

SUPREME COURT OF NIGERIA
17TH DECEMBER, 2010. SC. 265/2009
CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN,
F F TABAI, I. T. MUHAMMAD,
M. S. MUNTAKA-COOMASSIE, JJSC

1. OSUN STATE INDEPENDENT
ELECTORAL COMMISSION

2. ATTORNEY-GENERAL & APPELLANTS
COMMISSIONER FOR JUSTICE,
OSUN STATE

AND

1. ACTION CONGRESS

2. ALL NIGERIA PEOPLES PARTY
(ANPP) RESPONDENTS

3. NATIONAL CONSCIENCE PARTY
(NCP)

AND

1. AKOGUN LERE OYEWUMI

2. HON. WOLE OGUNSEMI

3. ALH. TESLIM IGBALAYE

4. HON. ADEBIYI YINUSA APPELLANTS

5. DR. BASIRU TOKUNBO SALAMI

6. ALH. GANIYU OLA-OLUWA

7. ENGR. AJISAFE KAMORU

8. HON. ADENIYI CALEB AKINOLA

9. HON. S. A. ADEGBOYEGA

10. HON. KAZEEM AKINLEYE

11. OTUNBA ADEMOLA ADEFILA

12. PRINCE OLANIYI RAZAQ A.

13. BARR. DUROTOLU OLUSEGUN

14. HON. SANYA OMIRIN

15. HON. MAYOWA ADEJOORIN

16. HON. ABIMBOLA OYEDELE

17. HON. AJAYIEYITAO JULIUS

18. ALH. ABIODUN AWOTUNDE

19. CHIEF GBENGA A. OWOLABI

20. ALII. MUFUTAU O. AMOO

21. ALH. KAMORU OLATUNJI

22. ENGR. OGUNGBOYEGA ADETOYE

23. HON. I. O. MAKINWA

24. HON. BELLO SULAIMAN

25. ENGR. S. O. FADARE

26. HON. AJANI RAUFU A. APPELLANTS

27. ENGR. TUNJI OBAWOLE

28. HON. FADIPE IBUKUN

29. HON. BAMIDELE SALAM

30. HON. ADEYEMO AJIBADE

31. HON. ATITEBI RASAQ

AND

1. ACTION CONGRESS (AC)

2. ALL NIGERIAN PEOPLES PARTY
(ANPP)

3. NATIONAL CONSCIENCE PARTY
(NCP)

4. OSUN STATE INDEPENDENT RESPONDENTS
ELECTORAL COMMISSION

5. ATTORNEY-GENERAL AND
COMMISSIONER FOR JUSTICE,
OSUN STATE

ELECTIONS - Procedure - Marginal notes - Purpose - Ss. 31. 121 & 122 Electoral Act & para 11 of 2nd Schedule to 1999 Constitution - Deal with the procedure - As shown by the marginal notes to the sections (H1)

ELECTIONS - Legislative powers - Of Local Government Councils - S. 121 Electoral Act & para 11 of 2nd Schedule to 1999 Constitution - Confer powers to National Assembly - To make laws regulating Local Government Elections (H2)

ELECTIONS - Local Government Councils - State legislative powers - Limit - Osun State House of Assembly - Has no power to make laws - Contrary to that made by National Assembly (H3)

ELECTIONS - National and State Legislation - Inconsistency - Effect

- Where S. 10 Osun State Electoral law - Is inconsistent with S. 31 Electoral Act - That law is null and void - To the extent of its inconsistency (H4)

APPEALS - Evaluation - Finding of trial court - On election notice - Trial court's finding on election notice - Was not only perverse - But was not based - On evidence in the record (H5)

APPEALS - Findings - Interference - Where trial court failed - To consider and evaluate evidence of parties - Appellate court has right - To evaluate and make necessary findings thereon (H6)

APPEALS - Purpose - It is a continuation of a suit - That complains against the decision of a trial or lower court - Absence of such decision - Makes an appeal impossible (H7)

APPEALS - Determination of - Rehearing - An appellate court is entitled to exercise - All powers of the trial court - By hearing on printed records - And reexamining of all evidence tendered - In the determination of an appeal (H8)

APPEALS - Rehearing - Propriety - Court of Appeal rightly exercised its power of rehearing - And rightly granted reliefs 2-5 dismissed by the trial court (H9)

JUDGMENTS - Reliefs - Consequential orders - Need for - Where necessary consequential order was not made - To revert to status quo ante - It would only amount to - A doubtful victory (H10)

JUDICIAL PRECEDENTS - Consequential orders - Amaechi v. INEC - Applicability - Court of Appeal was right in granting consequential orders - To give effect to reliefs 1-5 - By setting the election aside (H11)

APPEALS - Fair hearing - Complaint of breach - Propriety - Appellants who decided to stand by - And watch the outcome of the case at lower court - Can not complain of breach of fair hearing (H12)

FACTS

Plaintiffs/respondents at the high court of Osun State, sued defendants/appellants by originating summons claiming the following reliefs:- 1. A declaration that by combined provisions of paragraphs 11& 12 of second schedule to the 1999 Constitution and S. 12 of Electoral Act, 2006, National Assembly has powers to make laws with respect to registration of voters and procedures regulating elections to Local Government Councils. 2. A declaration that S. 10 Electoral Law of Osun State, which stipulates 21 days notice of election date for Local Government Councils in Osun State, is null and void as it is inconsistent with S. 31 Electoral Act, 2006, which provides 150 days notice of election date. 3. A declaration that Osun State Independent Electoral Commission cannot validly conduct elections into the 30 Local Government Councils in Osun State without giving 150 days mandatory notice of poll to plaintiffs in accordance with ss. 31 and 121 Electoral Act, 2006. Respondents sought for three other sundry reliefs. Respondents averred that 1st appellant preparing to conduct elections into offices of chairmen and councilors in all Local Government Councils in Osun State, published in The Nigerian Tribune of 5th November, 2007, 15th day of December, as date of Local Government Elections. Also, that 1st appellant ought to give 150 days notice of poll and 120 days to each respondent to file nomination of candidates, and that failure to give the required notice has put them in darkness as to the way, manner and time to prepare for the elections. In response, appellants argued that they have adequately notified respondents since May, 2007.

The learned trial judge after hearing both parties, granted relief No. 1 of respondents, refusing other reliefs in his judgment delivered on 14/12/07. On the following day, 1st appellant conducted elections in the 30 Local Government Councils of the State. Aggrieved, respondents filed a notice of appeal to the Court of Appeal on 24/12/07. The Court of Appeal in granting respondents' reliefs nullified the purported election and ordered for fresh election. Dissatisfied, appellants in the first Appeal have come to the Supreme Court. Consequently, the affected Chairmen of the 30 Local Government Councils applied and were granted leave to appeal as interested persons in the second Appeal. They, as appellants have complained of denial of

fair hearing by the other parties, now respondents.

ISSUES FOR DETERMINATION

1. *Whether the Court of Appeal was right in Law in declaring Section 10 of the Electoral Law, 2002 of Osun State unconstitutional, null and void on the grounds of inconsistency with Section 31 of the Electoral Act, 2006.* B

2. *Assuming, without conceding, that Section 31 of the Electoral Act, 2006 is applicable to the conduct of Local Government Elections whether the Court of Appeal was right in interfering with the finding of fact made by the trial court that the 1st appellant herein gave notice of election in May, 2007.* C

3. *Whether the Court of Appeal was right in setting aside the Local Government Election conducted on 15th December, 2007 on the ground that Section 10 of the Electoral Law, 2002 of Osun State which was relied upon by the 1st appellant in giving notice of the election was unconstitutional.* D

4. *Whether the Court of Appeal was right in law in granting reliefs 1-5 contained in the Respondents' Originating Summons and also an order setting aside the election conducted on 15th December, 2007, when the former had been abandoned in the Notice of Appeal and no leave of the court was sought and obtained to seek the latter which was not contained in the Originating Summons.* E

5. *Whether the Court of Appeal was right in law in ordering that a fresh election be conducted into Local Government Councils in Osun State strictly in compliance with the provisions of the Electoral Act, 2006 as if the provisions of the Electoral Law, 2002 of Osun State do not apply to the conduct of the election.* F

6. *Whether the Court of Appeal was right in Law in setting aside the elections conducted into Local Government Councils in Osun State on 15th December, 2007, when all the political parties that participated in and won the election were not made parties to the suit.* G

2ND APPEAL

1. *Whether the court below was right in granting reliefs in this case that adversely affected, eroded and annulled the vested rights of the Appellants in their elective offices as Chairmen of the Local Government Councils and Area councils, without affording them any form of hearing whatsoever, **when** the nullification of the provision of any* H

statute and/or liability incurred under the annulled enactment or statute, contrary to the stance of the court below.

2. *Whether in fact, Deed, or Law the provisions of Section 10 of the Osun State Electoral Law, 2002, was in fact inconsistent with or in derogation of the provisions of Section 31 of the Electoral Act, 2006, the provisions of the Constitution or any other statute for that matter.”*

HELD (Unanimously dismissing the two appeals per **MUNTAKA-COOMASSIE JSC**)

ELECTIONS - Procedure - Marginal notes - Purpose

1. Sections 121, 122 of the Electoral Act 2006 and Items 11 and 12 of the Second Schedule to the 1999 Constitution have been referred and digested by the Learned Counsel to the Parties in order to resolve this issue.

It is worthy of note that Section 31 of the Electoral Act, 2006 is under Part IV dealing with “Procedure at Election,” while sections 121 and 122 of the Electoral Act, 2006, are under Part VII dealing with “Procedure For Local Government Council Election.” It is therefore crystal clear that sections 31, 121 and 122 of the Electoral Act deal with the procedure for the conduct of the Local Government Election. The marginal note to sections is a good guide to knowing the intention of the Law Makers. Marginal notes are useful in considering the purpose of a section and the mischief at which it is aimed.

It is for these reasons I reject the submissions of the learned senior counsel to the Appellants in the second Appeal that “procedure mentioned in Paragraph 11 of the Second Schedule to the 1999 Constitution relate only to manual that prescribed procedure for accreditation of a polling station, and conduct of polling officers at such station”. It is my view and I so hold that the procedure for an Election includes the timing and notice to be given for the conduct of an Election. (pp. 3169 B/3170 G/3171 A)

H Legislative powers - Of Local Government Councils

2. The law is rather clear and un-ambiguous that by virtue of the provisions of Section 121 of the Electoral Act and paragraphs 11 and 12 of the second schedule to the 1999 Constitution, the National Assembly has powers to make laws to regulate the procedure

for the conduct of election to the Local Government Councils. Whereas it is the State House of Assembly that has the legislative powers to make laws with respect to matters relating to or connected with elections to the offices of chairmen or vice-chairmen of Local Government Councils in that state or the offices of the councillors therein. (p 3172B)

B

Local Government Councils - State legislative powers - Limit

3. As I have earlier held in this judgment that the timing and extent of the notice to be given for the conduct at the poll forms part of the procedure for conduct of the Local Government election which powers have been vested in the National Assembly. It therefore follows that the State House of Assembly has no power to make laws on the subject matter, unless, if it makes laws to conform with the provisions of the Act passed by the National Assembly.

C

D

I therefore hold that the Osun State House of Assembly has no legislative power to legislate on the procedure regulating elections to a Local Government Councils, the issue of notice inclusive, if it must make Law, it has to be in conformity with the provisions of section 31 of the Electoral Act, 2006. (p. 3172 D)

E

National and State Legislation - Inconsistency - Effect

4. The lower court in the resolution of this issue held as follows:-

“In my considered opinion, the provisions made as to the period of notice before the election in section 10 of Osun State Electoral Law is inconsistent with section 31 of the Electoral Act, 2006, contrary to the holding of the trial court. If anything less than 150 days is acceptable, certainly the object of the provision in section 31 would have been defeated. The failure to comply fully, I would say, has occasioned a miscarriage of justice as the number of days has far been bridged by the provisions of the state law. Section 10 of the Osun State Law is therefore illegal, unconstitutional, null and void to the extent of its inconsistency with section 31, and cannot stand.”

F

G

With due respect, I am in complete agreement with the findings of the lower court, the resultant legal effect is that the Local Government Councils election purportedly held on the 15th December, 2007 is not only invalid, but also null and void. (p. 3172 H)

H

APPEALS - Evaluation - Finding of trial court

5. The learned senior counsel has picked quarrel with the lower court finding that reversed the findings of the trial court that there was valid notice given by the Appellant for the conduct of the Local Government Council elections. All the submissions of the learned senior counsel on this point are completely misconceived and of no moment. The finding of the trial court was not only perverse but also not based on the evidence in the record. The only proved notice of poll given by the 1st Appellant was Exhibit A which gave 21 days notice contrary to the provisions of section 31 of the Electoral Act, 2006. It is therefore clear that no valid notice of poll, as required by section 31 of the Electoral Act, 2006, was given by the 1st-appellant.
(p. 3173 D)

D APPEALS - Findings - Interference

6. An Appellate Court would not ordinarily interfere with the findings of a lower court, unless where such findings are perverse and not based on the evidence before it. Where a trial court had failed to consider and evaluate evidence adduced by both Parties to a dispute on certain relevant issue, the Appellate Court has the right to consider and evaluate that evidence and to make necessary findings.
(p. 3173 F)

F APPEALS - Purpose

7. An appeal is generally regarded as a continuation of an original Suit rather than as an inception of a new Action. It is a complaint against the decision of a trial court before the lower court. Thus, in the absence of such a decision on a point there cannot possibly be an appeal against what has not been decided against a person.
(p. 3174 B)

APPEALS - Determination of - Rehearing

8. The power of the Court of Appeal with respect to the determination of appeal before it, is by way of rehearing, the word rehearing in this context means a hearing on printed records by re-examining the whole evidence both oral and documentary tendered before the trial court and forwarded to it. It means an examination of the case as a whole. The Court of Appeal is entitled to evaluate the evidence and

may reject conclusions of the trial Judge from facts which are not perverse. In other words, the Appellate Court is entitled to exercise all the powers of a court of first instance. (p. 3174 D)

APPEALS - Rehearing - Propriety

9. In the instant case, reliefs 2-5 contained in the Originating Summons were dismissed by the trial court and provoked this Appeal. It is clear from the Notice of Appeal that the Respondents appealed against the decision of the trial court to the lower court. The lower court has the power to re-hear the case by examining of the evidence, both oral and documentary, as contained in the printed Record in order to determine whether the lower court was right in refusing reliefs 2-5 as contained in the Originating Summons. It is my considered view that the lower court rightly exercised its powers by re-hearing the case presented before it and came to the right conclusions in granting Reliefs 2-5 as contained in the Originating Summons which was dismissed by the trial court. (p. 3174 G)

JUDGMENTS - Reliefs - Consequential orders - Need for

10. Concerning orders 6-7 granted by the lower court, it should be noted that the trial court gave its Judgment on the 14th December, 2007, while the Respondents hurriedly conducted the election in question on the 15th December, 2007. While the Notice of Appeal was filed on the 24th December, 2007.

My Lords, of what benefit will it be to the Respondents if only Reliefs 1-5 are granted without any consequential order to revert to the status quo ante, having earlier held that the election held on the 15th December, 2000, was invalid, illegal and unconstitutional? It would only amount to incredulous victory for the Respondents, who have been pursuing this case right from the trial to this court. (p. 3175 A)

Consequential orders - Amaechi v. INEC - Applicability

11. With tremendous respect, I would follow the wisdom adopted by this court in the case of Amaechi v. INEC (2008) 1 S.C. (Pt. I) 36; (2008) 5 NWLR (Pt. 1080) 227.

Reliefs 6-7 granted by the lower court are mere consequential orders to give effect to reliefs 1-5 granted. Merely granting reliefs 1-5

without more would confer no benefit on the Respondents. I therefore hold that the lower court was right in granting reliefs 6-7. With the resolution of this issue, it is my view that the lower court was right in setting aside the election conducted on the 15th December, 2007, being and done when Section 10 of the Osun State Electoral Law, B 2002, has been taken care of.

Apart from the fact that the notice was not duly carried out in compliance with the provision of section 31 which regulates the procedure for the conduct of the Local Government Council elections, C the Issues in this matter involve a matter of public-interest as opposed to an individual right. (pp. 3175 D/3176 E)

Fair hearing - Complaint of breach - Propriety

12. The gist of the argument of the learned senior counsel to the D Appellants is that orders 6-7, which set aside the election conducted on 15/12/2007, directly affected the Appellants, who were beneficiaries of the said election, as the elected chairmen of the Local Government Councils. And since they were not parties to the case, the orders as granted have occasioned grievous miscarriage of justice and a E breach of their fundamental rights to fair hearing. The submissions of learned senior counsel and the authorities cited, ordinarily would have been sufficient for the setting aside of the whole proceedings. But the question is where the Appellants were since the inception of this case at the trial court? The Appellants were aware of the pendency of this F case and the delivery of the judgment on 14/12/07, which paved way for the conduct of the election on 15/12/2007. In fact, all other political parties boycotted the election. After “winning” the elections conducted they decided to stand-by and watch the outcome of the G case at the lower court. It was only after the appeal succeeded with the setting aside the election, they then realized that they have interest in the matter and sought the leave of Court of Appeal as interested parties. Courts, indeed this court, as a court of last resort, will not aid an indolent. It does not lie in their mouth to complain of H breach of their fundamental human rights to fair hearing having by themselves stayed away from the court and allowed the Appellants in the first appeal to fight their battle for them. (p. 3176 H)

NOTABLE POINTS OF INTEREST

ONNOGHEN JSC

1. Dissenting judgments are not binding

It is settled Law that dissenting Judgments are not binding and also that the Lead(ing) Judgment of an Appellate Court constitutes the Judgment of the Court concerned and that where there is any inconsistency between a concurring Judgment and a Lead(ing) Judgment, the former would give way to the extent of the inconsistency. (p. 3189 G) B

2. Nullified enactment does not affect prior rights and liabilities C

The second point I want to comment on is the principle that the nullification of an enactment does not affect rights and liabilities that might have accrued under it and prior to the nullification. The above principle remains a good law but the question is whether it applies to the facts of this case. D

I hold the considered view that the principle applies herein in the sense that whatever salary, privileges and/or benefits the Appellants in the second Appeal might have earned or enjoyed prior to the nullification of the enactment under which their Election was conducted cannot be taken away following the nullification. These are the rights that enured to the Appellants following the election in question. The nullification also does not affect the status of the Appellants as Chairmen of their respective Local Government Councils during the life span of the enactment under which they were elected i.e. prior to the nullification. (p. 3191 D) E
F

REPRESENTATION

Yusuf O. Ali, SAN., (with him are A. O. Adelodun, SAN., A. K. Adeyi, S. A. Oke, Alex Akoja, K. J. Suleiman, P. I. Awoka, K. O. Lawal, A. A. Agbedex, T. E. Akintade) for the 1st set of Appellants. G

Tayo Oyetibo, SAN., (with him, C. I. Umeche), for the 2nd set of Appellants.

Femi Falana, (with him are; Adewole Afolabi, O. Akano, K. Alimi, S. Egbeyinka), for the Respondents. H

4th and 5th Respondents not represented.

CASES REFERRED TO

- NDIV v. SBN Plc. (2003) 1 NWLR (Pt. 801) 311
Mohammed (2003) 4 NWLR (Pt. 437) 45 at 456
Oredoyin v. Arowolo (1984) 4 NWLR (Pt. 114) 172
Inakoju v. Okotie-Eboh (1986) 1 NWLR (Pt. 16) 268
B Abdul-Karim v. Anazodo (2006) 29 WRN 151 at 173
Abdulkarim v. Anazodo (2006) 11 NWLR (Pt. 992) 299
Jumbo v. Bryanko Int. Ltd. (1985) 6 NWLR (Pt. 403) 545
Olawuyi v. Adeyemi (1990) 4 NWLR (Pt. 147) 746 at 769
C Gbadamosi v. Dairo (2001) 6 NWLR (Pt. 708) 137 at 167
Udeorah v. Nwakobi (2003) 4 NWLR (Pt. 811) 643 at 672
Ezedukara v. Macduka (1997) 8 NWLR (Pt. 518) 635 at 669
Obi v. INEC (2007) 7 S.C. 268; (2007) 11 NWLR (Pt. 1046) 565 at 639
D Pan African Bank Ltd. v. The State (1997) 4 NWLR (Pt. 499) 296 at 304
Babalola v. The State (1989) 7 S.C. (Pt. 1) 94; (1989) 4 NWLR (Pt. 115) 264
Ibrahim v. Mohammed (2003) 2 S.C. 127; (2003) 4 NWLR (Pt. 437) 453 at 456
E

STATUTES REFERRED TO

- Constitution of Federal Republic of Nigeria 1999, Items 11 & 12 ,
Second Schedule, ss. 36 (1) & 169
F Electoral Act, 2006, ss. 31, 32, 34, 121, 122, & 164
Osun State Electoral Law, 2002, s. 10

LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC

- G This is an Appeal against the Judgment of the Court of Appeal, Ibadan Division, delivered on the 19/3/2009 in which Plaintiffs' Appeal to it was allowed; dissatisfied with the Judgment of the Court of Appeal (hereinafter called the lower Court) the Defendants have appealed to the Apex Court of the land.
H The Plaintiffs, in their Originating Summons dated 8/11/07, filed before the Trial High Court i.e. High Court of Just Osun State, claimed the following Reliefs:-
1. A Declaration that the combined provisions of Paragraphs 11 and 12 of Second Schedule to the 1999 Constitution and Section

121 of the Electoral Act, the National Assembly has powers to make Laws with respect to registration of voters and the procedure regulating Elections to Local Government Councils.

2. A Declaration that Section 10 of the Electoral Law of Osun State which stipulates 21 days Notice of the date of Election into Local Government in Osun State is null and void as it is inconsistent with Section 31 Electoral Act, 2006 which provides 150 days Notice of Election date which forms part of the procedure for the conduct of Elections into the Local Government Councils. B

3. A Declaration that the Osun State Independent Electoral Commission cannot validly conduct Election into the 30 Local Government Councils in Osun State without giving 150 days Mandatory Notice of Poll to the Plaintiffs in accordance with Sections 31 and 121 of the Electoral Act, 2006. C

4. An Order compelling the 1st Defendant to give Statutory Notice of Election to Plaintiffs as prescribed under Section 31 of the Electoral Act. D

5. An Injunction restraining the 1st Defendant, its agents, servants, officers, privies, assigns and/ or howsoever called from giving effect to or implementing the provisions of Section 10 of the Osun State Electoral Law of 2002. E

6. An Injunction restraining the 1st Defendant from conducting any Election into the Local Government Councils in Osun State on the basis of Section 10 of the Osun State Electoral Law of 2002.” F

The averments relevant to the summons as contained it Affidavit in support are as follows:-

“7. That the 1st Defendant is preparing to conduct Election into the offices of chairman and councilors in all the Local Government Councils in reply (sic) to Osun State. G

8. That the 1st Defendant has published in the Nigeria Tribune of the 5th day of November, 2007 Page ‘O’ 15th day of December as the date of Local Government Elections. Attached is a photocopy of Page O of the Nigerian Tribune of the 5th day of November, 2007 and marked Exhibit’ A. H

9. That before any Election into Local Government Council in Osun State is conducted, the 1st Defendant is required to give to each of the Plaintiffs 150 (One Hundred and Fifty) days Notice of Poll.

10. That further to the deposition above, the 1st Defendant is

required to give 120 (One Hundred and Twenty days) before the Election to each of the Plaintiff to file nomination of their candidates.

11. That each of the Plaintiffs need time to arrange for the process leading to the emergence of their various candidates for Election into Local Government Council in Osun State.

B *12. That the failure to give the required Notice of poll and the notice of nomination forms to each of the Plaintiffs by the 1st Defendant has put the Plaintiffs in darkness as to the way, manner and time to prepare the process that will lead to the Notice of their candidates for the Election.”*

?C The Defendants/Respondents filed Counter-Affidavit, in which it was averred as follows:-

“7. that the Plaintiffs had been given adequate Notice of the 1st Defendant as the notice of the election was given since may, 2007 to all the Parties by the general notice issued to all the Parties and pasted on the Notice Board of the 1st Defendant.

8.

E *9. That I know that preparations by the 1st Defendant for the conduct of the forthcoming Local Government Election in the State commenced in earnest after the successful completion of the general election by which time all Parties particularly the Plaintiffs were notified.*

F *10. that precisely the 1st Defendant started its preparation on 28th May, 2007, when the Defendant commenced a series of sensitisation programmes and duly notified all the Political Parties actually on ground in the State of its readiness to organise the State Local Government Election on 15th December, 2007.*

G *11. that it was the consciousness of the 150 days statutory notice stipulation that made 1st Defendant to commence its preparation in earnest and all the Political Parties actively on ground in the State consequently duly notified.*

H *12. that apart from giving the requisite notifications, the Defendants also went on air (announcements on the OSBC Radio and Television Stations since that May, 2007) and also had series of interaction sessions with the parties actively on ground in the State.*

14. that consequent upon the due notices given by the 1st Defendant to all the Parties in the State, ten (10) of them inclusive the Plaintiffs had as at 30/11/09 collected the requisite forms and

fielded candidates in the forthcoming Election. Attached Exhibit A is the copy of the breakdown of the Parties and their candidates that will be contesting in the Election. Also attached are the photocopies of the receipts of payment made by the Plaintiffs to the 1st Defendant hereby marked Exhibit C.

15. that as a build up towards the Election, a meeting with stakeholders and staff of the 1st Defendant was organised/convened on 19/9/07 and press release on the outcome issued. Attached as Exhibit B is the copy of the press release dated 19/9/07.....

18. that the 1st Defendant has expended millions of Naira towards conducting the Election.”

The Learned Trial Chief Judge heard both Parties, and in his Judgment granted Relief No. 1 of the Plaintiffs, and refused Reliefs 2-6.

Dissatisfied with the Judgment of the Trial Court, the Plaintiffs have appealed to the Court of Appeal. It is worthy of note that the Trial High Court’s Judgment was delivered on the 14/12/07 while the 1st Defendant conducted the Election in the 30 Local Government Councils in the State on the 15/12/07. Whilst the Notice of Appeal to the Court below was filed on the 24/12/07.

The lower Court heard the appeal, and after considering the respective Briefs of Argument of the Parties allowed the Appeal and ordered as follows:-

“(1) That by the combined provisions of Items 11 and 12 of the Second Schedule to the 1999 Constitution and Section 121 of the Electoral Act, the National Assembly has powers to make Laws with respect to registration of voters and the procedure regulating Elections to Local Government Councils.

(2) That Section 10 of the Electoral Law of Osun State, 2002 which stipulates 21 days notice of the date of Election into Local Government in Osun State is null and void as it is inconsistent with Section 31 of the Electoral Act, 2006 which provides 150 days notice of election date which forms part of the procedure for the conduct of Elections into Local Government Councils.

(3) that the Osun State Independent Electoral Commission cannot validly conduct Election into the 30 Local Government Councils of Osun State without giving 150 mandatory notice of poll to the

Plaintiffs in accordance with Sections 31 and 121 of the Electoral Act, 2006.

(4) It is hereby ordered that the 1st Respondent gives statutory notice of Election to Plaintiffs as prescribed under Section 31 of the Electoral Act.

B *(5) The 1st Respondent, its agents, servants, officers, privies, assigns and/or however called are hereby restrained from giving, effect to or implementing the provisions of Section 10 of the Osun State Electoral Law, 2002.*

C *(6) It is ordered that the purported Local Government Election conducted in Osun State by the 1st Respondent on December 15th, 2007 is hereby set aside.*

D *(7) It is hereby ordered that a fresh Election be conducted in Osun State in strict compliance with the provisions of the Electoral Act, 2006."*

The Respondents were dissatisfied with the Judgment of the lower Court and have as a result, appealed to this Court.

E In the meantime, by a Motion dated 22/4/09, all the candidates that emerged as chairmen of the 30 Local Government Councils, in the Election and conducted by the 1st Defendant on the 15/12/07, applied for leave to appeal as interested persons and to appeal against the Judgment. The Application was granted, the Applicants were made the Appellants, while the Parties in the earlier Appeal were made Respondents.

F In accordance with the Rules of this Court all the Parties filed their respective Briefs of Arguments in the two Appeals.

G The Learned Senior Counsel to the Appellants in the first Appeal, Tayo Oyetibo, SAN., adopted his Brief in which six (6) Issues for determination were distilled as follows:-

"ISSUES FOR DETERMINATION

H *1. Whether the Court of Appeal was right in Law in declaring Section 10 of the electoral Law, 2002 of Osun State unconstitutional, null and void on the grounds of inconsistency with Section 31 of the Electoral Act, 2006 - Ground 1.*

2. Assuming, without conceding, that Section 31 of the Electoral Act, 2006 is applicable to the conduct of Local Government Elections whether the Court of Appeal was right in interfering with the finding of fact made by the Trial Court that the 1st Appellant

herein gave Notice of Election in May, 2007- Ground 2.

3. Whether the Court of Appeal was right in setting aside the Local Government Election conducted on 15th December, 2007 on the ground that Section 10 of the Electoral Law, 2002 of Osun State which was relied upon by the 1st Appellant in giving Notice of the Election was unconstitutional- Ground 4. B

4. Whether the Court of Appeal was right in law in granting Reliefs 1-5 contained in the Respondents' Originating Summons and also an Order setting aside the Election conducted on 15th December, 2007, when the former had been abandoned in the Notice of Appeal and no leave of the Court was sought and obtained to seek the latter which was not contained in the Originating Summons- Ground 3. C

5. Whether the Court of Appeal was right in law in ordering that a fresh Election be conducted into Local Government Councils in Osun State strictly in compliance with the provisions of the Electoral Act, 2006 as if the provisions of the Electoral Law, 2002 of Osun State do not apply to the conduct of the Election - Ground 5. D

6. Whether the Court of Appeal was right in Law in setting aside the Elections conducted into Local Government Councils in Osun State on 15th December, 2007, when all the Political Parties that participated in and won the Election were not made Parties to the Suit- Ground 6." E

In response, the Learned Counsel to the 1st - 3rd Respondents, Femi Falana, Esq., formulated four Issues for Determination thus:- F

"ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was right in declaring Section 10 of the Osun State Electoral Law, 2002 illegal and unconstitutional on the ground of inconsistency with Section 31 of the Electoral Act, 2006 - Ground 1. G

2. Whether the Court of Appeal was right in interfering with the finding of the Trial High Court that Notice of Election was given by the 1st Appellant in May, 2007 - Ground 2. H

3. Whether the Court of Appeal was right in granting 1-3 Reliefs contained in the Respondents' Originating Summons. Ground

4. Whether the Court of Appeal was right in setting aside the Election into the Local Government Councils in Osun State in De-

ember, 15th, 2007 and in ordering that a fresh Election be conducted in the circumstances. (Grounds 4, 5 and 6).

In the second Appeal, the Learned Senior Counsel to the Appellants, Yusuf Ali, SAN., formulated two issues for Determination which are herein after reproduced.

B “ISSUES FOR DETERMINATION

1. Whether the Court below was right in granting Reliefs in this case that adversely affected, eroded and annulled the vested rights of the Appellants in their elective offices as Chairmen of the Local Government Councils and Area council without affording them any form of hearing whatsoever when the nullification of the provision of any statute and/or liability incurred under the annulled enactment or statute contrary to the stance of the Court below.

C *2. Whether in fact, Deed, or Law the provisions of Section 10 of the Osun State Electoral Law, 2002, was in fact inconsistent with or in derogation of the provisions of Section 31 of the Electoral Act, 2006, the provisions of the Constitution or any other Statute for that matter.”*

E The Learned Counsel to the 1st - 3rd Respondents in the former Appeal, Femi Falana, Esq., also formulated four (4) Issues for Determination in the following terms:-

ISSUES FOR DETERMINATION

F *1. Whether the Court below was right in setting aside Local Government Election conducted in Osun State on December, 15th, 2007.*

G *2. Whether Section 10 of the Osun State Electoral Law, 2002 is illegal and unconstitutional on the ground of inconsistency with Section 3 of the Electoral Act, 2006, the provisions of the Constitution or any other statute for that matter.*

3. Whether the Court of Appeal was right in granting Reliefs Nos. 1-3 contained in the Respondents Originating Summons - Ground 3.

H *4. Whether the Court of Appeal was right in setting aside the Election into the Local Government Councils in Osun State on December, 15th, 2007 and in ordering that a fresh Election be conducted in the circumstances - Grounds 4, 5 and 6.”*

At the hearing, the Learned Senior Counsel to the Appellants in the first Appeal adopted his Brief of Argument and urged this

Court to allow the Appeal.

1ST ISSUE

On his 1st Issue, Learned Senior Counsel submitted in construing whether Section 31 of the Electoral Act, 2006 applies to Election into Local Council, the Court will undoubtedly consider the relevant provisions, not only of the Electoral Act but also of the Constitution of the Federal Republic of Nigeria. That Section 4 (a), (b) of the 1999 Constitution vests the National Assembly with the power, to make Laws for the Federation in respect of matters contained in the concurrent legislative list contained in Part 16 of the Second Schedule to the 1999 Constitution, the National Assembly enacted the procedure for Local Government Council Elections in Sections 121 and 122 of the Electoral Act. Counsel then submitted that Section 31 of the Electoral Act, 2006 does not apply to the filing of nominations in Local Government Election. That Section 121 of the Electoral Act contains general provisions that the procedure for filing nomination and casting of votes for Local Government Council Elections shall be the same as is applicable to other Elections under the Act, Section 121 (1), (2), (3) of the same Act makes specific provisions for the procedure for nomination in Local Government Elections.

Counsel therefore submitted that specific provisions derogate from general provisions, while general provisions do not derogate from special provisions, the cases of *Schroder v. Major & Company (Nig.) Ltd.* (1992) 2 NWLR (Pt. 101) 1: *Bamgboye v. Administrator-General.* 4 WACA 816, were cited.

In the case at hand, what is in issue is the procedure for nomination, that the marginal note to Section 122 of the Act provides a guide for the section, which is useful in considering the purpose of the section, he cited in support the case of *Oladaya v. Alagbe* (1993) 2 SCNLR 35 at 57.

Counsel contended that the literal interpretation of Sections 31 and 121 of the Act in such a way as would make the former to apply to Local Government Council Election will produce absurdity as it would mean that notice of Local Government Election must be published in each State not later than 150 days before the day appointed for holding the Election. The section must be taken as it is without modification, alteration or qualification, as decided in several cases some of which are

(a) Ifezue v. Mbadugha (1984) 1 SCNLR 427 at 447;

(b) Ezedukara v. Macduka (1997) 8 NWLR (Pt. 518) 635 at 669;

(c) Ojokolobo v. Alamu (1987) 3 NWLR (Pt. 61) 377 at 386.

Counsel further submitted that the Court below did great violence to Section 31 of the Electoral Act, 2006 when it isolated the requirement of 150 days Notice of Election as what is applicable to the conduct of Local Government Councils Election in Osun State, and ignored the other requirements under the same section that the notice be published in each State of the Federation.

Learned Senior Counsel further submitted that Section 31 of the Act does not deal with procedure for nomination but deals with notice of election. It was submitted that Part 11 of the concurrent Legislative List contained in Part 11 of the Second Schedule to the 1999 Constitution only empowers the National Assembly to make Laws for the Federation with respect to the registration of voters and the procedure regulating Election into Local Government Council in so far as Paragraph 12 of the concurrent Legislative List empowers a House of Assembly to make Laws with respect to Election into Local Government Council, it is the Electoral Law of Osun State that ought to be looked up to for the provision relating to notice of election, it was therefore wrong in declaring Section 10 of the Electoral Law of Osun State null and void as being inconsistent with Section 31 of the Electoral Act, 2006.

On Issue No. 2, Learned Senior Counsel submitted that the 1st Respondent complied with the provisions of Section 31 of the Electoral Act, 2006, even if it is conceded that Section 31 of the Act applies. Counsel referred to Paragraphs 10 and 12 of the Counter-Affidavit and referred also to the Trial Court's finding that Exhibit A attached to the Respondents' Affidavit was not inconsistent with Section 31 of the Electoral Act, 2006, because it was made in abundance of caution the stakeholders having been notified earlier on in May, 2007. It was therefore wrong for the lower Court to have interfered with this finding as it was based on the evidence before the Court; Counsel cited the case of-

(i) Otogbolu v. Okekuwa (1981) 6-7 S.C. (Reprint) 62; (1981) 6-7 S.C. 99 at 108; and

(ii) Ademola and Ors. v. Odiese & Ors. (1990) 1 NWLR (Pt.

125) 165 at 181

ISSUE NO. 3

On the Issue No. 3, it was submitted that the Court of Appeal violated the basic principle of law on the effect of nullification of a statute, whether by repeal or for its being un-constitutional does not affect anything, privileges, or obligation which has accrued thereunder. Counsel referred to *Abaye v. Ofili* (1986) 1 NWLR (Pt. 15) 134 and *Peenok Investment Ltd. v. Hotel Presidential Ltd.* (1982) 12 S.C. I; (1982) 12 S.C. (Reprint) 1; (1983) 4 NCLR 122; *University of Ilorin v. Adeniran* (2003) 17 NWLR (Pt. 849) 214/231 and Section 13 of the Interpretation Law of Oyo State.

As a result, even if the lower Court correctly held that Section 10 of the Electoral Law of Osun State is void being inconsistent with the provisions of Section 31 of the Electoral Act, 2006, the Local Government Ejection held on 15th December, 2007, could not be said to be invalid as it was held when the said section was still valid and extant.

ISSUE NO. 4

On Issue No. 4, the Learned Senior Counsel referred to the Relief stated in Notice of Appeal and submitted that the Respondent have abandoned their Reliefs as contained in the Originating Summons. It was the contention of the Learned Counsel that at the time the Election was conducted on 15th December, 2007, there was no pending Action against the Appellants and the Respondents did not seek the leave of the Court to amend its Originating Summons to include an Order setting aside the Election. The Reliefs 1-5 granted by the lower Court were abandoned in the Notice of Appeal. He relied on Order 6 Rule 2(1) of the Court of Appeal Rules, 2007 and submitted that the Respondents were expected to state all the Reliefs they claimed in their Notice of Appeal, and having failed to do so, the Court of Appeal therefore has no Jurisdiction to grant them, he cited the case of *Ekpeyong v. Nyong* (1975) 2 S.C. 71 at 80-81; (1975) 2 S.C. (Reprint) 65. Those Reliefs 6 and 7 were not claimed by the Respondents in their Originating Summons before the Trial Court, and the Respondents, who were the Appellants in the lower Court, did not seek and obtain the leave of that Court to seek two Reliefs. Thus, the Court cannot grant a Relief not claimed; he cites the case of *Kojo Attah v. Kwakuh Apawa* 17 WACA 75 at 76 -77.

ISSUE NO. 5

On the Issue No. 5, it was the contention of the Learned Counsel that the terms of Relief 7 granted by the lower Court did not leave any room for the applicability of the Electoral Law where as only Section 10 was nullified. The Order that a fresh Election be conducted in strict compliance with the provisions of the Electoral Act, 2006 has indirectly nullified the Electoral Law of Osun State, 2002; which was not part of the Respondents' Claim in the Originating Summons and as such the Order as made by the lower Court is a nullity.

ISSUE NO. 6

On Issue No. 6, it was the contention of the Learned Senior Counsel that it was wrong for the lower Court to have made an Order setting aside the Election without joining all ten Political Parties that participated in the Local Government Election conducted on 15th December, 2007. Since it is the Political Parties that win or lose in an Election, it was important and necessary for all the Political Parties that participated in the Election to be parties to this case, he cited in support the case of *Amaechi v. INEC* (2008) 1 S. C. (Pt. I) 36; (2008) 5 NWLR (Pt. 1080) 227/317; and *A. G Lagos Suite v. A. G. Federation* (2004) 11-12 S.C. 85; (2004) 18 NWLR (Pt. 904) 1.

Learned Counsel to the Respondents, Femi Falana, Esq., also adopted his Briefs of Argument, and urged this Court to dismiss the Appeal. It was the submission of the Learned Counsel on his Issue No. 1 that by virtue of Items 11 and 12 of the Second Schedule to the 1999 Constitution it is the National Assembly that is empowered to make Laws for the entire Federation with respect to the registration of voters and the procedure regulating Elections to a Local Government Council. Even though a House of Assembly of a State may make Laws with respect to Election to a Local Government but such a law must not be inconsistent with any law made by the National Assembly, he cited the case of *Attorney-General, Abia State v. Attorney-General of the Federation* (2002) 3 S.C. 106; (2002) 17 WRN 1 at 99.

He contended that the Trial Court was right when it granted the 1st Relief in the Originating Summons but somersaulted when it proceeded to hold that Section 10 of the Osun State Electoral Law which stipulated 21 days Notice before the holding of an Election is

not inconsistent with Section 31 of the Electoral Act, 2006 which provides 150 days Notice before the day appointed for holding an Election because what is required is notice and not the magic word “150 days”. It was the contention of Counsel that the Appellants did not avert his mind to the Supreme Court decision in the case of Attorney-General, Abia State v. Attorney-General of the Federation (supra), as adopted by the lower Court instead he has cited several cases that are totally irrelevant to the facts of his case. He therefore submitted that Section 10 of the Osun State Electoral Law, 2002, which prescribes a Notice of 21 days is inconsistent with Section 31 of the Electoral Act, 2006 which requires a Notice of 150 days before the conduct of Election. He referred to the submission of the Learned Senior Counsel to the Appellants that Section 10 of the Osun State Electoral Law, 2002 is valid on the ground that publication of notice is not part of the procedure for Election is misleading and it ought to be rejected in view of the decision in Attorney-General Abia State v. Attorney-General of the Federation (supra). He also referred to Paragraphs 4.6 and 4.7 of the Appellants’ Brief where it was contended that the National Assembly enacted the procedure for Local Government Elections in Sections 121 and 122 of the Electoral Act, 2006, pursuant to Items 11 and 12 on the concurrent Legislative List contained in Part 11 of the Second Schedule to the 1999 Constitution and that, Section 122 of the Electoral Act, 2006 deals with the procedure for nomination, while Section 31 deals with Notice of Election, and submitted that the Appellants’ Counsel have contended that Section 122 which deals with nomination is applicable to Local Government Elections, the Appellants have conveniently failed to examine Section 32 of the Electoral Act, 2006, which has prescribed 120 days for the filing of nomination of candidates by Political Parties. Thence, if 21 days Notice of Election is prescribed by Section 10 of the Osun State Electoral Law, 2002 is valid as urged by the Appellants, the Political Parties will not be in a position to file nomination of their candidates 120 days before the Election. He then submitted that by the combined effect of Items 11 and 12 of the concurrent Legislative List in the 1999 Constitution, Sections 121 and 122 of the Electoral Act, 2006 and the authority of Attorney-General Abia State v. Attorney-General of the Federation (supra), the decision of the Court below that Section 10 of the Osun State Electoral Law, 2002,

is illegal and unconstitutional as it is inconsistent with Section 31 of the Electoral Act, 2006, cannot be impugned.

On his Issue No. 2, it was the contention of the Learned Counsel that the claim that a Notice of Election was published in May, 2007, flies in the face of logic in view of the contents of Paragraphs 1 and 2 of Exhibit 2 attached to the Appellants' Counter-Affidavit, Exhibit 2 is a release signed by the Chairman of the 1st Respondent on the meeting held on September, 19th, 2007. Two months later Exhibit A of the Affidavit in support was published by the 1st Respondent, it is therefore crystal clear that the 1st Appellant gave 21 days Notice pursuant to Section 10 of the Osun State Electoral Law, 2002. It is therefore submitted that the finding of the Trial Court that a proper notice, as required cannot be valid in view of Exhibit A. The Affidavit in support of the Originating Summons. Hence since the Trial Court fell into grave error in the evaluation of the evidence before it, the Court of Appeal was right in setting it aside as it is perverse on the Issue of Notice. The case of Abdul-Karim v. Anazodo (2006) 29 WRN 151 at 173; (2006) 11 NWLR (Pt. 992) 299 was cited.

On Issue No. 3, it is the submission of the Counsel that this Court has not hesitated to set aside an Election once it was conducted in total violation of the Electoral Act, he referred to the case of Obi v. INEC (2007) 7 S.C. 268; (2007) 10 WRN 1 and Amaechi v. INEC (2008) 1 S.C. (Pt. I) 36; (2008) 5 NWLR (Pt. 1080) 227. It was his further contention that if the Court below had merely declared that the Local Government Election held in Osun State on December, 15th, 2007 was illegal and unconstitutional, the course of justice would not have been served. It would have been futile to so declare and that on the authority of Obi v. INEC (supra), the Court below cannot be faulted in setting aside the Local Government Election conducted by the 1st Appellant in contravention of Section 31 of the Electoral Act, 2006.

On his Issue No. 4, Counsel pointed out that the Reliefs sought in the Respondents' Originating Summons are set out on Page 2 of the Record, while the Trial Judge in his Judgment granted Relief 1 and dismissed Reliefs 2-6. The Plaintiffs being dissatisfied with the Judgment filed an Appeal and prayed the Court of Appeal to allow the Appeal and set aside the Election purportedly conducted by the Appellants on December, 15th 2007. That contrary to the contention

of the Appellants the Reliefs sought in the Originating Summons were not abandoned in the Court below and that by asking that the Appeal be allowed the Respondents were praying the Court below to hear the Appeal and grant the Reliefs sought in the Trial Court. An Appeal is by way of re-hearing, the lower Court had reheard the Appeal in line with Order 6 Rule 2 (i) of the Court of Appeal Rules, 2007 and allowed the Appeal and granted the Reliefs which the Trial Court refused to grant. The Relief 1 granted by the lower Court was an affirmation of Relief which had been granted by the Trial Court. Reliefs 2-5 granted by the Court below were sought by the Respondents in the Originating Summons, and the Court below proceeded to grant consequential reliefs which the justice of the case demands. B C

He further contended that it is erroneous as contended by the Appellants that an Appeal is a new Cause of Action, on the contrary, an Appeal is a continuation of the originating suit, he cited the case of *Adegoke Motors Ltd. v. Adesanya* (1989) 5 S.C. 113; (1989) 3 NWLR (Pt. 109) 250 at 266. D

Counsel further contended that an Appeal is an invitation to a Higher Court to review the decision of a lower Court to see whether on the proper consideration of the facts placed before it, and the Application of the Law the lower Court arrived at a correct decision. See: (a) *Ngige v. Obi* (2006) 18 WRN 1, and E

(b) *Oredoyin v. Arowolo* (1989) 7 S.C. (Pt. II) 1; (1989) 4 NWLR (Pt. 114) 172. F

It was further submitted that as the findings of the Trial Court could not be justified in fact and in Law, the Court below rightly granted Reliefs 2, 3, 4, 5 and 6 in the Originating Summons in the exercise of its powers under Section 16 of the Court of Appeal Act, See: *Obi v. INEC* (supra) at page 639. G

On the Issue of not joining the alleged ten Political Parties, the Learned Counsel pointed out that the list on Pages 46-47 of the Record contains names of Political Parties and their candidates “aspiring to the post of chairmen and councilors” and that there is no evidence to prove that the ten (10) Political Parties eventually contested the Election either at the Trial Court or the Court below. He contended that the Respondents are not bound to drag to Court those who are not aggrieved by the way and manner the 1st Respondent wanted to conduct the Election. Learned Counsel submitted that in H

the entire Judgment of the Court below nowhere was it stated either impliedly or expressly that the entire Osun State Electoral Law, 2002, has been declared illegal and unconstitutional by the lower Court, consequently the lower Court directed the Appellants to give statutory notice of Election to the Plaintiff as prescribed under Section 31
 B of the Electoral Act which stipulated in Section 10 of the Osun State Electoral Law, 2002.

In Reply to the submissions of the Respondents in their Brief of Argument, the Appellants filed a Reply in which they submitted
 C that the facts in Attorney-General Abia State v. Attorney-General of the Federation (supra), are not in all fours with the instant case.

On the Respondents' submission on Section 32 of the Electoral Act, 2006, it is submitted that the Respondents' submission is non sequitur for the simple reason that at no time in the Trial Court
 D or in the Court below was the interpretation to be given to Sections 32 and 34 of the Electoral Act, 2006, was in issue between the Parties.

On the exhibition of the Notice that was said to be issued by the 1st Respondent in May, 2007, the Learned Senior Counsel submitted
 E that the Appellants having deposed in Paragraph 7 of their Counter-Affidavit to the Originating Summons that notice of the Election was given since May, 2007, to all the Parties, they were not bound to adduce further evidence on the point.

On the second Appeal, the Learned Senior Counsel to the
 F Appellants, Yusuf Ali, SAN., adopted his Brief of Argument, and urged the Court to allow the Appeal.

On his Issue No. 1, for determination, Learned Senior Counsel submitted that it is un-arguable that the present set of Appellants was
 G not Parties at the Trial Court and the Court below. It is also not in dispute that the 4th Respondent conducted Elections into the 30 Local Government Councils and 1 Area Council in Osun State on 15th December, 2007 and that the winners emerged after the Election. He further contended that there was no relief in the Originating
 H Summons asking for the nullification of any Election already conducted by the 4th Respondent. There was no Application in the Court below by the 1st - 3rd Respondents to amend their Reliefs to include the nullification of the Elections and the holding of fresh ones. He therefore submitted that the legal, factual and plain implication of the

Reliefs granted i.e., Reliefs 6-7 without hearing the Appellants was that their election, they were removed from their offices and had the daunting task of taking part in another round of Local Government Elections in Osun State if they wish to remain as Chairmen of their Local Councils. It is settled that the right to a Fair Hearing is not a make believe, cosmetic or fairy doctrine but one of solid substance as a result any form of proceedings conducted in breach of the right to a Fair Hearing is a caricature of a hearing and liable to be set aside *ex debito justitiae*. Also a Court cannot make a valid binding Order on persons that are not parties to the Proceedings. If such Order is to be made then the party to be affected thereby must be heard in defence. Learned Senior Counsel referred to Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 and submitted that the section infers the twin pillars of natural justice namely, “*audi alterem partem* and *nemo iudex in causa sua*”. The Learned Senior Counsel cited the case of *Mohammed v. Kano N. A.* (1968) ANLR (Reprint) 411 at 413. B C D

Counsel contended that a Party that complains of the breach of his right to Fair Hearing need not show any injury or detriment he suffers thereby, the breach itself is the evidence of the injury, he cited the case of *Yahaya Adigun and Ors. v. Attorney-General of Oyo State* (1987) 2 NWLR (Pt. 56) 197. He contended that the present Appellants did suffer prejudice of having their Elections nullified by the Court below without any iota of hearing, fair or otherwise. E

On the Issue of an Order against non-party, Learned Counsel submitted that a Court is without Jurisdiction or vires to grant a binding Order against a person that is not a party to a proceeding, thus, a Court cannot make valid binding Order against a non-party and in the instant case, the Appellants were not parties to this proceedings at the Trial Court and the Court below, the cases of *Olawuyi v. Adeyemi* (1990) 4 NWLR (Pt. 147) 746 at 769 and *Pan African Bank Ltd. v. The State* (1997) 4 NWLR (Pt. 499) 296 at 304, were cited in support. F G

On the effect of the nullification of Section 10 of the Osun State Electoral Law, 2002, Learned Senior Counsel submitted that where an act was performed per force pursuant to an enactment and the enabling enactment is subsequently annulled by the Court all the rights, privileges and liabilities earned and incurred under the an- H

nullified enactment will not be affected. Counsel referred to Section 6 of the Interpretation Act, Cap. 192, Laws of the Federation, 1990. Thus, the nullification of Section 10 of the Osun State Electoral Law, 2002, amounted to “otherwise ceases to have effect,” then subsection 10 of the subsection 1 of Section 6 of the Interpretation Act comes into play. To his submissions on the effect of the nullification of an enactment vis-a-vis the rights, privileges and liabilities earned or incurred under it, Counsel further referred to the case of *Abaye v. Ojili* (1986) 1 NSCC Vol. 1794 at 104.

On the Issue No. 2, Learned Senior Counsel referred to Section 10 of the Osun State Electoral Law, 2002, Sections 31 and 121 of the Electoral Act, 2006, Section 7(4) of the 1999 Constitution, and Items 11 and 12 of the Second Schedule to the 1999 Constitution and submitted that the provisions of the Constitution is to be read together and not disjunctively that it is the plain words used that must be given effect to, that is the Courts are to prefer the literal Rules of Interpretation. Also the Court cannot call in aid the written Constitution of other Countries, such written Constitutions can only be looked at to see if they are similar to ours. Counsel cited the case of-

“(i) *Nafiu Rabi v. Kano State* (1980) 8-11 S.C. 130; (1980) 8-11 S.C. (Reprint) 85; (1979 -81) 12 NSCC 291 at 300-302;

(ii) *P.D. P v. INEC* (1999) 7 S.C. (Pt. II) 30; (1999) 11 NWLR (Pt. 626) 200 at 276-278.

Learned Senior Counsel submitted that the lower Court did not follow the law of this Honourable Court on the Interpretation of the Constitution and other Statutes as espoused in the dicta of this Court cited above. If it had done so it would not have arrived at the decision that the provisions of Section 10 of the Osun State Electoral Law, 2002, was inconsistent with the provisions of Section 31 of the Electoral Act, 2006. It was further submitted that a careful reading of Section 10 of the Osun State Electoral Law, 2002 reveals that the operating phrase on the section is “not less than 21 days.”

On the other hand, the operating phrase or words in Section 31 is “not later than 150 days.” Clearly it would be seen that the highest possible number of days Notice of Election must be given, while Section 10 of the Osun State Electoral Law, 2002 prescribed the minimum number of days the notice must be given. The Inter-

pretation of the Court below, Counsel further stressed would have been corrected, if the Act uses “not less than 150 days” then Section 10 of the Osun Law would have been inconsistent with the former.

Learned Counsel further submitted that Section 31 is exempted from the provisions of Section 121 of the Electoral Act, 2006, that it is a section that is not applicable to Elections in the Local Government of the State, this is because by the definition of the “commission” in Section 164 of the Electoral Act to mean the Independent National Electoral Commission established by the Constitution, while on the other hand Section 164 of the Electoral Act defined “State Commission” to mean State Independent Electoral Commission established by Section 169 of the Constitution. Hence, if Section 31 was meant to apply to Local Government Elections, the use of the word commission in that section would have included State Electoral Commissions.

Also it was submitted that the provisions of Paragraph 11 of the Second Schedule to the Constitution that talks of “procedure regulating elections to a Local Government Council” does not envisage the time of notice of such Election as a procedural law. The procedure as used therein will concern things like the manual that prescribed the procedure for accreditation of a polling station, conduct of polling officers at such station like the opening of ballot, giving of ballot papers to voters and counting of votes, Counsel referred to Black’s Law Dictionary 6th Edition, Pages 1203-1204. That there is nothing in the Electoral Act, 2006 that compels the Application of the provisions of Section 31 of the Electoral Act, 2006 to elections other than National Elections.

Learned Counsel to the 1st-3rd Respondents also adopted his Brief of Argument and urged this Court to dismiss the Appeal. On his Issue No. 11, Learned Counsel posited that it is not in dispute that this case originated before the Election into the Local Government in Osun State. The 1st-3rd Respondents filed the case to challenge the legality of the election sought to be conducted by the 4th Respondent. Judgment was given on the 14th day of December, 2007, the 4th Respondent then quickly conducted the Election on the 15th day of December, 2007. The Appellants in this case were the beneficiaries of both the Judgment and the illegal election hurriedly conducted to impose a fait accompli on the 1st-3rd Respondents, which

elections were nullified by the lower Court. The Learned Counsel submitted that if the lower Court had upheld the Elections as valid, the Appellants would not have approached this Court. He further contended that in all the processes before “ this Honourable Court, the Appellants have not said that they were not aware (or unaware) of the pendency of the Suit at the High Court sitting in Oshogbo or at the Court of Appeal. The Appellants only chose to stand by and watch the out come of the Proceedings. The Learned Counsel further submitted that the Appellants are caught by the principles of estoppel by standing by, that by their conduct they have elected to be bound by whatever decision that came out of the Court at the Court below, they cannot be heard to complain that they were not party to the suit at the two lower Courts. He then cited the case of: *Wytcherly v. Andrews* (2) (1871) 1. r. 2 p and d 327 at 328. This principle was adopted in the case of *Nana Ofori Atta* 11 of *Adan Sethe* for the stool of *Adeanse* (1957) 3 All ER 559 at 561: also is the case of *Gbadamosi v. Dairo* (2001) 6 NWLR (Pt. 708) 137 at 167.

Learned Counsel submitted that an Order cannot be made in the absence of a party if he is a necessary Party to the Action, it is only on that ground that the non-joinder of such party may affect the competency of the matter, and in the instant case, what is salient is that the Action of the 1st-3rd Respondents was commenced before the conduct of the Local Government Election so the Appellants could not have become necessary Parties as the only body whose conduct was being complained about by the 1st-3rd Respondents before the Trial Court was the 4th Respondent and not any contestant who was also victim of such illegality. It was his contention that the Appellants would have been relevant were the case to be one challenging the result of an Election in which the 1st - 4th Respondents actually participated and such action could only be filed at the Election Petition Tribunal. He further contended that if the Appellants were interested Parties, they ought to have joined the action from onset as they were aware of the pendency of the Suit. It does not therefore lie in their mouth to say that they ought to be joined ab-initio before an Order can be made that may affect their interest. Counsel cited the cases of:

(i) *Alashe v. Ilu* (1964) 1 All NLR 390 at 396.

(ii) *Ibrahim v. Mohammed* (2003) 2S.C. 127; (2003) 4 NWLR (Pt. 437) 453 at 456.

(iii) *Udeorah v. Nwakenobi* (2003) 4 NWLR (Pt. 811) 643 at 672 - 673.

On the Issue of Fair Hearing, Learned Counsel submitted that a person who stands by allowing another to champion his cause cannot complain of a breach of his right to Fair Hearing, in fact, he participated in the legal tussle by proxy; it would amount to a scandal to the administration of justice if the Appellants are allowed to hide under the cloak of Fair Hearing to upturn a Proceeding of which they were fully aware of but chose to stand by. It was further submitted that this is a pre-election matter arising out of a Local Government Election; the 1st-3rd Respondents challenged the validity of a State Law that provided for a 21 days notice only to all the Parties in preparation for the Election. This is a matter of procedure which falls within the ambit of the powers of the National Assembly to legislate on and that the appropriate provisions for determining the length of notice due to all parties is Section 31 of the Electoral Act, 2006. B C D

On Issue No 2, the Learned Counsel submitted that by virtue of Items 11 and 12 of the Second Schedule to the 1999 Constitution it is the National Assembly that is empowered to make Laws for the entire Federation with respect to the registration of voters and the procedure regulating elections to a Local Government Council. Even though a House of Assembly of a State may make Laws with respect to election to a Local Government Council but such a law must not be inconsistent with any law made by the National Assembly. Learned Counsel submitted that Items 11 and 12 of the concurrent legislative list have been given Interpretation by the Supreme Court in the case of *Attorney-General, Abia State v. Attorney-General of the Federation* (supra). E F

Learned Counsel to the Respondents referred to the Judgment of the Trial Court wherein it was held that the power of the Osun State House of Assembly to make Laws for the procedure for the conduct of Election into Local Government Council, is subject to the Electoral Act, 2006, he then further submitted that that Court somersaulted when it proceed to hold that Section 10 of the Osun State Electoral Law, 2002, which stipulates 21 days notice before the holding of Election is not inconsistent with Section 31 of the Electoral Act, 2006, which provides 150 days notice before the day appointed for the holding of an Election because what is required is notice and G H

not the magic word “150 days.”

Learned Counsel reproduced Section 10 of the Osun State Electoral Law, 2002, Sections 31 and 121 of the Electoral Act, 2006 and submitted that the Appellants deliberately ignored this Courts decision in Attorney-General Abia State v. Attorney-General of the Federation (supra).

Further submissions of the Respondents’ Counsel on these points were as submitted in the Brief of Arguments of the first Appeal which has been set out earlier in this Judgment.

The Appellants filed a Reply Brief to the Respondents’ Brief of Argument.

On the Issue of estoppel by standing by Learned Counsel submitted that the Respondents’ Counsel over looked an Affidavit-evidence that was canvassed, unopposed at the Court below when the Appellants sought leave to Appeal as parties interested. It was his contention that it was at that stage that the argument would have been opened to the Respondents to dispute the lack of awareness and/or knowledge of the Appellant on the existing Suit.

It was the Learned Counsel’s submission that since the Respondents did not raise the awareness of the Appellants on the existence of the pendency case, they are taken to have waived whatever right they have to complain on the point, Learned Counsel then cited the cases of:-

- (1) *Ariori v. Elemo* (1983) 1 SCNLR 1;
- (2) *Fawehinmi Construction Company Ltd. v. Olibu* (1998) 6 NWLR (Pt. 553) 171 at 191.

Learned Counsel again submitted that issue of necessary Parties is a fresh issue that was not agitated before the Court below. It is therefore not open to the Parties in an Appeal to raise fresh 15 issues without seeking the leave of Court before or in this Court. The case of: *Ijale v. Leventis and Company* (1959) SCNR 157; (1959)4 FSC 108; was cited.

Learned Counsel further submitted that all arguments about joinder or non-joinder as necessary Parties are issues that are properly domiciled with the Court below and having not raised same at the Court below, the doctrine of waiver will operate against the Respondents.

The central issue in the first Appeal is whether Section 10 of

the Osun State Electoral Law, 2002 is not void, null and unconstitutional in view of the provisions of Section 31 of the Electoral Act, 2006. The earlier law provides for a 21 days notice to be given before the Elections to the Local Government Councils in Osun State, while the latter provided for 150 days notice to the day of the poll.

Sections 121, 122 of the 1999 Constitution of this country (sic) and Items 11 and 12 of the Second Schedule to the 1999 Constitution have been referred and digested by the Learned Counsel to the Parties in order to resolve this issue. My Lords, it will be necessary at this point to set the provisions of the Statutes mentioned above:-

Section 10 of the Osun State Electoral Law, 2002, provides as follows:-

“1. Not less than 21 days before the date specified for holding of an election under this Law of the Electoral Commission shall, D through the Chief Electoral Officer of the State publish in the State, a Notice.

(a) stating the date of the Election; and

(b) appointing the place at which nomination papers are to be delivered.

2. The notice shall be further published in each constituency in respect of which an Election is to be held.”

Section 31 of the Electoral Act, 2006 provides:-

“1. The Commissioner shall not later than 150 days before the day appointed for holding of an Election under the Act publish a notice in each State of the Federation and the Federal Capital Territory.

(a) stating the date of the election; and

(b) appointing the place at which nomination papers are to be delivered.

2. The notice shall be published in each constituency in respect of which an Election is to be held.

3. In the case of a by-election, the Commission shall, not later than 14 days before the date appointed for the Election, publish a notice stating the date of the election.”

Section 121 of the Electoral Act, 2006, provides as follows:-

“121 The procedure for filing nominations and the casting and counting of votes for Local Government Elections shall be the same

as it is applicable to other Elections under this Act.”

Section 122 of the Electoral Act, 2006 provides as follows:-

B *“(1) If after the expiration of time for the delivery of nomination papers and the withdrawal of candidates for election of Councilors under this Act only one candidate remains duly nominated, that candidate shall be declared returned unopposed.*

C *(2) If after the expiration of time for the delivery of nomination papers and the withdrawal of candidate for Election of Councilors under this section more than one candidate is duly nominated, a poll shall be taken in accordance with the provisions of this Act.*

(3) Where at the close of nomination for election to the office of Chairman, only one candidate:-

(a) has been nominated; or

D *(b) remains nominated by reason of disqualification, withdrawal, incapacitation, disappearance, or death of the candidates, the State Independent Electoral Commission shall extend the time for nomination by 7 days: Provided that where after the extension only one candidate remains validly nominated, there shall be no further extension.*

E *Paragraphs 11 and 12 of the Second Schedule to the 1999 Constitution provides:-*

F *“11. The National Assembly may make Laws for the Federation with request to the registration of voters and the procedure regulating Elections to a Local Government Council.*

12. Nothing in Paragraph 11 hereof shall preclude a House of Assembly from making Laws with respect to Election to a Local Government Council in addition to but not inconsistent with any Law made by the National Assembly. “

G ***It is worthy of note that Section 31 of the Electoral Act, 2006 is under Part IV dealing with “Procedure At Election, “ while Sections 121 and 122 of the Electoral Act, 2006, are under Part VII dealing with “Procedure For Local Government Council Election. “ It is therefore crystal clear that Sections***
H ***31, 121 and 122 of the Electoral Act deal with the procedure for the conduct of the Local Government Election. The marginal note to sections is a good guide to knowing the intention of the Law Makers. Marginal notes are useful in considering the purpose of a section and the mischief at which it is aimed.***

See: The Leading Judgment of Eso, JSC., (as he then was) in Olaiya v. Alagbe (1983) 2 SCNL R 35 at 57.

It is for these reasons I reject the submissions of the Learned Senior Counsel to the Appellants in the second Appeal that “procedure mentioned in Paragraph 11 of the Second Schedule to the 1999 Constitution relate only to manual that prescribed procedure for accreditation of a polling station, and conduct of polling officers at such station”, it is my view and I so hold that the procedure for an Election includes the timing and notice to be given for the conduct of an Election.

The next question is to determine whether the National Assembly has the power to make laws for the procedure for the conduct of the Local Government Council Election. The Trial Chief Judge in his Judgment found as follows:-

“By virtue of the combined provisions of Paragraphs 11 and 12 of the Second Schedule to the 1999 Constitution and Section 121 of the Electoral Act the powers of Osun State House of Assembly to make laws for procedure for the conduct of election into Local Government Councils is subject to Electoral Act, 2006.”

The lower Court affirmed the finding of the Trial Court stated above when it held thus:-

“Item 11 empowers the National Assembly to make laws for the Federation in respect of the procedure to regulate elections to a Local Government Council, while Item 12 empowers a House of Assembly from making laws with respect to the same Local Government Council, in addition to but not inconsistent with any law made by the National Assembly has enacted a law on a subject, it is enough for such law to prevail over the law passed by a State House of Assembly, talk less of where there are defunct provisions made in the Constitution in situation where there is inconsistency between the two laws. The two legislative bodies may make laws concerning the Local Government Council Election but the catch is that the State law must not be inconsistent with any law made by the National Assembly. Where there is inconsistency the State law is void to the extent of the inconsistency. My Lords, I completely agree with the findings of the two lower Courts. His Lordship, Uwais, CJN., (as he then was) held in the case of Attorney-General Abia State v. Attorney

General of the Federation (2002) 3 S.C. 106; (2002) 17 WRN 1 at 99 as follows:-

*I agree that where the doctrine of covering the field applies, it is not necessary that there should be inconsistency between the Acts of the National Assembly. The fact that the National Assembly
B has enacted a law on the subject is enough for such law to prevail over the law passed by a State House of Assembly but where there is inconsistency, the State law is void to the extent of the inconsistency.”*

***The law is rather clear and un-ambiguous that by virtue
C of the provisions of Section 121 of the Electoral Act and Paragraphs 11 and 12 of the Second Schedule to the 1999 Constitution, the National Assembly has the powers to make Laws to regulate the procedure for the conduct of election to the Local Government Council. Whereas it is the State House of
D Assembly that has the legislative powers to make laws with respect to matters relating to or connected with elections to the office of Chairman or Vice-Chairman of Local Government Council in that State or the office of councillors therein.***

***As I have earlier held in this Judgment that the timing
E and extent of the notice to be given for the conduct at the poll forms part of the procedure for conduct of the Local Government Election which powers have been vested in the National Assembly. It therefore follows that the State House of Assembly has no power to make Laws on the subject matter, unless,
F if it makes laws to conform with the provisions of the Act passed by the National Assembly. See: Attorney-General Abia State v. Attorney-General of the Federation (2002) 3 SC 106; (2002) 6 NWLR (Pt. 763) 246. I therefore hold that the Osun State
G House of Assembly has no legislative powers to legislate on the procedure regulating elections to a Local Government Council, the issue of notice inclusive, if it must make Law it has to be in conformity with the provisions of Section 31 of the Electoral Act, 2006.***

The lower Court in the resolution of this issue held as follows:-

“In my considered opinion, the provisions made as to the period of notice before the Election in Section 10 of Osun State Electoral Law is inconsistent with Section 31 of the Elec-

toral Act, 2006, contrary to the holding of the Trial Court. If anything less than 150 days is acceptable, certainly the object of the provision in Section 31 would have been defeated. The failure to comply fully, I would say, has occasioned a miscarriage of justice as the number of days has far been bridged by the provisions of the State Law. Section 10 of the Osun State Law is therefore illegal, unconstitutional, null and void to the extent of its inconsistency with Section 31, and cannot stand. “

With due respect, I am in complete agreement with the findings of the lower Court, the resultant legal effect is that the Local Government Councils election purportedly held on the 15th December, 2007 is not only invalid, but also null and void.

The Learned Senior Counsel has picked quarrel with the lower Court finding that reversed the findings of the Trial Court that there was valid notice given by the Appellant for the conduct of the Local Government Council Elections. All the submissions of the Learned Senior Counsel on this point are completely misconceived and of no moment. The finding of the Trial Court was not only perverse but also not based on the evidence in the Record. The only proved notice of poll given by the 1st Appellant was Exhibit A which gave 21 days notice contrary to the provisions of Section 31 of the Electoral Act, 2006. It is therefore clear that no valid notice of poll, as required by Section 31 of the Electoral Act, 2006, was given by the 1st Appellant. An Appellate Court would not ordinarily interfere with the findings of a lower Court, unless where such findings are perverse and not based on the evidence before it. Where a Trial Court had failed to consider and evaluate evidence adduced by both Parties to a dispute on certain relevant issue, the Appellate Court has the right to consider and evaluate that evidence and to make necessary findings. See: Abdulkarim v. Anazodo (2006) 11 NWLR (Pt. 992) 299.

Closely related to the above issue of the Jurisdiction of the lower Court to make the Orders it made. The arguments of the Learned Senior Counsel to the Appellants are two fold:-

(a) that the Respondents in their Notice of Appeal had aban-

doned Reliefs 2-5 and that there was no Application made by them to amend at the lower Court, and

(b) that the Reliefs 6-7 were not claimed by the Respondents, hence the lower Court has no Jurisdiction to make them, as Court would not grant a Relief not claimed by a Party. This brings us
B to the question of what is an appeal?

An appeal is generally regarded as a continuation of an original Suit rather than as an inception of a new Action. It is a complaint against the decision of a Trial Court before the lower Court. Thus, in the absence of such a decision on a point there cannot possibly be an Appeal against what has not been decided against a person. See: NDIV v. SBN Plc. (2003) 1 NWLR (Pt. 801) 311; Oredoyin v. Arowolo (1984) 4 NWLR (Pt. 114) 172; Babalola v. The State (1989) 7 S.C. (Pt. 1) 94; (1989) 4 NWLR (Pt. 115) 264; Jumbo v. Bryanko Int. Ltd. (1985) 6 NWLR (Pt. 403) 545 and Ngige v. Obi (2006) 14 NWLR (Pt. 999) 1.
C

The power of the Court of Appeal with respect to the determination of appeal before it is by way of rehearing, the word rehearing in this context means a hearing on printed records by the re-examining the whole evidence both oral and documentary tendered before the Trial Court and forwarded to it. It means an examination of the case as a whole. The Court of Appeal is entitled to evaluate the evidence and may reject conclusions of the Trial Judge from facts which are not perverse. In other words, the Appellate Court is entitled to exercise all the powers of a Court of first instance. See: Inakoju v. Okotie-Eboh (1986) 1 NWLR (Pt. 16) 268 and Obi v. INEC (2007) 7 S.C. 268; (2007) 11 NWLR (Pt. 1046) 565 at 639. Section 16 of
E
F
G the Court of Appeal Act.

In the instant case, Reliefs 2-5 contained in the Originating Summons were dismissed by the Trial Court and provoked this Appeal. It is clear from the Notice of Appeal that the Respondents appealed against the decision of the Trial Court to the lower Court. The lower Court has the power to re-hear the case by examining of the evidence, both oral and documentary, as contained in the printed Record in order to determine whether the lower Court was right in refusing Reliefs 2-5 as contained in the Originating Summons. It is my
H

considered view that the lower Court rightly exercised its powers by re-hearing the case presented before it and came to the right conclusions in granting Reliefs 2-5 as contained in the Originating Summons which was dismissed by the Trial Court.

Concerning Orders 6-7 granted by the lower Court, it should be noted that the Trial Court gave its Judgment on the 14th December, 2007, while the Respondents hurriedly conducted the Election in question on the 15th December, 2007. While the Notice of Appeal was filed on the 24th December, 2007.

My Lords, of what benefit will it be to the Respondents if only Reliefs 1-5 are granted without any consequential Order to revert to the status quo ante, having earlier held that the election held on the 15th December, 2000, was invalid, illegal and unconstitutional? It would only amount to incredulous victory for the Respondents, who have been pursuing this case right from the Trial to this Court. With tremendous respect, I would follow the wisdom adopted by this Court in the case of Amaechi v. INEC (2008) 1 S.C. (Pt. I) 36; (2008) 5 NWLR (Pt. 1080) 227 at 345, per Musdapher, JSC., who adumbrated the legal position as follows:-

“The Relief granted to the Appellant even if not asked could under the circumstances of the facts of this case amount to a consequential relief. It is the law even where a person has not specifically asked for a relief from a Court, the Court has the power to grant such Relief as a consequential Relief. A consequential Order must be one made giving effect to the Judgment which it follows. It is not an Order made subsequent to a Judgment which it follows. It is not an Order made subsequent to a Judgment which derails from the extraneous Judgment or cautious matters. It is settled law that Court can Order an injunction even if it is not specifically claimed but appears incidentally necessary to protect established rights. See: Afolagbe v. Shorun (1985) 4 S.C. (Pt. I) 250 L; (1985) 1 NWLR (Pt. 2) 360; Okupe v. F. B. I. R. (1974) 4 S.C. 93; (1974) 4 S.C. (Reprint) 69; (1974) LNMLR 422; Liman v. Mohammed (1999) 6 S.C. (Pt. I) 67; (1999) 9 NWLR (Pt. 617) 116.”

At Page 394, my Learned Brother, Onnoghen, JSC., restated that legal position as follows:-

“A consequential Order is one giving effect to the Judgment which it follows; it is not, an Order made subsequent to a Judgment, which detracts from the Judgment or contains extraneous matters - See: *Obayagbona v. Obazee* (1972) 5 SC 247; (1972) 5 SC (Reprint) 159. In *Garba v. University of Maiduguri* (1986) 1 NWLR (Pt B 18) 550, this Court held that where a person has not specifically asked for a relief from Trial Court, a Trial Court has power to grant such a relief as a consequential Relief. See: *Okupe v. F.B.I.R.* (1974) 4 S.C. 93; (1974) 4 S.C. (Reprint) 69; (1974) 1 All NLR 314.”

C His Lordship Oguntade, JSC., who read the Leading Judgment summed up the position of the law at Page 315 as follows:-

“Am I now to say that although Amaechi has won his case, he should go home empty handed because Elections had been conducted into the office? That is not the way of the Court. A Court must D shy away from submitting itself to the constraining bind of technicalities. I must do justice even if the heaven fall. The truth of course is that when justice has been done, the heavens stay in place. It is futile to merely declare that it was Amaechi and not Omehia that was the candidate of the P.D.P what benefit will such a declaration confer on E Amaechi?”

I will follow the footsteps of my Learned Brother to do justice in this case. **Reliefs 6-7 granted by the lower Court are mere consequential Orders to give effect to Reliefs 1-5 granted. Merely granting Reliefs 1-5 without more would confer no F benefit on the Respondents. I therefore hold that the lower Court was right in granting Reliefs 6-7. With the resolution of this issue, it is my view that the lower Court was right in setting aside the Election conducted on the 15th December, 2007 G being and done when Section 10 of the Osun State Electoral Law, 2002; has been taken care of.**

Apart from the fact that the notice was not duly carried out in compliance with the provision of Section 31 which regulates the procedure for the conduct of the Local Government Council Elections, the Issues in this matter involves a H matter of public-interest as opposed to an individual right.

The last issue left undecided is the issue of the alleged breach of the Fundamental Human Right to Fair Hearing of the Appellants second Appeal. **The gist of the argument of the Learned Senior**

Counsel to the Appellants is that Orders 6-7 which set aside the Election conducted on 15/12/2007 directly affected the Appellants, who were the beneficiaries of the said election as the elected chairmen of the Local Government Councils. And since they were not parties to the case, the Orders as granted have occasioned grievous Miscarriage of Justice and a breach of their Fundamental Right to Fair Hearing. The submissions of the Learned Senior Counsel and the authorities cited ordinarily would have been sufficient for the setting aside of the whole proceedings. But the question is where the Appellants were since the inception of this case at the Trial Court? The Appellants were aware of the pendency of this case and the delivery of the Judgment on 14/12/07 which paved way for the conduct of the Election on 15/12/2007. In fact all other Political Parties boycotted the Election. After “winning” the elections conducted they decided to stand-by and watch the outcome of the case at the lower Court. It was only after the Appeal succeeded with the setting aside the election, they then realized that they have interest in the matter and sought the leave of Court of Appeal as interested Parties. Courts, indeed this Court, as a Court of last resort, will not aid an indolent. It does not lie in their mouth to complain of breach of their Fundamental Human Rights to Fair Hearing having by themselves stayed away from the Court and allowed the Appellants in the first appeal to fight their battle for them. See: Alaghe v. Mohammed (2003) 4 NWLR (Pt. 437) 45 at 456; and Udeorah v. Nwakobi (2003) 4 NWLR (Pt. 811) 643 at 672.

I therefore hold that the Appellants’ Rights to Fair Hearing have not in anyway been breached at all.

Finally my Lords, what I have been labouring to state all along is that I hold that these Appeals lack merit, same are consequently dismissed. Costs shall be in the cause.

MUKHTAR JSC

By way of Originating Summons, the Respondents in the High Court of Osun State sought the following Reliefs:-

A Declaration that by the combined provisions Paragraphs 11

and 12 of Second Schedule of the 1999 Constitution and Section 121 of the Electoral Act, the, National Assembly has powers to make laws with respect to registration of voters and the Procedure regulating Elections to Local Government Councils.

B A Declaration that Section 10 of the Electoral Law of Osun State which stipulates 21 days Notice of the date of Election into Local Government in Osun State is Null and Void as it is inconsistent with Section 31 Electoral Act, 2006 which provides 150 days Notice of Election date which forms part of the Procedure for the Conduct of Elections into the Local Government Councils.

C A Declaration that the Osun State Independent Electoral Commission cannot validly conduct Election into the 30 Local Government Councils in Osun State without giving 150 days mandatory Notice of Poll to the Plaintiffs in accordance with Sections 31 and 121 D of the Electoral Act.

An Order compelling the 1st Defendant to give Statutory Notice of Election to Plaintiffs as prescribed under Section 31 of the Electoral Act.

E An Injunction restraining the 1st Defendant, its agents, servants, officers, privies, assigns and/ or howsoever called from giving effect to or implementing the provisions of Section 10 of the Osun State Electoral Law, 2002.

F An Injunction restraining the 1st Defendant from conducting any Election into the Local Government Councils in Osun State on the basis of Section 10 of the Osun State Election Law, 2002.”

G An Affidavit in support of the Originating Summons, together with Counter-Affidavit in opposition was filed by the Parties. The Osun State High Court found for the Plaintiff's in respect of Relief (1), but refused the other Reliefs. The Plaintiffs appealed to the Court of Appeal, which set aside the decision of the Trial Judge and made the declarations sought. The Defendants have now appealed to this Court. The Issues distilled from the Grounds of Appeal have been set out in the Leading Judgment. In my view Issue (1) in the first set of Appellants' Brief of Argument is the crux of this Appeal as the laws set out therein form the basis of the case in the Trial Court, so I intend to highlight that issue only in my contribution. The Issue is as follows:-

“*whether the Court of Appeal was right in Law in declaring Section 10 of the Electoral Law, 2002 of Osun State unconstitutional,*

null and void on the grounds of inconsistency with Section 31 of the Electoral Act, 2006.”

This Issue is in parimateria with Issue (2) in the second set of Appellants’ Brief of Argument. In dealing with this Issue 1 will first reproduce the provisions of the Laws in controversy. Section (10) of the Osun State Electoral Law, 2002 provides thus:- B

“1. Not less than 21 days before the dates specified for holding of an Election under this Law the Electoral Commission shall, through the Chief Electoral Officer of the State, publish in the State, a notice

(a) stating the date of the Election; and

(b) appointing the place at which nomination papers are to be delivered. C

2. The notice shall be further published in each constituency in respect of which an Election is to hold.”

Then Section 31 of the Electoral Act, 2006 provides the following:- D

“31(1) the Commission shall not later than 150 days before the day appointed for holding of an Election under this Act publish a notice in each State of the Federation and the Federal Capital Territory.

(a) stating the date of the Election; and E

(b) appointing the place at which nomination papers are to be delivered.

2. The Notice shall be published in each constituency in respect of which an Election is to be held.

3. In the case of a bye-election, the Commission, shall, not later than 14 days before the date appointed for the Election, publish a Notice stating the date of the Election.” F

Quite clearly, there is inconsistency in the above provisions. The two Laws are applicable to Osun State, for whereas the former is specifically for Osun State, the later is for the whole unit called Nigeria, as it is a Federal Legislation that extends to and covers Osun State, by virtue of Paragraphs 11 and 12 of the concurrent legislative list in the second schedule to the Constitution of the Federal Republic of Nigeria, 1999. The said paragraphs read as follows:- G

“11. The National Assembly may make Laws for the Federation with respect to the registration of Voters and the procedure regulating Elections to a Local Government Council. H

12. Nothing in Paragraph 11 hereof shall preclude a House

of Assembly from making Laws with respect to Election to a Local Government Council in addition to but not inconsistent with any Law made by the National Assembly. ”

There is no gainsaying that the Constitution supra vests powers on the House of Assembly, Osun State, and the National Assembly to pass Laws in election matters in Osun State vide the authority of the above provisions. The inconsistency in the present case stems from the days provided for the giving of Notice for Election, which is the bone of contention in this case. Although the Osun State House of Assembly has power to legislate on electoral matters, and have so done, the law enacted by the Federal Lawmakers i.e. the Electoral Act of 2006 in this case is higher in authority and supreme. It is instructive to note that the immediate past provisions supra, specifically provides that the laws to be passed by the State House of Assembly must not be inconsistent with the provision of federal Act. In the circumstance that it is inconsistent, I believe it is correct to say that such provision is null and void. See: Attorney-General of Abia State v. Attorney-General of Federation (2002) 3 SC 106; (2002) 17 WRN 1. In this wise I hold that the provision of Section 10 of the Electoral Law of Osun State is null and void. This in effect means that acts done by the Appellants in pursuance to the said Section 10 supra to wit the Local Government Election conducted on 15th December, 2007 in Osun State is unconstitutional, null and void.

I have read the Leading Judgment delivered by my Learned Brother, Muntaka-Coomassic, JSC., and I agree with him that the Appeals have no merit and deserve to be dismissed. I also dismiss the Appeals and abide by the consequential Orders made in the Leading Judgment.

G

ONNOGHEN JSC

There are two Appeals involved in this Judgment. The first is by the original Defendants to the Action, while the second is by the thirty-one Chairmen of Local Governments in Osun State who were not parties to the original Action but were granted leave to Appeal to this Court against the Judgment of the lower Court as interested Parties. In the said second Appeal, both the Plaintiffs and Defendants in the originating Suit are made Respondents.

The Issues formulated by Learned Senior Counsel for the Appellants in the 1st Appeal, Tayo Oyetibo, Esq., SAN., are as follows:-

“(1) Whether the Court of Appeal was right in law in declaring Section 10 of the Electoral Law, 2002 of Osun State unconstitutional, null and void on the grounds of inconsistency with Section 31 of the Electoral Act, 2006: Ground 1.

“(2) Assuming without conceding that Section 31 of the Electoral Act, 2006 is applicable to the conduct of Local Government Elections whether the Court of Appeal was right in interfering with the finding of fact made by the Trial Court that the 1st Appellant herein gave Notice of Election in May, 2007: Ground 2.

“(3) Whether the Court of Appeal was right in setting aside the Local Government Election conducted on 15th December, 2007 on the ground that Section 10 of the Electoral Law, 2002 of Osun State which was relied upon by the 1st Appellant in giving Notice of the Election was unconstitutional: Ground 4.

“(4) Whether the Court of Appeal was right in law in granting Reliefs 1-5 contained in the Respondents’ Originating Summons and also an Order setting aside the Election conducted on 15th December, 2007, when the former had been abandoned in the Notice of Appeal and no Leave of the Court was sought and obtained to seek the latter which was not contained in the Originating Summons: Ground 3.

“(5) Whether the Court of Appeal was right in law in ordering that a fresh Election be conducted into Local Government Councils in Osun State strictly in compliance with the provisions of the Electoral Act, 2006 as if the provisions of the Electoral Law, 2002 of Osun State do not apply to the conduct of the Election: Ground 5.

“(6) Whether the Court of Appeal was right in Law in setting aside the Election conducted into Local Government Councils in Osun State on 15th December, 2007, when all the Political Parties that participated in and won the Election were not made Parties to the Suit: Ground 6.”

In the second Appeal, the Issues as formulated by Learned Senior Counsel for the Appellants, Yusuf O. Ali, Esq., SAN., in the Appellants’ Brief of Argument are as follows:-

“1. Whether the Court below was right in granting Reliefs in

the case (sic) that adversely affected, eroded and annulled the vested rights of the Appellants in their elective offices as Chairmen of the Local Government Councils and Area council without affording them any form of hearing whatsoever when the nullification of the provision of any statute and or enactment would not affect any right or liability incurred under the annulled enactment or statute contrary to the stance of the Court below.

2. Whether in fact, Deed, or Law the provisions of Section of the Osun State Electoral Law, 2002, was in fact inconsistent with or in derogation of the provisions of Section 31 of the Electoral Act, 2006, the provisions of the Constitution or any other Statute for that matter.”

It is the submission of Learned Senior Counsel for the Appellants in the first Appeal that Section 31 of the Electoral Act, 2006, is not relevant to the conduct of Local Government Council Elections and as such Section 10 of the Osun State Electoral Law is not unconstitutional; that assuming that Section 31 of the Electoral Act, 2006 applies, which Senior Counsel does not concede, the lower Court was in error when it interfered with the finding of fact by the Trial Court that the 1st Appellant complied with the provisions of the said Section 31 of the Electoral Act, 2006; that granted that Section 10 of the Osun State Electoral Law is unconstitutional, the nullification of the section in law cannot affect the Election which was conducted pursuant to the Law and prior to the said nullification; that the lower Court was in error in granting to the Respondents' Reliefs not specifically claimed by them; that the lower Court was wrong in ordering a fresh Election to be conducted strictly in compliance with the provisions of the Electoral Act, 2006, when the provisions of the Osun State Electoral Law, 2002, is the applicable Law to the conduct of the said Election.

Finally, it is the further submission of Learned Senior Counsel, that the lower Court was in error when it made an Order setting aside an Election which was contested by 10 Political Parties, at the instance of only three of the Political Parties, when the other seven Political Parties were never joined as parties in the Action, and urged the Court to allow the Appeal, set aside the Judgment of the lower Court and restore the Judgment of the Trial Court delivered on 14th December, 2007.

In respect of the second Appeal, it is the contention of Learned Senior Counsel for the Appellants that since the Appellants were never Parties to the Action in the lower Courts but positive Orders were made which adversely affected their rights without their being heard nor given opportunity of being heard, the decision of the lower Court ought to be set aside as the same violated the rights of the Appellants to Fair hearing; that the nullification of an enactment does not affect the rights, privileges and liabilities earned or incurred under the annulled enactment; that the lower Court did not correctly and properly interpret the Provisions of Section 10 of the Osun State Electoral Law, 2002, as well as Section 31 of the Electoral Act, 2006, that the provisions of Section 10 of the Electoral Law of Osun State is not in conflict with Section 31 of the Electoral Act, 2006, as held by the lower Court; that whereas Section 31 of the Electoral Act, 2006, provides for the highest number of days in which notice of election will be given, Section 10 of the Osun State Electoral Law, 2002, makes provision for the minimum number of days for such Notice; that Section 31 of the Electoral Act, 2006 is inapplicable to an Election into a Local Government Council but to National Elections. Finally, it is the contention of Learned Senior Counsel that if the interpretation of the lower Court is accepted, the power of the State Houses of Assembly assigned by the Constitution to make Laws on Local Government Elections is rendered otiose and consequently urged the Court to allow the Appeal and set aside the decision of the lower Court.

It should be noted that only the 1st - 3rd Respondents filed Brief of Argument in the 2nd Appeal while the 4th and 5th Respondents did not. This is understandable as the 4th and 5th Respondents are the Appellants in the 1st Appeal and positive resolution of the Issues in either of the Appeals would enure to the benefit of the Appellants in the two Appeals. To me, having regards to the legal effects of a resolution of the Issues in either of the Appeals, the 2nd Appeal was really not necessary but here we are being burdened with the consideration of two Appeals instead of one!!

Anyway, it is the contention of Learned Counsel for the Respondents that the lower Court was right in its holding that Section 10 of the Osun State Electoral Law, 2002, is inconsistent with Section 31 of the Electoral Act, 2006; that only Section 10 of the Electoral

Law was declared null and void on grounds of inconsistency with Section 31 of the Electoral Act, 2006, not the whole of the Electoral Law as argued by Learned Senior Counsel for the Appellants; that the lower Court have found that the Election conducted on 15th December, 2007 into the Local Governments were illegal and consequently null and void, the Court was right in setting same aside and ordering fresh Election in compliance with the provisions of the Electoral Act, 2006; that the Appellants in the second Appeal by standing by and thereby allowing the 4th and 5th Respondents to defend their interest at the lower Courts are caught by the doctrine of estoppel by standing by and cannot now be heard to complain of denial of their right to Fair Hearing and consequently urged the Court to dismiss the Appeals.

Both Parties to the Appeals agreed that Part II of the Concurrent Legislative List in Part II of the Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999, (hereinafter referred to as the 1999 Constitution) only empowers the National Assembly to make Laws for the Federation with respect to the registration of Voters and the procedure regulating Elections into Local Government Councils. The above being the case, it follows that the fundamental question/Issue to be determined in the Appeals is whether the giving of Notice of Election into Local Government Councils in Nigeria fall within the procedure regulating Elections into Local Government Councils so as to determine the consistency or otherwise of the provisions of Section 10 of the Osun State Electoral Law, 2002 vis-a-vis Section 31 of the Electoral Act, 2006, or the applicability of the doctrine of covering the field as argued by Learned Counsel for the Respondents.

Section 10 of the Osun State Electoral Law, 2002 provides as follows:-

“1. Not less than 21 days before the date specified for holding of an Election under this Law the Electoral Commission shall through the Chief Electoral Officer of the State publish in the State, a notice;

(a) stating the date of the election;
(b) and appointing the place at which nomination papers are to be delivered.

2. The Notice shall be further published in each constituency

in respect of which an Election is to be held.

On the other hand, Section 31 of the Electoral Act, 2006, stipulates thus:-

“1. The Commission shall not later than 150 days before the day appointed for holding of an Election under this Act publish a Notice in each State of the Federation and the Federal Capital Territory;

(a) stating the date of the elections; And

(b) appointing the place at which nomination papers are to be delivered.

2. The Notice shall be published in each constituency in respect of which an Election is to be held.

3. In the case of a by-election, the Commission shall, not later than 14 days before the date appointed for the Election publish a Notice stating the date of the Election.”

To resolve this important Issue, the lower Court also considered the provisions of Sections 121 and 122 of the Electoral Act, 2006, which Learned Senior Counsel for the Appellants agrees relate to and/or deal with procedure regulating Election into Local Government Councils and consequently not in dispute. These provisions enact as follows:-

“121. The procedure for filing nominations and the casting and counting of votes for Local Government Council Elections shall be the same as is applicable to other Elections under this Act.

122 (1) If after the expiration of time for the delivery of Nomination papers and the withdrawal of candidature for Election of Councilors under this Act only one Candidate remains duly nominated, that candidate shall be declared returned unopposed.

(2) If after the expiration of time for the delivery of nomination papers and the withdrawal of candidates for Election of Councilors under this section more than one candidate is duly nominated, a poll shall be taken in accordance with the provisions of this Act.

(3) Where at the close of nomination for Election to the office of Chairman, only one candidate:

(a) has been nominated; or

(b) remains nominated by reason of disqualification, withdrawal, incapacitation, disappearance, or death of the other candidates, the State Independent Electoral Commission shall extend the time for

nomination by 7 days.

PROVIDED that where after the extension only one candidate remains validly nominated, there shall be no further extension.”

It should be noted that the second arm of the provisions of Sections 10(1) of the Osun State Electoral Law, 2002 and 31(1) of the Electoral Act, 2006, talk of “appointing the place at which nomination papers are to be delivered” and only the opening paragraphs of the said Sections 10(1) of the Law and 31(1) of the Act provide for the time within which Notice of the Election to which the provisions on nomination of candidates relate, shall be given. It is the contention of Learned Senior Counsel for the Appellants that whereas the provisions relating to nomination in the Act are within the procedure regulating Elections into Local Government Councils in which the National Assembly is constitutionally empowered to make Laws, the giving of Notice of the said Election is not and that since by the provisions of Item 12 of the Second Schedule to the 1999 Constitution, the Osun State House of Assembly has concurrent powers with the National Assembly to enact Laws with respect to Election to a Local Government Council, the 21 days Notice of Election into Local Government Councils in Osun State is valid and not inconsistent with any other Law as there can be no other provision to compete with it. In other words, the contention is that the giving of Notice of Election is not part of the procedure regulating Election into Local Government Councils in the country and as such Section 31 of the Electoral Act, 2006, does not apply. It is difficult to see how the giving of Notice for an Election would not be part of the procedure regulating Election.

However, it is the contention of Learned Senior Counsel for the Appellants in the first Appeal in the Reply Brief filed in response to the 1st - 3rd Respondents’ Brief that going by the decision of this Court in *A. G. of Abia State v. A. G. of the Federation and Ors.* (2002) 3 S.C. 106; (2002) 6 NWLR (Pt. 763) 264 at 374, the provisions of Section 31 of the Electoral Act, 2006, does not apply to Local Government Councils Elections in this country. At that page of the report, this Court, per Kutigi, JSC., (as he then was) who wrote the Leading Judgment declared, amongst others that:

“5. The provisions contained in Sections 15 to 73 and 110 to 122 except Sections 16, 26 to 73, 115(7), 116, 117 and 118 (1)-(7)

of the Electoral Act, 2001, are from the date of the commencement of the Act inconsistent with the provisions of the 1999 Constitution and are accordingly null and void and inoperative.”

Before making the above order, Kutigi, JSC., (as he then was) had at Page 367 held as follows:

“Save and except for Laws for the Federation with respect to ^B
(a) registration of voters, and,

(b) the procedure for regulating Elections to a Local Government Council,

it is the House of Assembly of a State and not the National ^C
Assembly, which has the power to make Laws with respect to matters
relating to or connected with Election to the office of Chairman or
Vice-Chairman of Local Government Council in that State or to the
office of Councilors therein.

“Now, among the sections of that Act allegedly declared null ^D
and void is Section 23 of the Electoral Act, 2001, which provides as
follows:-

“23(1) Not less than 90 days before the date appointed for
holding of an Election under this Act, the Commission shall publish a
Notice in each State of the Federation and the Federal Capital Terri- ^E
tory-

(a) stating the date of the elections; and

(b) appointing the place at which nomination papers are deliv-
ered.

(2) The notice shall be published in each constituency in re- ^F
spect of which an election is to be held.

Provided that in the case of a bye-election, the Commission
shall, not later than 14 days before the date appointed for the Elec-
tion, publish a Notice stating the date of the Election.” ^G

The above provision is similar to the provisions in Section 31
of the Electoral Act, 2006, earlier reproduced. If the Leading Judg-
ment of this Court has in the earlier Judgment by implication held
that Section 23 of the Electoral Act, 2001, contravened the provi-
sions of the 1999 Constitution and consequently null and void in so ^H
far as it relates to Local Government Council Elections in this country
would its successor, Section 31 of the Electoral Act, 2006, not suffer
the same fate?

However, it is important to note that in the concurring Judg-

ments of Uwais, CJN., Ogundare, JSC., Ogwuegbu, JSC., and Ejiwunmi, JSC., in the above cited case, they held contrary views in respect of Section 23 of the Electoral Act, 2001. At Page 395 of the Report, Uwais, CJN., held as follows:-

B *“Section 23 subsections (1) and (2) appears to me to deal with the procedure for holding Elections. I do not see anything wrong with it. I therefore hold it to be valid.”*

While Ogundare, JSC., has this to say, inter alia at Page 441:

C *“I cannot see anything in this section that offends the provisions of the Constitution. My view is that the section is valid and I so hold.”*

The Hon. Justice Ogundare, JSC., followed same up by concluding at Page 449 of the Record thus:

D *“5. I declare that the provisions contained in Sections 15, 20(1) & (4), 21(1), 25, the proviso to 110(1), 111, 112, 113, 114, 115(1)-(6), 119, 120, 121 and 122 of the Electoral Act, 2001, are inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999 and are accordingly null and void and in operative.”*

E *At Page 467, Ogwuegbu, JSC., stated, inter alia:*

“Section 23 is valid. I see nothing wrong with it.”

On his part, Ejiwunmi, JSC., at Page 511 stated his views thus:

F *“4. I declare that save and except for Laws for the Federation with respect to:-*

(a) The registration of voters and

G *(b) The proceedings regulating Election to a Local Government Council, (sic) It is the House of Assembly of a State, and not the National Assembly which has the power to make Laws with respect to matters relating to or connected with Elections to the office of Chairman or Vice-Chairman of a Local Government Council in that State or to the office of Councilors therein.*

H *5. I declare that the provisions contained in Sections 15, 20(1), 20(4), 21(1), 25, the proviso to 110(1), 111, 112, 113, 114, 115(1)-(6), 119, 120, 121, and 122 of the Electoral Act, 2001 are inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999 and are accordingly null and void and inoperative.*

I therefore grant as stated above the claims of the Plaintiffs for the reasons given and the fuller reasons, given in the Judgment of my Learned Brother, Kutigi, JSC.”

On the other hand, Mohammed, JSC., and Kalgo, JSC., both agreed with Kutigi, JSC., (as he then was) with Kalgo, JSC., stating at Page 487 inter alia: B

“In respect of Claim (v) which challenged the validity of Sections 15-73 of Part II and Section 110-122 of Part IV of the Electoral Act, 2001, I hereby declare that Sections 15, 19 (b), 20(1), 21(1), 23, 25 (b), (e), (g), (m), (n), (o) and (p) in Part II and Sections 110 (I) (proviso only), Section 111, Section 112, Section 113, Section 114, Section 115(1) - (6), Section 119, Section 120, Section 121 and Section 122 as null and void and inoperative.....” C

The question then is, what is the legal effect of the obviously conflicting opinions of their Lordships on the status of Section 23 of the Electoral Act, 2001? Which of the two versions should be followed or represent the state of the Law? D

In the case of *Nwana v. F. C. D. A* (2004) 6-7 S.C. 136; (2004) 13 NWLR (Pt. 890) 128 at 140, this Court stated the Law as follows:-

“A concurring Judgment complements, edifies and adds to the Leading Judgment. It could at times be an improvement of the Leading Judgment when the Justices add to it certain aspects which the writer of the Leading Judgment did not remember to deal with. In so far as a concurring Judgment performs some or all the above functions, it has equal force with or as the Leading Judgment in so far as the principle of stare decisis are concerned. However a concurring Judgment is not expected to deviate from the Leading Judgment. A concurring Judgment, as the name implies, must be in agreement with the Leading Judgment. A concurring Judgment which does its own thing in its own way outside the Leading Judgment is not a concurring Judgment but a dissenting judgment.” E
F
G

It is settled Law that dissenting Judgments are not binding and also that the Lead(ing) Judgment of an Appellate Court constitutes the Judgment of the Court concerned and that where there is any inconsistency between a concurring Judgment and a Lead(ing) Judgment, the former would give way to the extent of the inconsistency. See: *Akpoku v. Ilonibu* (1998) 8 NWLR (Pt. 561) 283 at 292. H

We have a situation in which the concurring Judgments of four

of the seven Hon. Justices held a contrary view on a particular point - the validity of Section 23 of the Electoral Act, 2001 as against the Leading Judgment and two other concurring Judgments. Does this mean that the Leading Judgment remains inviolate even on the point in which it holds a contrary view as against the majority of the Justices who sat on the Appeal? I do not think so particularly as the contrary view of the majority in the concurring Judgments is completely in accord with the earlier holding in the Leading Judgment that the National Assembly has power to legislate on registration of Voters and the procedure regulating Elections to a Local Government Council coupled with the fact that the said Section 23 of the Electoral Act, 2001 deals clearly with part of the procedure regulating Elections including Elections to a Local Government Council. I hold the considered view that with regard to the Issue of the validity of Section 23 of the Electoral Act, 2001, the authority to be followed is that expressed by the majority of the concurring Judgments earlier reproduced in this Judgment, and that the opinion on the point expressed in the Leading Judgment together with those who agreed with it become the dissenting opinion on the particular point. I therefore hold the considered view that the principle of a concurring Judgment not being in accord with the Leading Judgment being regarded as a dissenting Judgment equally applies to the Leading Judgment where it fails to agree on a particular point with the majority of the Justices who concurred with the Leading Judgment. The principle cuts both ways to ensure substantial justice.

The above being the case and in view of the similarity between the provisions of Section 23 of Electoral Act, 2001 and Section 31 of the Electoral Act, 2006 it follows that the provisions of Section 31 of the Electoral Act, 2006 applies to the facts of this case, not Section 10 of the Osun State Electoral Law, 2002, which is clearly inconsistent with Section 31 of the Electoral Act, 2006 and by operation of the doctrine of covering the field which has been well discussed in the Leading Judgment and other Judgments of my Learned Brothers, the said Section 10 of the Osun State Electoral Law, 2002 is null and void.

As regards the second Appeal, it is very clear that the Appellants were fully aware of the legal battle raging between the Parties in the Trial Court and the lower Court but chose not to participate to

defend whatever right they claim to enure in their favour. They rather left the 4th and 5th Respondents to bear the blunt of the attack while defending the status quo. I have always held the view that Fair Hearing revolves around opportunity to be heard being offered to a person aggrieved or to be adversely affected by the decision of the Court, body or tribunal. Once that opportunity exists it is left for the party, person or body to utilize same in the protection of his rights or ventilation of his grievances. Where he fails or neglects to do so, he cannot later complain of denial of the Right of Fair Hearing. The Appellants were aware of the Suit soon after the Election and their swearing in as Chairmen but did nothing particularly as the decision of the Trial Court was in their favour. They were equally aware of the Proceedings in the lower Court but refused or neglected to participate. They only woke up when the decision of the lower Court was pronounced against them. To me, it is now too late to complain particularly as their case could not have been different from that of the 4th and 5th Respondents as demonstrated in the Issues before this Court - except Appellants' Issue 1 herein being considered.

The second point I want to comment on is the principle that the nullification of an enactment does not affect rights and liabilities that might have accrued under it and prior to the nullification. The above principle remains good law but the question is whether it applies to the facts of this case.

I hold the considered view that the principle applies herein in the sense that whatever salary, privileges and/or benefits the Appellants in the second Appeal might have earned or enjoyed prior to the nullification of the enactment under which their Election was conducted cannot be taken away following the nullification. These are the rights that enured to the Appellants following the election in question. The nullification also does not affect the status of the Appellants as Chairmen of their respective Local Government Councils during the life span of the enactment under which they were elected i.e. prior to the nullification.

The above situation is however different from the argument that the nullification of the law under which the Appellants were elected should not affect their remaining in the office to which they were elected under the annulled enactment. To me, to agree with the Appellants on that point will be stretching the Application of the prin-

ciple to a breaking point. It is like putting something on nothing and expecting it to stand.

In Election matters, where an Election is nullified for any reason, a re-election is usually ordered and the nullification usually does not affect official acts of the officers/persons whose Election had been nullified. To say that the people elected under a law which has been indefinitely or till the end of their tenure assigned by law so annulled is not only contrary to common sense but would amount to allowing the Appellants to keep what had been found to have been gotten wrongly or illegally.

Section 149 of the Electoral Act, 2006 for instance recognizes, the validity of the Election of the person whose Election is subsequently annulled to continue to remain in that office until either the determination of this Appeal against the decision nullifying his Election, or where he does not appeal, until the expiration of the time within which he ought to have filed his Appeal. This means that everything done within that time remains validly done and cannot be adversely affected by the nullification.

The said Section 149 of the Electoral Act, 2006 provides as follows:

“149 (1) If the Election Tribunal or the Court, as the case may be, determines that a candidate returned as elected was not validly elected, then if Notice of Appeal against that decision is given within 21 days from the date of the decision, the candidate returned as elected shall, notwithstanding the contrary decision of the Election Tribunal or the Court, remain in office pending the determination of the Appeal.

(2) If the Election Tribunal or the Court, as the case may be, determines that a candidate returned as elected was not validly elected, the candidate returned as elected shall, notwithstanding the contrary decision of the Election Tribunal or the Court, remain in office pending the expiration of the period of 21 days within which an Appeal may be brought.”

However, having regards to my resolution of the only Issue, I consider germane in this Appeal against the Appellants in the first Appeal which is substantially the same as Issue 2 in the second Appeal, it is clear that both Appeals are without merit and should be

dismissed. It is for the above and the fuller reasons assigned in the Leading Judgment of my Learned Brother, Muntaka-Coomassie, JSC., that I too dismissed the Appeals for lack of merit and abide by all the consequential Orders made therein including the Order as to costs.

B

TABAI JSC

I have had the benefit of reading in advance, the leading judgment of my learned brother, Muntaka-Coomassie, JSC., in the two appeals and I entirely agree with the conclusions therein that both appeals lack merit. In the said leading judgment my learned brother has, in his characteristic manner, narrated the facts in full and very comprehensively dealt with the various issues raised.

By way of emphasis let me comment briefly on the Appellants' 1st issue in the 1st appeal and the Appellants' 2nd issue in the second appeal. The Appellants' 1st issue as formulated by Tayo Oyetibo, SAN., is:-

"Whether the Court of Appeal was right in law in declaring section 10 of the Electoral Law, 2002 of Osun State unconstitutional null and void on the grounds of inconsistency with section 31 of the Electoral Act, 2006."

And the 2nd issue in the 2nd appeal as couched by Yusuf O. Ali, SAN., is:

"Whether in fact, deed or law the provisions of section 10 of the Osun State Electoral Law, 2002 was in fact inconsistent with or in derogation of the provisions of section 31 of the Electoral Act 2006, the provisions of the constitution or any other statute for that matter."

Section 10 of the Osun State Electoral Law, 2002 provides:

"1. Not less than 21 days before the date specified for holding of an election under this law the Electoral Commission shall through the Chief Electoral Officer of the State publish in the State a notice;

(a) Stating the date of the election;
(b) And appointing the place at which nomination papers are to be delivered

"2. The notice shall be further published in each constitu-

ency in respect of which an election is to be held”

Section 31 of the Electoral Act, 2006, on the other hand provides:

“1. The Commission shall not later than 150 days before the day appointed for holding of an election under this Act publish a Notice in each State of the Federation and the Federal Capital Territory:

(a) Stating the date of the elections: And

(b) appointing the place at which nomination papers are to be delivered.

2. The Notice shall be published in each constituency in respect of which an election is to be held.

3. In the case of a bye-election, the Commission shall, not later than 14 days before the date appointed for the election publish a Notice stating the date of the election.”

As can be seen from the above provisions while by Section 31 of the Electoral Act, 2006 the Electoral Commission is required to publish, not later than 150 days before the day appointed for holding an election, a Notice (a) stating the date of the election and (b) appointing the place or places at which nomination papers are to be delivered, Section 10 of the Osun State Law provides for only 21 days Notice. There is therefore inconsistency between Section 31 of the Electoral Act, 2006 and Section 10 of the Osun State Electoral Law, 2002.

By the doctrine of covering the field where the National Assembly has enacted a law on a particular subject, a State House of Assembly cannot enact a law on the same subject which is in conflict or inconsistent with the provisions of the enactment of the National Assembly. And where there is such an inconsistency between the provisions of any law enacted by the National Assembly and that enacted by the House of Assembly of a State, the law enacted by the National Assembly shall prevail and the law enacted by the House of Assembly of a State shall, to the extent of the inconsistency, be null and void. This is in tune with the provisions of section 4(5) of the 1999 Constitution which prescribes:-

“4(5) If any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other

law shall to the extent of the inconsistency be void.”

This articulates the doctrine of covering the field referred to and relied upon by Uwais, (CJN) in A. G. Abia State v. A. G. Federation (2002) 3 S.C. 106; (2002)6 NWLR (Pt. 763) 264 at 391.”

In apparent reliance on the above principle embodied in section 4 (5) of the 1999 Constitution the Court below nullified the provisions of Section 10 of the Osun State Electoral Law, 2002 on the ground that it is inconsistent with the provisions of Section 31 of the Electoral Act, 2006. Mr. Falana, of counsel for the Respondents, submitted in the Respondents’ brief that the decision of the Court below cannot be faulted and relied on A. G. Abia v. A. G. Federation (supra). The issue therein was whether Section 23 of the Electoral Act, 2001, which prescribed for a Notice of not less than 90 days before the date appointed for the holding of an election (a) stating the date of the election; and (b) appointing the place at which nominating papers are delivered was unconstitutional. In paragraph 4.10 of the Respondents’ brief, Mr. Falana relied specifically on the concurring judgment of Uwais, CJN., at page 395 where he held:

“Section 23 sub-sections (1) and (2) appears to me 25 to deal with the procedure for holding elections. I do not see anything wrong with it. I therefore hold it to be valid.”

And in paragraph 4.11 of his brief he further relied on a portion of the concurring opinion of Ogundare, JSC., at page 441 where he said:-

“Another section of the Electoral Act attached specifically by Chief Williams is Section 23 which reads:-

Section 23(1) Not less than 90 days before the date appointed for holding of an election under this Act, the Commission shall publish a Notice in each State of the Federation and the Federal Capital Territory

(a) stating the date of the elections, and
(b) appointing the place at which nomination papers are delivered

(2) The notice shall be published in each constituency in respect of which an election is to be held, provided that in the case of a bye-election, the Commission shall, not later than 14 days before the date appointed for the election, publish a notice stating the date of the election.

I cannot see anything in this section that offends the provisions of the Constitution. My view is that the section is valid and I so hold."

In the Appellants' Reply Brief Mr. Oyetibo, SAN., reacted to the above submission by relying also on the same *A. G Abia State v. A. G. Federation* (supra). He relied however only on the leading judgment of Kutigi, JSC., (as he then was) where at page 374 he said:-

"The provisions contained in Sections 15 to 73 and 110 to 122 except sections 16, 26 to 73, 115(7) 116, 117 and 118 (1) - (7) of the Electoral Act, 2001 are from the date of commencement of the Act inconsistent with the provisions of the 1999 Constitution and are accordingly null and void and inoperative."

The learned Senior Counsel while relying on the above pronouncement of Kutigi, went further to submit that the pronouncements of Uwais and Ogundare relied upon by the Respondents, though contained in their concurrent and supposedly supporting judgments, are inconsistent with the leading judgment and amount in effect to dissenting opinions and which therefore are not binding. He placed reliance on *Akpoku v. Ilombu* (1998) 8 NWLR (Pt. 56) 283 at 292; *Nwana v. FCDA* (2004) 6-7 S.C. 136; (2004) 13 NWLR (Pt. 889) 128 at 140; *Orugbo Vanor v. Una & Ors.* (2002) 9-10 S.C. 61; (2002) 16 NWLR (Pt. 792) 175; *FGN v. Zebra Energy Ltd.* (2002) 12 S.C. (Pt. II) 136; (2002) 18 NWLR (Pt. 798) 162 and *Bamaiyi v. The State* (2001) 7 S.C. (Pt. II) 62; (2001) 8 NWLR (Pt. 715) 270. Part of the arguments of learned Senior Counsel runs thus:

"It is submitted that a concurring judgment cannot supplant the lead judgment. Indeed, where there is inconsistency between a concurring judgment and the lead judgment the former would give way to the extent of the inconsistency ... The judgment of Uwais, CJN. (as he then was) and Ogundare, JSC., heavily relied upon by the Respondents are inconsistent with the lead judgment of Kutigi, JSC. At best, they amount to dissenting judgment. A dissenting judgment however powerful, learned and articulate is not the judgment of the Court or tribunal and it is therefore not binding."

The issue raised here is quite novel. In a case heard by plurality of judges the judgment emanating therefrom is said to be unanimous when all the judges agree on *the resolution of the issue or issues presented and the ultimate decision on the respective rights*

and obligations of the parties thereto. The usual practice is that one of the judges is assigned the duty of writing the lead or leading judgment with the others writing concurring opinions. Where however all the judges fail to agree on the resolution of the issues and the ultimate decision on the rights and obligations of the parties, then the decision of the majority (made up of the lead and concurring opinions) represents the judgment of the Court or tribunal and which alone is binding on the parties. And as the name connotes a concurring opinion or judgment must perforce agree with and support the lead judgment on all the material issues of law and facts deliberated upon and decided. On the other hand, the decision of one or more of the judges in a case denoting explicit disagreement with and contrary to the decision of the majority is the minority or dissenting judgment and no matter how well researched and written it has no binding force on the parties.

At this juncture it is necessary to see the opinion of each of the justices in A. G. Abia v. A. G. Federation (supra) on the legality of Section 23 of the Electoral Act, 2001. It was a full Court of seven Justices presided over by Uwais, CJN., and whose pronouncement at page 395 I have already noted. I have also already noted those of Kutigi and Ogundare at pages 374 and 441 respectively of the report. The pronouncement of Ogwuegbu is at page 467 of the record. He simply held:

“Section 23 is valid. I see nothing wrong with it.”

Mohammed, JSC., agreed with the conclusions in the leading judgment without any specific reference to and comments upon the validity or otherwise of Section 23 of the Electoral Act, 2001.

Kalgo, JSC., was more specific on the validity of Section 23 of the Electoral Act, 2001. In the concluding part of his judgment at page 487 of the report, he granted the reliefs claimed in the following terms:-

“In the final analysis, I grant claims (i), (ii) (b) to (e), (iii) and (iv) and dismiss claims (ii) (a) and (vi) of the Plaintiffs. In respect of claim (v) which challenged the validity of Sections 15-73 of Part II and Sections 110-122 of Part IV of the Electoral Act, 2001, I hereby declare that Sections 15, 19 (b) 20 (1), 21(1), 23, 25 (b), (e), (g), (m), (n), (o), and (p) in Part II and Section 110 (1) (proviso only) Section 111, Section 112, Section 113, Section 114, Section 115 (1)

-(6), Section 119, Section 120, Section 121 and Section 122 as null and void and inoperative.”

He thus declared Section 23 of the Electoral Act null and void and inoperative.

In his own judgment, Ejiwunmi, JSC., granted some of the
B reliefs claimed and dismissed others. With respect to the reliefs claimed he concluded at page 510 of the Report as follows:

*“To conclude, and for the avoidance of doubt, I hereby grant
C Plaintiffs’ claims (i), (ii) (b) - (e) (Hi), (iv) and part of (v). I dismiss
claims (ii) (a) and (vi). I find Sections 15, 20 (1) and (4), 21(1) and
25, the proviso to Section 110(1), Sections 111, 112, 113, 114, 115
(1)-(6), 119, 120, 121 and 122 of the Electoral Act, 2001 invalid.”
And still by way of conclusion at page 511 of the report he declared:-*

*“I declare that the provisions contained in Sections 15, 20 (1),
D 20(4), 21(1), 25, the proviso to 110(1) 111, 112, 113, 114, 115
(1)-(6), 119, 120, 121 and 122 of the Electoral Act 2001 are incon-
sistent with the provisions of the Constitution of the Federal Republic
of Nigeria, 1999 and are accordingly null and void and inoperative.”*

And so in the consideration of Ejiwunmi, JSC., there was nothing
E wrong with Section 23 of the Electoral Act, 2001 and it was therefore
not listed as one of the provisions of the Act which he nullified.

In the case therefore while Uwais, Ogundare, Ogwuegbu and
Ejiwunmi saw nothing unconstitutional with Section 23 of the Elec-
toral Act, 2001 and so held, Kutigi, Mohammed and Kalgo, on the
F other hand considered the provision in conflict with the constitution
and nullified it. Thus, by a majority of four to three the provision was
held to be valid and that represents the judgment of this court in the
case. It is true that Kutigi wrote the leading judgment with which all
G the concurring judgments must, of necessity, be in agreement. But
here is a peculiar situation where, on the issue of validity of Section
23 of the 2001 Electoral Act, the pronouncement in the leading Judg-
ment is in the minority. The question now is whether on this specific
issue the minority judgment can be held to represent the binding
H judgment of the court simply because the leading judgment of Kutigi
happens to be one of them? I shall answer this question in the nega-
tive. Although Kutigi’s judgment is the leading judgment his decision
on the validity or not of Section 23 of the Electoral Act is a minority
opinion which therefore does not represent the judgment of the court.

Orugbo & Anor. v. Bulara Una & Ors. (supra) cited by learned Senior Counsel for the Appellant supports and stated the principle that in any case heard by plurality of judges it is the majority opinion that represents the judgment of the court. The result is that Section 23 of the Electoral Act, 2001, remains valid.

It is a common ground that Section 23 of the Electoral Act, 2001 is in pari-materia with-Section 31 of the Electoral Act, 2006. And in view of the analysis and conclusion above about the legality of Section 23 of the Electoral Act, 2001 as decided in A-G. Abia v. A-G. Federation (supra) I hold that Section 31 of the Electoral Act, 2006 does not contravene the provisions of the 1999 Constitution. Section 10 of the Electoral Law Osun State is clearly inconsistent with Section 31 of the Electoral Act, 2006. And by virtue of the provisions of Section 4 (5) of the Constitution, Section 31 of the Electoral Act 2006 prevails and Section 10 of the Osun State Electoral Law, 2002 was rightly declared null and void by the court below for inconsistency.

The result is that the appeal fails and should be dismissed. For the foregoing reasons and the fuller reasons contained in the leading judgment of my learned brother, I also dismiss both appeals. I also abide by the consequential orders contained in the leading judgment.

MUHAMMAD JSC

My Learned Brother, Coomassie, JSC., afforded me the opportunity to read in draft, his Leading Judgment, just delivered. The facts of the case have ably been set out by my Learned Brother in the Leading Judgment. I do not intend to repeat same except where I consider it necessary for clarification. It is to be noted that there are two sets of Appellants in this Appeal: (i) the original Appellants who pursued the matter from the High Court of Justice of Osun State (Trial Court) down to this Court and these initially, were three; Osun State Independent Electoral Commission, Osun State House of Assembly and the Attorney-General and Commissioner of Justice of Osun State. They were the Defendants at the Trial Court. They were taken to the Trial Court by the Plaintiffs/Respondents herein in the persons of Action Congress (AC); All Nigerian Peoples Party (ANPP) and the National Conscience Party (NCP).

The 2nd set of Appellants, who were never a party to the matter on hand at the Trial Court and the Court below joined the matter at appeal level to this Court. They sought for leave from the Court below and they were granted same to join as interested Parties to the Appeal coming to this Court. They are the Chairmen of the 31
 B Local Government Area Councils of Osun State.

The bone of contention in this Appeal is the validity or otherwise of Section 10 made by the Osun State House of Assembly in the exercise of its power to make Law on Election matters relating to
 C Local Government Councils in Osun State. Section 10 of the Osun State Electoral Law deals with time limit within which to publish Notice of an Election scheduled for that State. The section provides:

*“1. Not less than 21 days before the date specified for holding of an Election under this Law the Electoral Commission shall, through
 D the Chief Electoral Officer of the State, publish in the State, a notice*
(a) stating the date of the election; and
(b) appointing the place at which nomination papers are to be delivered

*2. The Notice shall be further published in each Constitu-
 E ency in respect of which an Election is to be held,”*
(underlining supplied for emphasis)

The Electoral Act of 2006, on the other hand, makes a provision (almost similar but distinct) on the same subject matter. It provides:

*“31(1) the Commission shall not later than 150 days before
 F the day appointed for holding of an Election under this Act publish a Notice in each State of the Federation and the Federal Capital Territory.*

(a) stating the date of the Election; and
(b) appointing the place at which nomination papers are to be delivered.

2. The notice shall be published in each Constituency in respect of which an election is to be held.

*3. In the case of a bye-election, the Commission shall, not
 H later than 14 days before the date appointed for the Election, publish a notice stating the date of the Election.”*

Now, here are two Laws, similar in nature and subject matter but different in wordings and effect. In the Constitution of the Fed-

eral Republic of Nigeria, 1999, provisions have been made which accommodate/contemplate of a situation(s) where two separate and independent bodies/authorities, operating under the same Federation can each legislate on same subject. In the present situation, we have the National Assembly and a State Assembly legislating concurrently on the same subject matter as contained in both Section 10 of the Osun State Electoral Law and Section 31 of the Electoral Act, 2006. This has been made possible by Paragraphs 11 and 12 of the Concurrent Legislative List contained in Part II of the Second Schedule to the Constitution. It provides as follows:

“11. The National Assembly may make Laws for the Federation with respect to the registration of voters and the procedure regulating Elections to a Local Government Council.

12. Nothing in Paragraph 11 hereof shall preclude a House of Assembly from making Laws with respect to Election to a Local Government Council in addition to but not inconsistent with any Law made by National Assembly.”

(underlining supplied for emphasis)

This is not a novelty to the Constitution. It is intande with the legislative system in any federated democracy. In addition to the exclusive Legislative Power given to the National Assembly by Part 11 of the Constitution, particularly by Section 4 thereof, the National Assembly has been conferred with additional power to legislate on some aspects which have been classified under the concurrent legislative list. Under the same Section 4, the Constitution provides as follows:

“(4) In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make Laws with respect to the following matters, that is to say -

(a) any matter in the concurrent legislative list set out in the first column of Part 11 of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and

(b).

(5) If any Law enacted by the House of Assembly of a State is inconsistent with any Law validly made by the National Assembly, the Law made by the National Assembly shall prevail, and that other Law shall to the extent of the inconsistency be void.”

Equally, the same Section 4 of the Constitution provides for the States,

as follows:

“(7) The House of Assembly of a State shall have power to make Laws for the peace, Order and good Government of the State or any part thereof with respect to the following matters, that is to say

-
- B *(a) any matter not included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to this Constitution;*
- (b) any matter included in the concurrent Legislative List set out in the first column of Part 11 of the Second Schedule to this*
- C *Constitution to the extent prescribed in the second column opposite thereto; an*
- (c).....”*

It is thus legal and legitimate for both the National Assembly and a State House of Assembly to legislate on same subject matter D provided there is no inconsistency from the State Law. Where there is inconsistency however, the State Law will be declared null and void to the extent of its inconsistency, and in order not to create any vacuum, resort will be had to the old jurisprudential principle of covering the field, that is to say, that since there is a Federal Legislation E on the subject matter, it is not necessary for a federating state to legislate on that area and the provision made by the National Assembly covers the subject matter in question. In the present Appeal, Section 10 of Osun State Electoral Law, 2002, provides for 21 days for publicizing a Notice of an Election (Local Government Area Councils’ Election) whereas the Electoral Act (made by the National Assembly) had already made provision of 150 days for publicizing Notice of an Election in any State and the Federal Capital Territory. In the circumstance, it is the latter that will prevail and the former to be F declared null and void. I find support in what Uwais, Chief Justice of Nigeria said in the case of A. G. Abia State v. A. G. Federation (2002) 3 S.C. 106; (2002) 17 WRN 1 at 99, thus:

“I agree that where the doctrine of covering the field applies it is not necessary that there should be inconsistency between the Act H of the National Assembly and the Law passed by a House of Assembly? The fact that the National Assembly has enacted a law on the subject is enough for such Law to prevail over the law passed by a State House of Assembly but where there is inconsistency, the State Law is void to the extent of the inconsistency.”

It is thus clear that the essence of the doctrine of covering the field is to support the principles of hierarchy of legislations as a practical demonstration of the supremacy of the Federal Act, when Federal and State Legislations conflict on same subject matter. Therefore, as Section 10 of the Osun State Electoral Law is inconsistent with Section 31 of the Electoral Act (a Federal Legislation), the former must suffer the inevitable effect of its being null and void. Any Action which resulted from that void Law is itself void and of no legal consequence.

It is my humble view, that the Court below was quite right in its decision by holding the provision of Section 10 of the Osun State Electoral Law as unconstitutional, null and void. The Court below is equally right in holding that the Local Government Election conducted on 15th December, 2007, which was conducted pursuant to Section 10 of the Osun State Electoral Law, relied upon by the 1st Respondent in giving 21 days Notice of the said Election, was void and was rightly set aside by the Court below.

In conclusion, I agree with the Learned Counsel for the 1st-3rd Respondents in his submission that the Appellants who are Chairmen of the Local Government Councils in Osun State stood by and allowed the 4th and 5th Respondents to defend their interest at the High Court and the Court of Appeal. They did not complain when the High Court delivered its Judgment on December 14th, 2007, which favoured them. However, the Appellants suddenly realized that they were not given Fair Hearing when the Judgment of the Court of Appeal did not favour them. The consequence is that, having stood by and allowed the 4th and 5th Respondents to fight the battle for them, they are, in law, caught by the doctrine of estoppel by standing by. The Law helps the vigilant and not the indolent person.

For this and the fuller reasons given by my Learned Brother, Coomassie, JSC., in his Judgment, I, too, find no merit in this Appeal and it is hereby dismissed by me. I abide by all the consequential orders contained in the Leading Judgment including Order as to costs.