

**SUPREME COURT OF NIGERIA**  
9TH NOVEMBER, 2011. SC. 350/2011  
**CORAM:- F. F. TABAI, C. M. CHUKWUMA-ENEH, B.**  
**RHODES-VIVOUR, N. S. NGWUTA,**  
**M. U. PETER-ODILI, JJSC**

1. MALLAM ABUBAKAR ABUBAKAR  
2. GARBA KAMBA RAIBIU ..... APPELLANTS  
3. CONGRESS FOR PROGRESSIVE  
CHANGE

AND

1. SAIDU USMAN NASAMU  
2. IBRAHIM KHALIL ALIYU  
3. PEOPLES DEMOCRATIC PARTY  
4. INDEPENDENT NATIONAL ..... RESPONDENTS  
ELECTORAL COMMISSION  
5. INSPECTOR GENERAL OF POLICE  
6. COMMISSIONER OF POLICE,  
KEBBI STATE

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ELECTION PETITIONS - Appeals - Application preceding pre hearing notice - Mode of presentation - Since no mode is stipulated - Appellant's letter is valid under Electoral Act 2010 as amended paragraph 18(1) 1<sup>st</sup> Schedule (H1)

JURISDICTION - Determination - Basis - It is determined based on plaintiff's claim or petition - Which must come within the ambit of the law (H2)

**FACTS**

At the Kebbi State Gubernatorial Elections held in the State on the 26th day of April 2011, 1st and 2nd appellants/1<sup>st</sup> and 2<sup>nd</sup> petitioners represented 3rd appellant/3<sup>rd</sup> petitioner for the offices of Governor and Deputy Governor respectively. 1st and 2nd respondents represented 3rd respondent for the offices of Governor and Deputy Governor. The 4th respondent is the regulatory body responsible for conducting elections in Nigeria. After the election, 4th respondent declared 1st respondent the winner of the election. Ap-

pellants were dissatisfied with the results and quickly filed a petition at the Kebbi State Governorship Election Petition Tribunal. At the close of the pleadings, appellants applied to the Tribunal for the issuance of Pre-hearing Notice. He applied by writing a letter to the Tribunal through the Secretary of the Tribunal. The Tribunal gave approval and the Secretary issued forms TF 007 and TF 008 to appellants. The date for the Pre-hearing session was fixed for the 25th day of July 2011. On being served the Notice for the holding of the pre-hearing session 1st and 2nd respondents filed a Motion challenging the mode by which appellants activated the pre-hearing session. 1st and 2nd respondents' argument before the Tribunal was that by the provisions of paragraphs 18(1) - (5) and 47(1) - (3) of the 1st Schedule to the Electoral Act, 2010 (as amended), appellants ought to have activated the Pre-hearing session by Motion on Notice and not by letter. Appellant argued that a letter would suffice. The Tribunal agreed with the appellant, finding no merit in the application.

Being dissatisfied, 1st and 2nd respondents appealed to the Court of Appeal. The court allowed the appeal and made the following orders:

1. Set aside the ruling of the Tribunal delivered on 27th July 2011
2. Ruled that the letter dated 14th June 2011 was not an application within the provision of paragraph 18(1) and 47(2) to the first schedule of Electoral Act 2010 (as amended for the issuance of Pre-hearing Notice).
3. The failure of the 1st, 2nd and 3rd Respondents/Petitioners to apply for the issuance of Pre-hearing Notice in strict compliance with the provisions of paragraph 18(1) to the First Schedule of Electoral Act 2010 (as amended) constituted an abandonment of the petition and therefore liable to be dismissed.
4. The Petition is accordingly dismissed.

Aggrieved by the ruling, appellants appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

*"(i) Whether the lower court was right in holding that paragraph 47 (2) of the First Schedule to the Electoral Act 2010 (as amended) is applicable to applications envisaged under paragraph 18(1) of the schedule.*

*(ii) Whether the lower court was right when it held that the Appellants'/Respondents' letter to the Tribunal of 14/06/2011 for is-*

*suance of pre-hearing session notices does not qualify as an application under paragraph 18(1) of the First Schedule to the Electoral Act 2010 (as amended).*

*(iii) Whether the lower court was right in holding that the Appellants as petitioner had abandoned their petition and consequently dismissing same.*

*(iv) Whether the lower court was right in holding that the application for issuance of pre-hearing notice by letter other than a motion is not an irregularity which is not fatal to the petition."*

**HELD** (Allowing the appeal and upholding the judgment of the Tribunal per **TABAI JSC**)

***Appeals - Application preceding pre hearing notice***

1. Next is paragraph 18(3) which applies only to the respondent to the petition in the event of the petitioner's failure to apply for the issuance of pre-hearing session notice. Under this provision, the Respondent to the petition is at liberty to pursue either of two options open to him. He may, like the Petitioner, bring an application for the issuance of pre-hearing session notice. In such a situation the Respondent has no obligation to serve the application on the petitioner, it being in the nature of an ex-parte application. Alternatively and most importantly, he may bring an application by way of a motion which shall be served on the Petitioner to dismiss the petition. In my view, the purpose and necessary intendment of the provision is quite clear. There is no ambiguity whatsoever as to the distinction between "an application" simpliciter and a "motion". I agree with learned Senior Counsel for the Petitioners/Appellants that the distinction is deliberately set out in the provision. The provision separates the period of the pre-hearing session from the period immediately preceding it. The clear meaning of the provision is that at or during the period of the pre-hearing session all applications must be by way of a motion. But at the period before the commencement of the pre-hearing session, an application need not be by a motion. It can be in the form of a letter as was done in this case.

I hold therefore that in the absence of any special mode by which an application can be made at the period preceding the commencement of the pre-hearing session, the Appellant's letter dated the 14th June, 2011 is an application within the meaning of para-

graph 18(1) of the First Schedule to the Electoral Act 2010 (as amended). The letter constitutes a sufficient compliance with the requirements of the provision. (p. 2296 H)

***JURISDICTION - Determination - Basis***

- B 2. Jurisdiction is a creation of the Constitution and statute and the settled principle of law is that it is the claim or petition that determines its competence. The claim or petition must come within the ambit of the law that has conferred the jurisdiction. (p. 2298 G)

C ***NOTABLE POINTS OF INTEREST***  
***RHODES-VIVOUR JSC***

*1. Ordinary meaning should be given to unambiguous words used in statutes*

- D And so, where the words of a Statute are clear and free from ambiguity, they should be accorded their ordinary plain meaning and it is not for the judge to put glosses on them or to read into them meanings which render them artificial. (p. 2300 G)

E ***2. Miscarriage of justice - Meaning***

Miscarriage of justice varies from case to case. The facts and circumstances of the case must be examined. It could mean failure of the court to do justice, or justice mis-applied. Put in another way it is failure of justice. In effect there is miscarriage of justice if the order of

- F the court is prejudicial or inconsistent with the right of a party.  
 (p. 2304 A)

***REPRESENTATION***

- G Kola Awodein, SAN with F. Otaru, SAN, Ben Igbanoi, L. Tolani, S. Karegbo, A. Erhiabor, Chima Okereke, O. Adegboye and S. Sule, for the Appellants

Yusuf O. Ali, SAN with D. D. Dodo, SAN, Dr. Chief Amaechi Nwaiwu, SAN, Y. C. Maikyau, SAN, Dr. W. Egbewole, W. Agunbiade, B.

- H Sobanjo, K. K. Eleja, A. Mas'ud, S. A. Oke, W. Ismail, A. Akoja, S. O. Babakebe, K. T. Suleiman (Miss), Z. Onuaguluchi, D. Kwaki, T. E. Akintade (Miss), E. Onah, K. O. Lawal, N. Bon-Nwakanma (Mrs.), I. Okechukwu, G. O. Diugwu, V. Uche Obi, N.A. Dangiri, M. M. Jugu and J. Alobo, for the 1st - 3rd Respondents.

Ahmed Raji with M. Abu and Adegboyega Adewole, for the 4th Respondent

M. I. Pama for the 5th and 6th Respondent

**CASES REFERRED TO**

- Okereke v. Yar'Adua (2008) 12 NWLR (pt. 1100) 95 B  
Maitsidau & Anor. v. Chidari & Ors. (2008) 16 NWLR (Pt. 114) 553  
Garba Ado v. Mekara (2009) 9 NWLR (Pt. 1147) 491  
Saude v. Abdulahi (1989) 4 NWLR (Pt. 116) 387 at 442  
Schroder v. Major (1989) 2 NWLR (Pt. 101) 1 AT 19 C  
Abubakar v. Yar'Adua (2008) 4 NWLR (Pt. 1078) 465 at 511  
Chukwuogor vs. Chukwuogor (2007) ALL FWLR (pt. 349) 1154  
Uzodinma v. Udenwa (2004) 1 NWLR (Pt. 854) 308  
Nichizawa v Jethwani (1984) 12 SC 235  
Nneji v Chukwu (1988) 6 SCNJ 132 D  
Bello v A-G Oyo State (1986) 12 SC 111  
Mobil v. F.B.I.R. (1977) 3 SC 53  
Toriola v. Williams (1982) 7 SC 27  
Ifezue v Mbadugha (1984) 1 SCNL 427  
Oladija Sanusi v Oreitan I. Ameyogun (1992) 4 NWLR (Pt.237) 527 E

**BOOK REFERRED TO**

Oxford Advanced Learners Dictionary

**LEAD JUDGMENT BY TABAI JSC**

F

The originating process in this appeal is the petition filed at the Governorship Election Tribunal Birnin Kebbi. It was dated the 18th May, 2011. The petitioners were the appellants at the court below and are the 1st, 2nd and 3rd Respondents herein. Sequel to this petition a number of other processes were filed and exchanged by the parties.

The petitioners addressed a letter to the Honourable Tribunal. It is dated 14th June, 2011. Its heading  
“APPLICATION FOR THE ISSUANCE OF PRE-HEARING NOTICE”  
The said letter states:-

*“Pleadings have been concluded as the Tribunal has served all the respondents with copies of the petition and the 1st - 6th respondents have served us with their replies to the petition. We have equally*

*filed and served our petitioners replies to the respective replies.*

*Accordingly, we are humbly applying for the issuance of pre-hearing notice pursuant to paragraph 18 (1) and (2) of the First Schedule to the Electoral Act 2010 (as amended). We undertake to pay the cost of this application as assessed."*

B (See: page 333 of the record.)

On behalf of the 1st and 2nd respondents an application dated the 22nd of June, 2011 was filed for an order dismissing the petition in its entirety and setting aside as null and void and of no effect whatsoever, the notice of hearing purportedly issued at the instance of the petitioners. The grounds upon which the dismissal was sought are stated therein to be as follows:-

C (a) Pleadings were exchanged between the parties with the petitioners' reply filed at the close of pleadings on the 12th day of June 2011.

(b) The petitioner's reply was served to the 1st and 2nd respondents on the 13th of June, 2011.

(c) The petitioners had 7 days after the 12th June, 2011 to apply for the issuance of pre-hearing Notice but the petitioners did not do so.

(d) The petitioners' application for the issuance of pre-hearing Notice was made vide a letter dated 14th day of June, 2011 delivered to the Tribunal on the 15th of June, 2011.

F (e) No application for the issuance of pre-hearing Notice was made by the petitioners in accordance with the Electoral Act 2010 (as amended).

G (f) By the provisions of paragraph 47(2) of the First Schedule to the Electoral Act 2010 (as amended) all applications must be by motion supported by affidavit. (See pages 357 - 358 of the record).

H On the same day an identical application was made on behalf of the 3rd respondent (PDP). (See pages 376-379 of the record). Each of the application was supported by an affidavit of eleven paragraphs. In reaction, the petitioners filed a 24 paragraph counter affidavit. The 1st and 2nd respondents, the 3rd respondent and the petitioners submitted written addresses.

In its considered ruling on the 27/7/2011 the Applications for dismissal were refused and same dismissed. The 1st, 2nd and 3rd respondents were not satisfied with the decision and proceeded on

appeal to the Court of Appeal by their Notice of appeal dated 10th August, 2010. Therein the parties filed and exchanged their briefs of argument. In its considered judgment on the 23rd of September, 2011 the appeal was allowed. In the concluding paragraph the Court of Appeal, per Jimi Olukayode Bada, JCA stated as follows:

*“In the final analysis; it is my view that this appeal succeeds and it is allowed. Accordingly, I make the following orders:-*

*(1) The Ruling of the Governorship Election Petition Tribunal delivered on the 27th July, 2011 is hereby set aside.*

*(2) The letter dated 14th June, 2011 was not an application within the provision of paragraph 18 (1) and 47 (2) to the First Schedule of the Electoral Act 2010 (as amended) for the issuance of pre-hearing Notice.*

*(3) The failure of the 1st, 2nd and 3rd Respondents/Petitioners to apply for the issuance of Pre-hearing Notice in strict compliance with the provision of paragraph 18(1) to the First Schedule of the Electoral Act 2010 (as amended) constituted an abandonment of the petition and therefore liable to be dismissed.*

*(4) The Petition is accordingly dismissed.”*

The petitioners were aggrieved by the decision and have come on appeal to this Court. The Notice of appeal was filed on the 26th September, 2011. It raised eight grounds of appeal. The parties have through their counsel, filed and exchanged their briefs of argument. The Appellants’ brief was prepared by Kola Awodein, SAN. It was filed on the 5th October, 2011. There are also Appellant’s reply, brief to the 1st, 2nd and 3rd respondents’ brief and appellants’ reply, brief to the 4th respondents’ brief. They were also prepared by Kola Awodein, SAN and both were filed on the 31/10/2011.

The 1st - 3rd respondents brief was prepared by Yusuf O. Ali, SAN. It is dated the 28/10/2011 and was filed on the same day. The 4th respondents’ brief was prepared by Wale Balogun. It is dated and filed on the 28/10/2011. The brief of the 5th and 6th respondents was prepared by Abubakar Abdullahi. It was filed on the 3/11/2011.

In the appellants’ brief the following four issues for determination were formulated by Kola Awodein, SAN:-

*“(i) Whether the lower court was right in holding that paragraph 47 (2) of the First Schedule to the Electoral Act 2010 (as*

*amended) is applicable to applications envisaged under paragraph 18(1) of the schedule.*

(ii) *Whether the lower court was right when it held that the Appellants' Respondents' letter to the Tribunal of 14/06/2011 for issuance of pre-hearing session notices does not qualify as an application under paragraph 18(1) of the First Schedule to the Electoral Act 2010 (as amended).*

(iii) *Whether the lower court was right in holding that the Appellants as petitioner had abandoned their petition and consequently dismissing same.*

(iv) *Whether the lower court was right in holding that the application for issuance of pre-hearing notice by letter other than a motion is not an irregularity which is not fatal to the petition."*

In the 1st - 3rd respondents) brief Yusuf O. Ali, SAN adopted the four issues of the appellants.

Wale Balogun formulated a single issue for determination in the 4th respondent's brief. The issue is:-

"Whether in the light of the settled law on paragraph 18 (1) and 47 (2) of the Electoral Act 2010 (as amended) the Court of Appeal was not Right to have allowed the appeal and dismissed the petition."

And on behalf of the 5th and 6th respondents Abubakar Abdullahi, formulated three issues as follows:

(i) Whether in view of the definition of the word 'application' in paragraph 47(2) of the First Schedule to the Electoral Act 2010 (as amended) the lower court was right in holding that an application by way of a letter for the commencement of pre-hearing did not satisfy the requirement under paragraph 18(1) of the First Schedule to the Electoral Act 2010 (as amended).

(ii) Whether the lower court was not right in that in the circumstances the petitioners/appellants have not abandoned their petition.

(iii) Whether an application for pre-hearing in a letter did not amount to a fundamental breach thus rendering the petition incompetent.

The substance of the argument of Kola Awodein, SAN in the appellants' brief is as follows:-

He argued issues (i) (ii) and (iii) together. According to the learned Senior Counsel the issues are narrowed down to one issue of whether the appellants/petitioners letter to the Tribunal of 14th June, 2011

for the issuance of pre-hearing session notices satisfied the provisions of paragraph 18 (1) of the first schedule to the Electoral Act 2010 (as amended). It was Senior Counsel's submission that the filing of a motion envisaged under paragraph 47(2) of the First Schedule is not within the contemplation of paragraph 18(1) of the First Schedule to the Electoral Act 2010 (as amended). What is contemplated in paragraph 18 (1) is an application as distinct from a motion under paragraph 47 (2) of the First Schedule to the Electoral Act 2010. Counsel submitted that the use of word "application" in paragraph 18(1) of the First Schedule is deliberate and that if the law maker had intended the application to be by way of motion it would have so provided. Learned senior counsel referred to the specific provision in paragraph 18(3) of the schedule of the Act for either application or motion as the case may be and submitted that the application of the Petitioners/Appellants of the 14th of June, 2011 met the clear intention and spirit of section 18(1) of the First Schedule to the Act. Learned senior counsel referred to the provisions of paragraph 47(1) of the First Schedule to the effect that all motion shall be at the pre-hearing session and submitted that the application for issuance of pre-hearing session being an ante pre-hearing session application cannot be by motion. It was further contended that paragraph 18(1) is a specific provision and cannot therefore be subsumed into and/or interpreted in the light of the general provisions of paragraph 47(2). It was counsel's further submission that the pre-hearing session can only be commenced after the issuance of a pre-hearing notice. Learned senior counsel referred to the application for the commencement of a pre-hearing session under paragraph 18(1) and (3) of the First Schedule as a simple procedural application comparably to an application for pre-trial session under the various civil procedure rules that are usually commenced by letter. It was further submitted that since paragraph 18(1) is silent as to the mode of making the application to the Tribunal an application by letter is sufficient.

Learned senior counsel for the Appellants then referred to *ADO v. MAKERA* (2009) 9 NWLR (Pt. 1147) 491, *RIRUWA v. SHEKARAU* (2008) 12 NWLR (pt.1100) 142; *AYUBA v. INEC CA/K/EP/05/2007* and *HOPE DEMOCRATIC PARTY V. INEC CA/A/EP/5/2007* and contended that each of these cases is distinguishable from the present case and therefore that none is a binding authority on this case.

On the other hand, learned senior counsel contended,(sic) the Court of Appeal decisions in SARAFA HASSAN VS. INEC CA/1/EPT/HA/11/2007; SENATOR ABUBAKAR ATIKU BAGUDU 7 ORS V. SENATOR MUHAMMAD ADAMU ALIERO & ANR. CA/S/EPT/SNI/2010 AND ALIYU IBRAHIM GEBI V. ALHAJI GARBA DAHIRU B & 3 OTHERS CA/J/EP/HR/127/2011 applied to his case.

With respect to the appellants' 4th issue, learned senior counsel submitted that assuming without conceding that the application by letter was irregular it amounted to a mere procedural irregularity curable under paragraph 53 (1) of the First Schedule to the Electoral Act, 2010 (as amended). C

The substance of the arguments of Yusuf O. All, SAN in the 1st - 3rd respondents' brief of argument runs as follows:-

Learned Senior Counsel referred to the provisions of paragraph 47(2) D of the First Schedule to the Electoral Act 2010 and submitted that the finding of the court below on the effect of the letter of the 14/6/2011 was unassailable. A careful examination of the provisions in paragraph 18(1) and (3) of the First Schedule to the Act shows that the law makers did not intend any distinction between "an application" and "motion." He referred to paragraph 18(4) and submitted that the reference to both application and motion therein simply as "application" shows that there is no distinction between the two. It was further contended that paragraph 18(1) to (4) to paragraph 47(2) E of the First Schedule constitute "the rules" and that paragraph 47(2) F did not exclude any part of the First Schedule. There is no provision in the Electoral Act where an application was defined to be a letter, learned senior counsel argued. He argued that where a statute mentions specific things or persons, the intention is that those not mentioned are not intended to be included. He relied on BUHARI VS. G YUSUF (2003) 6 SC (Pt. 11) 156 at 158; ATTORNEY-GENERAL ONDO STATE VS. ATTORNEY-GENERAL EKITI STATE (2001) 9-10 SC 116 at 153. It was senior counsel's submission that the application for the issuance of pre-hearing notices is as much part of the H pre-hearing session as any other application.

With respect to the provisions of paragraph 47 (2) of the first schedule to the Act; learned senior counsel submitted that rules of court are meant to be obeyed no matter how harsh, hard, painful or even absurd they may be. Still on the contention of there being a

distinction between motions and applications, learned senior counsel referred to the head note of paragraph 47 of the First Schedule which says “motions and applications.”

Learned senior counsel further argued that the word application in paragraph 18(1) of the first schedule to the Electoral Act is neither ambiguous nor does it admit of more than one meaning. He submitted that Election Petitions are sui generis and different from ordinary civil matters and the breach of which technical procedures attracts fatal consequences. Reliance was placed on OKEREKE VS. YAR’ ADUA (2008) 12 NWLR (pt.1100) 95 and MAITSIDAU & ANOR. v. CHIDARI & ORS. (2008) 16 NWLR (Pt. 1114) 553 at 570.

Learned senior counsel referred to the cases relied upon by the court below in its decision, that is to say, GARBA ADO v. MEKARA (2009) 9 NWLR (Pt. 1147) 491; AYUBA v. INEC (supra); RIRUWA v. SHEKARAU (supra); HOPE DEMOCRATIC PARTY v. INEC & ORS. (supra) and submitted that they all dealt with the propriety or otherwise of writing a letter as an application for the issuance of pre-hearing notice and therefore applicable to the facts of this case. On the contrary learned senior counsel contended that SARAFA v. INEC (supra) TONY DIMEGWU v. INDEPENDENCE OGUNEWE (supra); SENATOR ABUBAKAR ATIKU & ORS V. SENATOR MUHAMMAD ADAMU ALIERO & ANOR (supra); ALIYU IBRAHIM GEBI V. ALHAJI GARBA DAHIRU & ORS. (supra) and BARRISTER YUSUF AKIIRIKWEM & ANOR. V. PEOPLES DEMOCRATIC PARTY & 104 ORS did not apply to the facts of this case. Learned senior counsel finally referred to IBANGA v. INEC ORS. CA/C/NAEA/GOV/171/2011 and submitted that the use of a letter as an application for the issuance of pre-hearing conference notice was in breach of the provisions of paragraph 18(1) of the First Schedule to the Electoral Act 2010 (as amended). He urged in conclusion that appellants’ issue 1, 2 and 3 be resolved in favour of the 1st and 3rd respondents.

On the appellants’ 4th issue learned senior counsel referred to the decisions in OKEREKE v. YAR’ADUA (supra), NWANKWO v. YAR’DUA (2011) 8 EPR page 1 and submitted that non-compliance with the provisions of paragraph 18 cannot be cured by paragraph 53 (1) of the First Schedule to the Electoral Act 2010. He submitted that it is a fundamental defect which goes to the jurisdiction of the

Tribunal, the absence of which renders the proceedings a nullity. Reliance was further placed on SAUDE VS. ADBULLAHI (1989) 4 NWLR (Pt. 116) 387 at 442; Chukwuogor vs. Chukwuogor (2007) ALL FWLR (pt.349) 1154; Uzodinma v. Udenwa (2004) 1 NWLR (Pt.854) 308. In conclusion learned senior counsel urged that the  
 B appeal be dismissed.

The arguments of learned counsel for the 4th respondent Wale Balogun in the 4th respondents' brief of argument is in substance to the same effect as those of the 1st, 2nd and 3rd respondents. Similarly, the arguments of Abubakar Abdullahi in the 5th and 6th respondents' brief of argument is substantially to the same effect as those of the 1st, 2nd and 3rd respondent.  
 C

In the appellants' reply brief to the 1st - 3rd respondents' brief of argument, Kola Awodein submitted that paragraph 18(1) of the  
 D First Schedule to the Electoral Act 2010 (as amended) does not remove the deliberate legislative distinction between the word "application" used in paragraph 18(1) and "motion" used in paragraph 18(3) of the First Schedule. He reiterated the argument that the specific stipulation in paragraph 18(1) of the First Schedule overrides  
 E the general provisions in paragraph 47(2) of the First Schedule and relied on SCHRODER VS. MAJOR (1989) 2 NWLR (Pt. 101) 1 AT 19. Learned senior counsel pointed out that paragraph 18 of the First Schedule to the Electoral Act 2010 is similar to the provisions of  
 F Order 25 of the Lagos State High Court (Civil Procedure) Rules governing pre-trial conferences and scheduling and also that paragraph 47(2) of the First Schedule is similar to Order 39(1) of the Lagos State High Court Civil Procedure Rules. It was his submission that a process to bring a certain condition into existence cannot be part of  
 G that condition.

Learned senior counsel for the appellants further submitted that Rules of court are devised to achieve substantial justice and are not hurdles to obstruct access to justice even in an election petition. It is not the law, counsel argued, that an election petition must be dismissed on any slightest defect with the Rules because they are sui generis. Learned senior counsel referred to a very recent decision of the Court of Appeal Calabar Division in FABIAN OKPA VS. IREK  
 H CA/C/NAEA/201/2011. On the need to eschew technicalities in the determination of election petition learned senior counsel relied fur-

ther on ABUBAKAR VS. YAR'ADUA (2008) 4 NWLR (Pt. 1078) 465 at 511. Rules of procedure are not by themselves an end but the means to achieve the end of justice, counsel contended. The arguments of learned senior counsel in the appellants' reply brief to the 4th respondents' brief is to the same effect as that of the 1st - 3rd respondents. B

I have considered the petition, the proceedings at the trial Tribunal, the judgment of the Tribunal, the judgment of the Court of Appeal, the notice and grounds of appeal to this court, the issues formulated therefrom, the argument in the briefs of arguments of the parties and the oral submission of counsel for the parties on the 3/11/2011 when the appeal was heard. In my view this appeal turns specifically on the construction of the relevant provisions of paragraphs 18 and 47 of the First Schedule to the Electoral Act 2010 (as amended). In this request, quite a number of very recent decisions of the Court of Appeal were cited. Regrettably we did not have benefit of reading the opinion of the Court of Appeal in these cases. This is largely due to time constraint. C D

The head note to paragraph 18 in "PRE-HEARING SESSION AND SCHEDULE" the relevant provisions are paragraph 18(1) (2) (3) and (4). The provisions run as follows:- E

"18(1) Within 7 days after the filing and service of the petitioners' reply on the respondent or 7 days after the filing and service of the respondent's reply, as the case may be, the petitioner shall apply for the issuance of pre-hearing notice as in form TF 007. F

(2) Upon application by a petitioner, the tribunal or court shall issue to the parties or their legal practitioners (if any) a pre-hearing conference notice as in form TF007 accompanied by a pre-hearing information sheet as in form TF008 for:- G

(a) the disposal of all matters which can be dealt with at an interlocutory application;

(b) giving such direction as to the future course of the petition as appear best adopted to secure its just expeditious and economical disposal in view of the urgency of election petitions; H

(c) giving directions on the order of witnesses to be called and such documents to be tendered by each party to prove their cases having in view the need for the expeditious disposal of the petition; and

(d) fixing clear dates for hearing of the petition.

(3) The respondent may bring the application in accordance with sub-paragraph (1) where the petitioner fails to do so, or by motion which shall be served on the petitioner and returnable in 3 clear days apply for an order to dismiss the petition.

B (4) Where the petitioner and the respondent fail to bring an application under this paragraph, the tribunal or court shall dismiss the petition as abandoned petition and no application for extension of time to take that step shall be filed or entertained.”

C The head-note to paragraph 47 reads MOTIONS AND APPLI-  
CATIONS. The relevant provisions are paragraph 47(1) and  
(2). They run thus:-

“47(1) *No motion shall be moved and all motions shall come  
up at the pre-hearing session except in extreme circumstances with  
D leave of the Tribunal or Court.*

*(2) Whereby these rules and application is authorized to be made to  
the Tribunal or Court, such application shall be made by motion  
which may be supported by affidavit and shall state under what rule  
or law the application is brought and shall be served on the respond-  
E ent.”*

Let me now examine these provisions in their proper context.  
The first question is whether there is any distinction between the words  
“motion” and “application” in paragraph 18 of the First Schedule to  
the Electoral Act 2010 (as amended). The appellants submitted that  
F there is a distinction and relied on the provisions of paragraph 18(3)  
and 47(1) of the First Schedule in support of their submission. The  
respondents on the other hand, submitted that there is no difference  
between the two words and relied mainly on the use of the word  
G “application” in paragraph 18(4) of the First Schedule to the Elec-  
toral Act 2010 (as amended) to mean both application and motion.

First to be examined is the provision of paragraph 18(1) of the  
First Schedule of the Electoral Act 2010 (as amended). Therein a  
duty is placed on the petitioner to apply for the issuance of pre-  
hearing session notice after the filling and service of the petition and  
the necessary replies. The provision is however silent on the mode of  
H application. There is no mention of word “motion” therein.

***Next is paragraph 18(3) which applies only to the re-  
spondent to the petition in the event of the petitioner’s failure***

**to apply for the issuance of pre-hearing session notice. Under this provision, the Respondent to the petition is at liberty to pursue either of two options open to him. He may, like the Petitioner, bring an application for the issuance of pre-hearing session notice. In such a situation the Respondent has no obligation to serve the application on the petitioner, it being in the nature of an ex-parte application. Alternatively and most importantly, he may bring an application by way of a motion which shall be served on the Petitioner to dismiss the petition. In my view, the purpose and necessary intendment of the provision is quite clear. There is no ambiguity whatsoever as to the distinction between “an application” simpliciter and a “motion”. I agree with learned Senior Counsel for the Petitioners/Appellants that the distinction is deliberately set out in the provision. The provision separates the period of the pre-hearing session from the period immediately preceding it. The clear meaning of the provision is that at or during the period of the pre-hearing session all applications must be by way of a motion. But at the period before the commencement of the pre-hearing session, an application need not be by a motion. It can be in the form of a letter as was done in this case.**

**I hold therefore that in the absence of any special mode by which an application can be made at the period preceding the commencement of the pre-hearing session, the Appellant’s letter dated the 14th June, 2011 is an application within the meaning of paragraph 18(1) of the First Schedule to the Electoral Act 2010 (as amended). The letter constitutes a sufficient compliance with the requirements of the provision.**

This view is further supported by the provision of paragraph 47(1) of the First Schedule to the Electoral Act which requires all motions to be brought and disposed of at or during the pre-hearing session. The provision further circumscribes the period at which an application shall be made by way of a motion as provided in paragraph 47(1) of the First Schedule to the Act. Paragraph 47(1) therefore confines the operations of paragraph 47(2) to the period during the pre-hearing session. It is clear from the combined reading of paragraph 18(1) (3) and (4) and paragraph 47(1) and (2) of the First

Schedule to the Electoral Act 2010 (as amended) that the Petitioners'/Appellants' letter of the 14th of June, 2011 is sufficient compliance with the requirements of the law to activate session.

On this issue 1, I am in full agreement with the reasoning and findings of the trial Tribunal in its ruling at page 505-507 of the record of proceedings. The Tribunal very ably considered and analyzed the provisions of paragraphs 18(1), (3), 47(1) and (2) of the First Schedule to the Act. In the event the court below had no basis whatsoever to interfere with the findings and conclusion of the Tribunal. The results is that I resolve the Appellants' issues (i), (ii) and (iii) in favour of the Appellants. The resolution of these issues effectively disposes of this appeal. A consideration and resolution of issue (iv) is no longer necessary.

Before I conclude, I would like to comment briefly on a submission of learned senior counsel for the 1st - 3rd respondents on jurisdiction. At paragraph 5.5 of the 1st - 3rd respondents, brief he submitted:-

*"It is trite that where the law lays down a procedure for doing a thing, non-compliance with that procedure robs the court of jurisdiction. It is submitted that the failure of 1st, 2nd and 3rd appellants to adhere to the provisions of paragraph 18(1) of the First Schedule to the Electoral Act 2010 (as amended) is fundamental and fatal to the petition, it is not a mere irregularity which the court can condone."*

I have already held that there was no non-compliance with the provisions of paragraph 18(1) of the First Schedule to the Electoral Act. Assuming, for the purpose of argument, that there was such non-compliance, would it affect the jurisdiction of the court to entertain the petition? I would answer this question in the negative.

***Jurisdiction is a creation of the Constitution and statute and the settled principle of law is that it is the claim or petition that determines its competence. The claim or petition must come within the ambit of the law that has conferred the jurisdiction.*** In this case there is no challenge of the competence of the petition to entertain the petition. The challenge here is non-compliance with paragraph 18(1) of the First Schedule to the Electoral Act. Where a plaintiff in a procedural steps (sic) necessary for the successful prosecution of the claim or petition, his act or omission constitut-

ing such failure or default does not affect the jurisdiction of the court. It only constitutes a failure to prosecute the claim and which failure attracts a dismissal.

In view of the foregoing I hold, with respect that the argument of learned senior counsel for the 1st - 3rd respondent is untenable.

In the final analysis, this appeal succeeds and it is accordingly allowed. The judgment of the Court of Appeal dated the 23rd of September, 2011 is hereby set aside. The ruling of the tribunal dated the 27th of July, 2011 be and is hereby restored. The petition is hereby remitted back to the Tribunal for hearing and determination on the merits.

I make no orders as to costs.

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***RHODES-VIVOUR, JSC***

At the Gubernatorial elections held on the 26th day of April 2011, the 1st and 2nd appellants represented the 3rd appellant, for the offices of Governor and Deputy Governor respectively. The 1st and 2nd respondents represented the 3rd respondent for the offices of Governor and Deputy Governor. The 4th respondent is the regulatory body responsible for conducting elections in Nigeria. The 4th and 5th respondents control security. The 4th respondent declared the 1st respondent the winner of the Election, and so he was sworn in as the Governor of Kebbi State. The Appellants were dissatisfied with the results and quickly filed a petition. At the close of the pleadings in the election petition, the appellants, as petitioners applied to the Tribunal for the issuance of Pre-hearing Notice. He applied by writing a letter to the Tribunal in care of the Secretary. The Tribunal gave approval and the Secretary issued forms TF 007 and TF 008. The date for the Pre-hearing session was fixed for the 25th day of July 2011.

On being served the Notice for the holding of the pre-hearing session the 1st and 2nd respondents filed a Motion challenging the mode by which the appellants activated the pre-hearing session.

The 1st and 2nd respondents' argument before the Tribunal was that by the provisions of paragraphs 18(1) - (5) and 47(1) - (3) of the 1st Schedule to the Electoral Act, 2010 as amended, the appellants/petitioners ought to have activated the Pre-hearing session

by Motion on Notice and not by letter.

The appellant argued that a letter would suffice. The Tribunal agreed with the appellant, finding no merit in the application. The 1st and 2nd respondents' appealed. The Court of Appeal allowed the appeal, and made the following orders:

B 1. The Ruling of the Governorship Election Petition Tribunal delivered on 27th July 2011 is hereby set aside.

2. The letter dated 14th June, 2011 was not an application within the provision of paragraph 18(1) and 47(2) to the first schedule of Electoral Act 2010 (as amended for the issuance of Pre-hearing Notice).

C 3. The failure of the 1st, 2nd and 3rd Respondents/Petitioners to apply for the issuance of Pre-hearing Notice in strict compliance with the provisions of paragraph 18(1) to the First Schedule of Electoral Act 2010 (as amended) constituted an abandonment of the petition and therefore liable to be dismissed.

4. The Petition is accordingly dismissed.

This appeal is against that judgment. I read the briefs of argument filed by all Counsel. The main issue in this appeal is:

E Whether application to commence pre-hearing sessions can be made by the appellant writing a letter to the Tribunal.

This calls for a diligent examination of the provisions of Paragraphs 18(1) - (5) and 47(1) - (3) of the First Schedule to the Electoral Act 2010 as amended. Before I do that I must say that Courts are constituted for the purpose of doing substantial justice between the parties and in so doing Rules of Court must always be interpreted to achieve that purpose. See *Nichizawa v Jethwani* 1984 12 SC p.235, *Nneji v Chukwu* 1988 6 SCNJ p.132, *Bello v A.G, Oyo State* 1986 G 12 SC p.111.

And so, where the words of a Statute are clear and free from ambiguity, they should be accorded their ordinary plain meaning and it is not for the judge to put glosses on them or to read into them meanings which render them artificial. See *Mobil v. F.B.I.R.* 1977 3 H SC P53, *Toriola v. Williams* 1982 7 SC P27

Election Petitions are sui generis. That is of its own kind, unique. These attract high emotions, whole communities and even states affected. The reason is obvious, the stakes are too high. So no one agrees he lost. Everyone wants to believe he is a winner, and so I

must be careful and strive at all times to achieve substantial justice in deciding them.

It is alleged in the Petition that the respondents (1st and 2nd) were not elected by majority of lawful votes cast at the election. It is important that the conduct of the election is examined and a judicial pronouncement made, and no technicality or arid legalism should stand in the way of that examination. B

Paragraphs 18(1) - (5) must be considered to find out how a Petitioner applies to start a Pre-hearing session.

It provides:

18(1) within 7 days after filing and service of the petitioners' reply on the respondent or 7 days after the filing and service of the respondents' reply, as the case may be, the petitioner shall apply for the issuance of pre-hearing notice as in Form TF 007 C

(2) upon application by a petitioner under sub-paragraph (1) of this paragraph, the tribunal or court shall issue to the parties or their Legal Practitioners (if any) a pre-hearing conference notice as in Form TF 007 accompanied by a pre-hearing information sheet as in Form TF008 for- D

(a) the disposal of all matters which can be dealt with on interlocutory application; E

(b) giving such directions as to the future course of the petition as appear best adapted to secure its just expeditious and economical disposal in view of the urgency of election petitions;

(c) giving direction on order of witness to be called and such documents to be tendered by each party to prove their cases having in view the need for the expeditious disposal of the petition; and F

(d) fixing clear dates for hearing of the petition.

(3) The respondent may bring the application in accordance with sub-paragraph (1) where the petitioner fails to do so, or by motion which shall be served on the petitioner and returnable in 3 clear days apply for an order to dismiss the petition. G

(4) Where the petitioner and the respondent fail to bring an application under this paragraph, the tribunal or court shall dismiss the petition as abandoned petition and no application for extension of time to take that step shall be filed or entertained. H

(5) Dismissal of a petition pursuant to sub-paragraphs (3) and (4) of this paragraph is final and the tribunal or court shall be functus

officio.

Paragraphs 18(1) and (2) are applicable on the close of pleadings. Sub-paragraphs (a), (b), (c) and (d) are matters that come up at the pre-hearing session.

Paragraph 18(3) provides for the respondent to commence  
B Pre-hearing session where the Petitioner fails to do so.

Paragraph 18(4) states the consequences where both parties fail to apply for a Pre-hearing session.

Paragraph 18(5) provides for dismissal of the petition pursuant to sub paragraphs (3) and (4) supra.  
C

The relevant provision in this appeal is paragraph 18(1). It reads:

*“within 7 days after the filing and service of the Petitioners’ reply on the Respondent or 7 days after the filing and service of the respondents reply, as the case may be, the Petitioner shall apply for the issuance of Pre-hearing notice as in form TF 007.”*  
D

How then is the Petitioner expected to apply.  
The Petitioner “shall apply”.

The Oxford Advanced Learners Dictionary says ‘Apply’ is to  
E make a formal request usually in writing by letter. “Shall” can be interpreted as “may” and “may” as “shall” depending in which context they are used. See Ifezue v Mbadugha 1984 1 SCNLR P427.

“Shall apply” in the context in which it is used means must, a  
F matter of compulsion. That means on the close of pleadings the Petitioner must/shall apply to the Tribunal to start the Pre-hearing session. That is to trigger the hearing.

Now, what does paragraph 47 of the same schedule say it is titled “Motions and applications” it states that:

G 47(1) No motion shall be moved and all motions shall come up at the pre-hearing session except in extreme circumstances with leave of Tribunal or court;

(2) whereby these Rules (sic) any application is authorized to be made to the Tribunal or court, such application shall be made by  
H motion which may be supported by affidavit and shall state under what rule or law the application is brought and shall be served on the respondent.

(3) every such application shall be accompanied by a written address in support of the reliefs sought.

(4) where the respondent to the motion intends to oppose the application, he shall within 7 days of the service on him of such application file his written address and may accompany it with a counter-affidavit.

(5) the applicant may, on being served with the written Address of the respondent file and serve an address in reply on points of law within 3 days of being served and where a counter-affidavit is served on the applicant he may file further affidavit with his reply. B

The words of a statute must always be construed to be consistent with every other part. But where sections/paragraphs etc are repugnant the earlier stands impliedly repealed by the latter. C

Paragraph 47(1) - (5) is titled Motions and Applications. It simply means that applications to be filed at or during the Pre-hearing session shall be by Motion.

On the other hand, paragraph 18(1) is to trigger Pre-trial session. On a calm and proper reading of Paragraphs 18(1) - (5) and 47(1) - (5) the conclusion is that there is no conflict in the paragraphs, nor do they complement each other. They are for different stages in the hearing at the Pre-hearing. Paragraph 18(1) is for Pre/before the date fixed for the Pre-hearing sessions while paragraph 47(1) - (5) is Post Pre-hearing date. That is to say during the Pre-hearing sessions applications shall be made by Motion. "Shall apply" means that the appellants shall apply by letter. Paragraphs 47(1) - (5) are provisions applicable during Pre-hearing sessions. D E

My Lords, the date for the Pre-hearing session was fixed for the 25th day of July 2011. The appellant as Petitioner was able to get the Tribunal to fix that date after he wrote a letter to the Tribunal in compliance with paragraph 18(1) supra. F

Paragraph 47(1) provides that at and during Pre-hearing sessions applications shall be made to the Tribunal by Motions. G

Paragraphs 18(1) - (5) applies pre 25/7/11. While paragraphs 47(1) - (5) applies post 25/7/11. There is no conflict whatsoever in paragraphs 18(1) - (5) and 47(1) - (5) of the first schedule of the Electoral Act 2010 as amended. H

The appellant as Petitioner was right to write a letter to trigger the Pre-hearing session, and that act was in compliance with Paragraph 18(1) supra.

The application under paragraph 18(1) for the issuance of Pre-

hearing session date is an ex parte application made by letter. The adverse party is not aware when the application is made. The respondents were not able to show how they were prejudiced by the appellants' application made by letter.

**B** Miscarriage of justice varies from case to case. The facts and circumstances of the case must be examined. It could mean failure of the court to do justice, or justice mis-applied. Put in another way it is failure of justice. In effect there is miscarriage of justice if the order of the court is prejudicial or inconsistent with the right of a party. See: **C** Oladija Sanusi v Oreitan I. Amevogun 1992 4 NWLR (Pt. 237) p.527

The respondents were unable to show how they were prejudiced by the appellants application by letter, or how an application by letter to trigger Pre-hearing session, granted by Tribunal amounts to miscarriage of justice. Since the respondents were unable to show **D** any of the above in the Tribunal or in this court their objection was frivolous. It appears to have been made to waste time, and they achieved that purpose. At the time we heard this appeal the Tribunal had less than a fortnight for time to run out.

The Tribunal was correct to dismiss the respondents' application. **E**

In the light of all that I have been saying and the reasoning in the leading judgment, I set aside the judgment of the Court of Appeal and restore the judgment of the Tribunal. I abide by all the **F** conclusions made by Tabai JSC.

**G**

**H**