR (Pt. 343) 90 at 104  
 Ogbebor v. Danjuma (2003) 15 NWLR (Pt. 843) 403

Alameiyeseigha v. FRN (2006) 16 NWLR (Pt. 1004) 1

Dalhatu v. Turaki (2003) 7 SC 1; (2003) 15 NWLR (Pt. 843) 300

Peter Obi v. INEC (2007) 7 SC 268; (2007) 11 NWLR (Pt. 1046) 565

Ugwu v. Araruaame (2007) 6 SC (Pt. I) 88; (2007) 12 NWLR (Pt. 1048) 367 B

Adesola v. Abidoye (1999) 10-12 SC 109; (1999) 14 NWLR (Pt. 637) 28 at 56

Agbakoba v. INEC (2008) 12 SC (Pt. III) 171; (2008) 18 NWLR (Pt. 1119) 489

A-G Abia State v. A-G Federation (2002) 3 SC 106; (2002) 6 NWLR (Pt. 763) 264 C

Inakoju v. Adeleke (2007) 1 SC (Pt. I) 1; (2007) 4 NWLR (Pt. 1025) 427 at 588-589

A-G Ondo State v. A-G Ekiti State (2001) 9-10 SC 116; (2001) 17 D NWLR (Pt. 743) 706

### **STATUTES REFERRED TO**

Court of Appeal Act, Cap 36, LFN 2004, s. 15

Electoral Act 2006, s. 34 (1) E

Local Government Electoral Law, 2004, s. 74

Kogi State Local Government Electoral Law 2004 ss. 23 & 56

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

This is an Appeal against the judgment of the Court of Appeal Holden at Abuja in appeal NO. CA/A/245/2009 delivered on the 17th day of June, 2010, allowing the appeal of the 1st Respondent in the first appeal and 4th Respondent in the second appeal and dismissing the decision of the High Court of Kogi State, Okpo Judicial Division in suit NO. OHC/8/200S delivered on the 7th day of May, 2009. F

On the 28th day of August, 2008, the 1st Respondent in the 1st Appeal and 4th Respondent in the second appeal, Mr. Michael Adejoh Itodo took out an originating summons calling for the determination of the following questions:- H

i. Whether the Claimant who contested for and won the election into the office of councilor representing Ogugu Ward II Olamaboro Local Government Council, in the election organized by the 2nd

Defendant on the 26th July, 2008, could be substituted by the 3rd Defendant after the election.

ii. Whether the 2nd Defendant either acting alone or in concert with the 1st and 3rd Defendants could withhold the Claimant's certificate of return after he had contested and won the election into the office of Councilor for Ogugu Ward II in Olamaboro Local Government Council.

iii. Whether the 1st Defendant is entitled to refuse to swear in the Claimant who, as the candidate of the 3rd Defendant, contested and won election into the office of Councilor representing Ogugu Ward II in Olamaboro Local Government Council.

iv. Whether going by the provisions of section 56 of Kogi State Local Government Electoral Law, 2004 the 1st to the 3rd Defendants can substitute the 4th Defendant for the Claimant as the Councilor representing Ogugu Ward II after election has been contested and won by the Claimant in the Local Government Election held on 26th July, 2008, in Kogi State.

The said Claimant sought the following reliefs from the court.

*"1. A declaration that the 3rd Defendant cannot substitute the 4th Defendant for the Claimant who contested for and won the election into the office of Councilor representing Ogugu Ward II in Olamaboro Local Government Council in the Election organized by the 2nd Defendant on the 26th July, 2008.*

*2. A declaration that the refusal by the 1st Defendant to swear in the Claimant along with the other elected Councilors on the 30th of July, 2008 is illegal, unconstitutional, null and void and constitutes a flagrant violation of the Claimants rights.*

*3. A declaration that the 4th Defendant who did not contest in the election held by the 2nd Defendant on the 26th July, 2008, cannot be sworn in by the 1st Defendant as the Councilor representing Ogugu Ward II in Olamaboro Local Government Council.*

*4. A declaration that the 2nd Defendant cannot withhold the certificate or return of the Claimant who contested and won the election into the office of Councilor representing Ogugu Ward II in Olamaboro Local Government Council in the election held on the 26th July, 2008.*

*5. An order directing the 2nd Defendant to release to the Claimant his certificate of return as the councilor representing Ogugu*



*Ward II in Olamaboro Local Government Council.*

6. *An order directing the 1st Defendant to forthwith, swear in the Claimant as the Councilor representing Ogugu Ward II in Olamaboro Local Government Council the Claimant having contested and won the election into the Councillorship seat of Ogugu Ward II in the Local Government Council Election held on the 26th July, 2008.* B

7. *An order of injunction restraining the 1st to the 3rd Defendants either by themselves, their agents, privies otherwise howsoever from putting forward and swearing in the 4th Defendant or any other person other than the Claimant as the Councilor representing the Ogugu Ward II in Olamaboro Local Government Council.* C

8. *An order of injunction restraining the 4th Defendant parading, representing and or howsoever putting himself forward as the Councilor representing the Ogugu Ward II in Olamaboro Local Government Council.”* D

On the 20th day of January, 2009, the 2nd Defendant, who is also the Appellant in the second Appeal, filed a preliminary objection praying the trial court for:

*“An order striking out the suit for want of Jurisdiction”* E

While the above objection was pending, the 1st, 3rd and 4th Defendants, who are the Appellants in the first appeal before this court, filed a preliminary objection on the 8th day of April, 2009, praying the Court for:

*“An order striking out this suit for being incompetent and this honourable court lacks the jurisdiction to entertain it, as the matter is an intra party, political and domestic dispute of the 3rd Appellant which the court has no jurisdiction to entertain.”* F

In a considered ruling on the objections, the learned trial judge G held that the action seeks to challenge the return of the 4th Defendant by the 2nd Defendant and that the High Court of Kogi State lacks the jurisdiction to entertain same.

The above decision resulted in an appeal in which the lower court upturned the decision of the trial court and proceeded to enter judgment for the Claimant/Appellant before that court in terms of the reliefs earlier reproduced in this judgment. It is against the said judgment that the Appellants have appealed. H

Learned counsel for the Appellants in the 1st Appeal, Biriayi

Dambo, Esq., in the Appellants' brief of argument filed, on the 29th day of October, 2010 has identified the following issues for determination:

B "1. *Whether from the peculiar facts of this case, the lower court was right to have come to the finding that the case before it, is that of wrongful substitution and not undue return as pronounced by the trial court.*

C "2. *Whether the learned trial (sic) justices of the Court of Appeal were right in allowing the appeal when in fact from the peculiar facts before the court, it is a post election matter in which the Election Tribunal has exclusive jurisdiction.*

D "3. *Whether the Court of Appeal properly exercised its powers under section 15 of the Court of Appeal Act. Cap. 36, Laws of the Federation of Nigeria, 2004 (formerly Section 16), by granting all the reliefs sought by the 1st Respondent as contained in his originating summons.*"

In respect of the 2nd appeal, learned counsel for the Appellant, Oluwakemi Balogun, Esq., in the Appellant's brief filed on 11th October, 2010, formulated the following issues for determination:

E "(a) *Whether the learned justices of the Court of Appeal were right in holding that the trial court had jurisdiction over the suit. This issue is distilled from ground 1 of the notice of appeal.*

F "(b) *Whether the learned justices of the Court of Appeal were right in invoking section 16 of the Court of Appeal Act to hear the case giving the peculiar facts and circumstances of this case. This issue is distilled from grounds 2, 3 and 4 of the grounds of appeal.*"

G It is clear from the above that the issues in the two appeals are very similar. It is clear that though the preliminary objection of the Appellant in the 2nd appeal is based on the matter being a post election matter which is within the exclusive jurisdiction of the Local Government Election Tribunal; that of the Appellant in the 1st Appeal is based on the issue being an intra party dispute which is outside the jurisdiction of the courts.

H On his part, learned counsel for the 1st Respondent in the 1st Appeal and 4th Respondent in the 2nd Appeal, Abdulahi M. Aliyu, Esq., in the brief of argument filed on 2nd November, 2010, identified the following as the issues calling for determination in the Appeals:-

*“i. Whether the learned justices of the Court of Appeal were right to hold that the High Court, as against the Local Government Election Petition Tribunal was the proper forum to try the 1st Respondent’s case (Grounds 1 and 2 of the notice and grounds of appeal).*

*ii. Whether the Court of Appeal properly exercised its power in determining this case on the merit in view of the peculiar circumstances of the case ? (Grounds 3 and 4 of the notice and grounds of appeal).”*

Looking closely at the facts of this case and the decisions of the lower courts, only two issues call for determination in the appeals namely:

*“i. Whether the trial court has jurisdiction to hear and determine the action as constituted, and,*

*ii. Whether the lower court was right in invoking its powers under section 15 of the Court of Appeal Act to hear and determine the matter.”*

In arguing issues 1 and 2 of the 1st appeal together, learned counsel for the Appellant submitted that the processes relevant for the determination of the issue of the jurisdiction of the trial court in this matter are the originating summons and the affidavits in support of the originating summons, as the court will not examine a counter-affidavit if any had been filed, relying on Inakoju v. Adeleke (2007) 1 S.C. (Pt. I) 1; (2007) 4 NWLR (Pt. 1025) 427 at 588-589; that looking at the reliefs claimed and the facts disclosed in the affidavits in support, it is clear that the case before the court is not that of “wrongful substitution” as held by the lower court but of “undue return” as found by the trial court and for which the courts have no jurisdiction, not being Election Tribunal.

It is the further submission of learned counsel that the law regulating local Government Election in Kogi State is the Local Government Election Law, 2004 Section 23 of which provides for substitution of candidates within five days of the date of election by political parties; that following the decision of the court in Onuoha v. Okafor (1993) 2 SCNLR 244, the issue as to who a political party chooses as its candidate in an election is purely an intra party political and domestic dispute over which the courts have no Jurisdiction; that section 23 of the Kogi State Local Government Law, 2004, is permis-

sive while section 34 (1) of the Electoral Act 2006 is mandatory; that the facts of the case disclose that the matter before the court is a post election matter in which exclusive jurisdiction is vested in the Local Government Election Tribunal; that a court cannot compel a political party to sponsor one candidate in preference to another, relying on Onuoha v. Okafor supra.

It is the further submission of learned counsel that the lower court was in error when it held that the Election Tribunal has no jurisdiction over the matter since it does not fall within the provisions of section 74 of the Local Government Elections Law, 2004, as a party to an election petition under the law can question the said election on the ground that the same was not conducted in compliance with the provisions of the law, which is basically the main point in the complaint before the trial court, and urged the court to resolve the issues in favour of the Appellant.

The argument of learned counsel for the Appellant in the 2nd Appeal on the Issue is very similar to that of Counsel for Appellant in the 1st Appeal earlier summarized in this Judgment, I therefore see no need to reproduce same herein.

On his part, learned counsel for the 1st Respondent submitted that the lower court was right in holding that the issue before the trial court was that of wrongful substitution as opposed to undue return. Learned counsel agreed that in determining the issue of jurisdiction, it is the claim of the plaintiff that ought to be looked at; that the complaint before the trial court is as stated in paragraphs 18 - 23 of the 1st Respondent's affidavit at page 7 of the record and that it involves the attempt at substituting the 1st Respondent after an election he won; that section 23 of the Kogi State Local Government Election Law lays down the conditions to be fulfilled by political parties when seeking substitution of candidates before an election and that a complaint of non-compliance with that provision falls outside the jurisdiction of an Election Tribunal but within the jurisdiction of the High Court as held by the lower court; that the fact that an action was filed after an election does not make the action a post election matter, as jurisdiction is determined by the nature of the complaint before the court; that Section 74 of the Kogi State Local Government Election Law does not apply as the complaints of the 1st Respondent do not fall within the grounds for questioning an election

particularly as the 1st Respondent did not complain about the conduct of the election, as he was satisfied with it; that the facts of this case are not different from that in Amaechi v. INEC and Ugwu v. Ararume; and that the case of Onuoha v. Okafor; Jang v. Abana do not apply where the names of the complaining persons were not sent to the electoral bodies concerned; that the word “may” in section 23 B of the Kogi State Local Government Election Law is not permissive as contended by the Appellants but places a duty on political parties wanting to substitute candidates to give at least five days notice to the electoral commission before the election, relying on Adesola v. Abidoye (1999) 10-12 S.C. 109; (1999) 14 NWLR (Pt. 637) 28 at C 56; Bakare v. A. G. F. (1990) 9-10 S.C. 26; (1990) 5 NWLR (Pt. 152) 5/6 and urged the court to resolve the issue against the Appellant.

It should be noted from the onset, that the issue is simply D whether the trial court has jurisdiction to entertain the matter as constituted, not whether the case of the 1st Respondent has merit. ***It is settled law that Jurisdiction is fundamental to adjudication and it is usually conferred on the court by the Constitution or Statute; it is really the foundation on which the court exercises E judicial powers. A proceeding, however well conducted remains a nullity if the court lacks the requisite jurisdiction to hear and determine the matter.***

***Also settled is the principle of law that in order to deter- F mine whether a court before which a matter pends has the Jurisdiction to entertain same, the court has to look at the plaintiff’s statement of claim before it and not the defence put forward by the Defendant to the action. The claim of the plaintiff in an action includes the originating summons and the G Affidavit(s) in support of same where the action is instituted by Originating Summons as was decided by this Court in the case of Inakoju v. Adeleke (2007) 1 S.C. (Pt. I) 1; 4 NWLR (Pt. 1025) 427 at 588-589.***

H I had earlier reproduced the questions to which the 1<sup>st</sup> Respondent, as plaintiff, sought answers at the trial court as well as the reliefs claimed by him. What are the facts relevant to the grant of the reliefs so claimed? For that, paragraphs 6-27 of the affidavit in support of the originating summons are relevant and are reproduced

hereunder as follows:-

*“6. That sometime this year, the 2nd Defendant fixed elections into Local Government Councils in Kogi State for the 26th day of July, 2008.*

*7. That as a member of the Peoples Democratic Party, I applied to contest for the office of Councilor for Ogugu Ward II at the Ward level of my party in line with the party’s Constitution.*

*8. That in line with the said Constitution. I was nominated by the party as the candidate nominated by her to contest for the scheduled Local Government Election on her platform.*

*9. That I annex a copy of the letter by the 3rd Defendant, dated the 26th June, 2008, forwarding my name to the 2nd Defendant and mark it as Exhibit “B”.*

*10. That upon my said nomination, I completed and submitted SIEC nomination form, particularly, form KGSIEC 4F wherein I was endorsed by 10 (ten) registered members of our party in the ward, photocopy of the said nomination form is attached herewith as Exhibit “C”.*

*11. That the 2nd Defendant, upon the receipt of Exhibit “C”, screened me and invited me for final documentation.*

*12. That the 2nd Defendant finally cleared me to contest the election of 26th July, 2008.*

*13. That the letter written to me by the 2nd Defendant inviting me for final documentation, dated 21st of July, 2008 is hereby annexed and marked as Exhibit “D”.*

*14. That the 2nd Defendant accepted my nomination vide KGSIEC form 011283 which is herewith annexed as Exhibit “E”.*

*15. That immediately before the election, the 3rd Defendant published and pasted the names of the persons cleared to contest election into the Olamaboro Local Government Council and my name was the 9th on the list. I annex a copy of the list and mark it as Exhibit “F”*

*16. That on the 26th day of July, 2008 I contested the election into Councillorship seat of Ogugu Ward II under the platform of the 3rd Defendant.*

*17. That I won the said Election under the platform of the Peoples Democratic Party (P.D.P).*

*18. That when I went along with the other councilors elected*

*under the platform of the 3rd Defendant, the chairman of the 2<sup>nd</sup> Defendant refused to issue me with the certificate of return.*

19. *That on inquiry, the chairman of the 2<sup>nd</sup> Defendant informed me that he has received instruction from the chairman of the 3<sup>rd</sup> Defendant not to give me my certificate of return.*

20. *That later, I discovered that the chairman of the 3<sup>rd</sup> Defendant is trying to substitute the name of the 4<sup>th</sup> Defendant for my name as the councilor elect for Ogugu Ward II.*

21. *That his substitution is taking place after the election has been held and result announced in my favour.*

22. *That on the 30th day of July, 2008, the 1st Defendant swore in the other councilors who were elected alone with me.*

23. *That the 1st Defendant refused to swear me in on the grounds that he had received instruction from the chairman of the 3rd Defendant not to swear me in.*

24. *That I have now discovered that the 1st, 2nd and 3rd Defendants have concluded arrangement to swear in the 4th Defendant as the councilor representing Ogugu Ward II when he did not contest the election for Councilor of that Ward.*

25. *That I know as a fact that at all time material, it my name that was published by my party and the office of the 1st Defendant as the candidate for (P.D.P) in the Councillorship Election of Ogugu Ward II of Olamaboro Local Government Area.*

26. *That I know as a fact that the 4th Defendant's name did not appear in any of the lists of contestants Issued by the 2nd and 3rd Defendants.*

27. *That I know as a fact that the 1st to the 3rd Defendants are only trying to substitute the name of the 4th Defendant for my name after the election has been won by me."*

Going through the above facts and the reliefs claimed by the 1st Respondent, the trial court came to the conclusion that the claim before the court is that of undue return and not wrongful substitution and as such the court with the requisite Jurisdiction is the Local Government Election Tribunal not the High Court. It is that decision that was set aside by the lower court. The question is which of the two courts is right?

Both counsel have referred the court to the provisions of the Kogi State Local Government Electoral Law, 2004, particularly sec-

tion 59, 70, 71 and 74 thereof, in support of their contending positions. learned counsel for the parties have also referred the court to section 23 of the said law which provides as follows:-

*“Any political party which wishes to change any of its candidates for any election under this law may signify its intention in writing to the commission not later than five (5) days to the date of election.”*

The Appellants have relied on the above provision to argue that the courts have no jurisdiction to entertain any matter challenging the substitution of a candidate by a political party for a Local Government Election and that the use of the word “may” in the said section of the law makes the provision permissive and not obligatory or compulsory. The 1st Respondent however does not agree. He contends that nominated candidates whose names had been forwarded to the electoral commission acquire justiciable right which can be enforced by action in court.

***It is not disputed that a political party has the power to nominate a candidate for any election without interference from the court, the matter being strictly within the domestic jurisdiction of the political parties.*** That has been the position of the Law as recognized in the case of Onuoha v. Okafor supra; Dalhatu v. Turaki (2003) 7 S.C. 1; (2003) 15 NWLR (Pt. 843) 300; Jang v. INEC (2004) 1 NWLR (Pt. 886) 146 etc.

***However, when it comes to the question of substituting another person (candidate) for the nominated candidate, the law now lays down certain conditions which the political party seeking the said substitution has to fulfill to make the venture a success.***

***Under section 34 of the Electoral Act, 2006, the political party has to inform INEC of the change in writing not later than sixty (60) days to the election in question and must give cogent and verifiable reasons for desiring the change or substitution*** - See: Amaechi v. INEC (2008) 1 S.C. (Pt. I) 36; Ugwu v. Araruame (2007) 6 S.C. (Pt. I) 88; (2007) 12 NWLR (Pt. 1048) 367; Agbakoba v. INEC (2008) 12 S.C. (Pt. III) 171; (2008) 18 NWLR (Pt. 1119) 489 etc.

***Whereas section 34 (1) of the Electoral Act, 2006, stipulates that the substitution must be made within sixty (60) days***



**to the election, section 23 of the Kogi State Local Government Elections Law, 2004, stipulates that for the intended substitution to be effective or legal, it should be made within five (5) days to the election in question.**

**The argument of the Appellants is that the said provision is not mandatory but permissive. I do not agree with that interpretation. Even though the word “may” is used in section 23 supra, the word does not relate to the time within which the substitution is to be effected (which is stated therein to be five (5) days) but relates only to the intention of the political party concerned which desires the change or substitution. Such a political party “may” signify its intention within the stipulated time, if it so desires or aborts same. The section does not mean that a political party is at liberty to effect a substitution of a nominated candidate less than five days to the election or even after the election. Any political party that fails to comply with section 23 of the law has by that act conferred or activated the jurisdiction of the court to protect the right conferred on the nominated candidate earlier submitted to the electoral body. To hold otherwise is to engineer a return to the dark days when substitution could be made even during the election or thereafter. We must always remember that our laws are meant to be obeyed for the benefit of the society since that is the only way to ensure certainty, peace and progress, equity, fair play, and the rule of law.**

The words of the section and the context in which they appear make the provisions of section 23 of the law in question very clear and unambiguous thereby needing no interpretation whatsoever as it is settled law that where the provisions of a statute are clear and unambiguous the court is to apply them as they are as there is nothing to be interpreted.

The next sub-Issue is whether the action before the trial court is concerned with wrongful substitution or undue return.

**By constitutional arrangements election matters are the exclusive concern of Election Tribunals and not the regular courts. However, where the matter involves issues of pre-election, the regular High Courts have jurisdiction to handle them.**

In the instant case, there is no dispute that the 1st Respon-

dent was duly nominated and submitted to the electoral body as the candidate of the Peoples Democratic Party for the election in question; that he was duly screened and cleared by the electoral body to contest the said election which he did and claimed to have won; that after the election the chairman of Kogi State Independent Electoral Commission refused to release the certificate of return of the 1st Respondent on the ground that the party (P.D.P) intended to substitute the 1st Respondent with another candidate (the 3rd Appellant).

***From the above facts, it is very clear that this is a post election matter as there was an election duly conducted by the appropriate authority on the 26th day of July, 2008 and which by Exhibit "2"; the certified true copy of the result of the election; the 1st Respondent won. At that stage it is too late to be talking of nomination of a candidate for the election in question, which is purely a pre-election matter. It should be noted that nomination is either by the original act of the party or by way of substitution. From the record, particularly Exhibit "2", election had been concluded and the name of the candidate who won same is the 1st Respondent. It follows therefore that appropriate venue for the trial of the issues arising from that concluded election is the appropriate Election Tribunal, not the regular High Courts. It is at the Tribunal that the electoral body concerned is to tell Nigerians why the Respondent who contested and won the election in issue is refused a certificate of return which certificate it rather issued to total stranger, 3rd Appellant. This clearly is a case of undue return of the 3rd Appellant who was not even a candidate at the election, by the case of the 1st Respondent, not wrongful substitution. If there was any such substitution in accordance with the provisions of section 23 of the law, the name of the 1st Respondent would not have been reflected Exhibit "2".***

***When one looks closely at the reliefs, in the originating summons, it is very clear that what the 1st Respondent seeks is a realization of the mandate given to him by his people by the court/tribunal making the appropriate orders including issuance of a certificate return, swearing him in duly elected councilor etc. It has nothing to do with wrongful substitution.***

***From the record the issue of substitution is very speculative as Exhibit "2" clearly contains the names of the Respondent as the winner of election in question.***

On the Issue as to whether the lower court properly exercised its powers under section 15 of the Court of Appeal Act, 2004, I hold the considered view that the issue has been over taken by events in view of the fact that I have held that the proper venue for the trial of the complaint (s) in the originating summons is the appropriate Election Tribunal not the High Court.

***It follows therefore, that since the High Court has no jurisdiction in the matter, the lower court lacks jurisdiction to hear and determine the matter under section 15 of the Court of Appeal Act, 2004, and that any purported exercise of that power in the circumstances of this case is nullity.*** The provision enacts as follow:-

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

***It is very clear from the above provisions, that the reviews of the Court of Appeal provided therein is dependent on the trial court either sitting as a court of first instance or exercising its appellate jurisdiction, having the requisite jurisdiction to entertain and determine the matter in the first place. Where the trial court has no jurisdiction to hear and***

***determine the matter, as found in the instant case, the Court of Appeal will be without jurisdiction to invoke and act on its powers under the said section of the Act.***

In the circumstance, issue 3 of the Appellant in the 1st appeal and Issue 2 in the second appeal are hereby discountenanced by me.

It is important to state that it is in the interest of democracy that urgent steps be taken by the Government of Kogi State to set up a Local Government Election Tribunal to urgently resolve the issues involved in this case to sustain the continued confidence of the electorate in the system. On the other hand the Government of Kogi State, Peoples Democratic Party, and the State INEC should put their heads together to put things right in the interest of the growth of democracy in this nation and to save all of us the embarrassment, before the community of nations, of having a person who was not nominated nor properly substituted for a nominated candidate let alone contesting and winning an election being forced on the people as their representative; that will be making a mockery of our democratic institutions and should not be encouraged. We need to strengthen the confidence of our people in our democratic process which must begin from within the political parties themselves and at the grass roots government. We must learn to always do the right thing no matter what, else, we will fail in the process.

I also need to comment on an emerging but disturbing practice before this court where parties named as Respondents in an Appeal rather than filing the traditional Respondent brief to either defend the judgment on appeal or concede the appeal, now file an appeal against the said judgment on the same grounds and raising the same issues as the original Appellant and leaving the initial appeal undefended by them, that is by not filing a Respondent brief thereto. I strongly think that legal practitioners should arrest the present trend for the benefit of the profession.

In conclusion, I find merit in the appeals which are hereby allowed by me in terms of the issues as resolved in this judgment. The judgment of the lower court in Appeal NO. CA/A/245/09 delivered on the 17th day of June, 2010 is hereby set aside and in its place it is hereby ordered that the ruling of the trial court in suit NO. OHC/08/08 delivered on the 7th day of May, 2009, be and is hereby restored

and affirmed.

I however make no order as to costs.

### MOHAMMED JSC

I have had the opportunity before today of reading in draft B the Judgment just delivered in these appeals by my learned brother, Onnoghen, JSC. My learned brother had thoroughly considered the issues arising for determination in the two appeals in his leading judgment with which I entirely agree. I only wish to add a few remarks by C way of emphasis.

From the undisputed facts filed by Mr. Michael Adejoh Itodo who is the 1st Respondent in the 1st Appeal and 4th Respondent in the 2nd appeal in the affidavit in support of his originating summons filed on 28th July, 2008, two days after the declaration of the results D of the Local Government Election conducted in Kogi State on 26th July, 2008, the 1st/4th Respondent emerges the winner of the Councilorship Election from Ogugu Ward II in Olamaboro Local Government Council of Kogi State. What gave rise to the dispute between the parties leading to the present appeals in this court is no E doubt the flagrant refusal of the chairman of the Kogi State Independent Electoral Commission to give the 1st/ 4th Respondent in these appeals his certificate of return to enable him to be sworn in as the duly elected Councillor representing Ogugu Ward II in the Olamaboro F Local Government Council. Therefore the dispute having occurred after the conduct of the Local Government election the outcome of which clearly showed in the certified true copy of the result of the election, Exhibit 2 to the affidavit in support of the originating summons that the 1st/4th Respondent had won the election, the dispute G is certainly not a pre-election dispute which should have gone to the High Court of Justice for resolution.

The provisions of the Kogi State Local Government Electoral Law, 2004, which deals with the issue of substitution of candidates by political parties, is Section 23 which states: H

*“23. Any political party which wishes to change any of its candidates for any election under this law may signify its intention in writing to the Commission not later than five (5) days to the date of election.”*

The provision of this section of the law, in my view, can only be resorted to by a political party wishing to change its candidate not later than five days to the date of the election. The section is certainly not available to a political party to hang on in an exercise of any change of candidate after the conduct of the election and the declaration of the result thereof. There can only be substitution of candidates under the law before election and not after the election. What happened in the present case was a recklessness of the first order and a flagrant disregard of the law on the part of the Appellants in these appeals, particularly the Kogi State Independent Electoral Commission which very unfortunately allowed itself to be used by politicians to deprive the electorates of their constitutional rights of having the person they voted for to serve them as Councilor in the Olamaboro Local Government Council of Kogi State to take his seat in the Council.

With these few observations, I share the same view with my ‘learned brother, Onnoghen, JSC., that these appeals must succeed. Accordingly, I also allow the appeals, set aside the decision of the court below and restore and affirm the decision of the trial court that it has no jurisdiction to entertain and determine the action. I make no order on costs.

### ***FABIYI JSC***

I have had a preview of the Judgment just delivered by my learned brother, Onnoghen, JSC. I agree.

The 1st Respondent in the 1st appeal who is the 4<sup>th</sup> Respondent in the 2nd appeal was the candidate of the 2<sup>nd</sup> Appellant in the 1st appeal and the 2nd Respondent in the 2<sup>nd</sup> appeal. The 1st/4<sup>th</sup> Respondent contested in the Local Government Election conducted in Kogi State on 26th July, 2008. He emerged as the winner of the Councillorship Election for Ogugu Ward II in Olamaboro Local Government Council. This fact is extant in the Certified True copy of the result of the Election. Exhibit 2 to the Affidavit in Support of the Originating Summons.

The Chairman of the 2nd Respondent in the 1st appeal and chairman of the Appellant in the 2nd appeal refused to issue a certificate of return to the 1st/4<sup>th</sup> Respondent to facilitate his being sworn in as the duly elected Councilor for Ogugu Ward II in the-said

Olamaboro Local Government Council. The 3rd Appellant in the 1st appeal who is the 3rd Respondent in the 2nd appeal who did not contest the election was eventually sworn in as the Councilor for the Ward.

The above facts remain undisputed as they were not challenged. The law is that they must be admitted and duly acted upon. See: *Omogbe v. Lawani* (1980) 3-4 S.C. 108 at 117; (1980) 3-4 S.C. (Reprint) 3; *Fasoro v. Beyioku & Ors.* (1988) 2 NWLR (Pt. 76) 263 at 271; *Mogaji v. Cadbury Nig. Ltd.* (1972) 2 S. C. 97; (1972) 2 S.C. (Reprint) 136; *Okorie v. Ejiofor* (1996) 3 NWLR (Pt. 343) 90 at 104.

The 1st/4th Respondent felt that he was unduly substituted and approached the State High Court for redress. The Appellants in both Appeals contended that the matter is one of undue return which should be heard by the State Election Tribunal. Of course, the position of the law, in strict sense, supports the Appellants who are unabashed schemers. Any matter relating to undue return, a post Election matter as herein, falls within the Jurisdiction of the State Election Tribunal and not that of the State High Court.

And so, the Appellants desire to take relish in the illegality perpetrated by them. The 2nd Respondent in the 1st appeal which is the Appellant in the 2nd appeal has, to date, succeeded in 'robbing Itodo to pay Musa'. This does not augur well in a real democratic set up. Musa who did not contest in the election has no right in law to sit on the chair earmarked for Ogugu Ward II of Olamaboro Local Government Council.

I endorse the admonition contained in the judgment of my brother. Let us hope that equity will prevail at the end. I hereby keep my peace.

### **ADEKEYE JSC**

I was privileged to read before now the Judgment just delivered by my learned brother, W. S. N. Onnoghen, JSC. My lord adequately and meticulously concluded the issues involved in the two appeals and I agree with his reasoning and conclusion. The two sets of appeal are against the judgment of the Abuja Division of the Court of appeal delivered on the 17th of June, 2010. The lower court by

that ruling allowed Mr. Michael Adejoh Itodo's appeal and dismissed the decision of the trial court the High Court of Kogi State, Okpo division delivered on the 7th of May, 2009. In that ruling, the High Court of Kogi State declined jurisdiction to entertain the matter by holding that it is a case of undue return under the exclusive jurisdiction of the Local Government Elections Tribunal by virtue of the community reading of the provisions of sections 66, 71 and 74 of the Kogi State Local Government Elections Law, 2004. The trial court consequently struck out the matter.

The background facts of this case reveal that Michael Adejoh Itodo, the 1st and 4th Respondent respectively in the two appeals, claimed before the trial court in his processes to be a member of the Peoples Democratic Party. Before the Local Government election which took place in Kogi State on the 26th of July, 2008, the party nominated, screened and cleared him to contest as the Councilor representing Ogugu Ward II in Olamaboro Local Government Council. Letters at pages 115-116 and 171 of the record support this claim. The name of the Michael Adejoh Itodo, was clearly indicated as the qualified candidate to contest for the post of Councillor for Ogugu Ward II Olamaboro Local Government Council. The overall list of qualified candidates for the post of Chairmanship and Councilorship was authentically signed by the Chairman, Peoples Democratic Party, Kogi State. I actually and indeed contested in the election of 26th July, 2008 and won election as the Councilor representing Ogugu Ward II in Olamaboro Local Government Council of Kogi State.

This fact is confirmed by the Kogi State Independent Electoral Commission declaration of result form for election of Councilor for Ogugu Ward II and signed by one William Idakwo the Returning Officer, vide page 132 of the record of appeal. On pages 185-189, the decision of the executive committee for screening - review within the Peoples Democratic Party, reflected the name of Enejo Solomon Musa as a consensus candidate for Ogugu Ward II in Ikemobero Local Government Council of Kogi State. This document was not signed by the Chairman of Peoples Democratic Party in Kogi State, but it was endorsed to him. In effect, the recommendation of Enejo Musa's name was by the executive committee of the party to the chairman of the party. There was no document to show the approval of his name by the party signed by the chairman of PDP Kogi State.



After winning the Election, regardless of the victory of Michael Adejoh Itodo, at the polls, the Appellants - Hon. Gabriel Yunisa Olofu and Kogi State Independent Electoral Commission, refused to issue the certificate of return and to swear him as the Councilor representing Ogugu Ward II. This was alleged to be instruction of the Kogi State Chairman of the Peoples Democratic Party, while Enejo Solomon Musa was to be sworn in as the Councilor instead. The Appellants claimed that, though Respondent's name was originally submitted to the Electoral Commission, he was substituted long before the election.

The facts available did no support that the substitution was validly affected before the election. It was Michael Adejoh Itodo contested the election on 26/7/2008, and it was his name which appeared on Form KGSIEC/EC8E (1) - which is the form declaration of result for election of Councilors. This relevant form glaringly indicated that Mr. Michael Adejoh Itodo won the Ogugu II Ward on the platform of Peoples Democratic Party having scored the majority of 3463 votes. Form KGSIEC/EC8E (1) was duly signed by William Idakwo, a returning officer. By a dramatic twist of event, the certificate of return of election under the Government Law was issued in the name of Solomon Enejo Musa, the oath of office as Councilor and the oath of allegiance.

The 1st Respondent filed an originating summons challenging the decision of the Appellants and Kogi Independent Electoral Commission as to whether having contested and won the election of 26/7/08 the electoral commission substitute at that stage. I have to emphasize in line with the leading judgment, that the core and germane issues for determination in this appeal is whether the case before the court is that of wrongful substitution and not undue return as pronounced by the trial court- and following from there - whether it is pre-election matter or post election matter and which court has the jurisdiction entertain it?

I agree unreservedly with my lord in the leading judgment that the issue involved in the suit is a post-election one and that challenging the undue return of a candidate.

The power of the State Independent Electoral Commission to conduct Local Government Councils election within the State is not in doubt. This is clearly stipulated in section 197 (1) (b) of the

1999 Constitution. Kogi State House of Assembly, by virtue of sections 4 (7) and 7 (1) of the 1999 Constitution, is empowered to make laws for election to a Local Government Council and any office in the Council.

The Kogi State House of Assembly promulgated the Kogi State Local Government Elections Law, 2004. It is the enabling law to regulate the election to the offices of Chairman and Councilors of the respective wards within the Local Government Area, vide Section 70 (1) (a) of the Local Government Elections Law 2004. A-G Abia State v. A-G Federation (2002) 3 S.C. 106; (2002) 6 NWLR (Pt. 763) 264.

Section 23 of the Local Government Elections Law, 2004 provides for substitution of a candidate as follows:-

*“Any political party which wishes to change any of its candidates for any election under this law may signify its intention in writing to the Commission not later than five days to the date of election.”*

I must remark here that in the interpretation of any statute or instrument, the object is to ascertain the intention of the legislature that had drawn it. The cardinal principle is that parties are presumed to intend what they have in fact said or written down. The words employed by them will be construed and should be given their ordinary and plain meaning and additional words or clauses ought not to be imported into a written document unless it is impossible to understand the agreement or document in the absence of such additional words or clauses.

U. B. N. Ltd. v. Nwaokolo (1995) 6 NWLR (Pt. 400) 127; Ojokolobo v. Alamu (1987) 3 NWLR (Pt. 61) 377; Adisa v. Oyinwola (2000) 6 S.C. (Pt. II) 47; (2000) 10 NWLR (Pt. 674) 46; Ifezue v. Mbadugha (1984) 1 SCNL 427 Shell Petroleum Development Co. Ltd. v. F. B. I. R (1996) 10 8 NWLR (Pt. 466) 256; Ugwu v. Ararume (2007) 6 S.C. (Pt. I) 88; (2007) 12 NWLR (Pt. 1048) 367; Ogbebor v. Danjuma (2003) 15 NWLR (Pt. 843) 403; A-G Ondo State v. A-G Ekiti State (2001) 9-10 S.C. 116; (2001) 17 NWLR (Pt. 743) 706; Garuba v. FCSC (1988) 1 NWLR (Pt. 71) 449; Alameiyeseigha v. FRN (2006) 16 NWLR (Pt. 1004) 1.

The words of section 23 are quite clear and unambiguous. The legislators are not expecting political parties to arbitrarily change

nominated candidates whom they have screened, cleared and found qualified to contest any elective post in the election.

If any party found itself in a position where the issue of changing a candidate is inevitable, the commission must be notified for administrative and procedural purposes in the preparation for the election. This is the only logical and proper step to take by a party wishing to contest for any elective post in the election. It is therefore mandatory. It is also a constitutional requirement that a candidate has to contest for an elective post on the platform of a political party. An independent candidate cannot contest for an elective post in an election under our electoral law. Hence the issue of nomination of candidate for an election by a party is a very important and sensitive step in any electoral process. The prerogative to choose any candidate and nominate him or her to contest on the platform of a party, belongs to that party. In an election, it is usually an intra party, political and domestic affair of that party - which the courts have no Jurisdiction to entertain. This is still good and sound law. Onuoha v. Okafor & Ors. (1993) 2 SCNLR 244; Dalhatu v. Turaki (2003) 7 S.C. 1; (2003) 15 NWLR (Pt. 843) 300; Jana v. INEC (2004) 1 NWLR (Pt. 886) 146; Section 34(1), (2) and (3) of the Electoral Law, 2006 for sound reasons employed the word shall in the enactment, to put an end to the usual arbitrariness with which political parties change their candidates. Breach of the conditions stipulated in section 34 (1) and (2) is now what is clearly justiciable. The time limit makes the provision justiciable. Ugwu v. Araruame (2007) 6 S.C. (Pt. I) 88; (2007) 12 NWLR (Pt. 1048) 367; Agbakoba v. 20 INEC (2008) 12 S.C. (Pt. III) 171; (2008) 18 NWLR (Pt. 119) 489; Amaechi v. INEC & Ors. (2008) 1 S. C (Pt. I) 36.

It is imperative to notify Kogi State Independent Electoral Commission of any change of candidate five clear days to the Election of 26/7/08. This was clearly not done by the Peoples Democratic Party in this case and I regard this as a fatal and irreparable omission. If this was done, Michael Adejoh Itodo would not have contested or returned as the person who duly contested for the post of Councillor by the Kogi State Electoral Commission on the declaration of result for election of Councilor and won the election (Form KGSIEC/EC8E (1))

The issue before the court is apparently not that of substit-

tion-as there is no concrete evidence on record to support this. The above mentioned cases confirm that substitution is a pre-election matter to be heard before the regular court. In the instant case, the Claimant before the trial court and 1st Respondent in this appeal Michael Adejoh Itodo contested an election for the post a Councillor of Ogugu Ward II in Olamaboro Local Government Council of Kogi State and won the election. No other PDP candidate contested the election with him. He was duly returned at the election Exhibit 2, a certified true copy of the result of the election confirms the foregoing. The complaint before this court is not about what transpired prior to the election but that of substitution of a candidate after an election was held, and the candidate substituted was not nominated, let alone contest the election. Whereas the party, the Chairman of the Olamaboro Government Council and State Independent electoral Commission assumed the power to deprive a successful candidate of certificate of return of election under the Local Government Law.

The steps taken by the chairman and the Peoples Democratic Party have no legal backing.

Similarly, the Kogi State Independent Electoral Commission is estopped from taking any step to contradict the document Exhibit 2, a declaration by its returning officer, William Idakwo that the 1st Respondent of Ogugu Ward II, PDP candidate scored the majority of 3,463 votes and was thereby declared the winner of the election and returned.

There is no provision in any of our electoral laws for the substitution of candidates after an election. It is sheer political recklessness for a party to change its candidate after an election or to deprive a winning candidate of the certificate of return. Such an act in my view shows lack of understanding of the democratic system. The partisan role often played by Independent Electoral Commission shall continue to raise an eyebrow, as in this instance, it is contrary to the electoral law. It is the Constitutional role and primary responsibility of any Independent Electoral Commission to conduct an Election, and therefore has a duty to defend any election it conducted. As an impartial body in the eyes of the law, it must stand by the result of the election no matter the circumstance.

The Kogi State Local Government Elections Law, 2004 particularly the provisions of sections 59 (c) and 66 are crystal clear on

the issue of certificate of return.

Section 59 (c) (iii)

The decision of the returning officer on any question arising from or relating to:-

*“Declaration of scores of candidates and the return of a candidate shall be final subject to review by a Tribunal or Court in an Election Petition proceeding under the law.”* B

Section 66

*“A sealed certificate of return at an election in a prescribed form shall be issued to every candidate who won an election under the law.”* C

In the case Ibrahim v. Shagari (1930) 1 NSCC 34, the Court defined Return as meaning “the declaration of the result of the election in accordance with the appropriate provisions of the Act and includes a certificate of return in form EC-8 in the schedule of the prevailing Electoral Act. Going by sections 59 (c) and 66 of the Kogi State Local Government Elections Law, 2004 and the case of Ibrahim v. Shagari (supra), the official report of voting in the context of the Local Government Elections Law, 2004 is the certificate of return. Kogi State Independent Electoral Commission has no right to withhold issuing of Certificate of Return to any winning candidate after an Election. The operative word in Section 66 is shall. By the combined effect of Sections 59 (c) (iii), 70 (1) (a), 71 (i) and 74 (b) of the Kogi State Local Government Elections Law, 2004, the cause of action here is predicated on undue return and not unlawful substitution as concluded by the lower court. The issue of undue return is outside the scope of the Jurisdiction of the lower court being a post-election matter, and only within the exclusive jurisdiction of the Election Tribunal. The lower court was wrong to have invoked section 15 of the Court of Appeal Act to hear and determine the Appeal, while the cases of Ladoja v. INEC (2007) 7 SC 99; (2007) 12 NWLR (Pt. 1047) 119, A-G Anambra State v. Okeke, Amaechi v. INEC (2008) 1 S.C. (Pt. I) 36; (2008) 12 NWLR (Pt. 1100) 29; Peter Obi v. INEC (2007) 7 S.C. 268; (2007) 11 NWLR (Pt. 1046) 565, relied upon by the lower court were irrelevant and inapplicable in the circumstance of this case. E F G H

With fuller reasons given in the leading judgment of my learned brother, W. S. N Onnoghen, JSC., I equally allow the appeal, reverse

the judgment of the lower court and affirm the ruling of the trial court. I abide By the Consequential orders in the Leading Judgment.

### **GALADIMA JSC**

B Sometime in August, 2008, at the High Court of Kogi State, Okpo Judicial Division, in Suit No. OHC/8/ 2008, Michael Adejoh Itodo the, 1st Respondent in the 1st Appeal and 4th Respondent in the second appeal took out an Originating Summons calling for the  
C determination of the following questions or issues:

*"(i) Whether the Claimant who contested for and won the election into the office of Councilor representing Ogugu Ward II Olamaboro Local Government Council, in the election organised by the 2nd Defendant on the 26th July, 2008 could be substituted by  
D the 3rd Defendant after the election.*

*(ii) Whether the 2nd Defendant either acting alone or in concert with the 1st and 3rd Defendants could withhold the Claimant's certificate of return after he had contested and won the election to the office of Councilor for Ogugu Ward II in Olamaboro Local Government Council.*  
E

*(iii) Whether the 1st Defendant is entitled to refuse to swear in the Claimant who, as the candidate of the 3rd Defendant, contested and won election in the office of Councilor representing Ogugu Ward II in Olamaboro Local Government Council.*  
F

*(iv) Whether going by the provisions of section 56 of Kogi State Local Government Electoral Law, 2004 the 1st to the 3rd Defendants can substitute the 4th Defendant for the Claimant as the Councilor representing Ogugu Ward II after election has been contested and won by the Claimant in the Local Government Election held on 26th July, 2008 in Kogi State."*  
G

The said Claimant sought the following reliefs from the court.

*"1. A declaration that the 3rd Defendant cannot substitute the 4th Defendant for the Claimant who contested for and won the election into the office of Councillor representing Ogugu Ward II in Olamaboro Local Government Council in the election organized by the 2nd Defendant on the 26th July, 2008.*  
H

*2. A Declaration that the refusal by the 1st Defendant to swear in the claimant along with the other elected Councilors on the 30th*

*of July, 2008 is illegal, unconstitutional, null and void and constitutes a flagrant violation of the claimants rights.*

3. *A Declaration that the 4th Defendant who did not contest in the election held by the 2nd Defendant on the 26th July, 2008 cannot be sworn in by the 1st Defendant as the Councilor representing Ogugu Ward II in Olamaboro Local Government Council.* B

4. *A Declaration that the 2nd Defendant cannot withhold the certificate of return of the Claimant who contested and won the election into the office of councilor representing Ogugu Ward II in Olamaboro Local Government Council in the election held on the 26th July, 2008.* C

5. *An Order directing the 2nd Defendant to release to the Claimant his certificate of return as the Councilor representing Ogugu Ward II in Olamaboro Local Government Council.*

6. *An Order directing the 1st Defendant to, forthwith, swear D in the Claimant as the Councilor representing Ogugu Ward 11 in Olamaboro Local Government Council the Claimant having contested and won the election into the Councillorship seat of Ogugu Ward II in the Local Government Council Election held on the 26th July, 2008.* E

7. *An Order of injunction restraining the 1st to the 3rd Defendants either by themselves, their agents, privies otherwise however from putting forward and swearing in the 4th Defendant or any other person other than the Claimant as the Councillor representing the Ogugu Ward II in Olamaboro Local Government Council.* F

8. *An Order of injunction restraining the 4th Defendant parading, representing and or howsoever putting himself forward as the Councillor representing the Ogugu Ward II in Olamaboro Local Government Council.* G

A preliminary objection filed by the 2nd Defendant/ Appellant on the 20th day of January, 2009 prayed the Trial Court thus:-

*“An Order striking out the suit for want of jurisdiction.”*

The 1st, 3rd and 4th Defendants, the first set of the Appellants herein followed suite four months after and equally filed a preliminary H objection praying the trial court for:

*“An order striking out this suit for being incompetent and this honourable court lacks the jurisdiction to entertain it, as the matter is an intra party, political and domestic dispute, of the 3<sup>rd</sup> Appellant the*

*Court have (sic) no jurisdiction to entertain.”*

The learned trial judge in his considered ruling on the objections, held that the action seeks to challenge the return of the 4th Defendant by the 2<sup>nd</sup> Defendant and that the High Court of Kogi State lacks jurisdiction to entertain same.

B An appeal to the Court of Appeal, Abuja by the Appellants resulted in overturning the decision of the trial court. Judgment was entered for the Claimant/Appellant in terms of his reliefs reproduced above. Against the said judgment, the Appellants herein have now appealed to this court.

C In the 1st set of Appellants’ brief of argument, 3 issues were identified whilst 2<sup>nd</sup> set of Appellant formulated two similar issues.

D Close study of the facts of this case show clearly that the Appellants are complaining against the trial court assuming jurisdiction to hear and determine the action as constituted and the right of court below invoking its powers under section 16 of the Court of Appeal Act to hear and determine the matter.

E In the 1st Appeal, learned counsel for the Appellant has submitted that the processes relevant for the determination of the Issue of the Jurisdiction of the trial court are the originating summons and the supporting affidavit. Reliance was placed on the case of Inakoju v. Adeleke (2007) 1 S.C. (Pt. I) 1; (2007) 4 NWLR (Pt. 1025) 427 at 588-89, that looking at the reliefs claimed and the facts disclosed in the affidavits in support, it is clear that the case before the court is not that of “wrongful substitution” as held by the lower court but of “undue return” as found by the trial court and for which the courts have no jurisdiction, not being Election Tribunal. Reliance was further placed on section 23 of the Local Government Election Law, 2004 (regulating Local Government Election in Kogi State).

G In his further submission, learned counsel submitted that the lower court erred in law when it held that the Election Tribunal has no jurisdiction over the matter since it does fall within the provisions of section 74 of the Local Government Law, 2004, as a party to an election on the ground that the same was not conducted in compliance with the provisions of the law, which is the main point in the complaint before the trial court.

H The argument of the learned counsel for the Appellant in the second appeal is quite similar to that of the counsel for the Appellant



in the 1st appeal.

On the other hand, learned counsel for the 1st Respondent submitted that the lower court was right in holding that the issue before the trial court was that of wrongful substitution as opposed to undue return. He agreed that in determining the issue of jurisdiction, the claim of the plaintiff ought to be closely looked into and that the complaint of the 1st Respondent at the trial court, as stated in paragraphs 18-33 of his affidavit, involves the attempt at substituting the 1<sup>st</sup> Respondent after an election he had won. I may have recourse to the lengthy submissions of the learned counsel for the 1<sup>st</sup> Respondent anon, but it suffices now to briefly touch on the main and simple Issue in this matter.

The simple issue in this matter is whether the trial court has jurisdiction to entertain the 1st Respondent's case. It is trite law that the jurisdiction of court is conferred by the Constitution or Statutes to enable it exercise its power to adjudicate. Where the Constitution or Statute clearly confers jurisdiction the power of court cannot be vitiated, but it would be, if the court lacks requisite jurisdiction to hear and determine whether a court has jurisdiction to entertain a matter or not; it has a duty to look at the plaintiff's statement of claim before it and not the defence put forward by the Defendant to the action. It has been decided by this court in the case of *Inakoju v. Adeleke* (2007) 1 S.C. (Pt. I) 1; (2007) 4 NWLR (Pt. 1025) 427 at 588-9, that the claim of the plaintiff in an action includes the originating summons as well as the affidavit in support of same, where the action is instituted by Originating *Summons*. The questions to which the 1st Respondent, as a plaintiff at the trial court sought for answers as well as the reliefs the claimed had been set out earlier. To assist in determination of this matter 22 paragraph affidavits in support of the originating summons have been ably adumbrated in the leading judgment.

I have carefully gone through them and the reliefs by the 1st Respondent. It is the same claims and reliefs that the trial court hinged its decision and came to the conclusion that the claims before the court is that of undue return and not wrongful substitution (emphasis supplied) and as such the court with the requisite jurisdiction is the Local Government Election Tribunal and not the State High Court. That decision having been set aside by the court below, this raises the question which of the two courts has come to the right conclusion.

In support of their contending positions both learned counsel have referred and relied on the provisions of the Kogi State Local Government Electoral Law, 2004, Sections 59, 70, 71 and 74.

Also section 23 of the said Law to which reference was made by the learned counsel for the parties provides thus:

B *“Any political party which wishes to change any of its candidates for any election under this law may signify its intention in writing to the commission not later than five (5) days to the date of election.”*

C Relying on this provision, the Appellants have argued that the courts have not been conferred with jurisdiction to entertain any matter challenging the substitution of a candidate by a political party for a Local Government Election. They argued further that the use of the word “may” in the section of the law makes the provision permissive  
D and not obligatory. The 1st Respondent disagrees. He contends that a candidate who has been nominated and his name forwarded to the Electoral Commission acquire justifiable right that can be enforced in Court. Clarification on this matter has been admirably made in the leading judgment. It is hereby summarized. The power of a political  
E party to nominate a candidate for an election is never in doubt as the matter is within the domestic jurisdiction of the political party: See Onuoha v. Okafor (1993) 2 SCNLR 244; Dalhatu v. Turaki (2003) 7 S.C. 1; (2003) 15 NWLR (Pt. 886) 146. In the case of substitution of  
F another candidate for the nominated candidate, there are certain conditions, which the political party seeking the said substitution, must be met. Under section 34 (1) of the Electoral Act, 2006, the political party has to inform Independent Electoral Commission (INEC) of the change in writing within sixty days to the election. This court has  
G held that the INEC must give “cogent and verifiable reasons” for desiring the change or substitution: See: Amaechi v. INEC (2008) 1 S.C. (Pt. 1) 36; Ugwu v. Ararume (2007) 6 S.C. (Pt. I) 88; (2007) 12 NWLR (Pt. 1048) 367.

H However, section 23 of the Kogi State Local Government Election Law, 2004 stipulates that for the intended substitution to be legally effective it should be made within five days to the election in question. I agree that there is misinterpretation of this section by the Appellants. The word “may” used in section 23 supra, does not relate to the time within which the substitution is to be effected i.e. 5

days, but relates to the intention of the political party concerned which desires the substitution. This makes sense, if such a party may signify its intention within the stipulated time if it so desires. Failure to comply with section 34 or 23 (supra) by a political party provides the ire of the law and confers on the court to protect the right of the aggrieved nominated candidate earlier submitted to the electoral body. That is the intendment of these provisions of the law. I cannot hold otherwise. Section 23 of the Law is clear and unambiguous. It does not admit of any other interpretation.

In the case at hand there is no dispute that the 1st Respondent was duly nominated and submitted to the Kogi State Independent Electoral Commission as the candidate of the PDP for the election into the office of Councilor representing Ogugu Ward If Olamaboro Local Government Council in the election organised by the said Electoral Commission. He was duly screened and cleared to contest the election in question. He contested and won but after the election the chairman of the Electoral Commission refused to release the certificate of return of the 1st Respondent, on the ground that his party (PDP) intended to substitute his name with another candidate (the 3rd Appellant).

From the foregoing facts, it is clear to me that this is a post election matter because an election was duly conducted by the appropriate body. By Exhibit '2', the certified true copy of the election result, the 1<sup>st</sup> Respondent was the winner. It follows therefore that the appropriate venue for the trial of the issues arising from this concluded election is the appropriate Election Tribunal not the regular state High Court. It is the Tribunal that can question the Electoral body concerned why the 1<sup>st</sup> Respondent who contested and won the election in question is refused a certificate of return but rather issued to the 3<sup>rd</sup> Appellant who was not a candidate at the election. This is a case of undue return of the 3<sup>rd</sup> Appellant. It has nothing to do with wrongful substitution and so hold.

On the issue as to whether the lower court properly exercised its power under section 16 of the Court of Appeal Act, 2004, I agree that the Issue is no longer of any moment. Since the High Court has no jurisdiction in the matter, the court below lacks jurisdiction to hear and determine the matter under section 15 of the Court of Appeal Act, 2004 and any purported exercise of that power in the circum-

stances of this case, is a nullity. In the circumstance issue 3 of the Appellant in the 1st appeal and issue 2 in the second appeal are accordingly discountenanced.

Finally, I share the worry of my brother in his exhortation of the need for the Government of Kogi State to set up a Local Government Election Tribunal to urgently resolve the issues involved in this case so as to sustain the continued confidence of the electorate in the system. With this little contribution, I too find merit in the appeals and are hereby allowed in terms of the issue as resolved in the Leading Judgment. I abide by the consequential order made, including costs.

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