

SUPREME COURT OF NIGERIA

24TH FEBRUARY, 2012. SC. 480/2011, SC. 11/2012 (CONS.)

CORAM: - **W. S. N. ONNOGHEN, I. T. MUHAMMAD, O. O.**

ADEKEYE, B. RHODES-VIVOUR,

M. U. PETER-ODILI, JJSC

OCHEJA EMMANUEL

DANGANA - SC.480/2011

AND

..... APPELLANTS

PEOPLES DEMOCRATIC

PARTY - SC.11/2012

AND

1. HON. ATAI AIDOKO ALI USMAN

2. ALL NIGERIA PEOPLES PARTY

3. PEOPLES DEMOCRATIC PARTY

4. INDEPENDENT NATIONAL

ELECTORAL COMMISSION

5. DR. S. A. ABOLUSORO

..... RESPONDENTS

(The Returning Officer Kogi East

Senatorial District)

- SC.480/2011, SC.11/2012

JURISDICTION - Courts - Source of - It is derived from the Constitution and statutes creating a court - Hence court and parties cannot assume jurisdiction by agreement (H1)

COURTS - Jurisdiction - Absence of - Effect - Court must first decide on its jurisdiction - Because if it lacks same - Its proceedings would amount to nullity (H2)

COURTS - Competence - Court is competent to entertain a case - When it has unfettered jurisdiction over the subject matter - With a properly constituted judicial membership (H3)

COURTS - Jurisdiction - Determination of - Principles - Jurisdiction inter alia is a matter of substantive law - Which cannot be conferred on court by litigant - Where statute has not vested same (H4)

CONSTITUTIONAL LAW - Constitution - Interpretation - Literal rule
- Court must confine itself to the ordinary meaning of words used -
Save it is at variance with legislature's intention (H5)

ELECTION PETITIONS - Appeals - Jurisdiction - Court of Appeal -
By 1999 Constitution s. 246(3) - It shall be the final court - In respect
of appeals arising from National Assembly election petition tribunal
(H6)

COURTS - Jurisdiction - Absence of - Proper order to make - Where
a court lacks jurisdiction - It should give an order striking out the
matter (H7)

FACTS

The parties in appeal no: SC. 480/2011 are Ocheja Emmanuel Dangana as appellant, while Hon. Atai Aidoko Ali Usman, All Nigeria Peoples Party (ANPP), Peoples Democratic Party (PDP), Independent National Electoral Commission (INEC) and Dr. S.A. Abolusoro (Returning Officer Kogi East Senatorial District) are 1st - 5th respondents. In appeal no: SC. 11/2012, appellant is Peoples Democratic Party (PDP), while Hon. Atai Aidoko Ali Usman, All Nigeria Peoples Party (ANPP), Ocheja Emmanuel Dangana, Independent National Electoral Commission (INEC) and Dr. S. A. Abolusoro (Returning Officer Kogi East Senatorial District) are respondents. Appellant and 1st respondent in appeal no: SC. 480/2011 emerged as the senatorial candidates for their respective parties i.e. Peoples Democratic Party and All Nigeria Peoples Party. On the 9th of April, 2011, the Kogi East Senatorial District Election was conducted by INEC. Both parties were sponsored by their respective political parties. Appellant allegedly won the election by scoring 131,386 votes cast at the election. 1st respondent came second with 16,600 votes cast. Certificate of return was thus issued to appellant by INEC.

Being dissatisfied, 1st respondent filed a petition at the National Assembly Election Petition Tribunal sitting at Lokoja to challenge the declaration and return of appellant. 1st respondent contends that appellant was not qualified to contest the election as he was not validly sponsored by his party as required by Section 65 (2) (b) of the 1999 Constitution and Section 138 (1) (a) of the Electoral

Act 2010 (as amended). In its judgment, the Tribunal dismissed the petition of the 1st and 2nd respondents by identifying the issues raised as pre-election. Aggrieved, 1st and 2nd respondents appealed to the Court of Appeal, Abuja. The court allowed the appeal on the sole ground that appellant was not qualified to contest at the time of the election as envisaged by Section 65 (2) (b) of the 1999 Constitution and Section 138 (1)(a) of the Electoral Act 2010. Consequently, any votes allegedly credited to appellant at the said election were wasted votes in the eyes of the law. Dissatisfied, appellant lodged an appeal to the Supreme Court. He contends that the Court of Appeal exceeded its jurisdiction to delve into pre-election issues of the senatorial primaries. 1st and 2nd respondents filed notice of preliminary objection to the competence of the Supreme Court to entertain the appeals.

HELD (Unanimously striking out the appeals per **ADEKEYE JSC**)
JURISDICTION - Courts - Source of

1. The unique aspect of jurisdiction is that courts are set up by the Constitution, Decrees, Laws, Acts and Edicts. They cloak the courts with the powers and their jurisdiction of adjudication. If the Constitution, Decrees, Acts, Laws and Edicts do not grant jurisdiction to a court or tribunal, the court and the parties cannot by agreement endow itself with jurisdiction. The jurisdiction of the court is confined, limited and circumscribed by the statute creating it. In view of the fact that jurisdiction is threshold matter, it is very fundamental as it goes to the competence of the court to hear and determine a suit.

Jurisdiction on a broad perception encompasses legal capacity, power or authority of a court. Competence of a court is the handmaid of jurisdiction of a court. A court must have both jurisdiction and competence to be properly seized of a cause or matter. Jurisdiction in that sense means the legal capacity, power or authority vested in it by the Constitution or statute creating the court. (p. 591 A/G)

Jurisdiction - Absence of - Effect

2. Where a court does not have jurisdiction to hear a matter, the entire proceedings no matter how well conducted and decided would amount to a nullity. It is mandatory and very crucial that courts decide the issue of jurisdiction before looking into the extent of judicial

power exercisable under that jurisdiction. At the commencement of a trial, particularly where there is a challenge to the jurisdiction of a court, the court must first assume jurisdiction to consider whether it has or lacks jurisdiction. (p. 591 D)

B *COURTS - Competence*

- 3. A court is competent to entertain a case -
 - a. When the subject matter of the case is within the court's jurisdiction.
 - b. Whether there is any feature in the case which prevents the court from exercising its jurisdiction.
 - c. When it is properly constituted as regards members and qualifications of the members of the bench and no member is disqualified for one reason or another. (p. 591 H)

D *Jurisdiction - Determination of- Principles*

- 4. When dealing with the issue of jurisdiction or lack of it the courts are guided by some principles which are: -
 - a. Jurisdiction is a matter of substantive law no litigant can confer jurisdiction on the court where the constitution or statute or any provision of common law says that court does not have jurisdiction.
 - b. Jurisdiction cannot be assumed in the interest of justice.
 - c. Nothing shall be intended to be outside the jurisdiction of the superior court but that which specifically appears to be so and on the contrary nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly alleged.
 - d. Although courts have great powers yet their powers are not unlimited. Their jurisdiction is confined, limited and circumscribed by the statute creating it.
 - e. The court is not hungry after jurisdiction.
 - f. Judges have a duty to expound the jurisdiction of the court and not expand it as by so doing the court will be usurping the functions of the legislature.
 - g. Court cannot give itself jurisdiction by misconstruing statute. Once a court has no jurisdiction, a party cannot use any statutory provision or common law principle to impose it because absence of jurisdiction is irreparable in law. The matter ends there. (p. 592 B/595 D)

Constitution - Interpretation - Literal rule

5. In the literal rule of interpretation, courts must interpret words in the Constitution in accordance with the intendment and certainly not in a way opposed to the purpose intended for the enactment. There should be no divergence but a strict confinement within the ordinary meaning of the words used in the Constitution unless that is at variance with the intention of the legislature to be gathered from the words used or leads to any manifest absurdity or repugnance. B

Furthermore, where the words of a statute are clear, unambiguous and unequivocally express the intention of the lawmakers, effort must be given to them irrespective of whether that produces a harsh or inconvenient result. In the instant appeals, the provisions of the foregoing section are clear and unambiguous. The words of the provision ought to be accorded their simple grammatical meaning. D (p. 593 F)

Jurisdiction - Court of Appeal - By 1999 Constitution s. 246(3)

6. It is apparent that the provisions of the 1999 Constitution as amended do not envisage an appeal to the Supreme Court from the Court of Appeal in National Assembly Election Petitions based on whether anybody has been validly elected as a member of the National Assembly. The Court of Appeal shall be the final court by virtue of Section 246 (3) of the 1999 Constitution. The provision of Section 246 (3) affirms the previous decisions of this court. E F

In short by virtue of section 246 (1) (b) (i) and (3) of the 1999 Constitution, the Court of Appeal has the mandate to decide an appeal arising from an election petition and shall be the final court. Whether it did so perfectly, rightly or wrongly, the decision it arrives at cannot be taken on appeal to the Supreme Court for consideration. The Supreme Court cannot entertain appeals which it has no jurisdiction to adjudicate upon. (p. 594 B/595 B) G

Jurisdiction - Absence of - Proper order to make

7. It is trite that where a court finds that it lacks jurisdiction to adjudicate on any matter, the proper order to make is an order of striking out. (p. 595 F) H

NOTABLE POINT OF INTEREST

RHODES-VIVOUR JSC

1. Preliminary objection – Purpose of

Dissatisfied with the judgment of the Appeal Tribunal the PDP candidate filed this appeal. Two Notices of Preliminary objections were
 B filed against the hearing of this appeal and my learned brother Adekeye, JSC examined both of them and quite rightly in my view sustained them. A preliminary objection is filed by a respondent against the hearing of an appeal. The main aim is to contend that the appeal
 C is fundamentally defective of incompetent. If it succeeds, the appeal abates. A preliminary objection to the hearing of an election petition appeal may be raised on the ground that this court has no jurisdiction to hear the appeal or that time within which to hear a matter had since run out. See Sections 246 (3), 285 (5), (6) and (7) of the
 D constitution objects to some grounds of the appeal filed he ought to file and rely on a Motion on Notice. If it succeeds, the appeal would still be heard on other grounds that can sustain the appeal. A successful Preliminary objection terminates the hearing of the appeal.
 (p. 604 H)

REPRESENTATION

P. A. Akubo SAN with P. A. Abalaka Esq., J. A. Akubo Esq., S. Y. Tsok Esq., V. Y. Olaniyan (Miss); S. Abdullahi Esq., E. D. Pam Esq., for the
 F Appellants
 Patrick I. N. Ikwueto SAN with C. I. Mbaeri Esq., Isaiah Bozimo Esq., for the 1st and 2nd Respondents.
 Chief Olusola Oke with Chief A. O. Ajana., U. A. Mohammed., Prince John Ola Mafo., Owukori Akuyibo., Promise Ogbadu., Gbadebo
 G Ijuesan., Mulikat Kilani, for the 3rd Respondent.
 Ahmed Raji Esq., for the 4th and 5th Respondents

CASES REFERRED TO

Ucha v. Onwe & 4 Ors (2011) 4 NWLR (pt.1237) 386
 H Odedo v. INEC (2009) 17 NWLR (pt.1117) 554
 Dingyadi v. INEC (2011) 10 NWLR (pt.1255) 347
 Onuaguluchi v. Ndu (2007) 7 NWLR (pt.712) 309
 Adeogun v. Fashogbon (2008) 17 NWLR (pt.1115) 149
 Ayogu v. Nnamani (2006) 8 NWLR (pt.981) 170

Ibrahim v. INEC (1999) 8 NWLR (pt.614) 334
 ANPP v. Usman (2006) 8 NWLR (pt.117) 654
 Ucha v. Onwe (2011) All FWLR (pt.580) 1227
 Afribank Nig. Plc. v. Akwara (2006) 5 NWLR (pt.974) 619Onuorah
 v. K.R.PL Ltd. (2005) 6 NWLR (pt.921) 393
 Ajayi v. Milad Ondo State (1997) 5 NWLR (pt.504) 237 B
 Amadi v. NNPC (2000) 10 NWLR (pt.674) 76
 Galadima v. Tambai (2000) 11 NWLR (pt.677) 1

STATUTES REFERRED TO

Constitution of Federal Republic of Nigeria 1999 (as amended), ss. C
 65 (2) (b), 233 (1)(2)(e), 239 (2) (e), 243, 246 (1)(b)(i), (3), 285
 Electoral Act 2010 (as amended), ss. 85 (1), 87 (a), 138 (1) (a)

LEAD JUDGMENT BY ADEKEYE JSC

The two appeals now before this court as SC.480/2011 and D
 SC.11.2012 emanated from the judgment of the Court of Appeal
 Abuja delivered on the 13th of December 2011. They are based on
 the same records of appeal transmitted to this court on 18/1/2012.

The parties in SC.480/2011 are Ocheja Emmanuel Dangana E
 as appellant and Hon. Atai Aidoko Ali Usman; All Nigeria Peoples
 Party (ANPP); Peoples Democratic Party (PDP); Independent National
 Electoral Commission (INEC); Dr. S.A. Abolusoro (Returning Officer
 Kogi East Senatorial District) as 1st - 5th respondents. In appeal SC.11/ F
 2012, the appellant is Peoples Democratic Party (PDP) and Hon. Atai
 Aidoko Ali Usman; All Nigeria Peoples Party (ANPP); Ocheja
 Emmanuel Dangana; Independent National Electoral Commission
 (INEC); Dr. S. A. Abolusoro (Returning Officer Kogi East Senatorial
 District) as respondents. In preparation for the 2011 General Elec- G
 tions, the Independent National Electoral Commission (INEC) pub-
 lished its timetable for all the election activities, Primaries were held
 by parties contesting in the election during which the appellant and
 1st respondent in the appeal SC.480/2011 became the senatorial
 candidates for their respective parties - Peoples Democratic Party and H
 All Nigeria Peoples Party. On the 9th of April, 2011, the Kogi East
 Senatorial District Election was conducted by INEC. The appellant
 was sponsored by his party, PDP and the 1st respondent by ANPP.
 They both contested with candidates of six other political parties. The

appellant won the election by scoring 131,386 votes. He defeated the 1st respondent who came second with 16,600 votes. Certificate of return was issued to him by INEC. The 1st respondent being dissatisfied with the outcome of the election filed a petition on the 27th of April 2011 at the Election Petition Tribunal sitting at Lokoja to challenge the declaration and return of the appellant. In the judgment delivered on the 18th of October 2011, the Tribunal held amongst other things that the 1st and 2nd respondents predicated their petition on the fact that the appellant was not qualified to contest the election as he was not lawfully and validly sponsored to contest the election as a candidate for his party as required by Section 65 (2) (b) of the 1999 Constitution and Section 138 (1) (a) of the Electoral Act 2010 (as amended). The Tribunal identified flaws in the conduct of P.D.P. primaries which took place in Anyigba instead of Idah the Senatorial constituency headquarters for Kogi East on 28th January 2011. The Tribunal dismissed the petition of the 1st and 2nd respondents by identifying the issues raised as pre-election. The 1st and 2nd respondents appealed to the Court of Appeal, Abuja.

In the judgment of the court delivered on the 13th of December 2011 the appeal was allowed on the sole ground that the appellant was not qualified to contest at the time of the election as envisaged by Section 65 (2) (b) of the 1999 Constitution and Section 138 (1)(a) of the Electoral Act 2010. Consequently, any votes allegedly credited to him at the said election were wasted votes in the eyes of the law. The appellant lodged an appeal to this court to express his dissatisfaction as his contention was that the Court of Appeal exceeded its jurisdiction to delve into pre-election issues of the senatorial primaries conducted on the 28th January 2011. The Court of Appeal directed the 4th respondent to withdraw the Certificate of Return issued to the appellant and instead issued the 1st respondent a Certificate of Return. Vide pages 1127-1151 Vol.2 of the Record.

The appellant filed two separate Notices of Appeal. The learned counsel later withdrew the Notice of Appeal filed on 15th December 2011 and relied on the Notice filed on 23rd December 2011. At the hearing of the appeals, the appellant relied on the brief and the reply brief and formulated four issues for determination as appellant as follows:-

1. Whether having regard to the correct interpretation of the

combined , provisions of Section 65 (2) (b) and 246 (1) (b) (i) of the Constitution of Federal Republic of Nigeria 1999 as amended vis-a-vis sections 85 (1), 87 (a) and 138 (1) of the Electoral Act 2010 (as amended) as well as the pleadings filed and exchanged and evidence adduced, the judgment of the Court of Appeal which nullified the election of the appellant predicated on a pre-election matter to wit B invalidity of senatorial primary conducted on 28th January, 2011 is not altogether a nullity for want of jurisdiction and denial of fair hearing.

2. Whether the Court of Appeal was right in admitting the letter dated 24th January 2011 as Exhibit P21 and relying heavily on C same to nullify the election of the appellant.

3. Whether having regards to the doctrine of stare decisis in the circumstances of this case the Court of Appeal was right in declining to follow the decision of this Honourable court in Senator Julius D Ali Ucha v. Dr. Emmanuel Onwe & 4 Ors (2011) 4 NWLR (pt.1237) pg.386 on the ground that it was distinguishable from the present case.

4. Whether the Court of Appeal was right in overruling the preliminary objections against the appeal before it. E

The 1st and 2nd appellants raised three issues for determination as follows:-

1. Within the context of Section 65 (2) (b) of the 1999 Constitution and Section 138 (1) (a) of the Electoral Act 2010, is the issue of qualification of a person to contest a senatorial election a pre-election outside the jurisdiction of the National Assembly Election F Tribunal.

2. Whether the Court of Appeal was right in admitting in evidence the letter dated 24th January 2011 as Exhibit P21 and relying G on same to nullify the election of the appellant.

3. Whether the Court of Appeal rightly overruled the preliminary objection of the appellant against the competence of the appeal below.

The 3rd respondent/appellant - the Peoples Democratic Party H (PDP) raised two issues as follows:-

1. Whether the Court of Appeal was not in grave error and its judgment a nullity when it assumed jurisdiction in an election petition to determine the validity and actually determined the validity of the

primary election which produced the appellant as candidate of 3rd respondent for the Kogi East Senatorial District election of 9th April 2011.

2. Was the lower court right when it nullified the primaries election of the 3rd respondent in an election petition when -

B a. The 1st and 2nd respondents are not members of the 3rd respondent.

b. When the 1st and 2nd respondents did not plead or raise the issue of 21 days notice which formed the kernel of the judgment.

C c. And the 3rd respondent was not heard on the unpleaded fact of 21 days notice which the lower court raised suo motu.

The learned counsel for the 4th and 5th respondents, Mr. Raji Ahmed withdrew the joint brief at the hearing of the appeal in that the respondents conceded the appeal without filing a cross-appeal.

D The traditional role of a respondent in an appeal is to defend the judgment.

Before the argument in the substantive appeals, the learned senior counsel for the 1st and 2nd respondents in the two appeals raised a preliminary objection to the competence of the two appeals.

E He mentioned that this honourable court has no jurisdiction to entertain any appeal from the final decision of the Court of Appeal in respect of appeals arising from the National and State House of Assembly Election Petitions Tribunal. The grounds for the preliminary objections in both appeals are similar and in fact the eight grounds in the appeal SC.11.2012 are subsumed in the ten grounds raised in appeal SC.480/2011. I shall consider the preliminary objection in the two appeals together.

F The learned senior counsel Mr. Ikwueto predicated the preliminary objection on ten grounds as follows -

G 1) By the provision of Section 246 (3) of the 1999 Constitution the decision of the Court of Appeal in respect of appeals arising from the National and State House of Assembly Election Petitions shall be final.

H 2) The judgment of the Court of Appeal dated 13th December, 2011 arose from a decision of the National Assembly Election Petition Tribunal sitting at Lokoja, Kogi State concerning the election to the office of member of Senate for Kogi East Senatorial District.

3) Sponsorship of a candidate is a constitutional requirement

for qualification to contest an election to the office of Senate under Section 65 (2) of the 1999 Constitution.

4) By the provision of Section 138 (1) (a) of the Electoral Act 2010 (as amended) an election may be questioned on the ground that a person whose election is challenged was at the time of the election not qualified to contest the election. B

5) The final decision of the Court of Appeal dated 13th December 2011 on the constitutional qualification of the appellant (Ocheja Emmanuel Dangana) to contest the election held in Kogi East Senatorial District on 9th April 2011 is not an intra party dispute nor a case of substitution of candidates by a political party and thus not a pre-election matter. C

6) The decision concerning pre-election disputes in *Odedo v. INEC* (2009) 17 NWLR (pt.1117) pg.554 and *Senator Julius Ucha v. Dr. Emmanuel Onwe & Ors* (2011) 4 NWLR (pt.1237) pg.386 are totally irrelevant to the constitutional and statutory issues of qualification to contest election within the meaning of Section 65 (2) (b) of the 1999 Constitution (as amended) and Section 138 (1) (a) of the Electoral Act 2010 (as amended). D

7. The jurisdiction of the Supreme Court over any matter is statutory. E

8. The grounds of appeal contained in the notice of appeal dated 23rd December 2011 are grounds of mixed law and facts.

9. The appellant's brief of argument filed on 6th January 2011 and based on the notice of appeal filed on 23rd December 2011 is grossly incompetent. F

10. No leave of this honourable court nor the court below was sought and obtained to appeal to this honourable court on grounds of mixed law and facts. G

The learned senior counsel distinguished the case of *Ucha v. Onwe* from the present appeal. The Practice Directions for Election Appeals to the Supreme Court dated 19th October, 2011 did not envisage an appeal to this court from decision of the court below in respect of appeals emanating from National/State House of Assembly Election petitions but only appeals emanating from Governorship Election Petitions and Presidential Election Petitions. H

In the reply to the preliminary objection, the appellant in SC.480/2011 attacked the competence of the 1st and 2nd respond-

ents' briefs as the briefs are not filed 5 days after service of the appellants' but 14 days thereafter. This was in gross violation of paragraph 6 of the Practice Direction. The 1st and 2nd respondents did not obtain leave to file the briefs out of time. The learned senior counsel for the appellant Mr. Akubo submitted that the 1st and 2nd respondents missed the point on the issue of jurisdiction. The lower court used a pre-election issue of senatorial primaries conducted on 28th January, 2011 to invalidate both the nomination and election of the appellant.

The Court of Appeal was no longer sitting as an appeal Tribunal having delved into a subject-matter that should have come before it in a regular civil appeal bothering on pre-election issue. That gave the appellant an automatic constitutional right of appeal to this court by virtue of Section 233 (1) of the Constitution. The Court of Appeal is only a final court pursuant to Section 246 (3) of the Constitution to the extent that it limits itself to election appeals. This court in many decided cases held that it had jurisdiction where the appeal involve a pre-election matter. The appellant mentioned the cases of Senator Julius Ali Ucha v. Dr. Emmanuel Onwe & 4 Ors (2022) 4 NWLR (pt.1237) p.386, Dingyadi v. INEC (2011) 10 NWLR (pt.1255) pg.347 at pg.394, Onuaguluchi v. Ndu (2007) 7 NWLR (pt.712) 309. The Supreme Court as the final constitutional law court remains the ultimate court to interpret and construe Section 233 (1)(b)(i) of the Constitution as amended. The appellants contended that the question of sponsorship under Section 65 (2)(b) of the Constitution is inextricably linked to an aspirant's qualification to contest an election. The appellants submitted in rebuttal that the contention has no force of law. The claim of the 1st and 2nd respondents that the said primaries have to do with the constitutional qualification of the appellant arising from his purported illegal and unlawful sponsorship is manifestly contradicted by this court in the case of Ucha v. Onwe as a wrong position of the law. Further, the contention that sponsorship as a pre-condition for qualification to contest an election under Section 138 (1) (a) and 65 (2)(b) of the Constitution is misconceived - as the so called issue of qualification of the appellant is limited to non-attendance of INEC at the senatorial primary of 28th January, 2011. The court is urged to overrule the preliminary objection.

The appellant in appeal SC.11/2012 and 3rd respondent in

SC.480/2012 replied by laying emphasis on the jurisdiction of the Court of Appeal particularly in election matters as defined by the constitution - under Section 246 (1)(b)(i) of the 1999 Constitution (as amended) and the validity of the primary election conducted under Section 87 of the Electoral Act 2010. The jurisdiction to entertain complaints arising from the conduct of the primary election of a political party is by virtue of Section 87 (9) of the Electoral Act vested in the regular courts from where appeals lie to the Court of Appeal pursuant to Section 243 of the Constitution. Appeals from an Election Petition Tribunal established under Section 285 of the Constitution go to the Court of Appeal pursuant to Section 246 of the Constitution.

The findings of fact of the Court of Appeal at page 1146 of the record read:

“The process that purportedly ushered him in on 28th January 2011 as candidate of the PDP is seriously flawed. The purported nomination was illegal and a nullity.”

The power of the Election Tribunal and the Court of Appeal while acting under Section 246 of the constitution does not extend or cover primaries election or pre-election matters. The issue arising out of the primaries election held on 28th January 2011 before National Assembly Election is a pre-election matter which the Court of Appeal while sitting on appeal from an election Tribunal ought not to countenance. The appellant 3rd respondent cited decisions of this court to that effect - Adeogun v. Fashogbon (2008) 17 NWLR (pt.1115) p.149, Ayogu v. Nnamani (2006) 8 NWLR (pt.981) pg.170, Ibrahim v. INEC (1999) 8 NWLR (pt.614) pg.334, ANPP v. Usman (2006) 8 NWLR (pt.117) pg.654, Ucha v. Onwe (2011) All FWLR (pt.580) pg.1227 at pg.1259.

On the authority of Ucha v. Onwe 7 4 Ors (2011) 4 NWLR (pt.1237) pg.386 where an election petition tribunal or the Court of Appeal while determining an appeal arising from an election tribunal found its decision on a subject over which an appeal lies under the Supreme Court jurisdiction, the Supreme Court has jurisdiction to entertain appeal from such decision notwithstanding that the decision appealed against arose from an election petition. The decision of the Court of Appeal in this matter is a nullity. The court is urged to overrule the objection of the 1st and 2nd respondents and hear the

appeals on their merit.

The meat and substance of the preliminary objection of the 1st, and 2nd respondents is for this court to determine whether it has jurisdiction to hear these appeals under Section 233 (2) (e) of the 1999 Constitution (as amended) when the subject matter of the appeals is an election petition emanating from an Election Petition Tribunal and the Election Appeal Tribunal. Pursuant to Section 246 (3) of the 1999 Constitution, the final court is the Court of Appeal and the Supreme Court has no jurisdiction to adjudicate on it. This issue is straightforward and within narrow limit. This court is invited to interpret the scope and extent of its jurisdiction under Section 239 (2) (e) of the 1999 Constitution (as amended) and Section 246 (3) of the Constitution.

An election was conducted by the 4th respondent, INEC in the Kogi East Senatorial District on the 9th of April 2011. Amongst the candidates who contested were candidates sponsored by their parties the Peoples Democratic Party and the All Nigeria Peoples Party. At the time the petition was filed, the scenario was that:-

1. Primaries were held and completed by the parties.
2. Candidates were nominated by the parties with their names forwarded to INEC.
3. A valid election was conducted for Kogi East Senatorial District.
4. The appellant in the appeal SC.480/2011 emerged the winner of the election. The loser presented a petition before the Tribunal.

It was brought under one of the valid grounds for challenging an election under Section 138 (1) (a) of the Electoral Act 2010 and Section 65 (2) of the 1999 Constitution. On a close scrutiny of the legal points raised and submission of counsel in the preliminary objection, I observed that relatively similar issues were raised in the appeals to be heard and determined by this court when the issue of jurisdiction is settled. It will amount to putting the cart before the horse if I consider and determine the submission of counsel now. I defer the issue of competence to hear the subject matter of the appeals until the preliminary issue of jurisdiction of this court is settled. It is sufficient to note that the appeals are against the decision of the Election Petition Appeal Tribunal, Abuja in respect of Kogi East Sena-

torial District election. The focus in this preliminary objection is the jurisdiction of the Court of Appeal as a final court over senatorial elections and the Supreme Court as a final court over governorship election.

The unique aspect of jurisdiction is that courts are set up by the Constitution, Decrees, Laws, Acts and Edicts. They cloak the courts with the powers and their jurisdiction of adjudication. If the Constitution, Decrees, Acts, Laws and Edicts do not grant jurisdiction to a court or tribunal, the court and the parties cannot by agreement endow itself with jurisdiction. The jurisdiction of the court is confined, limited and circumscribed by the statute creating it. In view of the fact that jurisdiction is threshold matter, it is very fundamental as it goes to the competence of the court to hear and determine a suit.

Where a court does not have jurisdiction to hear a matter, the entire proceedings no matter how well conducted and decided would amount to a nullity. It is mandatory and very crucial that courts decide the issue of jurisdiction before looking into the extent of judicial power exercisable under that jurisdiction. At the commencement of a trial, particularly where there is a challenge to the jurisdiction of a court, the court must first assume jurisdiction to consider whether it has or lacks jurisdiction. Afribank (Nig.) Plc. v. Akwara (2006) 5 NWLR (pt.974) pg.619, Okulate v. Awosanya (2000) 2 NWLR (pt.646) pg.530, Onuorah v. KRPL Ltd. (2005) 6 NWLR (pt.921) pg.393, Messrs NV Scheep v. The MV 'S' Araz (2000) 15 NWLR (pt.691) pg. 622, Ajayi v. Milad Ondo State (1997) 5 NWLR (pt.504) pg.237, Amadi v. N.N.P.C. (2000) 10 NWLR (pt.674) pg.76, Galadima v. Tambai (2000) 11 NWLR (pt.677) pg.1.

Jurisdiction on a broad perception encompasses legal capacity, power or authority of a court. Competence of a court is the handmaid of jurisdiction of a court. A court must have both jurisdiction and competence to be properly seized of a cause or matter. Jurisdiction in that sense means the legal capacity, power or authority vested in it by the Constitution or statute creating the court.

A court is competent to entertain a case -

a. When the subject matter of the case is within the

court's jurisdiction.

b. Whether there is any feature in the case which prevents the court from exercising its jurisdiction.

c. When it is properly constituted as regards members and qualifications of the members of the bench and no member is disqualified for one reason or another. Madukolu v. Nkemdilim (1962) 2 SCNLR pg.341, Galadima v. Tambai (2000) 6 SC (pt.1) pg.196, Araka v. Ejeagwu (2000) 12 SC (pt.1) pg.99.

When dealing with the issue of jurisdiction or lack of it the courts are guided by some principles which are: -

a. Jurisdiction is a matter of substantive law no litigant can confer jurisdiction on the court where the constitution or statute or any provision of common law says that the court does not have jurisdiction.

b. Jurisdiction cannot be assumed in the interest of justice.

c. Nothing shall be intended to be outside the jurisdiction of the superior court but that which specifically appears to be so and on the contrary nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly alleged.

d. Although courts have great powers yet their powers are not unlimited. Their jurisdiction is confined, limited and circumscribed by the statute creating it.

e. The court is not hungry after jurisdiction.

f. Judges have a duty to expound the jurisdiction of the court and not expand it as by so doing the court will be usurping the functions of the legislature.

g. Court cannot give itself jurisdiction by misconstruing statute. African Newspapers of Nigeria v. Federal Republic of Nigeria (1985) 2 NWLR (pt.6) pg.137.

I shall now give a microscopic analysis to the two appeals so as to determine whether this court has jurisdiction conferred on it by the constitution to entertain appeals from senatorial election petitions in view of Section 246 (3) and Section 285 of the Constitution (as amended). It is when this crucial issue of jurisdiction is settled that we can embark on the question of competence of the court to adjudicate upon the subject matter of the appeal. The petitions are com-

plaints against the conduct of the senatorial election in Kogi State Senatorial District on the 9th of April, 2011. The petition was filed, heard and determined by Election Petition Tribunal Lokoja. The appeal in the matter went before the Election Appeal Tribunal, Court of Appeal Abuja where it was heard and determined.

Section 285 (1) of the 1999 Constitution stipulates that -

“There shall be established for the Federation one or more election tribunals to be known as the National Assembly Election Tribunals which shall to the exclusion of any court or tribunal have original jurisdiction to hear and determine petitions as to whether -
a. Any person has been validly elected as a member of the National Assembly.”

Section 246 (1)(a) of the Constitution:-

“An appeal to the Court of Appeal shall lie as of right from (b) Decisions of the National Assembly Election Tribunals and governorship and Legislative Houses Election Tribunals on any question as to whether

(i) Any person has been validly elected as a member of the National Assembly or of a House of Assembly of a State under the Constitution.

(3) The decision of the Court of Appeal in respect of appeals arising from election petitions shall be final.

Section 233 (2) (e) as amended does not make reference to appeal from the Court of Appeal on whether anybody has been validly elected as a member of the National Assembly.”

In the literal rule of interpretation, courts must interpret words in the Constitution in accordance with the intendment and certainly not in a way opposed to the purpose intended for the enactment. There should be no divergence but a strict confinement within the ordinary meaning of the words used in the Constitution unless that is at variance with the intention of the legislature to be gathered from the words used or leads to any manifest absurdity or repugnance.

Fawehinmi v. I.G.P. (2000) 7 NWLR (pt.665) pg.481, Awolowo v. Shagari (1979) 6-9 SC 51.

Furthermore, where the words of a statute are clear, unambiguous and unequivocally express the intention of the lawmakers, effort must be given to them irrespective of

whether that produces a harsh or inconvenient result. In the instant appeals, the provisions of the foregoing section are clear and unambiguous. The words of the provision ought to be accorded their simple grammatical meaning. A-G Bendel State v. A-G Federation (1982) 3 NCLR 1, Imah v. Okogbe (1993) 1 B NWLR (pt.316) pg.159, Obomhense v. Erhabor (1993) 7 NWLR (pt.303) pg.22.

It is apparent that the provisions of the 1999 Constitution as amended do not envisage an appeal to the Supreme Court from the Court of Appeal in National Assembly Election Petitions based on whether anybody has been validly elected as a member of the National Assembly. The Court of Appeal shall be the final court by virtue of Section 246 (3) of the 1999 Constitution. The provision of Section 246 (3) affirms the previous decisions of this court.

In the case Onuaguluchi v. Ndu (2001) 7 NWLR (pt.712) pg.309 this court held at pages 321-322 paragraphs H-D

“Where an appeal is actually in respect of National Assembly election or other relevant election, whatever errors of a procedural nature or of a procedural vice as to jurisdiction or competency, cannot be corrected by this court. They can only be corrected by the Court of Appeal or else they will remain uncorrected or unresolved as this court cannot intervene since it has no appellate or supervisory Jurisdiction over the Court of Appeal in such circumstance. This court will not permit or encourage any subterfuge under which it may assume jurisdiction to hear an appeal in respect of which the Constitution has in clear and unambiguous language made the Court of Appeal the final court. It follows that an appeal In respect of a decision of the Tribunal In an election petition when decided by the Court of Appeal cannot be taken on appeal to the Supreme Court but is final for all purposes.”

Also in the case of Awuse v. Odili (2003) 18 NWLR (pt.851) pg.116 this court said:-

“It is therefore now well settled that pursuant to the provisions of Sections 246 (1) (b) and 11 and (3) of the 1999 Constitution, the Court of Appeal acting within its jurisdiction in deciding an appeal arising from an election petition as stipulated under the said section of the constitution is the final Court of Appeal. Whether it did so

rightly or wrongly in its decision cannot be questioned on appeal in this court by virtue of the express provisions of the said Section 246 (3) of the 1999 Constitution which stipulates that the decision of the Court of Appeal in respect of appeals arising from the relevant election shall be final.” Esewe v. M. T. Gbe (1988) 5 NWLR (pt.93) pg.134, Eco consult Ltd. v. Pancho Villa Limited (1999) 1 NWLR B (pt.588) pg.507.

In short by virtue of section 246 (1) (b) (i) and (3) of the 1999 Constitution, the Court of Appeal has the mandate to decide an appeal arising from an election petition and shall be the final court. Whether it did so perfectly, rightly or wrongly, the decision it arrives at cannot be taken on appeal to the Supreme Court for consideration. The Supreme Court cannot entertain appeals which it has no jurisdiction to adjudicate upon. C

Once a court has no jurisdiction, a party cannot use any statutory provision or common law principle to impose it because absence of jurisdiction is irreparable in law. The matter ends there. Madukolu v. Nkemdilim (1962) 2 SCNLR 341, Ibeanu v. Ogbiede (1994) 7 NWLR (pt.359) pg.697, Peenok Investment Ltd. v. Hotel Presidential Ltd. (1982) NSCC pg.477. D

In the final analysis, the preliminary objection of the 1st and 2nd respondents to the appeals SC.480/2011 and SC.11/2012 has merit and it is accordingly sustained.

It is trite that where a court finds that it lacks jurisdiction to adjudicate on any matter, the proper order to make is an order of striking out. Saleh v. Monguno (2003) 1 NWLR (pt.801) pg.221, Okafor v. Nnaife (1973) 1 All NLR (pt.1) pg.238. The two appeals SC.480/2011 and SC.11/2012 are hereby struck out. Parties are to bear their costs. F

ONNOGHEN JSC

The consolidated appeals are against the judgment of the Court of Appeal Held at Abuja in appeal no. CA/A/EPT/582/2011 delivered on the 13th day of December, 2011 in which the court allowed the appeal of the 1st and 2nd respondents against the decision of the National Assembly Election Petition Tribunal Holden at Lokoja in H

petition no. EPT/KG/NAE/SEN/1/2011 delivered on the 18th day of October, 2011. The petition arose from the National Assembly election into Kogi East Senatorial Seat which was held on the 9th day of April, 2011. It is the contention of the 1st and 2nd respondents herein, that as at the time of the said senatorial election, the appellant was not qualified to contest same as he was not lawfully and validly sponsored as a candidate for the election as required by Section 65(2)(b) of the 1999 Constitution and Section 138(1) (a) of the Electoral Act, 2010 as amended. The petition was dismissed by the tribunal resulting in an appeal to the lower court which was allowed. The return and declaration of the appellant as the winner of the said election was consequently nullified by the lower court. The instant appeals are against the said judgment of the lower court.

The issues for determination in SC/480/2011, as identified by learned senior counsel for the appellant in the appellant brief filed on 6th January, 2012 are as follows:-

1. Whether having regard to the correct interpretation of the combined , provisions of Section 65 (2) (b) and 246 (1) (b) (i) of the Constitution of Federal Republic of Nigeria 1999 as amended vis-a-vis Sections 85 (1), 87 (a) and 138 (1) of the Electoral Act 2010 (as amended) as well as the pleadings filed and exchanged and evidence adduced, the judgment of the Court of Appeal which nullified the election of the appellant predicated on a pre-election matter to wit invalidity of senatorial primary conducted on 28th January, 2011 is not altogether a nullity for want of jurisdiction and denial of fair hearing.

2. Whether the Court of Appeal was right in admitting the letter dated 24th January 2011 as Exhibit P:21 and relying heavily on same to nullify the election of the appellant.

3. Whether having regards to the doctrine of stare decisis in the circumstances of this case the Court of Appeal was right in declining to follow the decision of this Honourable court in Senator Julius Ali Ucha v. Dr. Emmanuel Onwe & 4 Ors (2011) 4 NWLR (pt.1237) pg.386 on the ground that it was distinguishable from the present case.

4. Whether the Court of Appeal was right in overruling the preliminary objections against the appeal before it.

On the other hand, Chief Olusola Oke for the appellant in SC/

11/2012 formulated the following two issues in the appellant brief filed on 19th January, 2012, for the determination of the appeal. These are:-

“(i). Whether the Court of Appeal was not in grave error and its judgment a nullity when it assumed jurisdiction in an election petition to determine the validity and actually determined the validity of the primary election which produced the appellant as candidate of 3rd respondent for the Kogi East Senatorial District election of 9th April, 2011.

“(ii) Was the lower court right when it nullified the primaries election of the 3rd respondent in an election petition when -

a. The 1st and 2nd respondents are not members of the 3rd respondent.

b. When the 1st and 2nd respondents did not plead or raise the issue of twenty-one (21) days notice which formed the kernel of the judgment.

c. And the 3rd respondent was not heard on the unpleaded fact of twenty-one (21) days notice which the lower court raised suo motu.”

It is important to note that appeal no. SC.480/2011 was filed, by People Democratic Party’s (PDP) candidate for the Senatorial election in question who was returned by the National Electoral Commissioner as winner of the said election while no. SC.11/2012 was filed by the Peoples Democratic Party (PDP) itself.

Before proceeding any further on the merits of the issues canvassed in the appeals, it is necessary to deal with a periphery matter arising from a preliminary objection by the 1st and 2nd respondents, which has been argued in the brief filed on their behalf by learned senior counsel, P. I. N. Ikwueto, SAN on 20th January, 2012 on the competence of the appeals. The grounds of the objection are as follows:-

“(i) By the provision of Section 246 (3) of the 1999 Constitution the decision of the Court of Appeal in respect of appeals arising from the National and State House of Assembly Election Petitions shall be final.

“(ii) The judgment of the Court of Appeal dated 13th December 2011 arose from a decision of the National Assembly Election Petition Tribunal sitting at Lokoja, Kogi State concerning the election

to the office of member of Senate for Kogi East Senatorial District.

(iii) Sponsorship of a candidate is a constitutional requirement for qualification to contest an election to the office of Senate under Section 65 (2) of the 1999 Constitution.

(iv) By the provision of Section 138 (1) (a) of the Electoral Act 2010 (as amended) an election may be questioned on the ground that a person whose election is challenged was at the time of the election not qualified to contest the election.

(v) The final decision of the Court of Appeal dated 13th December 2011 on the constitutional qualification of the appellant (Ocheja Emmanuel Dangana) to contest the election held in Kogi East Senatorial District on 9th April 2011 is not an intra party dispute nor a case of substitution of candidates by a political party and thus not a pre-election matter.

(vi) The decision concerning pre-election disputes in Odedo v. INEC (2009) 17 NWLR (pt.1117) pg.554 and Senator Julius Ucha v. Dr. Emmanuel Onwe & Ors (2011) 4 NWLR (pt.1237) pg.386 are totally irrelevant to the constitutional and statutory issues of qualification to contest election within the meaning of Section 65 (2) (b) of the 1999 Constitution (as amended) and Section 138 (1) (a) of the Electoral Act 2010 (as amended).

(vii) The jurisdiction of the Supreme Court over any matter is statutory.

(viii) The grounds of appeal contained in the notice of appeal dated 23rd December 2011 are grounds of mixed law and facts.

(ix) The appellant's brief of argument filed on 6th January 2011 and based on the notice of appeal filed on 23rd December 2011 is grossly incompetent.

(x). No leave of this honourable court nor the court below was sought and obtained to appeal to this honourable court on grounds of mixed law and facts."

In arguing the objection learned senior counsel for 1st and 2nd respondents referred the court to Section 246(3) of the Constitution of the Federal Republic of Nigeria 1999 (hereinafter referred to as the 1999 Constitution), as amended, and submitted that by the provisions of the said section of the Constitution, the decision of the lower court rendered on 13th December, 2011 is final and cannot be appealed against to this court; that the decision of the court in

Uchia vs Onwe (2011) 4 NWLR (Pt. 1237) 386 at 428 is distinguishable on the facts and law from the instant case; that the issue in that case was on substitution of candidates whereas in the instant case, the issue is on sponsorship of a candidate etc; that by the provisions of Section 233 (2)(e)(i) of the 1999 Constitution as amended this court now has jurisdiction to hear and determine appeals from the Court of Appeal on decisions on any question as to whether any person has been validly elected to the office of Governor or Deputy Governor of a state which jurisdiction does not extend to cases involving National Assembly election which must terminate at the Court of Appeal, and urged the court to uphold the objection and strike out the appeals. B C

In his reaction, learned senior counsel for appellant in SC/480/2011. P. A. Akubo, SAN, in a reply brief filed on 24th January, 2012, submitted that this court has the jurisdiction to entertain the appeal as the issue used by the lower court to determined the appeal before it centre on senatorial primary election conducted on 28th January, 2011 which is pre-election matter over which this court has jurisdiction; that the lower court stepped out of the scope of its appellate jurisdiction under Section 246(3) of the 1999 Constitution and as such it was no longer sitting as an appeal tribunal, over election matters; that appellant therefore has a constitutional right of appeal to this court under Section 233(1) of the 1999 Constitution, as amended; that the Court of Appeal is only a final court under Section 246(3) of the constitution to the extent that it limits itself to election appeals; that this court being the ultimate court has the duty to state when the decision of the Court of Appeal can be final under section 246(3) of the 1999 Constitution, and that the issue of the proper interpretation of Section 246(3) of the said constitution being a constitutional matter this court remains the ultimate court to interpret the provisions under Section 233 (1) (b) of the said constitution and relied on Ucha vs Onwe supra and Onuaguluchi vs Ndu (2001) 7 NWLR (pt.712) 309 to urge the court to hold that it has jurisdiction and to overrule the objection. D E F G H

It is settled law that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal

effect whatsoever. That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost.

It is also settled law that the exercise of appellate jurisdiction by a court/tribunal is entirely statutory as an appellate court derives its jurisdiction either from the statute/constitution creating it and/or any other enabling statutory powers/enactment.

In terms of the jurisdiction of the Court of Appeal in relation to election matters Section 246 of the 1999 Constitution, as amended, makes provision to that effect in the following terms:-
246 (1)

*“An appeal to the Court of Appeal shall lie as of right from:-
(b) decisions of the Notional and State Houses of Assembly, Election Tribunals ; and
(c) decisions of the governorship election tribunals, an any question as ,to whether:
(i) any person has been validly elected as a member of the National Assembly or of a House of Assembly of a State under this constitution;
(ii) any person has been validly elected to the Office of a Governor or Deputy Governor; or
(iii) the term of office of any person has ceased or the seat of any such person has become vacant”.*

It is very clear that Section 246(1) supra confers jurisdiction on the Court of Appeal to hear appeals form election tribunals in relation to National and State Houses of Assembly election petitions as well as from the governorship election tribunals on the issue as to whether any person has been validly elected as governor or deputy governor of a state under the constitution or the term of office of such persons has ceased or their seat have become vacant.

However in Section 246(3) of the said constitution it is provided as follows:-

“(3) The decisions of the Courts of Appeal in respect of appeals arising from the National and State Houses of Assembly election petitions shall be final”.

In other words, all appeals in relation to National and State Houses of Assembly election petition terminate at the Court of Appeal. The Court of Appeal is therefore the final bus stop in respect of

appeals arising from the decisions of National and State Houses of Assembly election tribunals.

There is no dispute that the appeal giving rise to the instant further appeals to this court originated from the decision of the National and State Houses of Assembly election petition tribunal in respect of the Kogi East Senatorial Seat, which was decided on 18th October, 2011 resulting in an appeal to the Court of Appeal which appeal was allowed and the judgment of the tribunal set aside. B

From the arguments presented by the parties it is not in doubt that both parties agree that by constitutional arrangement appeals from decisions of the National and State Houses of Assembly election petition tribunals terminate at the Court of Appeal as there is no further right of appeal to the Supreme Court in relation thereto. C However, it is the case of appellants that the instant appeals are different in the sense that the subject matter at the tribunal and before D the lower court was not an election petition matter strictly speaking but a pre-election matter as the same involves the issue of qualification of a candidate to contest the election in question and as such appellants have a right of appeal up the Supreme Court particularly as such matters are not meant for election tribunals but for the High E Courts. It is the further contention of appellants that the lower court have dabbled into a pre-election matter under the guise of an election petition matter opens its decision thereon to appeal to the Supreme Court. The case of Ucha vs. Onwe supra was cited and relied F upon as authority for the proposition.

In paragraph 15 of the petition, the 1st and 2nd respondents pleaded as follows:-

"15. The petitioners aver that the 1st respondent was not qualified to contest the senatorial election contrary to the mandatory provisions of section 85 of the Election Act, 2010 (as amended) the 3rd respondent did not attend nor monitor the purported primary election held by the Peoples Democratic Party; the 2nd, respondent, on 28th February, 2011 at which the 1st respondent was purportedly selected as the senatorial candidate of the PDP for Kogi East Senatorial District. The petitioners will at the trial found on:- , G H

a. Letter dated 24th January, 2011 written by the 3rd respondents to the National Chairman of the Peoples Democratic Party. (PDP).

b. Enrolled order dated 20th January, 2011 made by the Fed-

eral High Court, Abuja in suit no. FHC/ABJ/CS/167/2007.

c. Report on the conduct of senatorial primaries for Kogi East Senatorial Constituency dated 29th January, 2011. ”

It is clear from the above that the ground for questioning the election of the 1st appellant is that he was not qualified to contest the election in question due to the fact that he was not validly nominated by the party as its candidate for the said election.

Section 138(1)(a) of the Electoral Act, 2010 as amended provides inter alia, that an election may be questioned on the ground that a “person whose election is questioned was at the time of the election, not qualified to contest the election”.

With the above provision in view, it will be very unsafe to agree with the submission of learned senior counsel for the appellant that the issue involved in this case was strictly a pre- election matter in which an election tribunal has no jurisdiction to hear and determine and that only the High Courts have jurisdiction to deal with the matter. I do not agree that the matter envisaged in Section 138(1)(a) of the Electoral Act, 2010, as amended, is a pre-election matter over which an election tribunal has no jurisdiction. I however agree that the qualification/disqualification to contest an election is both a pre-election and an election matter.

However, in the instant case, Section 138(1)(a) of the Electoral Act has clearly made the particular pre-election matter entertainable by an election tribunal by expressly making the issue of qualification of a candidate to contest an election a ground in an election petition challenging or questioning the return of the winner of the said election.

I therefore hold the considered view that an issue of qualification of a candidate to contest an election under the Electoral Act, 2010 (as amended) is both a pre-election and an election matter which both the High Courts and the relevant election tribunals have jurisdiction to hear and determine.

Where an aggrieved party decides to go through the High Court to challenge or question the qualification of such a candidate, his right of appeal terminates at the Supreme Court. Where, however, he decides to go through the election tribunal route and the election to which the issue relates is a National or State Houses of Assembly election, then, his quest for justice constitutionally terminates at the

Court of Appeal by operation of section 246(3) of the 1999 constitution supra. On the other hands, if the election being questioned is a governorship election then the issue of qualification as a ground for questioning the election can be canvassed up to the Supreme Court by virtue of Section 233(1)(e)(iv) of the said 1999 Constitution.

The jurisdiction to hear and determine the issue of qualification of a candidate in an election is therefore parallel - one through the High Courts and the other through the election tribunals. B

It is common knowledge that parallel lines never meet. That being the case, it is demonstrably clear that a journey which started in an election tribunal in petition challenging the election of a senator on grounds of qualification can never end up at the Supreme Court simply because the issue is a pre-election matter over which the High Courts also have jurisdiction. It is important to note that the jurisdiction of an appellate court is statutory and very much dependent on the jurisdiction of the lower court to hear and determine the matter. Where, as in this case the constitution provides that a particular matter must terminate at the Court of Appeal, the Supreme Court will have no jurisdiction to entertain a further appeal on any matter/issue arising therefrom as the court would have no supervisory role to play in the matter. C D E

It does not matter whether the lower court decided rightly or wrongly, it has the jurisdiction and it has the jurisdiction and it is the final court on the matter. Where it is wrong, it is up to that court and that court alone, to review its decision in an appropriately case and upon an appropriate application to the effect, not by way of surreptitious appeal to this court. F

In the circumstances and having regards to the detailed reasons contained in the lead judgment of my learned brother ADEKEYE JSC just delivered which I had a preview of, I agree that the preliminary objection is meritorious and should be upheld. I order accordingly and abide by the consequential orders made in the said lead judgment including the order as to costs. Appeals struck out. G

H

MUHAMMAD JSC

These are consolidated appeals from the court below. It is on a matter involving the National Assembly seat (Senatorial seat). The

provision of section 246(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) stipulates:

“The decision of the Court of Appeal in respect of appeals arising from election petitions shall be final.”

B Thus, any attempt to confer jurisdiction on this court must have been borne out of total misunderstanding of the law or for mere waste of the energy and resources of the parties involved and the personnel of this court. I do not think this court will yield to that ill-fated invitation.

C The appeals are a non-starter and are hereby struck out. The preliminary objection of the 1st and 2nd respondents succeed and are hereby sustained.

The detailed reasons by my learned brother, Adekeye, JSC are hereby adopted as mine. Parties to bear their own costs in both D appeals.

RHODES-VIVOUR JSC

E The appellant and the 1st respondent in suit No. SC.480/11 contested senatorial Elections as candidates of the people Democratic Party (PDP) and the All Nigeria People Party (ANPP) respectively. The election was for the Kogi East Senatorial seat. The appellant won. The 1st respondent filed and argued a Petition at the Election Tribunal and lost. He appealed and won, judgment was delivered by the F Appeal Court (Appeal Tribunal) on the 13th of December 2011. That court allowed the appeal because it found that the appellant was not qualified to contest the election. It placed reliance on section 65 (2)(b) of the Constitution and Section 138 (1)(a) of the Electoral G Act. Dissatisfied with the judgment of the Appeal Tribunal the PDP candidate filed this appeal. Two Notices of Preliminary objections were filed against the hearing of this appeal and my learned brother Adekeye, JSC examined both of them and quite rightly in my view sustained them.

H A preliminary objection is filed by a respondent against the hearing of an appeal. The main aim is to contend that the appeal is fundamentally defective of incompetent. If it succeeds the appeal abates. A preliminary objection to the hearing of an election petition appeal may be raised on the ground that this court has no jurisdic-

tion to hear the appeal or that time within which to hear a matter had since run out. See Sections 246 (3), 285 (5), (6) and (7) of the constitution objects to some grounds of the appeal filed he ought to file and rely on a Motion on Notice. If it succeeds the appeal would still be heard on other grounds that can sustain the appeal. A successful Preliminary objection terminates the hearing of the appeal. B

In this appeal the respondents were correct to file a preliminary objection against the hearing of the appeal; its success has correctly terminated the hearing of the appeal. The issue in the preliminary objections is whether this court has jurisdiction to hear appeals from National Assembly elections. C

Jurisdiction has always been a threshold issue. It must be decided once it is raised and quickly too. A trial or a hearing conducted without jurisdiction amounts to a wasted effort, a complete nullity no matter how well the matter was decided. That explains why the issue of jurisdiction can be raised at any time, in the trial court, on appeal, or in the Supreme Court for the first time, See A.G. Anambra State v. A.G. Federation 1993 6 NWLR pt.302 p.700, Barclays Bank of Nig v. Central Bank of Nig 1976 6 SC p.75, Usman Dan Fodio University v. Kraus Thompson Organisation Ltd (2001) 15 NWLR pt.736 p.305. D E

A court is competent. That is to say it has jurisdiction when-

1. it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and F

2. the subject matter of the case is within its jurisdiction, and no feature in the case which prevents the court from exercising its jurisdiction; and

3. the case comes before the court initiated by due the process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. See Madukolu & Ors. v. Nkemdilim 1962 2 NSCC p.374. G

The issue raised in the Preliminary objections is on the hearing of this appeal by this court. The provisions of Section 246 (3) of the Constitution are thus relevant. The Preliminary objections thus falls within (2) above. Section 246 (3) of the Constitution states that: 246 H
(1) Appeal to the Court of Appeal shall lie as of right from.....

(3) The decisions of the Court of Appeal in respect of appeals from National and State Houses of Assembly ‘election petitions shall

be final.

In the interpretation of the constitution a judge should not only rely on the provisions of the constitution but also on our historical development as a people and the history before the Constitution was enacted. See *Bronik Motors Ltd. & Anor v. Wema Bank Ltd* 1985 6 B NCLR pt.1, *Rabiu v. The State* 1981 2 NCLR p.293, *Okhae v. The Governor of Bendel State & Ors* 1990 4 NWLR Pt.144 p. 327.

In interpreting provisions of the constitution a judge should give effect to every word in the section to be interpreted, and where C the words used are clear and not ambiguous they must be given their plain, ordinary meaning. The starting point would be to find out the intention of the legislature. Subsection (3) of section 246 of the constitution is clear. The words used are plain as plain can be. The intention of the legislature clearly expressed is that all appeals from national and State House of Assembly election petitions shall come to D an end after the Court of Appeal delivers its judgment. There shall be no further appeal to the Supreme Court. On the other hand, the Supreme Court is the final court for hearing appeals for the election of the President and Vice president, Governor and Deputy Governor. See section 233 of the constitution. The intention of the legislature E is that the Court of Appeal shall be the final court for the hearing of election petition appeals arising from the National and State Houses of Assembly elections. It has been long settled that when objection to F the jurisdiction of this court is established, this court has a duty to protect the administration of justice by not proceeding to hear an appeal, which it is apparent it has no jurisdiction to hear.

This appeal is from the elections conducted by the Independent National Election Commission (INEC) for the Kogi East Senatorial seat. It is an appeal from the National Assembly election petition G in view of the fact that it is for a senatorial seat. By virtue of the clear provisions of subsection (3) of the section 246 of the constitution, the judgment of the Court of Appeal delivered on the 13th day of December, 2011 is final. This court has no jurisdiction to hear an appeal H from the judgment even if the judgment is wrong. It remains inviolate forever. The pending appeals are incompetent.

For this and the more detailed reasoning in the leading judgment delivered by my learned brother Adekeye, JSC which I was privileged to read in draft form, I would strike out this appeal.

PETER-ODILI JSC

On the 9th April, 2011, the Independent National Electoral Commission (INEC), the 4th Respondent herein conducted the election for the office of senate of the Federal Republic in respect of Kogi East Senatorial district. The 1st Respondent contested the election on the platform of All Nigeria Peoples Party (ANPP), the 2nd Respondent herein. The Appellant equally contested the said election on the platform of Peoples Democratic Party (PDP), the 3rd Respondent. Six (6) other political parties also participated in the election by filing different candidates. The Appellant was duly returned as the winner of the election by the 4th Respondent having scored a total of 131,386 votes while his closest rival, the 1st Respondent scored 114,786 votes thereby beating the latter with a margin of 16,600 votes. Dissatisfied with the said election, the 1st and 2nd Respondents filed a petition on 27th April, 2011 before the National Assembly Election Petition Tribunal sitting in Lokoja, Kogi State challenging the declaration and return of the present Appellant. The Appellant was the 1st Respondent in the petition. The petition of the 1st and 2nd Respondent is contained on pages 1 – 123 Volume 1, of the Record.

Hearing of the petition commenced before the trial Tribunal on 5th July, 2011. The 1st and 2nd Respondents called only two witnesses including 1st Respondents and closed their case. The present Appellant opened his defence and testified as the sole witness and closed his defence. The 3rd Respondent opened its defence and called one witness who testified as DW2. The 4th and 5th Respondents opened and closed their defence and called one witness in the person of the 5th Respondent who testified as DW3. Exhibits were tendered. Judgment delivered on 18th October, 2011 the Trial Tribunal dismissing the Petition for lacking in merit. That the Tribunal lacked jurisdiction to entertain pre-election matter having regard to the issue of Senatorial Primary conducted by the 3rd Respondent on 28th January, 2011 resulting in the emergence of the Appellant as its Senatorial candidate for the election.

The 1st and 2nd Respondents filed an appeal against the judgment of the trial tribunal of the Court of Appeal, Abuja Division. Judgment was delivered on 13th December, 2011, the Court of Appeal allowed the appeal and nullified the election of the Appellant

on the sole ground that the process of Senatorial Primary of 28th January, 2011 which ushered in the Appellant as candidate of the 3rd Appellant as candidate of the 3rd Respondent was seriously flawed and that the nomination of the Appellant was illegal and a nullity. The Court of Appeal also overruled the Preliminary Objections of the Appellant and that of the 3rd Respondent. The Appellant dissatisfied has appealed to this court. It seems necessary to go into the background of what has brought about this appeal.

FACTS:

The Petition of the 1st and 2nd Respondents is anchored on three (3) Grounds as set out at paragraph 8 of the Petition. However, the only ground relevant for the purpose of this Appeal out of the three (3) grounds in question is ground, 3. The said ground alleges that the present Appellant was at the time of the election not qualified to contest the election. The 1st and 2nd Respondents supplied particulars or facts in support of the grounds on which the petition was brought. With particular reference to the alleged ground of non-qualification of the Appellant, the 1st and 2nd Respondents anchored on the said ground on the allegation that the 4th Respondent did not attend nor monitor the Senatorial primary election held by the Peoples Democratic Party (the 3rd Respondent) on 28th January, 2011 in which the Appellant was selected as the Senatorial candidate of the party for Kogi East Senatorial District. The 1st and 2nd Respondents pleaded three (3) documents in support of this allegation. The three (3) documents are:

1. Letter dated 24 January 2011 written by the 3rd Respondent to the National chairman of the Peoples Democratic Party (PDP).
2. Enrolled order dated 25 January 2011 made by The Federal High court Abuja in suit No. FHC/ABJ/CS/167/2007.
3. Report on Conduct of Senatorial Election primaries for Kogi East senatorial constituency dated 29th January, 2011.

The averments of the 1st and 2nd Respondents in their petition regarding the alleged non-qualification of the Appellant are contained at paragraph 15 of the petition. See pages 46-47, volume I of the Record. The said paragraph was merely reproduced by the 1st respondent at paragraph L9 of his witness statement on oath. See page 107, volume 1 of the record. The Appellant effectively traversed the said ground vide paragraph 32 of his Reply and maintained therein

that the said allegation of the 1st and 2nd Respondents raises a pre-election issue which transcends the scope of jurisdiction of the trial Tribunal. See page 162, volume 1 of the record. For added measure, the petition vide paragraph 37 of the reply of the Appellant. See pages 163-165, volume I of the Record. In addition, the Appellant vide paragraph 41 of his witness statement on oath profoundly controverted the allegation that he was not qualified to contest the election. See page 203, volume 2 of the Record. The 3rd Respondent equally challenged ground 3 of the petition vide paragraph 29 of the Reply. See page 325, volume 1 of the Record.

Remarkably, the 1st Respondent who all along had been a member of the Peoples Democratic Party (PDP), the 3rd Respondent herein and even won election twice on its platform to the House of Representatives between 2003 and 2011 suddenly claimed that he was the candidate of ANPP in respect of the Kogi East Senatorial District Election which was conducted on 9th April, 2011. His position is that he withdrew his membership of PDP on 9th January, 2011 and that he won the party primary of ANPP on 12th January, 2011 having been validly elected unopposed. Curiously, the same 1st Respondent who claimed to have been validly elected unopposed as candidate of the 2nd January, 2011 confirmed under Oath on 24th January, 2011 before the Federal High Court, Abuja vide paragraph 4 of his Affidavit in support of his Originating Summons tendered as Exhibit P19 that he was a registered member of Peoples Democratic Party. In fact, the 1st Respondent added another dimension at paragraph 2 of his witness statement on oath deposed to on 27th April, 2011 before the trial Tribunal that he made his witness statement on oath in support of the petition with the consent of the 3rd Respondent (Peoples' Democratic Party) for himself and on behalf of the said party. See page 60, volume 1 of the Record.

Indeed, the 1st Respondent obtained Interim Injunction vide Exhibit P14 on 25th January, 2011 in an attempt to validate the mandate he claimed to have procured from the 3rd Respondent on 7th January 2011. The Injunction was however vacated vide Exhibit P18 on 24th January, 2011". The said suit filed by the 1st Respondent in suit No. FHC/ABJ/CS/167/2011 on 24th January, 2011 vide originating summons is Exhibit P19. The suit was dismissed on 31st January, 2011 vide Exhibit P20.

Meanwhile, the 1st Respondent who claimed to have resigned his membership of the 3rd Respondent and even pleaded his letter of resignation dated 9th January, 2011, did not tender any such letter of resignation. However, the 1st and 2nd Respondents tendered various documents in support of the petition before the trial Tribunal which were admitted in evidence.

Importantly, some documents from the 1st and 2nd Respondents such as: letter dated 24th January, 2011 supposedly from INEC to the National Chairman of PDP tendered on 9th July, 2011 and 16th September, 2011 were rejected in the course of trial before the trial Tribunal. See pages 771 - 777, 779 - 784 and 836 - 839, volume 1 of the Record. Under cross-examination, the learned counsel to the present Appellant tendered three documents through the 1st Respondent who testified as PW1. The three documents tendered and admitted under cross-examination are as follows:

1. Exhibit P18, that is enrolled order of the Federal High court delivered on 28th January 2011 vacating order of Interim Injunction earlier granted on 25th January, 2011 in Suit No. FHC/ABJ/CS/67/2011.

2. Exhibit P19, certified True copy of the originating Summons filed by the 1st Appellant in Federal High Court, Abuja on 24th January, 2011 in Suit No. FHC/ABJ/CS/67/2011.

3. Exhibit P20, Certified True Copy of Judgment Delivered on 31st January, 2011 in respect of the Said Suit No: FHC/ABJ/CS/67/2011. See pages 795 -796, volume 1 of the Record.

Instructively, Exhibit P1, to wit, Form ECSD is the collated results of the Senatorial Election from the nine (9) Local Government Areas that make up Kogi East Senatorial District. It is the same as Exhibit R2. Similarly, Exhibit P2, to wit, Form EC8E is the Declaration of Result of the election. It is also the same as Exhibit "R3". Both Exhibits P1 and P2 which are synonymous with Exhibits R2 and R3 clearly show that the Appellant scored a total of 131,386 votes to beat the 1st Respondent who scored 114,796 votes by a margin of 16,600 votes. Importantly, in the whole gamut of the petition of the 1st and 2nd Respondents, there was no allegation whatsoever that INEC was not given the mandatory 21 days notice by PDP to attend and monitor the senatorial primary conducted by the 3rd Respondent on 28th January, 2011. In the same token, INEC did not com-

plain at all that it was not given 21 days notice by the 3rd Respondent in respect of the senatorial primary conducted on 28th January, 2011. In the entire witness statement on oath of the 1st Respondent in support of the petition as well as in support of the Petitioners' Reply, no paragraph alluded to the fact that INEC was not given 21 days notice by the 3rd Respondent with respect to the Senatorial primary conducted on 28th January, 2011. Better still, in Exhibit P19 being the certified True Copy of the Originating Summons in Suit No. FHC/CS/67/2011 wherein the 1st Respondent sought to validate his claim to victory of Senatorial primary said to have been conducted on 7th January, 2011,, the 1st Respondent did not raise the issue of 21 days notice to INEC but claimed his alleged victory as the winner of the senatorial primary.

In its Judgment delivered on 18th October, 2011, the trial Tribunal dismissed the Petition of the 1st and 2nd Respondents after dispassionately considering available evidence before it. Specifically, the trial Tribunal maintained that the Appellant was sponsored by a political party, namely, the 3rd Respondent and that the name of the Appellant was listed amongst the participants in the election. See page 926, lines 13-15, volume 1 of the Record. The trial Tribunal also held that issues of nomination, sponsorship and substitution were pre-election matters which by their nature cannot be ventilated before an Election Petition Tribunal. See page 926, lines 13-15, volume 1 of the Record. The 1st and 2nd Respondents filed an Appeal against the Judgment of the trial Tribunal to the Court of Appeal, Abuja Judicial Division. The Notice and Grounds of Appeal dated and filed on 1st November, 2011 by the 1st and 2nd Respondents is at pages 949-965, volume 1 of the Record. It contains 14 Grounds of Appeal. Briefs were filed exchanged before the lower court. See pages 976-1118, volume 2 of the Record. In the Appellants' Brief of Argument dated and filed on 18th November, 2011 before the lower court, only three (3) issues were formulated for determination at page three (3) thereof. The present Appellant as well as 3rd respondent set out to attack same in limine vide Notices of Preliminary Objection.

In its Judgment delivered on 13th December, 2011, the Court of Appeal overruled the Preliminary Objections of the Appellant and the 3rd Respondent. Thereafter, the court abandoned all other issues in the appeal and solely concentrated on alleged invalidity of the

Senatorial primary of appeal came to the conclusion that the Senatorial primary conducted on 28th January, 2011 by the 3rd Respondent resulting in the emergency of the Appellant as its candidate for the senatorial Election in Kogi East Senatorial District was seriously flawed. The court declared the nomination of the Appellant as illegal
 B and a nullity and accordingly nullified the election of the Appellant as Senator of the Federal Republic of Nigeria. The Court did not stop there but proceeded to declare the votes of the Appellant as wasted votes and thereupon declared the 1st Respondent as duly elected
 C Senator of the Federal Republic. The Court then directed the 4th Respondent to withdraw the certificate of Return issued to the Appellant and in turn issue the 1st respondent a Certificate of Return.

The Court equally admitted a letter dated 24th January, 2011 as Exhibit P21. Even though the said letter was admittedly founded
 D on Newspaper reports which Newspaper reports were not tendered before the trial Tribunal, the Court of Appeal relied on the said letter and came to the conclusion that INEC gave PDP enough Notice of the futility of the Senatorial primary planned for 28th January, 2011. The court construed section 65 (21 (b) of the constitution of the
 E Federal Republic of Nigeria, 1999 (as Amended) together with section 138 (1) (a) of the Electoral Act, 2010 (as Amended) to arrive at the conclusion that the issue of qualification or disqualification is both a pre-election and post-election issue. In short, the court came to the
 F conclusion that the primary election conducted on 28th January, 2011 culminating in the nomination of the Appellant as PDP candidate for the election was illegal and a manifest violation of Section 85 of the Electoral Act, 2010 (as amended). The Appellant filed two separate Notices of Appeal. The first one was filed on 15th December, 2011
 G while the second was filed on 23rd December, 2011. The Appellant is abandoning the first Notice of Appeal but relying on the second Notice of Appeal filed on 23rd December, 2011.

The facts above are the same as those in SC.11/12 wherein Peoples Democratic Party is Appellant. But to be cautious I shall relate the Brief of the facts in the version proffered by the Appellant in
 H this appeal SC.11/12 and they are as follows:-

While the Appellant sponsored the 3rd Respondent for the Kogi East Senatorial Election, the 1st Respondent contested the election on the platform of the 2nd Respondent. Parties agree that the Appellant's

primary election which produced the 3rd Respondent as candidate of the Appellant in the senatorial election was held on 28th January, 2011.

All that the 1st and 2nd Respondents pleaded in their petition regarding the qualification of the 3rd Respondent to contest the senatorial election is at paragraph 15 of the Petition (see pages 46 - 47 of the Record of Appeal). B

15. "The petitioners aver that the 1st Respondent was not qualified to contest the senatorial election.

Contrary to the mandatory provisions of Sections 85 of the Electoral Act, 2010 (as amended) the 3rd Respondent did not attend nor monitor the purported primary election held by the Peoples Democratic party, the 2nd Respondent, on 28th January, 2011 at which the 1st Respondent was purportedly selected as the Senatorial candidate of the PDP for Kogi East Senatorial District. The Petitioners will at the trial found on: C

1. Letter dated 24th January, 2011 written by the 3rd Respondent to the National Chairman of the Peoples Democratic Party (PDP).

2. Enrolled order dated 20th January, 2011 made by the Federal High Court Abuja in suit No. FHC/ABJ/CS/167/2007.

3. Report on the conduct of Senatorial Primaries for Kogi East Senatorial Constituency dated 29th January, 2011

Appellant in response to the above pleaded at paragraph 29 of her Reply (See page 325 of the Record): F

29. "The averments contained in paragraph 15 of the Petition to the effect that the 1st Respondent was not qualified to contest the election is needlessly vexatious as it raises a pre-election issue which transcends the scope of jurisdiction of this Honourable Tribunal". G

Clearly, from these pleadings, the issue in dispute between the parties is the alleged non attendance of the January 28, 2011 Kogi East Senatorial primary election of the Appellant by the 4th Respondent, INEC.

The two matters being taken together upon a consolidation, on the 24/1/12 date of hearing Mr. Akubo SAN learned counsel for the Appellant in SC.480/11 and 3rd Respondent in SC.11/12 adopted the Appellant's Brief filed on 6/1/12 and a Reply Brief filed on 24/1/12. He adopted the said Briefs and urged the Court to allow the H

appeal.

In the Appellant's Brief were couched four issues for determination, viz:-

1. Whether having regard to the correct interpretation of the combined , provisions of Section 65 (2) (b) and 246 (1) (b) (i) of the
B Constitution of Federal Republic of Nigeria 1999 as amended vis-a-
vis Sections 85 (1), 87 (a) and 138 (1) of the Electoral Act 2010 (as
amended) as well as the pleadings filed and exchanged and evidence
adduced, the judgment of the Court of Appeal which nullified the
C election of the appellant predicated on a pre-election matter to wit
invalidity of senatorial primary conducted on 28th January, 2011 is
not altogether a nullity for want of jurisdiction and denial of fair hear-
ing.

2. Whether the Court of Appeal was right in admitting the
D letter dated 24th January 2011 as Exhibit P21 and relying heavily on
same to nullify the election of the appellant.

3. Whether having regards to the doctrine of stare decisis in
the circumstances of this case the Court of Appeal was right in declin-
ing to follow the decision of this Honourable court in Senator Julius
E Ali Ucha v. Dr. Emmanuel Onwe & 4 Ors (2011) 4 NWLR (pt. 1237)
pg.386 on the ground that it was distinguishable from the present
case.

4. Whether the Court of Appeal was right in overruling the
F preliminary objections against the appeal before it.

Mr. P. I. N. Ikwueto SAN adopted the Briefs of 1st and 2nd
Respondents filed on 20/1/12, in it was argued the preliminary ob-
jection of the Respondents 1st and 2nd. However, learned counsel
had couched therein three issues for determination in the event that
G the Preliminary Objection failed. The three issues are as follows:-

1. Within the context of Section 65(2)(b) of the 1999 constitu-
tion and section 138 (1) (a) of the Electoral Act, 2010, is the issue of
qualification of a person to contest a Senatorial Election a pre-elec-
tion outside the jurisdiction of the National Assembly Election.

H 2. Whether the Court of Appeal was right in admitting in evi-
dence the letter dated 24th January 2011 as Exhibit P21 and relying
on same to nullify the election of the Appellant.

3. Whether the Court of Appeal rightly overruled the Prelimi-
nary Objection of the Appellant against the competence of the ap-

peal below.

The 3rd Respondent in a Brief settled by Chief Olusola Oke and filed on 24/1/12 in which were formulated two issues for determination which are:

“Whether the Court of Appeal was not in grave error and its judgment a nullity when it assumed jurisdiction in an election petition appeal to determine the validity and actually determined the validity of the primary election which produced the Appellant as candidate of the 3rd Respondent for the Kogi East Senatorial District election of 9th April, 2011.”

1. Was the Lower Court right when it nullified the primary election of the 3rd Respondent in an election petition when
2. The 1st and 2nd Respondents are not members of the 3rd Respondent.
3. When the 1st and 2nd respondents did not plead or raise the issue of 21 days notice which formed the kernel of the judgment.
4. And the 3rd Respondent was not heard on the unpleaded fact of 21 days notice which the Lower Court raised suo motu.

Mr. Ahmed Raji learned counsel for the 4th and 5th Respondent conceded to the appeals and withdrew the Respondents Brief which was struck out.

The Preliminary Objection is to be taken here and now before going further.

PRELIMINARY OBJECTION:

1. By the provision of Section 246 (3) of the 1999 Constitution the decision of the Court of Appeal in respect of appeals arising from the National and State House of Assembly Election Petitions shall be final.
2. The judgment of the Court of Appeal dated 13th December 2011 arose from a decision of the National Assembly Election Petition Tribunal sitting at Lokoja, Kogi State concerning the election to the office of member of Senate for Kogi East Senatorial District.
3. Sponsorship of a candidate is a constitutional requirement for qualification to contest an election to the office of Senate under Section 65 (2) of the 1999 Constitution.
4. By the provision of Section 138 (1) (a) of the Electoral Act 2010 (as amended) an election may be questioned on the ground that a person whose election is challenged was at the time of the

election not qualified to contest the election.

5. The final decision of the Court of Appeal dated 13th December 2011 on the constitutional qualification of the appellant (Ocheja Emmanuel Dangana) to contest the election held in Kogi East Senatorial District on 9th April 2011 is not an intra party dispute
B nor a case of substitution of candidates by a political party and thus not a pre-election matter.

6. The decision concerning pre-election disputes in *Odedo v. INEC* (2008) 17 NWLR (pt.1117) pg.554 and *Senator Julius Ucha v. Dr. Emmanuel Onwe & Ors* (2011) 4 NWLR (pt.1237) pg.386 are
C totally irrelevant to the constitutional and statutory issues of qualification to contest election within the meaning of Section 65 (2) (b) of the 1999 Constitution (as amended) and Section 138 (1) (a) of the Electoral Act 2010 (as amended).

7. The jurisdiction of the Supreme Court over any matter is
D statutory.

8. The grounds of appeal contained in the notice of appeal dated 23rd December, 2011 are grounds of mixed law and facts.

9. The appellant's brief of argument filed on 6th January 2011
E and based on the notice of appeal filed on 23rd December 2011 is grossly incompetent.

10. No leave of this honourable court nor the court below was
F sought and obtained to appeal to this honourable court on grounds of mixed law and facts.

Learned Senior Advocate for the 1st and 2nd Respondents Mr. Ikwueto said the judgment of the Court below which determined the Constitutional qualification of the Appellant pursuant to Section 65 (2) (b) of the 1999 Constitution and Section 138 (1) (a) of the
G Electoral Act 2010 (as amended) to contest for the Senate; is a "decision" by virtue of Section 318 (1) of the Constitution and consequently by virtue of Section 246 (3) of the Constitution, the said decision of the Court below dated 13/12/2011 "shall be final." Mr. Ikwueto SAN said the case *Ucha v. Onwe* (2011) 4 NWLR (pt.1237)
H 386 at 428 is distinguishable and inapplicable here. He stated that the provisions of Section 233 (2) (e) of the 1999 Constitution specifically deals with instances when an appeal can lie to the Supreme Court against a decision of the Court of Appeal. That while Section 233 (2) (e) of the 1999 Constitution is a special provision, that in

Section (1997) 8 NWLR (Pt.5181) 635; *Ojemen v Momodu II* (1983) 3 SC 173; *Ogbechie v. Onochie* (1986) NSCC (Pt.1) 443; *Nwadike v Ibekwe* (1987) 18 NSCC (pt. II) 1219; *Ajayi v Omoregbe* (1993) 6 NWLR (pt.301) 512 at 531.

Learned counsel for the Respondents 1st and 2nd went on to query the competence of some of the grounds of appeal namely 1, 2, 3, 7 and being argued with the competent grounds render the competent tainted and therefore unarguable and incompetent. He cited *Tiaminu v. Olaogun* (2008) 17 NWLR (Pt. 1115) 66 at 92; *Nze Unakalamba* (1998) 2 NWLR (Pt.537) 308 at 321; *Beneyin v. Gbobo* (1989) 1 NWLR (Pt.97) 372 at 380; *Akuche v. Nnamdi* (1992) 8 NWLR (Pt.258) 214 at 224; *Kano Textile Plc. v. G & H (Nig.) Ltd.* (2002) 2 NWLR (Pt.751) 420 at 445. Also on the incompetence of some of the grounds is that being grounds of fact, the absence of leave rendered them incompetent. He cited *Orakosin v. Menkiti* (2001) 9 NWLR (Pt.719) 529 at 539.

Responding based on the Appellants Reply Brief settled by P.A. Akubo SAN, learned counsel contended that the Lower Court used a pre-election issue of Senatorial Primary conducted before the date of election, to wit: 28th January, 2011 to invalidate both the nomination and election of the Appellant. That the Court of Appeal was not sitting as an Appeal Tribunal having descended into a subject matter that should have come before it in a regular civil appeal both-
 ering on pre-election issue. That the Appellant in this case, has auto-
 matic constitutional right of appeal to this Court pursuant to Section 233 (1) of the constitution. He referred to *Abubakar v Yar'Adua* (2008) 4 NWLR (Pt.1078) 465 at 496.

Learned Senior Counsel for the appellant said that the Court of Appeal is only a final Court pursuant to Section 246 (3) of the Constitution to the extent that it limits itself to election appeals. That there is no election appeal or when a supposed election appeal is suddenly converted into a normal, civil and regular appeal on a pre-election issue, the Court of Appeal ceases to have the final say since it loses its cloak of finality under Section 246 (3) of the Constitution. He referred to *Dingyadi v INEC* (2011) 10 NWLR (pt.1255) 347 at 394; *Onuaguluchi v. Ndu* (2001) 7 NWLR (pt.712) 309.

On the issue of the incompetence of the grounds of appeal without leave, learned counsel for the Appellant said no leave was

required since the basis was jurisdictional and therefore grounds of law requiring no leave. He urged the Court to dismiss the Objection.

As a re-cap, the 1st and 2nd Respondents as Plaintiffs at the trial tribunal challenged the declaration and return of the Appellant as the winner of the Senatorial Election before the Election Tribunal

B on the three grounds as follows:-

“a. The election and return of the 1st Respondent was invalid by reason of corrupt practices and substantial non-compliance with the provisions of the electoral Act 2010 as Amended.

C *b. The 1st Respondent was not duly elected by majority of lawful votes cast at the election.*

c. The 1st Respondent was at the time of the election not qualified to contest the election.”

The Election Tribunal in its Judgment dismissed the petition D aforementioned but the Court of Appeal disagreed and went along with the contention of that Appellant was not qualified to contest the election at the time the election was conducted pursuant to Section 65 (2)(b) of the 1999 Constitution and Section 138 (1) (a) of the Electoral Act. In effect, upholding the third leg or ground of the Peti- E tion on the basis of non-qualification.

The Appellant’s standpoint in this appeal is that since the basis of the qualification or non-qualification was in the course of the Pri- mary Election of the Peoples Democratic Party (3rd Respondent), F that the appeal was properly before this court being a pre-election matter. The 1st and 2nd Respondents have refused that point of view, on the ground that it was not strictly speaking a matter of pre-election but an election dispute covered by Section 138 (1) (a) of the Electoral Act and Section 65 (21) (b) of the Constitution within the G jurisdiction of the election Tribunal and thereby caught up by section 246 (3) of 1999 Constitution which had provided for the Court of Appeal being the port of disembarkation and the end of the journey. The effect being that there cannot be recourse to the Supreme Court.

H I would want to cite Section 246 (3) of the 1999 Constitution here and quote:-

“Section 246 (3): the decision of the Court of Appeal in respect of appeals arising from the National and state House of Assembly election petitions shall be final.”

Section 138 (1) (a) of the Electoral Act 2010 as amended has

this to say:-

“138 (1): An election may be questioned on any of the following grounds: that is to say:-

1. That a person whose election is questioned was, at the time of the election, not qualified to contest the election.”

The Appellant through counsel had strenuously and with a lot of hardwork anchored on the case of Senator Julius Ali Ucha v. Dr. Emmanuel Onwe & 4 Ors (2011) 4 NWLR (Pt.1237) 386 as a basis to give this court jurisdiction to hear their appeal from the Court of Appeal after a judgment of an Election Tribunal. I have no difficulty in stating that the situation herein is different and not apposite to that of Ucha v Onwe (supra) and other similar pre-election cases cited. This is so because the dispute here and now is the election proper and the Electoral Act had provided for a challenge based on non-qualification to contest. That the disqualification arose in the course of a primary Election is neither here nor there. In fact, my understanding is that where ever or whatever process produced the disqualification is not relevant. The important thing is that there is disqualification to contest the election, the outcome of which is challenged at the Election Tribunal and so long as the starting point of the litigation is the Election Tribunal, then at the Court of Appeal once the subject matter is National Assembly or State Assembly seat it terminates. A purported appeal cannot therefore find its way to this court because a feature or anything resembling issues that could be dealt with at the State High Court or federal High court would not give it either the passport or visa to this Court. Sections 138 Electoral Act and Section 246 (3) of the Constitution have seen to that.

The conclusion therefore from the above and the fuller reasons of my learned brother O. O. Adekeye, JSC in the leading judgment, the Preliminary Objection is upheld and the appeal struck out.

It goes without saying that the fate of SC.480/2011 has befallen the SC.11/2012 since the basis of the dispute is the same. The appeal SC/11/2012 is also struck out the reasons in SC.480/2011 sufficing.