

SUPREME COURT OF NIGERIA
28TH DECEMBER, 2011. SC. 426/2011
CORAM: - D. MUSDAPHER, CJN, M. MOHAMMED, W. S.
N. ONNOGHEN, J. A. FABIYI, O. O. ADEKEYE, B.
RHODES-VIVOUR, N. S. NGWUTA, JJSC

CONGRESS FOR PROGRESSIVE
CHANGE
AND

..... APPELLANT

1. INDEPENDENT NATIONAL
ELECTORAL COMMISSION

2. CHIEF NATIONAL ELECTORAL
COMMISSIONER

3. DR. GOODLUCK EBELE
JONATHAN

..... RESPONDENTS

4. ARCHITECT MOHAMMED
NAMADI SAMBO

5. PEOPLES DEMOCRATIC PARTY

6. 36 STATES AND F.C.T. RESIDENT
ELECTORAL COMMISSIONERS

ACTIONS - Limitation - Statutes of - Effect - Action cannot be validly
instituted - After expiration of limitation period prescribed therein
(H1)

APPEALS - Grounds - Not related to decision appealed - Fate - Such
grounds are deemed incompetent - And liable to be struck out (H2)

EVIDENCE - Evaluation - It is duty of trial court to evaluate evidence
- And where it makes finding on credibility of witness - Appellate
court will not interfere (H3)

EVIDENCE - Reevaluation on appeal - Propriety - Provided it does
not involve credibility of witnesses - Appellate court can reevaluate
evidence and make its own findings (H4)

ACTIONS - Declaration of right - Proof - Onus is on plaintiff to establish
his claim upon the strength of his case - And not upon the weakness
of the defence (H5)

2824 Congress for Progressive Change v. Independent National Electoral

COURTS - Judgment - Delivery of - Basis - Court can only pronounce judgment based on properly adduced credible evidence - And not on extraneous matters (H6)

EVIDENCE - Presumption - Regularity of an act - It is presumed that election result declared by a returning officer is correct - As such the burden of rebutting is on the party who denies its correctness (H7)

ELECTION PETITIONS - Allegation of non compliance - Proof - Petitioner must not only assert non compliance - But must also satisfy the court - That same affected the election result to justify nullification (H8)

ELECTIONS - Conduct - Determination of - Court will assess the pleadings and substance of the complaint - And determine whether the omission complained of - Is substantial to affect conduct of the election (H9)

FACTS

1st respondent - the Independent National Electoral Commission conducted the April 2011 General election into the offices of the President and Vice-President of the Federal Republic of Nigeria. Appellant - Congress for Progressive Change (CPC) was one of the twenty political parties which contested the election. It sponsored General Muhammadu Buhari as its presidential candidate and Pastor Babatunde Bakare for the post of Vice President. 5th respondent - Peoples Democratic Party (PDP) also a political party in the election, sponsored Dr. Goodluck Ebele Jonathan as the flag bearer for the office of President and Architect Namadi Sambo as Vice President. At the conclusion of the voting exercise, PDP scored 22,471,370 votes and Congress for Progressive Change (CPC) had 12,211,670 votes. As a result of the foregoing votes, INEC declared PDP and its candidates as winners of the election.

Thereupon Dr. Goodluck Ebele Jonathan and Architect Namadi Sambo became the President and Vice President respectively of the Federal Republic of Nigeria having scored the highest number of votes cast at the election and the mandatory one quarter of the votes cast in each of at least two thirds of all the 36 States in the Federation and

in the Federal Capital Territory, Abuja in compliance with the constitutional provision vide section 134 (2) of the 1999 Constitution of the Federal Republic of Nigeria as amended. Appellant being aggrieved with the conduct of the election and the return of 3rd and 4th respondents challenged the validity of the election by presenting a petition before the Court of Appeal, Abuja. Appellant claims the following reliefs inter alia, a declaration that the election and the return of 3rd and 4th respondents who were sponsored by 5th respondent is voided by corrupt practices and substantial non-compliances with the relevant provisions of the Electoral Act 2010 as amended. Respondents filed their respective responses by way of defence to the petition. In its judgment, the court dismissed appellant's petition on the ground that it (appellant) failed to successfully challenge the election of 3rd and 4th respondents. Aggrieved further, appellant filed an appeal to Supreme Court.

ISSUE FOR DETERMINATION

"In spite of the state of pleadings and evidence before the lower court whether it was right for the court below to have held that there was substantial compliance with the Electoral Act 2010 (as amended) and that the declaration of the 3rd and 4th respondents as duly elected was constitutional".

HELD (Unanimously dismissing the appeal per **ADEKEYE JSC**)
ACTIONS - Limitation - Statutes of

1. The simple, straight forward, unambiguous words used in the foregoing provisions show that Section 285 (7) of the 1999 Constitution (as amended) and Section 1 of the Practice Directions are Limitation Laws.

Where a statute of limitation prescribes a period within which an action should be brought, legal proceedings cannot be properly or validly instituted after the expiration of the prescribed period. Thus an action instituted after the expiration period of the prescribed period is said to be statute barred.

Where the limitation of time is imposed in a statute, decree or edict unless the said statute, decree or edict makes provision for extension of time, the courts cannot extend the time. An action filed outside the period will lapse due to effluxion of time. This is the fate of the interlocutory appeals raised in grounds 7, 10, 12, 13, 14, 15 and 17

of the notice of appeal. They are all statute barred and cannot be legally resuscitated. Issue number 3 which is formulated from these grounds must go with them. (p. 2838 B)

Grounds - Not related to decision appealed - Fate

- B 2. Any grounds of appeal which do not arise from the ratio of the judgment appealed against equally cannot stand for reason of incompetency. The preliminary objection is sustained and the incompetent grounds and issue are struck out. I observe that issues 4 and 5 in the issues for determination in the brief of the 1st, 2nd, 6th
C - 42nd respondents are formulated from grounds 7, 10 and 17 of the appellant's already struck out. These issues also have no legs to stand on; they are consequently struck out. Issue No.3 of the appellant's brief is struck out. (p. 2838 G)

D

It is duty of trial court to evaluate evidence

3. The most important aspect of the duty of the court in the evaluation of evidence is to decide where the scale preponderates by qualitative evidence. The court must ensure that it holds the string or scale of
E justice evenly balanced between the parties so that justice may not only be done but must manifestly be seen to have been done. There is however a distinct difference between the role of a trial court and that of an appellate court in the area of evaluation of evidence. It is
F the trial court which alone has the primary function of fully considering the totality of evidence placed before it, ascribes probative value to it, put same on the imaginary scale of justice to determine the party in whose favour the balance tilts, make the necessary findings of fact flowing therefrom, apply the relevant law to the findings and come
G to a logical conclusion. The evaluation of evidence remains the exclusive preserve of the trial court because of its singular opportunity of hearing and watching the demeanour of witnesses as they testify and thus it is the court best suited to assess their credibility. Where a
H trial court makes a finding on the credibility of a witness, an appellate court would not ordinarily interfere. (p. 2843 B)

EVIDENCE - Reevaluation on appeal - Propriety

4. Where the nature of the case is such that the evaluation would not entail the assessment of credibility of witnesses and would be confined

to drawing inferences and making findings from admitted and proved facts and from contents of documentary evidence, the appellate court is in as vantage a position as the trial court to evaluate or re-evaluate the evidence and make its own findings. This court as an appellate court to the lower Tribunal has a duty to re-appraise the evidence on record to see if the findings of the trial court were perverse. B
(p. 2843 F)

Declaration of right - Proof

5. It is trite that in a claim for declaration, the onus is on the plaintiff to establish his claim upon the strength of his own case and not upon the weakness of the case of the defendant. The plaintiff must therefore satisfy the court that upon the pleadings and cogent and credible evidence adduced by him that he is entitled to the declaration of right in his favour. C
D

From the foregoing, the burden of proof generally in the sense of establishing a case virtually lies on the plaintiff or the initiator of a suit. He who asserts must prove what he asserts i.e. qui affirmat non a qui negat incumbat probat. The party who asserts in his pleadings the existence of a particular fact is required to prove such fact by adducing credible evidence. If he fails to do so, his case fails. A plaintiff would be expected to succeed on the strength of his own case and not on the weakness of the defence. E

The case of the appellant as petitioner before the lower court and even in his brief before this court demonstrated a clear misconception of the burden of proof required from a petitioner alleging non-compliance with the provisions of Section 139 of the Electoral Act. The evidence of the appellant both oral and documentary was geared towards the burden of proof resting squarely on the 1st respondent G based on certain alleged complaints in the conduct of the election, non-production of documentary evidence and witnesses in the petition. Allegations of substantial non-compliance with electoral laws or regulations is not a new concept in our court in election petition. The Supreme Court over the years had made pronouncements to settle that the burden of proving that non-compliance with the Electoral Act which substantially affected the result of the election lies on the petitioner. H
(pp. 2844 C/2845 H)

Judgment - Delivery of - Basis

6. A court of law can only pronounce judgment based on credible evidence presented and properly established before it. A court of law is not at liberty to go outside the evidence and search for extraneous evidence in favour of the parties. (p. 2850 B)

B

Presumption - Regularity of an act

7. Generally speaking, in an election petition, it is the petitioner who will fail if no evidence at all were given on either side since there is a presumption of regularity in the execution of an official act as shown in Section 168 (1) of the Evidence Act which provides that: -

C

“Where any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.”

D

There is a presumption that any election result declared by a returning officer is authentic and correct. The burden to rebut is on the person who denies its correctness. It is however a rebuttable presumption. (p. 2850 D)

E

ELECTION PETITIONS - Allegation of non compliance - Proof

8. Where an allegation was made that an election was invalid by reason of non-compliance with the provisions of Section 139 (1) of the Electoral Act 2010 (as amended) the section vested an Election Tribunal or court entertaining an election petition with the power to decide from the evidence tendered before it in such case whether the alleged non-compliance was substantial enough to invalidate the election. The emphasis is not on whether those acts of non-compliance are of criminal or civil nature, but on whether the election was conducted substantially in accordance with the principles of the Electoral Act and that the non-compliance did not substantially affect the result of the election. The petitioner must not only assert but must satisfy the court that non-compliance affected the election result to justify nullification. (p. 2851 F)

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ELECTIONS - Conduct - Determination of

9. The duty lies on the court to determine whether or not an election was conducted substantially in accordance with the Constitution and the Electoral Act 2010. The court will look at circumstance of the

case, including the state of pleadings, especially the credibility of the petitioners position and the nature and substance of the complaints of the petitioner, the attitude of the functionaries charged with the conduct of the election and whether the omissions complained of by the petitioner even if proved, affected the conduct of the election. (p. 2852 D) B

NOTABLE POINT OF INTEREST

MOHAMMED JSC

1. When an issue is considered as being academic C

An academic issue or question is one which does not require any answer or adjudication by a court of law because it is not necessary. An academic issue or question could be a hypothetical or moot question. An academic issue or question does not relate to the live issues in the litigation because it is spent as it will not ensure any right D or benefit on the successful party.

Since it is quite clear that from the day the 6th relief asking for conduct of fresh election was struck out, the petition of the Appellant became empty as it will not ensure any right or benefit on the Appellant/ Petitioner even if the petition were successful. (p. 2864 B) E

REPRESENTATION

Oladipo Okpeseyi SAN, Abubakar Malami SAN, Ademola Olowoyeye Esq., A. B. Mahmud Esq., Ismaila Alasa Esq., S.O. Imhanobe Esq., F Chuks Nwana Esq., O. O. Obono-Obla Esq., J. Obono-Obla (Mrs.), Babatunde Ogungbamila Esq., Ejike Okpara Esq., Tope Adebayo Esq., Joshua Akor Esq., Mary Ekpere (Miss), Ego Okechukwu (Mrs.), Godwin Obiajuru Nwalutu Esq., Ayodeje Oshin Esq., Daisey Anagenda (Miss); Falodun Arifayan Esq., Ikpebe Emmanuel Idoko, G R. A. Adzuanaga for the Appellant.

Chief A. S. Awomolo SAN, A. B. Mahmoud SAN, Dr. Onyechi Ikpeazu SAN, H. M. Liman SAN, I. K. Bawa, Ahmed Raji, Abdullahi Bello, V. O. Awomolo (Mrs.), Patience Osagiede Ofeyi (Mrs.), Wale Balogun Esq., Eytayo Fatogun, Esq., Ikechukwu Maledo, Seun Alabi, Esq., Hajara Baba-Ajanah (Mrs.), Onyinyechi Ezindu (Miss), Kehinde Ogunwumiju, Aminu Sadauki, Prisca Ozalesike (Miss), I. M. Dikko; Marcus Abu, Esq., Ebuka Nwaezei Hadi Jazuli, Y. D. Dangana, H

Abdulahi Auta, I. Uwa; Chinedu Onyechi-Ikpeazu, Adeola Adedipe, Oluwasanmi Aiyemowa, Fatima Bukar, D. E. Daniel, Feyisayo Folorunso (Mrs.), Ephraim Ajijola, Esq., Anurika Osuigwe (Miss), Iheanyi Uwa, Lynda Otuoniyo (Miss), Aliyu Abdullahi, Esq., Lynda Chuba Ikpeazu, Mavis Ekwechi, Ja'afaru Aseneshi Ayitogo, Olamide
 B Ayoola-Giwa (Mrs.) Ayotunde Ogunleye, Esq., for 1st, 2nd, 6th to 42nd Respondents.

Chief Wole Olanipekun SAN, Chief O. C. J. Okocha SAN, Dr. Alex
 C Izinyon SAN, D. D. Dodo SAN, Mr. Ighodaro Imadegbero SAN, Mr. J. T. U. Nnodum SAN, Mr. O. A. Omonuwa SAN, Dr. Paul Erokoro SAN, Dr. Fabian Ajogwu SAN, F. F. Egele, Esq., Uche V. Obi; Gbenga Adeyemi, Esq., Hannatu Abdurrahman (Mrs.), D. O. Achumba (Mrs.), F. O. Izinyon, Esq., Joshua E. Aloba, Esq., E. Ogbojafor, Esq., Olabode
 D Olanipekun, Esq., Festus Jumbo, Esq., Bukola Araromi (Mrs.), Rachael Osibu (Miss), Otonvwun Ibori (Mrs.), Barbara Omosun (Miss), Okonache Ogar, Esq., Nnamdi Ekwem, Esq., Kenekchukwu Azie, Esq., Aisha Ali (Miss), L. O. Fagbemi (Jnr.) Esq., Abdulmajid Oniyangi, Esq., Chinonso Anozie, Esq., Alex Izinyon (II) Esq., Yunusa Umaru,
 E Esq., Iseone Inyang, Samuel Abbah, Esq., L.A. Ikhanoba, Esq., for the 3rd and 4th Respondents.

Chief Joe-Kyari Gadzama, SAN, Dr. (Sir) Amaechi Nwaiwu, SAN,
 F Chief Duro Adeyele, SAN, Chief C.U. Ekomaru, SAN, M. A. Abubakar, Esq., J. N. Egwuonwu, Esq., Aruodo Uche (Miss), Sola-Ephraim Oluwanuga, mni, M. Monguno, Esq., Chief Olusola Oke, E. S. Oluwabiye, Esq., Magai Vimtim Magai, Esq., J. O. Adesina (Mrs.); M. M. Bakari, Esq., Oladele Gbadeyan, Esq., A. C. Ozioko, Esq.,
 G Afam Osigwe, Esq., Nneka Bon-Nwakanma (Mrs.), C. P. Oli, Esq., Theophilus Okwute, Esq., N. N. Shaltha (Miss), Chinyere Onyedim (Mrs.), Isaac Dennis Folorunsho, Esq., I. D. Odanwu, Esq., A. S. Akingbade, Esq., G. O. Diugwu, Esq., D. H. Bwala, Esq., U. M. Jawur, Esq., Babatunde Adewusi, Esq., Chijioke Uwandu, Esq., Funmilayo
 H Oshunwusi (Miss), Ifeanyi Okechukwu Esq., Deji Morakinyo, Esq., Ewuwuni Onnoghen (Miss), I. H. Ngada, Esq., Ayo Babalola, Esq., J. M. Ugbeji (Miss), P. C. Igwenazor, Esq., Odom Ifeanyi, Esq., C. T. Danjema, Esq., Adanaya Gaya, Esq., Chinelo Oragba (Miss), Daratu Saleh Esq., Alade A. Glory (Miss), F. I. Nwodo Esq., O. O. Oguntade,

Esq., B. S. Barau, Esq., Kukoyi Tinuola Adetoun (Mrs.), Chioma Oji (Miss), Gbolahon Ogunmola, Esq., for the 5th Respondents.

CASES REFERRED TO

Ezeke v. Dede (1999) 5 NWLR (pt. 60) 80	
Ezeobi v. Nzeka (1989) 1 NWLR (Pt.98) 478	B
Akpan v. Bob (2010) 17 NWLR (pt.1223) 421	
Amadi v. Orisakwe (1992) NWLR (pt.511) 161	
Fagunwa v. Adibi (2004) 17 NWLR (pt.903) 544	
Woluchem v. Gudi (1981) 5 SC. 291	C
Mogaji v. Odofin (1978) 4 SC 91	
Duni v. Nwosu (1989) 4 NWLR (pt.113) 24	
Akintola v. Balogun (2000) 1 NWLR (pt.642) 532	
Ebba v. Ogodo (1984) 1 SCNLR 372	
Mogaji v. Cadbury (Nig.) Ltd. (1985) 2 NWLR (pt.7) 393	D
Buhari v. Obasanjo (2005) 2 NWLR (pt.910) 2411	
Igwe v. A.C.B. Plc (1999) 6 NWLR (pt.605) 1	
Ajadi v. Ajibola (2004) 10 NWLR (pt.898) 91	
Haruna v. Modibbo (2004) 16 NWLR (pt.900) 487	E

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, ss. 134 (2)(4), 239, 285(7)	
Evidence Act LFN 1990, ss. 131 (1)(2), 132, 133 (1)(2), 134 and 135	F
Evidence Act 2011 (as amended), ss. 168(1)	
Electoral Act 2010 (as amended), s. 139 (1)	
Practice Directions [Election Appeals to Supreme Court] No. 33 of 2011, s. 1	G

LEAD JUDGMENT BY ADEKEYE JSC

The 1st respondent in this appeal, the Independent National Electoral Commission in accordance with its constitutional role in the process of building a democratic society, conducted an election into the offices of the President and Vice-President of the Federal Republic of Nigeria on the 16th of April, 2011. Congress for Progressive Change (CPC), now the appellant was one of the twenty political parties which contested the election sponsoring General Muhammadu Buhari as

its presidential candidate and Pastor Babatunde Bakare for the post of Vice President. The 5th respondent, Peoples Democratic Party (PDP) also a candidate in the election had Dr. Goodluck Ebele Jonathan as the flag bearer for the office of President and Architect Namadi Sambo as Vice President. At the conclusion of the voting exercise, PDP scored B 22,471,370 votes and Congress for Progressive Change (CPC) had 12,211,670 votes. As a result of the foregoing votes, INEC declared PDP and its candidates as winners of the election. Thereupon Dr. Goodluck Ebele Jonathan and Architect Namadi Sambo became the C President and Vice President of the Federal Republic of Nigeria having scored the highest number of votes cast at the election and the mandatory one quarter of the votes cast in each of at least two thirds of all the States in the Federation and in the Federal Capital Territory, Abuja in compliance with the constitutional provision. Vide Section D 134 (2) of the Constitution of the Federal Republic of Nigeria. Congress for Progressive change was aggrieved with the conduct of the election and the return of the 3rd and 4th respondents, challenged the validity of the entire election by presenting a petition before the Court of Appeal Abuja on 8/5/2011. In the petition it joined INEC E with all the principal officers, like Chief Electoral Commissioner and the Chief Returning Officer in all the States of the Federation.

The reliefs sought before the trial court are at paragraph 40 Vol.1 of the Record pages 68-69 of the Record of Appeal. They read as follows:

F Wherefore the petitioner prays that it may be determined as follows -

(i) That it may be declared that the election and the return of the 3rd and 4th respondents who were sponsored by the 5th G respondent is voided by corrupt practices and substantial non-compliances with the relevant provisions of the Electoral Act 2010 as amended.

(ii) That it may be declared that the 3rd and 4th respondents who were sponsored by the 5th respondent were not duly elected in H respect of Kaduna, Sokoto, Nassarawa, Kwara, Adamawa, Abia, Akwa Ibom, Enugu, Cross River, Rivers State, Ebonyi, Bayelsa, Delta, Imo, Anambra, Benue, Lagos, Plateau States and Federal Capital Territory, Abuja.

(iii) That it may be determined that the 3rd respondent did not

fulfill the requirements of Section 134 (2) of the Constitution of the Federal Republic of Nigeria with regards to:-

(a) Scoring the highest number of votes cast at the election and

(b) Mandatory one quarter of the votes cast at the election in each of at least two third of all states in the Federation and in the Federal Capital Territory, Abuja B

(iv) That it may be determined that the result declared by the 2nd respondent on the 18th day of April, 2011 by which the 3rd respondent was returned as the elected President of Nigeria is wrongful, invalid and unlawful. C

(v) A declaration that the presidential election for the office of the president held on the 16th day of April, 2011 did not produce a winner as contemplated by the provision of the constitution of the Federal Republic of Nigeria 1999. D

(vi) An order directing the 1st and 2nd respondents to arrange another election between the petitioner and the 3rd respondent in conformity with the provision of section 134 (4) or such other relevant provisions of the constitution of the Federal Republic of Nigeria as amended. E

The respondents filed their respective responses by way of their defence to the petition. Vide Vol.2 pages 469 - 703, Vol. 3 pages 848 - 1120, Vol. 3 pages 1121 to 1405.

The trial court struck out reliefs 4 and 6 in the Ruling delivered on the 14th of July, 2011 (Vide vol. 3 pages 824 - 830 of the Records of Appeal). The petition went on trial on Reliefs 1, 2, 3, and 5 only. At the conclusion of trial, parties adopted the written addresses filed by them. In a lucid and well considered judgment of the court below delivered on the 1st of November, 2011, the learned justices of the lower court dismissed the appellant's petition by making order as follows- F

"The election of the office of President and vice president Federal Republic of Nigeria held on 16/4/2011 has not been successfully challenged. The 3rd and 4th respondents scored the majority of lawful votes cast at the election and secured the mandatory one quarter of the votes cast at the election in each of at least two thirds of all the states in the Federation and in the Federal Capital Territory, Abuja. H

Consequently the 3rd and 4th respondents won the election conducted by the 1st respondent on the said 16th April, 2011 and were returned by the 4th respondent as duly elected President and Vice President respectively of the Federal Republic of Nigeria. The petition fails in its entirety and it is hereby dismissed.”

B Being aggrieved by the decision of the lower court, CPC filed an appeal to this court. It also sought an appeal against various rulings of the court delivered during the pre-hearing session and the entire proceedings in the course of hearing of the petition. The appellant raised twenty five grounds in the notice of appeal filed.

C At the hearing of the appeal on the 13th of December 2011, the appellant adopted and relied on four briefs filed as follows -

(a) The appellant's brief filed on 28/11/11

(b) A reply to 1st, 2nd, 6th - 42nd respondents' brief filed on D 5/12/11.

(c) A reply to the 3rd and 4th respondents' brief filed on 5/12/11.

(d) A reply to the sin respondent's brief filed on 7/12/11.

E Three issues were formulated for determination in the appellant's brief which are -

(1) In view of the sui generis nature of an election petition, whether the evaluation of evidence by the court below and its decision on burden of proof were not wrongful and led to grave miscarriage of justice.

F (2) In spite of the state of pleadings and evidence before the lower court whether it was right for the court below to have held that there was substantial compliance with the Electoral Act 2010 (as amended) and that the declaration of 3rd and 4th respondents as G duly elected was constitutional.

(3) Considering the evidence before the trial court and vis-a-vis the several rulings whether it can be said that the conduct of the trial court was done in a manner consistent with appellant's right to fair hearing.

H The 1st, 2nd, 6th - 42nd respondents adopted and relied on the respondents, brief filed 1/12/11, where five issues were settled for determination in this appeal which read as follows:-

(1) Whether the learned justices of the Court of Appeal applied the correct principle of law in evaluating the evidence led at the trial

and in holding that the 3rd and 4th respondents were duly elected.

(2) Whether the learned justices of the Court of Appeal were correct when they held that the burden of proof in the case was on the appellant to establish that the election was vitiated by non-compliance with the provisions of the Electoral Act 2010 (as amended). B

(3) Whether the learned justices of the Court of Appeal were correct in rejecting the documents tendered by the appellant and in not pronouncing on the rejected documents in their judgment.

(4) Whether the learned justices of the Court of Appeal denied the appellant the rights to fair hearing by virtue of the Ruling delivered on 6th and 22nd September 2011. C

(5) Whether the learned justices of the Court of Appeal were correct when they set aside the subpoena which the appellant abandoned. D

In the brief filed on 2/12/11, the 3rd and 4th appellants distilled two issues for determination which read as follows-

1) Having regard to the clear provisions of Section 131 (1) and (2), 132 and 133 (1) of the Evidence Act read together with Section 139 (1) of the Electoral Act 2010 (as amended) and considering several appellate court decisions on the question of burden of proof whether or not the decision of the lower court on where and when the burden of proof in the petition before it was situated can be faulted. E

2) Considering the evidence led in support of the state of pleadings as well as the way and manner the lower court carefully and painstakingly weighed and analysed the evidence given, whether: F

(1) The lower court was not right in dismissing the petition.

(2) Appellant's right to fair hearing was breached. G

The 5th respondent adopted and relied on the brief deemed filed on 13/12/11. The 5th respondent distilled two issues for determination in the brief namely-

(a) Whether having regards to the evidence adduced by the appellant/petitioner vis-à-vis the respondents, the lower court was right to have dismissed the petition on the ground that the appellant failed to prove the allegations of crime contained in the petition beyond reasonable doubt and/or non-criminal allegations on the balance of probability or preponderance of evidence as required by law, H

(b) Whether having regards to both oral and documentary evidence adduced by the appellant in relation to the facts and circumstances of the appellant's case, it would be right to say that the appellant was denied fair hearing.

B Chief Awomolo learned senior counsel directed the court's attention to the notice of preliminary objection filed to some of the grounds of appeal, already argued in the brief. Chief Olanipekun, learned senior counsel for the 3rd and 4th respondents also towed the same line.

C On a close scrutiny of the briefs filed by the 1st, 2nd, 6th - 42nd respondents and the 3rd and 4th respondents, I observed that the grounds of objections are not only identical; they also raised similar terminal legal defects. In that situation, it is imperative on the court to first hear and determine such preliminary issues. If they are found to D be defects in the competence of those grounds of appeal and the issues formulated from them the resultant effect is to deprive this court of the power of adjudication on them. Any defect in competence is extrinsic to adjudication. The preliminary objection raised by Chief Awomolo, SAN to the notice and grounds of appeal are as follows-

E (1) The notice of appeal is defective in as much as it reflects that the appeal relates to Rulings delivered in the course of the hearing of the petition.

(2) Grounds 7, 10, 13 and 17 of the grounds of appeal are F appeals against interlocutory decisions of the Court of Appeal over which previous notices of appeal were filed and with respect to decisions delivered over a period of sixty (60) days within which an appeal shall be determined.

(3) Ground 14 and 16 of the notice and grounds of appeal do G not arise from the decision of the Court of Appeal.

In the preliminary objection raised by Chief Olanipekun SAN, this court is persuaded to strike out grounds 7, 10, 12, 13, 14, 15 and 17 of the appellant's ground of appeal as well as the issues and arguments thereon in the appellant's brief of argument. The grounds H of the objection of both sets of respondents challenged the competence of the notice of appeal as they cover the judgment of the lower court delivered on 1/11/11 and several unspecified rulings of the same court delivered on unspecified dates.

On gleaning through the Records of appeal, the rulings of the

lower court delivered during the proceedings at the hearing of the petition by the trial court came on various dates like 6/11/11 at pages 2422-2427 of the Record; 15/9/11 at page 2455 of the Record; 28/9/11 on pages 2567-2570 of the Record. The appellant filed notice of appeal in respect of these interlocutory Rulings. These are the Rulings reflected in grounds 10, 12, ground 13 (i)- (iv), grounds 14 and 15. Grounds 7, 10, 12, 13, 14, 15 and 17 are statute barred being in breach of Section 285 (7) of the Constitution of the Federal Republic of Nigeria and Section one of the practice Directions [Election Appeals to the Supreme Court]. The contention also is that any issue distilled from the incompetent grounds must equally be struck out because an incompetent ground of appeal cannot give rise to a competent issue for determination. Issue No. 3 raised from these incompetent grounds of appeal is afflicted by the same incompetence and must suffer the same fate.

Cases were cited in support of the submission - Akpan v. Bob (2010) 17 NWLR (pt.1223) 421 at 493, Amadi v. Orisakwe (1992) NWLR (pt.511) pg. 161, Fagunwa v. Adibi (2004) 17 NWLR (pt.903) pg.544, Peoples Democratic Party (PDP) v. Congress for Progressive Change (CPC) & Ors consolidated, appeals SC.272/2011 and SC.226/2011 delivered on 31/10/11.

Finally the learned senior counsel drew the attention of this court to the fact that the appellant has presented notice of appeals without dates and particulars or specifications contrary to Order 8 of the Supreme Court Rules. The said notice of appeal is incurably bad and the court is urged to strike it out. In addition to the foregoing submission, Chief Awomolo SAN concluded that these appeals lapsed on the 6th, 17th and 22nd of November 2011 respectively and they cannot now legally arise for determination. Grounds 14 and 16 did not arise from the decisions appealed against. It is trite that a ground of appeal must arise from live issues at the trial and must challenge the ratio of the decision. He cited Osuji v. Ekeocha (2009) 16 NWLR (pt.1166) pg.81 at pg.122, Babalola v. State (1989) 4 NWLR (pt.115) pg.264.

It is apt and proper for the determination of the legal questions raised in these objections to have an insight into the relevant laws. Section 285 (7) of the 1999 constitution (as amended) reads -

“An appeal from a decision of an election tribunal or Court of

Appeal in an election matter shall be heard and disposed off within 60 days from the date of the delivery of judgment of the tribunal or Court of Appeal.”

Section one Practice Directions [Election Appeals to the Supreme Court] No. 33 of 2011, Federal Republic of Nigeria Official Gazette

B Vol. 98 reads -

“The appellant shall file in the Registry of the Court of Appeal his notice and grounds of appeal within 14 days from the date of the decision appealed against.”

C ***The simple, straight forward, unambiguous words used in the foregoing provisions show that Section 285 (7) of the 1999 Constitution (as amended) and Section 1 of the Practice Directions are Limitation Laws.***

D ***Where a statute of limitation prescribes a period within which an action should be brought, legal proceedings cannot be properly or validly instituted after the expiration of the prescribed period. Thus an action instituted after the expiration period of the prescribed period is said to be statute barred.***

E Osun State Government v. Dalami Nigeria Ltd. (2007) All FWLR (pt.365) pg.438, Jallco Ltd. V. Owoniboye Tech. Serv. Ltd. (1995) 4 NWLR (pt.391) pg. 531 at 538.

F ***Where the limitation of time is imposed in a statute, decree or edict unless the said statute, decree or edict makes provision for extension of time, the courts cannot extend the time. An action filed outside the period will lapse due to effluxion of time. This is the fate of the interlocutory appeals raised in grounds 7, 10, 12, 13, 14, 15 and 17 of the notice of appeal. They are all statute barred and cannot be legally***
 G ***resuscitated. Issue number 3 which is formulated from these grounds must go with them.***

H ***Any grounds of appeal which do not arise from the ratio of the judgment appealed against equally cannot stand for reason of incompetency. The preliminary objection is sustained and the incompetent grounds and issue are struck out. I observe that issues 4 and 5 in the issues for determination in the brief of the 1st, 2nd, 6th - 42nd respondents are formulated from grounds 7, 10 and 17 of the appellant’s already struck out. These issues also have no legs to stand on; they are***

consequently struck out. Issue No.3 of the appellant's brief is struck out.

It is noteworthy that the learned senior counsel for the 3rd and 4th respondents in paragraphs 2.1 of the respondents submitted that -

“Appellant conceded at the lower court that its petition was restricted to the issue of non-compliance.” B

At page 2843 before presenting his issues for determination to the lower tribunal, learned senior counsel for the petitioner conceded that no evidence was adduced on the allegation of crime which he alleged in the petition - the court was persuaded to decide the petition on the balance of probability. This will obviously have an impact on the scope of issue one which challenged the evaluation of evidence and the decision of the lower court on burden of proof which were alleged to be wrongful and led to grave miscarriage of justice. C D

The germane issue for determination is now issue No. 2 which reads-

“In spite of the state of pleadings and evidence before the lower court whether it was right for the court below to have held that there was substantial compliance with the Electoral Act 2010 (as amended) and that the declaration of the 3rd and 4th respondents as duly elected was constitutional”. E

The submission of the appellant is that the election petition is generally considered to be sui generis, this court must look for guidance in its decision primarily within the four walls of the Electoral Act and it is only when this is lacking can the court fall back on the relevant court rules and case law. The position of the law in election is not totally the same with ordinary civil cases. The lower court used double standards in the evaluation of the evidence of the appellant and the respondents. The court held in the judgment that a litigant can take advantage of the evidence of the opponent which supports its case when holding that the failure of the 1st set of respondents to call evidence did not totally rob them of defences that they could garner from the lapses in the case of the appellant. The court held that it did not have to undertake a detailed evaluation of the respondents' evidence because the onus of proof has not shifted. This court is to treat this petition as a civil claim which requires proof on the balance of probability or preponderance of evidence - section 134 of the F G H

Evidence Act. The appellant had discharged the burden of proof in Section 133 (1) and (2) of the Evidence Act to establish that the presidential election conducted on 16/4/2011 by the 1st respondent was not conducted in compliance with the Electoral Act. Particularly that the election was marred by non-accreditation of voters, entry of wrong figures in forms EC8A, EC8B and EC8C, arbitrary allocation of scores in favour of the 3rd respondent, non supply/excess supply of electoral materials/use of fake ballot papers printed by a company owned by stalwarts of the 5th respondent which was used to conduct election in the North West, North Central, South East, South South and South West of the country and the Federal Capital Territory, Abuja. The 1st, 2nd, 6th - 42nd respondents have woefully failed to discharge the burden of proof placed on them to show their non-compliance with the provisions of the Electoral Act did substantially affect the result of the election.

The 1st, 2nd, 6th - 42nd respondents abandoned substantial portions of their pleadings including statutory documents of their pleadings such as forms EC8A, EC8B, EC8C and EC825. Also voters Register used in the accreditation of voters which were pleaded and made part of their Reply on which they had pleaded that the election was not conducted in compliance with the provisions of the Electoral Act by refusing to call evidence in support of the averments in these pleadings.

The appellant further submitted that in view of the failure of the 1st, 2nd, 6th - 42nd respondents to call evidence to show that non-compliance above did not substantially affect the result of the election; the burden placed on the appellant by law is to prove its case by minimal evidence.

The 3rd, 4th and 5th respondents who are the beneficiaries of the conduct of the election in violation of the provisions of the Electoral Act by the 1st, 2nd, 6th - 42nd respondents have equally failed to establish by credible evidence that the election in which they were said to be victorious was conducted in accordance with law. The court is urged to allow the appeal.

The learned senior counsel, for the 1st, 2nd and 6th - 42nd respondents Dr. Ikpeazu, argued the issue of evaluation of evidence and burden of proof together with the 2nd issue alleging that the 1st, 2nd and 6th - 42nd respondents failed to call evidence to show that

non-compliance did not substantially affect the result of the election. The learned senior counsel restated the pleadings of the appellant particularly the prayers. The 1st, 2nd and 6th - 42nd respondents joined issues with the appellants in their joint brief and produced the relevant portions specifically pleaded. They went over category of witnesses called by the appellant and the nature and quality of their evidence. The respondents called enough witnesses to rebut the allegation that collation was improperly done. Since all the front loaded documents of the respondents were tendered by the appellant and having availed it the opportunity to obtain all the documents with which it intended to prove its case, the 1st, 2nd and 6th - 42nd respondents stopped calling witnesses. B
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The respondents relied on three processes to establish their pleadings -

1. Cross-examination of witnesses. D
2. Evidence of three witnesses with respect to three States.
3. Documentary evidence which were all certified and carried the presumption of regularity and which relate to all the States in contention as well as others.

The respondents urged this court to hold that the lower court applied the correct principle of law in evaluating the evidence led at the trial court and holding that the 3rd and 4th respondents were duly elected. That the burden of proof was on the appellant to establish that the election was vitiated by non-compliance with the provisions of the Electoral Act. E
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The learned senior counsel for the 3rd and 4th respondents, Chief Olanipekun submitted that although the petitioner did not adduce any evidence to warrant assuming responsibility for any shift of burden of proof, the 3rd and 4th respondents still called 22 witnesses who gave uncontradicted evidence that the presidential election was free and fair. The nature of the petitioner's case completely omitted the 3rd and 4th respondents whose election is being challenged. The appellant devoted the entirety of its brief to attacking the alleged weakness in INEC's case. The petitioner failed to properly package his case under Section 139 (1) of the Electoral Act. The evidence of witnesses produced to establish non-compliance failed to do so in any manner. The 3rd and 4th respondents submitted that after striking out relief 6 granting the other reliefs would amount to G
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making an unenforceable order. The entire appeal has not only become academic but also abusive of the processes of court. Page 2856 of the Record shows a dispassionate review of the evidence. At pages 2837-2840, the lower court gave detailed and graphic analyses of the witnesses who testified for the appellant and the sets of
 B respondents. At pages 2844-2845, the lower court identified the issues formulated by the parties. The court is urged to dismiss the appeal. The learned senior counsel made reference to an avalanche of cases - sixty-seven of them in number.

C The learned senior counsel for the 5th respondent in his submission laid emphasis on the position of law on the burden of proof. The learned senior counsel restated sections 131, 132 and 133, 134 and 135 of the Evidence Act 2011 (as amended) and cited the case of Imonikhe v. Unity Bank Plc (2011) NSCQR (Pt.2) pg.554
 D at pgs.575 - 576

The appellant has failed woefully to show that the presidential election held on the 16th day of April, 2011 was conducted in non-compliance with the provisions of the Electoral Act 2010 and how such non-compliance with the provisions of the Electoral Act 2010
 E has substantially affected the result of the election. The court is urged to refuse the relief sought by the appellant and dismiss this appeal.

I have painstakingly considered the submission of all the parties in this appeal. The issue for determination has been narrowed down
 F principally to issue No. 2 in the appellant's brief which is that -

"In spite of the state of pleadings and evidence before the lower court, whether it was right for the court below to have held that there was substantial compliance with the Electoral Act 2010 (as amended) and that the declaration of 3rd and 4th respondents as duly elected
 G was constitutional. "

I cannot close my eyes to issue of wrongful evaluation of evidence by the court below and its decision on burden of proof raised under-issue one. I am mindful of the fact that these factors are part of the legal points for consideration under the issue about non-
 H compliance. I intend to elaborate on them under issue 2 for the avoidance of repetition. It strikes me as odd that throughout the conduct of the case in the petition, the appellant viciously pitched its tent against INEC to the neglect of his real foes; the 3rd, 4th and 5th respondents who deprived it of the victory at the polls and office of

the President of the Federal Republic of Nigeria and Vice President.

I intend at this stage to elucidate on certain legal points which will continue to lurk at the background during the consideration of the germane issue in this appeal. These are -

(a) What amounts to a Declaratory Relief?

(b) Evaluation of evidence by an Appellate court.

B

The most important aspect of the duty of the court in the evaluation of evidence is to decide where the scale preponderates by qualitative evidence. The court must ensure that it holds the string or scale of justice evenly balanced between the parties so that justice may not only be done but must manifestly be seen to have been done. There is however a distinct difference between the role of a trial court and that of an appellate court in the area of evaluation of evidence. It is the trial court which alone has the primary function of fully considering the totality of evidence placed before it, ascribes probative value to it, put same on the imaginary scale of justice to determine the party in whose favour the balance tilts, make the necessary findings of fact flowing therefrom, apply the relevant law to the findings and come to a logical conclusion. The evaluation of evidence remains the exclusive preserve of the trial court because of its singular opportunity of hearing and watching the demeanour of witnesses as they testify and thus it is the court best suited to assess their credibility. Where a trial court makes a finding on the credibility of a witness, an appellate court would not ordinarily interfere.

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Where the nature of the case is such that the evaluation would not entail the assessment of credibility of witnesses and would be confined to drawing inferences and making findings from admitted and proved facts and from contents of documentary evidence, the appellate court is in as vantage a position as the trial court to evaluate or re-evaluate the evidence and make its own findings. This court as an appellate court to the lower Tribunal has a duty to re-appraise the evidence on record to see if the findings of the trial court were perverse. Woluchem v. Gudi (1981) 5 SC. 291, Mogaji v. Odofoin (1978) 4 SC 91, Duni v. Nwosu (1989) 4 NWLR (pt.113) pg.24, Akintola v. Balogun (2000) 1 NWLR (pt.642) pg. 532, Ebba v. Ogodo

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H

(1984) 1 SCNLR 372, Mogaji v. Cadbury (Nig.) Ltd. (1985) 2 NWLR (pt.7) pg.393.

Before I consider the issue of non-compliance, I must express my observation on gleaning through the records pages 68-69 based on the pleadings of the appellant that reliefs 1, 2 and 5, paragraph B 40 are basically declaratory in nature. They are:

(i) That the election was invalid by reason of corrupt practices and substantial non-compliance with the provisions of the Electoral Act 2010 which substantially affected the result of the election.

C (ii) That the 3rd and 4th respondents were not duly elected by majority of lawful votes cast at the election.

They relate to Section 134 (2) of the 1999 Constitution and 139 (1) of the Electoral Act 2010.

It is trite that in a claim for declaration, the onus is on D the plaintiff to establish his claim upon the strength of his own case and not upon the weakness of the case of the defendant. The plaintiff must therefore satisfy the court that upon the pleadings and cogent and credible evidence adduced by him that he is entitled to the declaration of right in his favour.

E Nwokidu v. Okanu (2010) 3 NWLR (pt.1181) pg.362, Ekundayo v. Baruwa (1965) 2 All NLR pg.211, Dantata v. Mohamrned (2000) 7 NWLR (pt.664) pg.176.

Section 139 (1) of the Electoral Act stipulates that -

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

G The issue of non-compliance was raised before the lower-court. The court in its judgment concluded at page 2876 of the record that-

H “*Since the petitioner conceded that the petition was not based on the allegations of corrupt practices but on substantial non-compliance, for noncompliance to render the election invalid or contrary to the Electoral Act, it must be so great and substantial and the court or Tribunal must be satisfied that it affected or might have affected the majority of the votes or the result of the election.*”

The Supreme Court re-stated the law on non-compliance with the provisions of the Electoral Act 2006 in the case Buhari v. INEC

(2008) 19 NWLR (pt.1120) pg.246 at 435-436.

“The law as it stands requires the petitioner after establishing the substantial noncompliance occasioned by breach of Section 45 (1) and (2) of the Act, to go ahead and prove that the non-compliance affected the result of the election.

It is clear from the decided authorities that before a petition can succeed on the ground of non-compliance with the provisions of the Electoral Act; the petitioners must prove not only that there was non-compliance with the provisions of the Electoral Act but that the non-compliance substantially affected the result of the election.

In other words, the petitioner has two burdens to prove:-

- (a) That non-compliance took place and*
- (b) That the non-compliance substantially affected the result of the election.”*

That leads to another crucial or vital question - on whom then does the burden of proof lie? In finding an answer to this question, I shall explore the relevant sections of the Evidence Act 2011 (as amended).

Section 131 (1)

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist”

131 (2)

“When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

132

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

133(1)

“In civil case, the burden of first proving existence or non-compliance of a fact lies on a party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.”

Section 134 reads:

“The burden of proof shall be discharged on the balance of probabilities in any civil proceedings.”

From the foregoing, the burden of proof generally in the

sense of establishing a case virtually lies on the plaintiff or the initiator of a suit. He who asserts must prove what he asserts i.e. qui affirmat non a qui negat incumbat probat. The party who asserts in his pleadings the existence of a particular fact is required to prove such fact by adducing credible evidence.

B If he fails to do so, his case fails. A plaintiff would be expected to succeed on the strength of his own case and not on the weakness of the defence.

C On the other hand, if he succeeds in adducing evidence to prove pleaded facts, he is said to have discharged the burden of proof that rests on him. The burden then shifts to his adversary to prove that the fact established by the evidence adduced would not, on the preponderance of evidence, result in the court giving judgment in favour of the party. The same D burden is applicable to election cases. Until the plaintiff or petitioner has discharged the onus cast on him by law, the onus does not shift. Buhari v. Obasanjo (2005) 2 NWLR (pt.910) pg.241, Igwe v. A.C.B. Plc (1999) 6 NWLR (pt.605) pg.1, Ajadi v. Ajibola (2004) 10 NWLR (pt.898) pg.91, Haruna v. Modibbo (2004) E 16 NWLR (pt.900) pg.487.

F The case of the appellant as petitioner before the lower court and even in his brief before this court demonstrated a clear misconception of the burden of proof required from a petitioner alleging non-compliance with the provisions of Section 139 of the Electoral Act. The evidence of the appellant both oral and documentary was geared towards the burden of proof resting squarely on the 1st respondent based on certain alleged complaints in the conduct of the election, non- G production of documentary evidence and witnesses in the petition. Allegations of substantial non-compliance with electoral laws or regulations is not a new concept in our court in election petition. The Supreme Court over the years had made pronouncements to settle that the burden of proving H that non-compliance with the Electoral Act which substantially affected the result of the election lies on the petitioner.

I shall restate the pronouncement of the Supreme Court in some of these cases. In the case of Akinfosile v. Ijose (1960) Vols. 4 and 5 pg.192 or 1960 WRNLR 60; an election petition brought before

an Akure High Court on the grounds of irregularities and non-compliance with some provisions of the Election to the House of Representatives Regulations 1958. On appeal to the Federal Supreme Court, the court held -

"I do not find it necessary to say more about these cases than that in my view none of those cited by counsel for the petitioner supports the proposition contended for him namely, that once any non-compliance with the regulations has been shown by the petitioner, the onus shifts to the respondent to satisfy the court trying an election petition that the noncompliance did not affect the result of the election. I am firmly of the view as above indicated that a petitioner who alleges in his petition a particular non-compliance avers in his prayer that the non-compliance was substantial, must so satisfy the court. This petitioner failed to do."

In the case of Awolowo v. Shagari (1979), All NLR 120 at pg.161; (1979) 6-9 SC pg.51; (1979) 12 NSCC pg.87 at pg. 23 the Supreme Court said that-

"If this proposition is closely examined it will be found to be equivalent to this that the non-observance of these rules or forms which is to render the election invalid must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of the votes in or other words the result of the election."

In the case of Buhari v. Obasanjo (2005) 13 NWLR (pt.941) pg.1, the Supreme Court said that -

"It is manifest that an election by virtue of Section 135 (1) of the Act shall not be invalidated by mere reason it was not conducted substantially in accordance with the provisions of the Act. It must be shown clearly by evidence that the non-substantiality has affected the result of the election. Election and its victory is like soccer and goals scored. The petitioner must not only show substantial non-compliance but also the figures i.e. the votes that the compliance attracted or omitted. The elementary evidential burden of the person asserting must prove has not been derogated from by Section 135 (1). The petitioner must not only assert but must also prove to the court that the non-compliance has so affected the election result to justify nullification."

In more recent times in the case of *Abubakar v. Yar' Adua* (2008) 19 NWLR (pt.1120) pg.1, the Supreme Court said that -

“The operative words in Section 146 (1) are if it appears to the election tribunal or court that the election was conducted substantially in accordance with the principles of the Act. In view of the facts that the tribunal or court can only come to the conclusion in the light of the evidence before it, one of the parties must give that evidence to the contrary and the party is the one who will fail if that evidence is not given. That party in my humble view is the petitioner. He is the party who alleges that the election was not conducted substantially in accordance with the principles of the Electoral Act.”

Section 135 (1) Electoral Act 2002 and Section 146 (1) of the 2006 Electoral Act are now Section 139 (1) of the Electoral Act 2010 (as amended).

In the act of presenting its case, the appellant adopted the stance of passing the buck. It brought all allegations amounting to noncompliance and retreated, expecting the 1st respondent INEC to provide the necessary and relevant material evidence to establish its case.

By force of law, the Independent National Electoral Commission has the duty of conducting elections. Besides the constitutional provisions, it is guided by the Electoral Act 2010 (as amended) and the Election guidelines and Manual issued for its officials in accordance with the Act. These documents embody all steps to comply with in the conduct of a free, fair and hitch free election, a party seeking nullification of an election must succeed on the strength of his own case and not on the weakness of the respondent's case. This is so in that failure of the adversary to call evidence will not relieve the party from satisfying the tribunal by cogent and reliable proof or evidence in support of the petition. *Rotimi v. Fajoriji* (1999) 6 NWLR (pt.606) pg.305, *Okoroji v. Ngwu* (1992) 1 NWLR (pt.263) pg.113.

The appellant as petitioner at the trial court relied on both oral and documentary evidence to establish the averments in its pleadings.

The appellant called 47 witnesses who gave diverse evidence about the conduct of the election like-

1. Those in charge of analysis of ECB series.
2. Those in charge of voters Register.
3. Reporters on supply of election materials.

4. Polling Unit Agents for States
5. Roving Agents
6. Supervisory Collating Agents

DOCUMENTARY EVIDENCE

7. At the pre-hearing proceedings, it was agreed that certain documents like Forms EC8A, EC8B, EC8C, Ballot Papers, Register of voters showing accreditation of voters, documents showing distribution of ballot papers and other election materials and documents were to be obtained by them from the State offices of the 1st, 2nd, 6th - 42nd respondents (INEC) subject to payment of fees specified for the certification of the documents.
8. Documents in which only certified true copies could be obtained appellant requested for the original.
9. On occasion when subpoenaed witness was available and documents to be tendered by them - appellant proceeded to close its case contending that such witness was a witness of court.
10. Front loaded documents of the 1st, 2nd, 6th - 42nd respondents were tendered by the appellant.

The quality of the evidence of the witnesses called by the appellant did not meet the required standard of proof to rebut the allegations levied against the respondents. In view of the gravity of the allegations, the onus was on the appellant to prove the allegations which it failed to discharge. As regards the witnesses called, PW1 one Buba Galadima and Prince Tony Momoh - who are both important Chieftains of CPC; the Chairman and National Secretary respectively had their witness statements muddled up and the application that both of them should swap their witness statements was refused by court. Both witnesses had their statements struck out (Vide pages 99, 101-109 of Vol. 1 and 2515, 2258 of Vol.6 of the Record). They were meant to be key witnesses for the petitioner. Of all the forty-seven witnesses called by the appellant, none of them tendered their voters cards to indicate that they wanted to vote but could not owing to absence of election materials. The roving agents and witnesses who claimed they analysed result streets and voters register and found discrepancies in a number of voters register did not tender such report during the hearing of the petition. There was evidence that the appellant had polling Agents all over the country but only six of them were called. The six agents who were called gave contradictory

evidence.

Any evidence produced by the appellant to rebut the presumption of regularity enjoyed by INEC by virtue of Section 168 of the Evidence Act 2011 (as amended) can only be rebutted by cogent, credible and acceptable evidence.

A court of law can only pronounce judgment based on credible evidence presented and properly established before it. A court of law is not at liberty to go outside the evidence and search for extraneous evidence in favour of the parties.

Abubakar v. Yar'Adua (2008) 19 NWLR (pt.1120) pg.1.

The contention of the appellant in this petition is that by virtue of the constitutional role of the 1st respondent in the conduct of the election, once it had alleged irregularities such as non-accreditation of voters, under supply of voting materials etc the onus shifts to the respondent to rebut them.

Generally speaking, in an election petition, it is the petitioner who will fail if no evidence at all were given on either side since there is a presumption of regularity in the execution of an official act as shown in Section 168 (1) of the Evidence Act which provides that: -

“Where any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.”

There is a presumption that any election result declared by a returning officer is authentic and correct. The burden to rebut is on the person who denies its correctness. It is however a rebuttable presumption. Jalingo v. Nyame (1992) 3 NWLR (pt.231) pg.538, Nwobodo v. Onoh (1984) 1 SCNLR (pt.231) pg.538, Omoboriowo v. Ajasin (1984) 1 SCNLR pg.108, Abubakar v. Yar'Adua (2008) 19 NWLR (pt.1120) pg.1, Hashidu v. Goje (2003) 15 NWLR (pt.843) at pg.352.

Documentary evidence produced by the 1st respondent was related to -

(a) Election Collation Results in Form ECBD for Adamawa, Abia, Akwa Ibom, Anambra, cross River, Ebonyi, Enugu, Imo, Jigawa, Kaduna, Nasarawa, Rivers, Sokoto and Taraba States where election was challenged by the appellant.

(b) Summary results of National election which took place in

36 States and the Federal Capital Territory.

(c) Declaration of Result of election in Forms EC8D and EC8A.

(d) Letters of contract to AERO VOTE LTD. G. I. Solution Ltd, Tulip Press Ltd. for the printing of ballot papers and distribution of election materials.

Certified true copies of these documents were brought to the Tribunal and tendered in evidence and by virtue of Section 168 of the Evidence Act (as amended) they all carry presumption of regularity. B

In the case of *Omoboriowo v. Ajasin* (1984) 1 SCNLR pg.1 the Supreme Court confirmed this principle when it said -

“Now as I stated in Nwobodo v. Onoh (supra) there is in law a rebuttable presumption that the result of any election declared by the Returning Officer is correct and authentic by virtue of Section 115, 14-8 (c) and 149 (1) of the Evidence Act and the burden is on the person which denied the correctness and authenticity of the return to rebut the presumption. Where such denial is based on a mere complaint that the petitioner scored a majority of lawful votes the rebuttal needs only to be proved within the balance of probability.” C D

The case of *Ibrahim v. Shagari* (1983) 2 SCNLR pg.196 stated categorically that - E

“The onus lies on the appellants to establish first substantial non compliance. Secondly that it did or could have affected the result of the election. It is after they have established the foregoing that the onus would have shifted to the respondents to establish that the results was not affected.” F

Where an allegation was made that an election was invalid by reason of non-compliance with the provisions of Section 139 (1) of the Electoral Act 2010 (as amended) the section vested an Election Tribunal or court entertaining an election petition with the power to decide from the evidence tendered before it in such case whether the alleged non-compliance was substantial enough to invalidate the election. The emphasis is not on whether those acts of non-compliance are of criminal or civil nature, but on whether the election was conducted substantially in accordance with the principles of the Electoral Act and that the non-compliance did not substantially affect the result of the election. The petitioner must not only assert but must satisfy the court that non-compliance affected the G H

election result to justify nullification. Buhari v. Obasanjo (2005) 13 NWLR (pt.941) pg.1, Awolowo v. Shagari (1929) 6-9 SC pg.51, Akinfosile v. Ijose (1960) SCNLR pg.176, Swen v. Dzungwe (1966) 1 SCNLR pg. 111, Bassey v. Young (1963) 1 SCNLR pg.61, Sorunke v. Odebunmi (1960) SCNLR pg.414, Dada v. Dosunmu (2006) 18 NWLR (pt.2010) pg.134, Amosun v. INEC (2007) ALL FWLR (pt.391) pg. 1712. In the case of Swen v. Dzungwe (1966) 1 SCNLR pg.111 this court held that -

“It follows clearly that if at the end of the case of the petitioner, a case of non-compliance is established which may not affect the result of the election, it is impossible for the tribunal to say whether or not the result were affected by the non-compliance as found could not and did not in fact affect the result of the election, then the petition is entitled to succeed on the simple ground that civil cases are proved by preponderance of accepted evidence.”

The duty lies on the court to determine whether or not an election was conducted substantially in accordance with the Constitution and the Electoral Act 2010. The court will look at circumstance of the case, including the state of pleadings, especially the credibility of the petitioners position and the nature and substance of the complaints of the petitioner, the attitude of the functionaries charged with the conduct of the election and whether the omissions complained of by the petitioner even if proved, affected the conduct of the election. Okoroji v. Ngwu (1992) 9 NWLR (pt.263) pg.113.

The court discharged this duty and found that the lapses of the appellant in the process of hearing of the petition at the court below mentioned in this judgment are just a tip of the ice berg. The lower court identified them exhaustively in evaluating the evidence available in the petition before holding on pg.2877 of the record that

“From whatever angle this petition is looked at, it is clear that the burden of proof of the allegations contained in the petition be they criminal or for substantial non-compliance rested with the petitioner. The petitioner did not discharge this burden to warrant rebuttal evidence to be adduced by the 1st set of respondents.”

The lower court came to this conclusion going by the evidence before it both oral and documentary that the election of the office of the president and vice-president had not been successfully challenged;

the petition failed and was dismissed. The foregoing conclusion of the lower court was in the circumstance right, proper and unassailable - this court has no justifiable reason to interfere with it. The appeal lacks merit and it is accordingly dismissed. The judgment of the lower court is affirmed. Consequently, the 3rd and 4th respondents won the election conducted by the 1st respondent on the said 16th April, 2011 and were returned by the 1st respondent as the duly elected President and Vice-President respectively of the Federal Republic of Nigeria. No order as to costs.

MUSDAPHER CJN

On the 16th of April, 2011, the Independent National Electoral 1st respondent herein, organized and conducted the presidential elections in the Federal Republic of Nigeria. The appellant herein, the Congress for Progressive Change (CPC) was one of the twenty political parties which contested the elections. The congress for Progressive change sponsored as its presidential and vice presidential candidates General Muhammadu Buhari and pastor Babatunde Bakare respectively. The 5th respondent herein, the Peoples' Democratic Party, had its candidates as Dr. Goodluck Jonathan and his running mate, Architect Namadi Sambo, the 3rd and 4th respondents respectively in this appeal. After the collation of all the results by the officials of the 1st respondent, the 3rd and 4th respondents were said to have scored 22,471,370 votes and the candidates for the appellant, General Muhammadu Buhari and Pastor Babatunde Bakare were said to have scored 12,211,670 votes. As the result of the votes scored by each of the twenty political parties were collated, the Presidential Returning officer returned the 3rd and 4th respondents that is to say Dr. Goodluck Ebele Jonathan and Architect Namadi sambo as President and Vice president of the Federal Republic of Nigeria having satisfied all the provisions of section 134 (2) of the Constitution.

The appellant, the Congress for progressive Change, was not happy with the return of the 3rd and 4th respondents; it presented a petition before the Court of Appeal challenging the return of the 3rd and 4th respondents. By paragraph 13 of the petition, the grounds upon which the return was challenged is as follows:-

“13. The grounds upon which this petition is brought are as

follows:

(a) The election was invalid by reason of corrupt practices and substantial non-compliance with the provisions of the Electoral Act 2010 which substantially affected the result of the election.

(b) The 3rd and 4th respondents were not duly elected by majority of lawful votes cast at the election.”

By Paragraph 40, the petitioner/appellant prayed for the following reliefs:-

(i) That it may be declared that the election and the return of the 3rd and 4th respondents who were sponsored by the 5th respondent is voided by corrupt practices and substantial non-compliances with the relevant provisions of the Electoral Act 2010 as amended.

(ii) That it may be declared that the 3rd and 4th respondents who were sponsored by the 5th respondent were not duly elected in respect of Kaduna, Sokoto, Nassarawa, Kwara, Adamawa, Abia, Akwa Ibom, Enugu, Cross River, Rivers State, Ebonyi, Bayelsa, Delta, Imo, Anambra, Benue, Lagos, Plateau States and Federal Capital Territory, Abuja.

(iii) That it may be determined that the 3rd respondent did not fulfill the requirements of Section 134 (2) of the Constitution of the Federal Republic of Nigeria with regards to -

(a) Scoring the highest number of votes cast at the election and

(b) Mandatory one quarter of the votes cast at the election in each of at least two third of all states in the Federation and in the Federal Capital Territory, Abuja.

(iv) That it may be determined that the result declared by the 2nd respondent on the 18th day of April, 2011 by which the 3rd respondent was returned as the elected President of Nigeria is wrongful, invalid and unlawful.

(v) A declaration that the presidential election for the office of the president held on the 16/4/2011 did not produce a winner as contemplated by the provision of the constitution of the Federal Republic of Nigeria 1999.

(vi) An order directing the 1st and 2nd respondents to arrange another election between the petitioner and the 3rd respondent in conformity with the provision of section 134 (4) or such other relevant

provisions of the constitution of the Federal Republic of Nigeria as amended.

After all the preliminaries including the prehearing sessions, the matter proceeded to trial but in a Ruling delivered on the 14/7/2011, Reliefs 4 and 6 were struck out' thus leaving reliefs 1, 2, 3 and 5. In its judgment delivered on the 1/11/2011, the Court of Appeal dismissed the petition and the return of the 3rd and 4th respondents as duly elected President and Vice President of Nigeria. B

It is important to note at this stage that there was no appeal filed by the appellant against the ruling of 14/7/2011 striking out reliefs 4 and 6. Again it is worthy of note that the appellant at the trial has conceded in his written address before the Court of Appeal that they did not lead any evidence in proof of the criminal allegations as contained in the petition. Thus the allegations of corrupt practices and other criminal acts were abandoned as not duly proved. In any event, the appellant felt unhappy with the decision of the Court of Appeal dismissing its petition and has now appealed to this court. In pursuance of the notice of Appeal, the appellant has submitted to this court three issues for the determination of the appeal. The issues read:- C D E

(1) In view of the sui generis nature of an election petition, whether the evaluation of evidence by the court below and its decision on burden of proof were not wrongful and led to grave miscarriage of justice.

(2) In spite of the state of pleadings and evidence before the lower court whether it was right for the court below to have held that there was substantial compliance with the Electoral Act 2010 (as amended) and that the declaration of 3rd and 4th respondents as duly elected was constitutional. F G

(3) Considering the evidence before the trial court and vis-a-vis the several rulings whether it can be said that the conduct of the trial court was done in a manner consistent with appellant's right to fair hearing.

In their respective written briefs, the respondents have raised notices of preliminary objections to the competence of some of the grounds of appeal. The objections relate to the interlocutory Rulings made by the Court of Appeal. Now by the provisions of section 285 (7) of the constitution, the period to which an appeal can be entertained H

in an election petition decisions or rulings, interlocutory or otherwise has been limited to 60 days. Section 285 (7) of the Constitution reads:-

“An appeal from a decision of an Election Tribunal or Court of Appeal in an election in matter shall be heard and disposed of within
B 60 days from the date the delivery of the judgment of the Tribunal or Court of Appeal.”

It is thus clear, that those grounds in relation to the decisions made interlocutory having lapsed, this court would appear to have
C no jurisdiction to entertain them. Thus we can only entertain the grounds of appeal pertaining only to the final decision delivered by the court on the 1/11/2011. I accordingly strike out grounds of appeal Nos. 7, 10, 12, 13, 14, 15 and 17. They are all statute based and cannot be considered by this court. Issue No. 3 as submitted by the
D appellant cannot be a proper issue for the determination of this appeal. It is accordingly struck out.

I have above, referred to the concession of the learned counsel for the appellant that he had limited his complaints to issue of non-compliance with the provisions of the Electoral Act in relation to the
E actions of the 1st respondent and its officials in the conduct of the elections

Looking at the entire evidence adduced by the appellant in support of the petition and the argument of counsel particularly in support of issue for the determination Nos. 1 and 2 and the argument
F of the appellant’s counsel, it appears to me that counsel is heavily relying on the failure of the respondents to call evidence to disprove the allegation of non-compliance with the provisions of the Electoral Act. In my view, it is incumbent on the petitioner to prove allegations
G of non-compliance by adducing credible evidence on the balance of probabilities that the regulatory electoral commission, the 1st respondent, did not substantially comply with the provisions of the Electoral Act in the conduct of the election.

On the allegations on non-compliance with the provisions of
H the Electoral Act and or corrupt practices and criminal acts, the appellant in his petition made the following allegations:-

(a) Breach of Section 12(2) of the Electoral Act 2010 in that the 1st set of Respondents by registering votes multiple times allowed members of the 5th Respondent party to vote multiple times in the

same registration centre.

(b) Breach of Section 27(1) of the Electoral Act in that 1st set of Respondents deliberately did not announce result of the election at the designated paces for the purpose of inflating votes in favour of 3rd and 4th Respondents.

(c) Breach of Section 28(1) and (2) of the Electoral Act in that by failing to swear to affidavit of neutrality, the staff of 1st Respondent who colluded with 3rd - 4th and 5th Respondents to manipulate the result for purpose of inflating votes. B

(d) Breach of Section 43(3) and (a) of the Electoral Act, 2010 in that by not inviting polling agents to be present for the distribution of materials, voting, counting of votes and collation of votes, 1st, 3rd, 4th, and 5th Respondents- C

- under-supplied election materials in Appellant's stronghold
- delayed supply of materials in such places D
- 1st Respondents gave election materials to 5th Respondent with which they secured Unlawful votes.
- 5th Respondent's agents and police officers unlawfully seized ballot papers with which they secured unlawful votes.
- engaged in multiple thumb printing of ballot papers E
- indiscriminately awarded votes to 5th Respondent
- willfully interfered with votes
- falsified result sheets
- different Registers of voter were used in the presidential election and Government election. F

(e) Election materials were not properly accounted for in that ballot papers were juxtaposed to facilitate ballot stuffing ballot papers were missing, unofficial ballot papers were used.

(f) Over voting. G

(g) Inflation of votes.

(h) Forms EC8A (1), were not properly filled so as to conceal tracking of irregularities.

(i) Breach of Section 46(1) and 47 of the Electoral Act in that election did not take place on the same day and time. H

(j) Breach of Section 48(1) and (2) of the Electoral Act in that procedure at commencement of voting was not satisfied.

(k) Breach of Section 52(4) of the Electoral Act in that voters sympathetic to Appellant were intimidated and prevented from voting

and where they voted the votes were removed and were destroyed, notably in Akwa-Ibom and cross River State.

(l) Breach of Section 52(l) of the Electoral Act in that 1st Respondent allowed multiple voting to favour 5th, 3rd and 4th Respondents.

B (m) Breach of Sections 57 and 58 of the Electoral Act in that voters, voted indiscriminately regardless of the polling units where they were registered.

C (n) Breach of Sections 63(2) (3) (4), and 74 of the Electoral Act, 2010 in that Forms EC8 series were not stamped and votes different from the results at designated stations were returned.

(o) Breach of Section 77 of the Electoral Act in that vital documents were not made available to the Appellant by the 1st Respondent namely-

D - Copies of Voters Register - hand and Electronic copies

- All Forms EC8 series

- List of INEC officials and ad-hoc staff

- Guideline and Manuel

- Delineation of polling units

E - Un-coded excel

- Specimen ballot papers.

F The appellant has made number of complaints in the conduct of the presidential election and some of these allegations border issues of corrupt practices and other criminal acts and issues of non-compliance with the provisions of the Electoral Act. But I must emphasize and repeat that the appellant had conceded that he had not led any evidence in proof of the allegations in relation to the corrupt practices and other criminal acts as contained under sections G 117 to 132 of the Electoral Act as amended. The appellant merely rely on the issues of non-compliance.

H The 1st set of respondents in their reply denied the allegations of non-compliance in its decision the Court of Appeal found that based on the state of pleadings the appellant challenged the result of the election in only 14 states and the Federal Capital Territory leaving the results of the election in the 22 states unchallenged. The court also decided that it was not enough for the appellant merely to assert that there was non-compliance, he was duty bound to establish that fact by adducing credible evidence.

In the case of ABUBAKAR VS. YAR'ADUA (2008) 19 NWLR (Pt.1120) 1 at 155 this Court per NIKI TOBI JSC said:-

“Election results are presumed by law to be correct until the contrary is proved. It is however a rebuttable presumption. In other words, there is a rebuttable presumption that the result of any election declared by a returning officer is correct and authentic and the burden is on the person who denies the correctness and authenticity of the return to rebut the presumption. See OMOBORIOWO vs. AJASIN (1984) 1 SCNLR 108, JALINGO VS. NYAME (1992) 3 NWLR (Pt 231) 530. FINEBONE VS. BROWN (1999) 4 NWLR (Pt 600) 613, HASHIDU VS. GOJE (2003) 15 NWLR (Pt. 843) 352 and BUHARI vs. OBASANJO (2005) 13 NWLR (Pt.941) 1.

In the case of BUHARI VS. OBASANJO supra at page 222, EJIWUNMI JSC of blessed memory stated:-

“..The onus lies on the appellant to establish first substantial non-compliance. Secondly, that it did or could have affected the result of the election. It is after the appellants have established the foregoing that the onus would shift to the respondents to establish that the results was not affected. See IBRAHIM VS. SHAGARI (1983) 2 SCNLR 176.

It is elementary law that in a claim for a declaration such as the instant one, the onus is on who alleges to establish his case and not to rely on the weakness of the defence. A plaintiff in such a situation must satisfy the court with cogent and compellable evidence properly pleaded that he is entitled to the declaration, even admissions by the defendant may not do. See MAGNUS vs. EWEKA (1981) 1 sc 101. In this matter, the appellant having failed to lead credible evidence in support of his petition on the allegations of non-compliance, he cannot rely on the failure of the defence to lead evidence as proof of his allegations. It is not enough merely to raise the issue, the appellant has the onus to establish by credible evidence the allegations of non-compliance with the provisions of the Electoral Act as enumerated above.

Indeed section 139 (1) of Electoral Act provides:

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

compliance did not affect substantially the result of the election.”

From the forgoing, it is the duty of the appellant to prove by credible evidence to the satisfaction of the court the acts of non-compliance and that such acts of non-compliance substantially affect the result of the election. See AKINFOSILE VS. IJOSE (1960) WRNLR B 60; AWOLOWO VS. SHAGARI (1979) ALL NLR 120.

It is elementary law that a person seeking to nullify an election must succeed on the strength of this case as pleaded and not on the weakness of the case of the respondents, or on the failure of the respondents to adduce any evidence. In the instant case the trial Court of Appeal found that the appellant has failed to discharge the burden placed upon him and I agree with the Court of Appeal when in its Judgment, it stated:-

“From whatever angle this petition is looked at, it is clear that D the burden of proof of the allegations contained in the petition be they criminal or substantial non-compliance rested with the petitioner. The petitioner did not discharge this burden to warrant the rebuttal of the evidence to be adduced by the 1st set of respondents.”

I have before now read the judgment of my colleague Adekeye E JSC, just delivered in this matter and for these and the fuller reasons contained in the aforesaid judgment, I too dismiss this appeal and affirm the decision of the Court of Appeal. I abide by the order for costs proposed in the said judgment.

F

MOHAMMED JSC

I have had the privilege before today of reading the judgment just delivered by my learned brother Adekeye, JSC. I agree with the G reasons therein carefully outlined and the conclusion ultimately arrived at that this appeal lacks merit and ought to be dismissed.

The judgment of my learned brother is very comprehensive. With regard to the Notices of preliminary Objection raised by all the Respondents to several grounds of appeal arising from interlocutory H Rulings of the trial Court, the provisions of Section 285(7) of the 1999 Constitution as amended in 2010, have effectively taken care of the complaints of the Respondents. Although in normal proceedings of this Court interlocutory appeals filed in the cause of proceedings of the Court of Appeal, now a trial Court in election matters, may,

with the leave of this Court be argued along with the appeal against the final judgment of the Court, Section 285(7) of the 1999 Constitution of the Federal Republic of Nigeria as amended in 2010, has introduced a substantial exception where election matters are involved. Section 285 of the Constitution which deals with the establishment and jurisdiction of Election Tribunal and the Court of Appeal, has pegged the period within which any appeal against the judgment or decision of Tribunal or the Court of Appeal, shall be heard and determined in sub-section (7) which states -

“285(7) An appeal from a decision of an Election Tribunal or Court of Appeal in election matter shall be heard and disposed of within 60 days from the date of the delivery of judgment of the Tribunal or Court of Appeal.”

This provision has already been the subject of interpretation and application by this Court in its decision in election matters in appeals number SC.272/2011 and SC.276/2011 Peoples Democratic Party (P.D.P) v. Congress for Progressive Change (C.P.C.) delivered on 31st October, 2011, where this court held that the provisions are quite plain and must be applied accordingly. In this case even in the Notice of Appeal filed by the Appellant at pages 2885 -2907 of the record of appeal, it was shown that the Notice of Appeal was only an appeal against the final judgment of the Court of Appeal delivered on 1st November, 2011, as the Rulings of the Court of Appeal delivered in the course of the hearing of the Appellant’s petition, were not even specified let alone identified by their respective dates of delivery. I therefore entirely agree with my learned brother in the leading judgment that these interlocutory appeal even where they exist, not having been heard and determined within 60 days from date of the unspecified Rulings being appealed against, are incompetent, completely dead and for this reason ought to be struck out. Accordingly all the affected interlocutory appeals are hereby struck-out.

THE APPEAL

The judgment of my learned brother has very closely examined the issues arising for determination in this appeal particularly from the angle the Appellant saw the issues for determination arising from the 25 grounds of appeal filed in its Notice of Appeal. I shall only say a word or two on the Appellants issue number 2 which states:

“2. In spite of the state of Pleadings and evidence before the lower Court, whether it was right for the Court below to have held that there was substantial compliance with the Electoral Act 2010 (as amended) and that the declaration of 3rd and 4th Respondents as duly elected was constitutional (Distilled from grounds 5 - 18 and 21)

B Looking at the relevant parts of the pleading which in this case is the Appellants petition, the grounds upon which the petition was based as shown at page 9 of the record are -

“(a) The election was invalid by reason of corrupt Practices and substantial non-compliance with the provisions of the Electoral Act, 2010 which substantially affected the result of the election.

(b) The 3rd and 4th Respondents were not duly elected by majority of lawful votes cast at the election”

The petitioner/Appellant after pleading the relevant facts in D several paragraphs of the petition, finally sought for the following reliefs namely -

“1. That it may be declared that the election and the return of the 3rd and 4th respondents who were sponsored by the 5th respondent is voided by corrupt practices and substantial non-compliances with the relevant provisions of the Electoral Act 2010 as amended.

2. That it may be declared that the 3rd and 4th respondents who were sponsored by the 5th respondent were not duly elected in F respect of Kaduna, Sokoto, Nassarawa, Kwara, Adamawa, Abia, Akwa Ibom, Enugu, Cross River, Rivers State, Ebonyi, Bayelsa, Delta, Imo, Anambra, Benue, Lagos, Plateau States and Federal Capital Territory, Abuja.

3. That it may be determined that the 3rd respondent did not G fulfill the requirements of Section 134 (2) of the Constitution of the Federal Republic of Nigeria with regards to:-

(a) Scoring the highest number of votes cast at the election and

(b) Mandatory one quarter of the votes cast at the election in H each of at least two third of all states in the Federation and in the Federal Capital Territory, Abuja

4. That it may be determined that the result declared by the 2nd respondent on the 18th day of April, 2011 by which the 3rd respondent was returned as the elected President of Nigeria is wrongful,

invalid and unlawful.

5. A declaration that the presidential election for the office of the president held on the 16th day of April, 2011 did not produce a winner as contemplated by the provision of the constitution of the Federal Republic of Nigeria 1999.

6. An order directing the 1st and 2nd respondents to arrange another election between the petitioner and the 3rd respondent in conformity with the provision of section 134 (4) or such other relevant provisions of the constitution of the Federal Republic of Nigeria as amended.

The record of appeal reveals that following objections raised by the Respondents to reliefs 4 and 6 in the course of the hearing of the petition, these reliefs were struck-out by the Court of Appeal together with all the paragraphs of the Appellants petition containing allegations against non-parties to the petition. This is contained in the Ruling of the court below delivered on 14th July, 2011. Thus, the Appellant was left with the task of proving its two grounds of the petition to justify the trial court granting it the remaining reliefs 1, 2, 3 and 5. The question to be asked is whether or not the Appellant discharged the burden of proof of the two grounds upon which it questioned the Presidential election conducted by the 1st and 2nd Respondents on 16th day of April, 2011, which returned the 3rd and 4th Respondents as the duly elected President and Vice-president respectively, of the Federal Republic of Nigeria. However, before even embarking on the exercise of looking into the nature of evidence adduced by the Appellant, it is not out of place to observe that with the removal of the 5th relief from the list of reliefs being claimed by the Appellant, as the result of that relief having been struck out, even if the Appellant had succeeded in being granted the remaining declaratory reliefs 1, 2, 3 and 5, of what use or benefit would that have been to the Appellant in the absence of the vital relief of the trial court ordering 1st and 2nd Respondents to conduct a fresh election after the nullification of the election conducted on 16th April, 2011, which the Appellant questioned in its petition? The answer of course is obvious. This is because the grant of reliefs 1, 2, 3 and 5 alone without vital and appropriate relief of directing 1st and 2nd Respondents to conduct another election, would have served no useful purpose to the petitioner/Appellant thereby in my view rendering

the whole exercise of continuing with the hearing of the petition, a rather academic exercise. In *Odedo v. INEC* (2008) 17 NWLR (pt.117) 554 at 600, this court citing with approval its earlier decision in *plateau state v. A.G. Federation* (2006) 3 NWLR (Pt.967) 346 at 419 where Niki Tobi JSC stated the meaning of academic question.

B *“A suit is academic where it is merely theoretical, makes empty sound, and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to the practical situation of human nature and humanity.”*

C *An academic* issue or question is one which does not require any answer or adjudication by a court of law because it is not necessary. An academic issue or question could be a hypothetical or moot question. An academic issue or question does not relate to the live issues in the litigation because it is spent as it will not ensure any right D or benefit on the successful party. See *Tanimola v. Mapping Godatta Limited* (1995) 6 NWLR (Pt.403) 517; *Nwoboshi v. A.C.B.* (1995) 6 NWLR (Pt.404) 658; *Ogbonna v. President F.R.N.* (1997) 5 N.W.L.R. (Pt.504) 281 and *Ndulue v. Ibezim* (2002) 12 NWLR (Pt.780) 139. Since it is quite clear that from the day the 6th relief asking for conduct E of fresh election was struck out, the petition of the Appellant became empty as it will not ensure any right or benefit on the Appellant/Petitioner even if the petition were successful.

Looking at the evidence on record as adduced by the witnesses F called by the Appellant in support of the petition and the brief of argument of the Appellant particularly in support of the 2nd issue for determination, the Appellant seemed to rely heavily on the failure of the 1st set of Respondents to call evidence in support of the conduct of the election in accordance with the Constitution and the Electoral G Act, 2010. This approach to the case of the Appellant by its learned Counsel completely failed to take into consideration of the position of the law regarding the burden of proof on a party asking for declaratory relief from Court in an action like the Appellant’s petition at hand. By its very nature, an election petition is principally predicated H on complaints on the conduct of election and is usually concluded with reliefs being sought most of which are declaratory in nature. No wonder therefore, of the four remaining reliefs in the Appellants Petition which were refused and dismissed by the Court of Appeal at the end of the hearing of the petition, 3 of the reliefs are declaratory

in nature while the remaining one is in form of a possible determination in the event of the success of the declaratory reliefs. The law however is trite as rightly found by the Court of Appeal in its judgment that a plaintiff like the Appellant in this case claiming declaratory reliefs, must rely on the strength of his own case and not on the weakness of the defence. This principle of law applies not only where the Defendant calls no evidence which is the main complaint of the Appellant in the present case but even where there is admission of the Plaintiff's case by the Defendant. See the case of *Wallersteiner v. Moir* (1979) 3 All E.R. 217 at 251 where Buckley L. J. said -

"It is has always been my experience, and I believe it be a Practice of long standing, that the Court does not make declarations of right either on admission or default of pleading... but only if the court was satisfied by evidence."

This statement of the law was cited and applied by this court in *Vincent I. Bello v. Magnus Eweka* (1981) 1 S.C. 101 and *Monunwase v. Sorungbe* (1988) 5 NWLR (Pt.92) 90 at 102. In this respect, the Appellant as Petitioner having failed to lead credible evidence in support of his petition, the Court below was right in applying the law in dismissing the petition.

It is for above reasons and fuller reasons given in the lead judgment of my learned brother Adekeye, JSC, with which I entirely agree, that I also see no merit at all in this appeal, which I hereby dismiss. I abide by the order and costs in the lead judgment.

ONNOGHEN JSC

This is an appeal against decision of the lower court sitting as the National Election Tribunal in petition No.CA/A/EPC/PRES/1/2011 delivered on the 1st day of November, 2011 in which the court dismissed the petition challenging the return of Dr. Goodluck Ebele Jonathan and Architect Mohammed Namadi Sambo as President and Vice President respectively of the Federal Republic of Nigeria. Appellant was the petitioner at the lower court and being dissatisfied with the decision has appealed to this court on twenty-five (25) grounds of appeal out of which, learned senior counsel for the appellant has formulated three issues, Oladipo Okpseyi, SAN in the appellant brief filed on 28th November, 2011. The issues are as follows:-

1. In view of the *sui generis* nature of an election petition, whether the evaluation of evidence by the court below and its decision on burden of proof were not wrongful and led to grave miscarriage of justice (Distilled from grounds 1, 2, 3, 4, 6, 8, 9, 10, 19, 20, 23, 24 and 25).

B 2. In spite of the state of pleadings and evidence before the lower court, whether it was right for the court below to have held that there was substantial compliance with the Electoral Act 2010 (as amended) and that the declaration of 3rd and 4th respondents as
C duly elected was constitutional (Distilled from grounds 5, 18 and 21).

3. Considering the evidence before the trial court vis-a-vis its several rulings, whether it can be said that the conduct of the trial was done in a manner consider with appellant's right to fair hearing (Distilled from grounds 7, 10, 11, 12, 13, 15, 17, and 22).

D The facts of the case have been detailed in the lead judgment of my learned brother ADEKEYE, JSC just delivered and include the following:-

On the 16th day of April, 2011, the 1st respondent, Independent National Electoral Commission (INEC) conducted a
E general election in Nigeria for the office of the President of the Federal Republic of Nigeria. Appellant is a registered party which nominated and sponsored General Muhammadu Buhari and Tunde Bakare as its Presidential and vice-Presidential candidates respectively at the said
F election. Other registered political parties including the 5th respondent, Peoples Democratic Party (PDP) sponsored candidates for that election. The PDP candidates are the 3rd and 4th respondents in this appeal. At the end of the election process the 1st respondent declared the
G 3rd and 4th respondents duly elected for scoring the majority of the lawful votes cast at the election and haven satisfied the constitutional requirements of securing not less than one-quarter (1/4) of the votes cast in each of at least two-third (2/3) of the States of the Federal Republic of Nigeria and Federal Capital Territory.

Appellant was not satisfied with the return of the 3rd and 4th
H respondents and consequently petitioned the National Election Tribunal resulting in the instant appeal.

The petition was founded on two grounds, to wit:-

“13 (a) The election was invalid by reason of corrupt practices and substantial non-compliance with the provisions of the Electoral

Act, 2010 which substantially affected the result of the election.

(b) The 3rd and 4th respondents were not duly elected by majority of lawful votes cast at the election.

Appellant prayed the tribunal for the following reliefs:-

“1. That it may be declared that the election and the return of the 3rd and 4th respondents who were sponsored by the 5th respondent is voided by corrupt practices and substantial non-compliances with the relevant provisions of the Electoral Act, 2010 as amended. B

2. That it may be declared that the 3rd and 4th respondents who were sponsored by the 5th respondent were not duly elected in respect of Kaduna, Sokoto, Nassarawa, Kwara, Adamawa, Abia, Akwa Ibom, Enugu, Cross River, Rivers State, Ebonyi, Bayelsa, Delta, Imo, Anambra, Benue, Lagos, Plateau States and Federal Capital Territory, Abuja. C D

3. That it may be determined that the 3rd respondent did not fulfill the requirements of Section 134 (2) of the Constitution of the Federal.

4. That it may be determined that the result declared by the 2nd respondent on the 18th day of April, 2011 by which the 3rd respondent was returned as the elected President of Nigeria is wrongful, invalid and unlawful. E

5. A declaration that the presidential election for the office of the president held on the 16th day of April, 2011 did not produce a winner as contemplated by the provision of the constitution of the Federal Republic of Nigeria 1999. F

6. An order directing the 1st and 2nd respondents to arrange another election between the petitioner and the 3rd respondent in conformity with the provision of section 134 (4) or such other relevant provisions of the constitution of the Federal Republic of Nigeria (as amended).” G

It should be noted that both senior counsel for the 1st, 2nd-6th-42nd respondents and of the 3rd and 4th respondent filed and argued preliminary objections to some of the grounds of appeal which, by the practice of this court were argued in their briefs of argument and reacted to in the reply briefs of the appellant. H

Primarily, the objections are centered on the ground that some of the grounds of appeal are against interlocutory decisions of the

Court of Appeal over which previous notices of appeal were filed and with respect to decisions in respect of which appeals shall be heard and determined within sixty (60) days and that grounds 14 and 16 of the grounds of appeal do not arise from the decision of the lower court.

B It is the submission of learned senior counsel for the respondent's/objectors that by the combined effects of Section 285(7) of the Constitution of the Federal Republic of Nigeria, 1999 as amended [herein after referred to as the 1999 Constitution (as amended)] and Section 24(2) (a) of the Court of Appeal Act, 2004, C grounds 7, 10, 12, 13,14, 15 and 17 of the grounds of appeal were filed in breach of the said provisions and consequently invalid and liable to be struck out as well as any issues formulated therefrom. Senior counsel cited and relied on the recent judgment of this court D in the consolidate appeal nos. SC/272/2011 and SC/276/2011 between Peoples Democratic Party (PDP) v. Congress for Progressive Change (CPC) & Ors delivered on the 31st day of October, 2011 on the interpretation of Section 285(7) of the 1999 Constitution (as amended).

E In his reaction, learned senior counsel for the appellant submitted in the reply briefs sought to distinguish the decision of this court in the consolidate appeals, *supra*, and the facts of this appeal in that in the earlier appeals, notices of appeal were not only filed but F the appeals were duly entered in this court and briefs of arguments filed; that in the circumstance this court was right in holding that the appeals were incompetent following the expiration of sixty (60) days as provided under Section 285(7) of the 1999 Constitution; that until an appeal is entered in the Supreme Court and number assigned, G it is not an appeal before the court; that no number was assigned to any of the interlocutory appeals in contention; that Section 285(7) of the 1999 Constitution as amended “ talks of the judgment of the court as distinct from a ruling” and that even though both words may mean “decision” the word (decision) was not used in the constitution; H that appellant's right to appeal on all grounds after judgment cannot be taken away because he has failed to appeal on every ruling delivered in the course of trial.

The important provision relevant to the objection is Section 285(7) of the 1999 Constitution (as amended) which provides as

follows:-

“An appeal from a decision of an election tribunal or Court of Appeal in an election matter shall be heard and disposed of within sixty (60) days from the date of the delivery of judgment of the tribunal or Court of Appeal”.

The appellant does not dispute the fact that some of the grounds of appeal complained of are against the rulings of the lower court made on various dates prior to the final judgment of 1st November, 2011. Also not disputed is the fact that appellant filed separate notices of appeal against the various interlocutory rulings and that more than sixty (60) days had lapsed between the dates of the rulings and the hearing of the instant appeal.

It is however the contention of appellant that since the various interlocutory appeals were not entered at the Supreme Court the decision of this court in the consolidated appeals cited earlier in this judgment does not apply. Another ground for the inapplicability of Section 285(7) of the 1999 Constitution (as amended) in the views of learned senior counsel for the appellant, is that the instant appeal is against the judgment of the lower court not a decision or ruling.

From the provisions of Section 285(7) of the 1999 Constitution (as amended) and the decision of this court in the consolidated appeals supra, it is very clear that an appeal against any decision of an election tribunal or Court of Appeal relating to an election must be heard and disposed of within sixty (60) days from the date of the delivery of the decision/judgment. Once a decision has been rendered by the tribunal/court concerned and it is the intention of a party to appeal against same the appeal and the hearing of same must be concluded within sixty (60) days of the date of the decision/judgment, otherwise the appeal lapses.

It is also clear from the provisions that it does not matter whether the appeal had been entered at the appellate court or not as the operative words are “within sixty (60) days from the date of the delivery of judgment” not entering of the appeal at the appellate court.

It must also be stated clearly that the provisions apply both to interlocutory and final decisions of the election tribunal or Court of Appeal as the operative words are “decision” and “judgment” both of which, it is settled law, mean the same thing. This means that with the present state of the law as constitutionally provided it would be

unwise not to appeal and have the same determined within sixty (60) days of an interlocutory decision as failure to do so may be caught by the said provision.

It will therefore be dangerous to await the final decision of the tribunal/Court of Appeal before appealing against interlocutory decision(s) rendered in the proceedings. I therefore affirm that “appeals from a decision of an election tribunal or the Court of Appeal in an election shall be heard and determined within sixty (60) days from the date the judgment decision appealed against was delivered by the tribunal or Court of Appeal” - see the consolidated appeal Nos.SC/272/2011 and SC/276/2011 Peoples Democratic party (PDP) vs. Congress for Progressive Change (CPC) delivered on 31st October, 2011.

In the circumstance I sustain the preliminary objection relating to appeals/ filed in relation to the interlocutory decisions of the lower court and which were not heard and determined within sixty (60) days of the decisions appealed against contrary to the provisions of Section 285(7) of the 1999 Constitution (as amended).

On the merit of the appeal, it is the submission of learned senior counsel for the appellant OLADIPO OKPESEYI, ESQ, SAN that the lumping together of the evidence of the respondents in evaluating the evidence adduced at the trial resulted in injustice to the appellant; that the totality of the evidence shows that there was neither a winner nor a loser at the election and that the return of the 3rd and 4th respondents is wrongful and unconstitutional; that the evidence of PW1 was uncontroverted but was expunged from the record by the lower court and urged the court to allow the appeal.

DR IKPEAZU, SAN who argued the appeal on behalf of the 1st, 2nd, 6th - 42nd respondents upon application by CHIEF A. S. AWOMOLO, SAN, leading counsel submitted that the lower court was right in holding that the burden of proof lies squarely on the appellant and never shifted throughout the trial and that appellant failed to discharge the said burden that appellant pleaded two sets of results, one genuine and the other fake and undertook to prove the averments at the trial but failed to do so; that the issue of non-election did not arise from the pleadings as appellant admitted that election took place but contended that the results were forged; that the above being the case, the issue of lumping together an evidence of the

respondents does not arise and urged the court to dismiss the appeal.

For the 3rd and 4th respondents, CHIEF OLANIPEKUN, SAN, submitted that there is no appeal against the ruling of 12th September, 2011 expunging the evidence of PW1 and that with evidence of PW1 gone, there is nothing to ground the case of appellant and that the lower court was therefore right in dismissing same. Looking at the reliefs claimed, learned senior counsel submitted that the court cannot order a fresh election between appellant and the 3rd and 4th respondents as appellant is a political party while 3rd and 4th respondents are natural persons and urged the court to dismiss the appeal.

On his part, DR. NWAIWU, SAN for the 5th respondent submitted that since appellant made allegations of crime which it failed to prove beyond reasonable doubt, the petition deserved to fail; that appellant also failed to prove the non-criminal allegations on the balance of probability and urged the court to dismiss the appeal.

From the briefs of argument, it is clear that the appeal is basically on the facts. Even on the facts, it is important to note that appellant is not pursuing the criminal allegations as senior counsel for appellant had so informed the court and is relying on the civil allegations.

The argument of learned senior counsel for appellant on the issue of lumping of evidence of the respondents together resulting in a miscarriage of justice to appellant is very strange and funny having regards to the two grounds on which appellant sought the reliefs, which grounds and reliefs had earlier been reproduced in the judgment.

With the severance or abandonment of allegations of crime which I took to mean those relating to corrupt practices, what appellant has left are the grounds that the election in question was not conducted in substantial compliance with the provisions of the Electoral Act, 2010, which failure substantially affected the result of the election and that the 3rd and 4th respondents were not duly elected by majority of lawful votes cast at the election.

The issue that should interest appellant and which is of paramount importance in the case is whether appellant made out any case on the pleadings against which a balancing exercise by the lower court of the evidence of the respondents against that of appellant could be carried out by the lower court, not whether the lower court

lumped together the evidence of the respondents during evaluation thereby resulting in injustice. In fact, the argument that the lower court by lumping the evidence of the respondents together” substituted the defences of the 2nd and 3rd sets of respondents for that of the 1st set of respondents” is an admission of the fact that there was evidence on record to justify the defence put forward by the respondents as against the case of appellant; appellant’s case is simply that instead of the evidence coming from respondent “A”, it came from respondent “B”. The question is, should the lower court, or any court for that matter, not to have relied on such legally admissible evidence on record in coming to a decision on the issues in contention between the parties in the proceedings?

I do not think that to do so resulted in any miscarriage of justice or injustice to the appellant as it is the duty imposed by law on appellant to adduced credible evidence in proof of his case. It would rather be unjust for the court to close its eyes to such evidence on record when the same is relevant for the determination of the issue(s) in controversies between the parties.

In the instant case, the issue in controversy is whether there was non-compliance with the provisions of the Electoral Act and if so whether the non-compliance was substantial so as to substantially affect the result of the election. Does it matter, in that case, from whom the evidence comes to be on record? I think where appellant missed the point is in relation to the principle of burden of proof which, as held by the lower court rests on appellant. The question is whether appellant discharged that burden.

It is settled law that an appellate court will not interfere with a finding of fact by a lower court where such findings is supported by the pleadings and evidence on record. Therefore where a lower court unequivocally evaluates the evidence, and dispassionately appraises the facts, it is not the business of an appellate court to substitute its own views for those of the trial/lower court as the appellate court will only interfere in exceptional circumstances such as where the finding is perverse, not supported by evidence or had occasioned a miscarriage of justice, see *Woluchem vs Gudi* (1 981) 5 S.C 291; *Mogaji vs Odofin* (1978) 4 S.C 91; *Obisanya vs Nwoko* (1974) 6 S.C. 69; *Hamza vs. Kure* (2010) 10 NWLR (Pt.1203) 630 at 654.

Section 136 of the Evidence Act provides that in a proceeding,

the burden lies on that person who would fail if no evidence at all were given on either side. In an election petition the party who would fail if no evidence is produced in either side is clearly the petitioner.

In respect of the issue of non-compliance the onus is also on the petitioner who is to establish substantial non-compliance and that the non-compliance did affect the result of the election. B

It is only after a petitioner/appellant herein, has established the above that the onus would shift to the respondents to establish that the result of the election was not so affected - see Ibrahim v. Shagari (1983) 2 SCNLR 176; Buhari vs. Obasanjo (2005) 13 NWLR (Pt.941) 1 at 222. C

In Buhari vs. INEC (2008) 19 NWLR (Pt.1120) 246 at 435 - 436 this court held thus:

"...the law as it stands requires the petitioner after establishing the substantial non-compliance occasioned by breach of Section 45(1) and (2) of the Act, to go ahead and prove that the non-compliance affected the result of the election. It is clear from decided authorities that before a petition can succeed on the ground of non-compliance with the provisions of the Electoral Act; the petitioners must prove not only that there was non-compliance with the provisions of the Electoral Act but that the non-compliance substantially affected the result of the elections. In other words, the petitioner has two burdens to prove:-

(i) that the non-compliance took place, and

(ii) that the non-compliance substantially affected the result of the election. See Akinfosile vs. Ijose (1960) SCNLR 447; Buhari vs obasanjo (2005) 13 NWLR (Pt.941) and Awolowo vs Shagari (1979) 6 - 9 S.C 51. "See also the provisions of Section 139(1) of the Electoral Act, 2010 as amended. F

It is therefore not the correct statement of the law, as contended by learned senior counsel for the appellant that the burden of proof lies on 1st respondent being statutorily charged with the conduct of the election and that once appellant had alleged the irregularities of non-accreditation, under-supply of voting materials, etc, the onus immediately shifts to the respondents because once it appears to the Election Tribunal or court that the election was conducted in accordance with the principle of the Electoral Act, and that the non-compliance did not affect substantially the result of the election then G

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the “election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act” - See Section 139(1) of the Electoral Act , 2010 as amended.

In the instant case, the respondent called evidence showing that the election was conducted regularly and in accordance with the provisions of the Act, which evidence satisfied the lower court. The lower court held at page 2877 of the record thus:

“From whichever angle this petition is looked at, it is clear that the burden of proof of the allegations contained in the petition be they criminal or for substantial non-compliance rested with the petitioner. The petitioner did not discharge this burden to warrant rebuttal evidence to be adduced by the 1st set of respondents”.

I am of the opinion that the lower court is right in so holding, particularly as the evidence of pw1 which is the pivot of the case of non-compliance put forward by appellant was expunged from the record and there is no appeal against same. Appellant’s case was thus left without legally admissible evidence in support.

In the circumstance I agree with the reasoning and conclusion of my learned brother ADEKEYE, JSC that the appeal is without merit whatsoever and should be dismissed.

I order accordingly and abide by the consequential orders made in the said lead judgment including the order as to costs.

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FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother Adekeye, J.S.C. I agree with all the reasons therein advanced to arrive at the conclusion that the appeal is devoid of merit and deserves to be dismissed.

I desire to chip in a few words of my own. The relevant facts as well as the prayers of the appellant have been clearly set out in the lead judgment. I only wish to discuss briefly the salient issue for determination in this appeal. The appellant conceded at the lower court that its petition was restricted to the issue of non-compliance. At page 2843, of the Record of Appeal, learned senior counsel for the petitioner conceded that no evidence was adduced on the allegations of crime alleged in the petition. It is not surprising that even before this court, the appellant did not formulate any issue

touching on allegations of crime contained in its petition.

I should state it that grounds of appeal, with no issue formulated therefrom, are deemed as abandoned. See: Alhaji Abudu W. Akibu & Ors. v. Alhaji Munirat Oduntan & Ors. (2000) 7 SCNJ 189, Sparkling Breweries Ltd. & Anr v. Union Bank Ltd. (2001) 7 SCNJ 321.

The lower court was persuaded to decide the petition on the balance of probability. The vital and determinant issue as set out in issue 2 of the appellant reads as follows:-

“(2) In spite of the state of pleadings and evidence before the lower court whether it was right for the court below to have held that there was substantial compliance with Electoral Act 2010 (as amended) and that the declaration of 3rd and 4th respondents as duly elected was constitutional.”

On behalf of the 3rd and 4th respondents their own issue 2 which is fairly similar to the above reads as follows:-

“(2) Considering the evidence led in support of the state of pleadings as well as the way and manner the lower court carefully and painstakingly weighed and analysed the evidence given, whether:-
(1) The lower court was not right in dismissing the petition.
(2) Appellant’s right to fair hearing was breached.”

The appellant’s counsel attempted to raise some doubts with respect to the evidence in the witness statements of P.W.1 Galadima and P.W.2 - Tony Momoh. P.W.1 adopted P.W.2’s statement and was cross-examined and discharged. P.W.2 came and was given that of P.W.1. He naturally raised an alarm. Malani, SAN who appeared for the appellant petitioner applied for metamorphosis. In the ruling on the blunder on 12-09-2011, the court below refused to swap the evidence of P.W.1 and P.W.2 and vice versa. The evidence of P.W.2 was expunged. There is no appeal against that ruling. There was no evidence of P.W.1 as P.W.2 said he was the one who made the statement.

It is the duty of a counsel to conduct the case of his client to the best of his ability. And where a blunder is committed, as herein, such is to the dismay of the counsel and to the chagrin of the client. They cannot be heard to complain in respect of their own self created blunder. The court below was in order in the stance taken by it.

This court has consistently held that for a petition to succeed on non-compliance with the provision of the Electoral Act, the

petitioner must prove not only that there was non-compliance with the provisions of the Act but that the non-compliance substantially affected the result of the election. In other words, the petitioner has two burdens to prove:-

1. That the non-compliance took place; and
- B 2. That the non-compliance substantially affected the result of the election.

See: Buhari v. INEC (2005) 19 NWLR (Pt.1120) 246 at 435, Buhari v. Obasanjo (2005) 13 NWLR (Pt.941) 1 at B0; Akinfosile v. Ijose (1960) SCNLR 447; Awolowo v. Shagari (1979) 6-9 SC 51.

C The court below found that the appellant failed to prove substantial non-compliance. The appellant tried to push the burden of proof of his declaratory reliefs at the door steps of the 1st respondent - INEC. Such a step is not in tune with the law. Since the appellant D failed to prove substantial non-compliance, he could not depict, in clear terms, that noncompliance substantially affected the result of the election,

In short, the vital issue in contention was not surmounted by the appellant. The issue must, at the tail end, be resolved against it E and in favour of the respondents.

The appellant complained of breach of right of fair hearing. The appellant who failed to lead proper evidence and lay adequate foundation of its case should not have recourse to fair hearing; a ready tool for a party who appreciates that he has not properly F discharged his functions. Such equates to clinging to a straw. This sort of stance should be discouraged. The appellant was given adequate time to present his case at the lower court. It has been shown earlier on in this judgment that some documents were rejected at the lower G court because the appellant did not properly present its case. The appellant's right to fair hearing was not denied in any way, in my considered view. The appellant should leave the right of fair hearing to where it rightly belongs. See: Saburi Adebayo v. Attorney-General of Ogun State (2008) 7 NWLR (Pt.1085) 201 at 221-222.

H For the above reasons and the fuller ones ably adumbrated in the lead judgment, I also see no merit in this appeal. I hereby dismiss it and abide by all consequential orders in the lead judgment; that relating to costs inclusive.

RHODES-VIVOUR JSC

I have had the privilege of reading in draft the judgment delivered by my learned brother Adekeye, JSC; I am in full agreement with it. I propose, though to make some observations on the appellant's issue No.2.

It reads:

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"2. In spite of the state of pleadings and evidence before the lower court, whether it was right for the court below to have held that there was substantial compliance with the Electoral Act 2010 (as amended) and that the declaration of 3rd and 4th respondents as duly elected was constitutional".

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Section 139 (1) of the Electoral act states that:-

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

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I shall now examine a few cases to see when an election could be invalidated for non-compliance In *Sorunke v. Odebunmi* 5 FSC 1950 SCNLR p.414

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There were 138 polling booths, but the election was conducted in 86 polling booths. The Federal Supreme Court had this to say:

"In the present case the fact that the election was conducted in 86 of the 136 polling booths of the constituency in question was not found wanting, prima facie shows that there was substantial compliance... in the majority of the polling booths where the election took place in the Constituency. The burden was therefore on the appellant to show that the non-compliance which applied to 52 polling booths, as found by the learned trial Judge actually vitiated the election in the constituency as a whole. That he failed to do".

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In *Buhari v Obasanjo* 2005 13 NWLR pt.941 p.1, this Court had this to say on non-compliance-

"...It is manifest that an election by virtue of Section 135 (1) of the Act shall not be invalidated by mere reason it was not conducted substantially in accordance with the provisions of the Act, it must be shown clearly by evidence that the non-substantiality has affected the results of the election, Election and its victory is like soccer and goals scored. The petitioner must not only show substantial non

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compliance but also the figures i.e. votes that the compliance attracted or omitted. The elementary evidential burden of “the person asserting must prove” has not been derogated from section 135 (1). The petitioners must not only assert but must satisfy the court that the non-compliance has so affected the election-result to justify nullification”

Section 135 (1) of the Electoral Act 2002 and Section 139 (1) of the Electoral Act 2010 (as amended) are the same. See also Awolowo v. Shagari 1979 6 - 9 SC p.51, Akinfosile v. Ijose 1960 SCNLR p.447, Ibrahim v. Shagari 1983 2 SC NLR p.176, Swen v Dzunswe 1966 NMLR p.297.

To succeed, the petitioner must establish that there was non compliance, and it was substantial thereby affecting the result. It is after the above is established that the onus shifts to the respondents to establish that the results were not affected. Indeed in Nwobodo v. Onoh 1984 1 All NLR p.2. This court held that there is a rebuttable presumption that the result of any election declared by FEDECO (now INEC) is correct and authentic and the onus is on the person who denies its correctness and authenticity to rebut the presumption.

At the court below the petitioner, now appellant conceded that, the petition was not based on allegations of corrupt practices but on substantial non-compliance with provisions of the Electoral Act 2010 (as amended). The Tribunal quite rightly in my view found that the petitioner did not discharge the burden to warrant rebuttal evidence to be adduced by the 1st set of respondents.

The question to be answered is, has the non-compliance alleged, by the petitioner (Appellant) so affected the election to justify nullification?

Elections held all over the world have irregularities, malpractices, or non-compliance in one form or the other. The duty of the Court is to examine the allegations on the evidence led and the circumstances of the case to see if they were substantial to justify nullification of the result. In Bassey v. Young 1963 1 ALL N.L.R. p.31.

The electoral officer failed to open the poll at the prescribed time. Several voters were thus deprived of their right to vote. This was held by the court to be substantial. In other situations or circumstances the courts could also be right to hold that on those facts it was not substantial to nullify the election.

In this petition, the court below held that:

“If a surgical operation is to be carried out of the petitioners pleading; the only averments that are devoid of any criminal allegation would be paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 (iii) (v) vii), 29, 35, 37, and 39. These seemingly untainted paragraphs cannot sustain the petition”

The appellant called 47 witnesses in support of what was left of his pleadings. I must observe that the duty of the court below (the trial court) is to receive all the relevant evidence. That is perception. The next duty of the court is to weigh the evidence in the context of the surrounding circumstances of the case. That is evaluation. A finding of fact involves both perception and evaluation.

The position of the Law is that the person who asserts must prove. After the petitioner (appellant) establishes to the satisfaction of the court that there was non-compliance he is to further satisfy the court that the non compliance substantiality affected the results of the election. Then the onus shifts to the respondent (especially INEC) to lead evidence in rebuttal. This, the appellant failed to do as evidence led on its behalf did not meet the standard of proof required and so the respondents had no duty to rebut the allegations. The court below correctly evaluated evidence.

By the inclusion of section 139(1) in the Electoral Act 2010 (as amended) the Legislatures intention is to prevent an election from being invalidated for failure to comply with minor provisions of the Act which have no substantial effect on the final results of the election.

In the course of the proceedings in the court below there was a mix up in the adoption of witness depositions. Learned counsel for the appellant on an application before the court below sought for an order changing the evidence credited to PW1 as that of PW2 and vice - versa. He urged the court to correct the error. The Court refused to swap evidence. The effect of the Ruling rendered on 12/9/11 is that the evidence of PW2 was expunged; and also there was no evidence of PW1 because Mr. Tony Momoh, (PW2) said that it was he who made witness statement adopted by PW1.

A review of appellant's pleadings reveals PW1 and PW2 to be very vital and fundamental witnesses. There was no appeal against the Ruling of 12/9/11. The Ruling of the Court delivered on 12/9/11 eroded whatever redeeming features the appellant had and in the

absence of an appeal against the Ruling the Ruling delivered 12/9/11 remains inviolate.

With this scenario there is hardly any chance of a successful appeal.

In view of procedural blunders and the failure to attain
B minimum proof the appeal cannot succeed.

Finally, I must observe that in the petition allegations of crime were directly in issue, but the appellant abandoned them and fought his petition on non-compliance and he failed woefully by not attaining
C required standard of proof.

In the circumstances, the appellant failed to show that non-compliance actually vitiated the Presidential elections held on the 16th of April, 2011 substantially to justify nullification.

For this and the more detailed reasoning in the leading judgment
D I would dismiss this appeal.

NGWUTA JSC

I had the privilege of reading in draft the lead judgment of my
E learned brother, Adekeye, JSC. His Lordship set out the relevant facts and exhaustively treated the arguments in the briefs filed by learned Counsel for the parties.

I will make a few comments by way of contribution to the lead
F judgment.

The interlocutory rulings of the Court below which formed the basis of some of the appellant's grounds of appeal were delivered between 17/9/11 and 28/9/11. Judgment was delivered on 1/11/11 and the notice of appeal was filed on 11/11/11.

G Section 285(7) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides:

"S.285(7) An appeal from the decision of an election tribunal or Court of Appeal in an election matter shall be heard and disposed of within 60 days from the date of the delivery of judgment of the
H Tribunal or Court of Appeal."

It is trite that decision includes ruling. No appeal on any of the rulings can be entertained as the 60 days period stipulated in s.285 (7) of the Constitution has elapsed before the notice of appeal was filed. See appeals numbers SC.272/2011 and SC.276/2011

(Consolidated) in which judgment was delivered by this Court on 31/10/2011. The preliminary objections to the hearing of the appeal against the rulings are sustained.

In the main appeal, reliefs Nos. 1, 2 and 5 are declaratory reliefs in respect of which the Petitioner would succeed on the strength of his case even if the respondents offered no evidence. See *Kodilinye v. Odu* (1935) WACA 336. The Respondents' case does not contain evidence supporting the appellant's case. See *Akinola & Ors v. Oluwa & Ors* (1962) 1 All NLR (Pt. 2) 224 at 225. B

The grant or denial of a declaratory relief is subject to the discretion of the Court. Reliefs 4 and 6 were struck out and the appellant did not appeal the order striking them out. The declarations sought are directed to relief number 6. Relief number 6 (if it had not been struck out) cannot be granted in absence of proof of the declarations sought, and which were not proved on the preponderance of evidence. C

Be that as it may, relief number 6 cannot be granted in its present form, even if it had not been struck out. A political party may participate in an election but it cannot be a candidate in the election. A candidate in an election is a human being and while a political party may participate in an election, it cannot be a candidate. See section 137(1)(a) and (b) of the Electoral Act 2010 (as amended). E

At page 2739 of Vol. 6 of the record in paragraph 7.0 of the Petitioner's final written address, the learned Silk for the Petitioner stated thus: F

“7.0 Severance of Pleadings:

It can be seen that the Petitioners cautiously, throughout the trial, without giving evidence of the allegations of crime they have made in the Petition. It is submitted that the failure of the Petitioners to lead evidence to establish that crime alleged in the Petition means the commission of crime is not the focus of the Petition.” G

The question is: will severance of paragraphs predicated on commission of crime salvage the Petition? In other words, are the paragraphs untainted with crime, if proved, sufficient to sustain the Petition? H

At page 2847 of Vol. 6 of the Record, the lower court in its judgment held, inter alia:

“If a surgical operation is to be carried out of the Petitioner's

pleading, the only averments that are devoid of any criminal allegations would be paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28(iii)(v)(vii), 29, 35, 37 and 39. These seemingly untainted paragraphs cannot sustain the Petition.”

By the above finding, their Lordships of the court below
 B sounded the death-knell of the appellant’s petition. I have scrutinized all the twenty-five grounds of appeal in the appellant’s notice of appeal. The appellant unwittingly or by design, did not appeal the finding that render all subsequent efforts in pursuit of the petition exercise in
 C futility. The appellant is deemed to have accepted the finding that its petition had collapsed upon its failure to prove the criminal allegation on which it is mainly founded.

The only live issue in the appeal as determined by my learned brother Adekeye, JSC in the lead judgment is the issue of non-
 D compliance with the Electoral Act 2010 (as amended). Section 139(1) of the Electoral Act 2010 as amended provides thus:

“S.139(1): An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election Tribunal or Court that the election was conducted
 E substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election.”

By invoking the doctrine of non-compliance, the appellant assumed the burden of satisfying the trial Court that the election was
 F not conducted in substantial compliance with the principles of the Act and that the non-compliance affected substantially the result of the election. In other words, the non-compliance was such that if it had not occurred, the result of the election would have been different. See section 136(1) of the Evidence Act (as amended).

G The appellant bears the burden of proof until he proves that there was substantial non-compliance and that the non-compliance substantially affected the result of the election. This, the appellant failed to do. The onus of proof does not shift on mere assertion that there was no compliance with the Act. The appellant has to prove
 H what he asserts and its effect on the result of the election before the burden will shift to the respondents to disprove non-compliance. See *Buhari v. Obasanjo* (2006) 2 EPR 295.

Learned Senior Counsel for the Appellant claimed in his submission, that the result of the election showed that there was no

winner and no loser. If the election produced neither winner nor loser against who, by who and upon what grounds, can an election petition be brought? It is a candidate or a party who lost the election that can file a petition against the winner as a respondent. See s.137 (1) and (2) of the Act. Section 138(1) lists four (4) grounds any one of which can found(SIC) election petition. See also ss.239 (1), 285(1) B and (2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). See also *Ezeke v. Dede* (1999) 5 NWLR (pt. 60) 80; *Ezeobi v. Nzeka* (1989) 1 NWLR (Pt.98) 478; *National Electoral Commission v. National Republican Convention* (1993) 1 NWLR C (pt.267) 126; *Ibrahim v. INEC* (1999) 8 NWLR (pt. 614) 334.

A no-winner, no-loser situation does not constitute a ground of presenting an election petition under the Act or the Constitution.

For the above and the more exhaustive reasoning in the lead judgment, I also dismiss the appeal as devoid of merit. I adopt the D consequential orders in the lead judgment.

Appeal dismissed.

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