

SUPREME COURT OF NIGERIA
FRIDAY 7TH DECEMBER, 2012. SC. 213/2012
**CORAM:- M. MOHAMMED, M. S. MUNTAKA-
COOMASSIE, S. GALADIMA, N. S. NGWUTA,
S. S. ALAGOA, JJSC**

HON. OGBONNA ASOGWA APPELLANT
AND
1. PEOPLES DEMOCRATIC PARTY
2. INDEPENDENT NATIONAL
ELECTORAL COMMISSION RESPONDENTS
3. HON. DR. PATRICK ASADU

APPEALS - Hearing - Preliminary objection to - Success of - Will bring the litigation to an end - If dismissed - The Appeal will be determined on merit (H1)

APPEALS - Leave - To appeal against interlocutory decisions - And on grounds that are not of law - Are to be separately secured vide provisions of the Constitution - Failing which offending grounds will be struck out (H2)

APPEALS - Ground - Judgment - Counsel should not wrongfully interpret court's judgment - Just to build a ground of appeal - As ground not derived from lower court's judgment is incompetent (H3)

APPEALS - Ground - Speculative & abandoned ground - That is vague or general - Contravenes O. 8 r. 2(4) Supreme Court Rules (H4)

APPEALS - Action - Consistency - Without obtaining amendment from court - A party has to be consistent in his case - From lower to appellate court (H5)

ELECTION PETITIONS - Party primaries & main election - INEC as electoral umpire - Must ensure compliance with Electoral Act - And guidelines of the party - As to maintain sanctity in electoral process (H6)

APPEALS - Ground - Election - Originating summons - Where reliefs sought cannot be dealt with under that summons - The ground on fair hearing will be struck out (H7)

ORIGINATING SUMMONS - Applicability of - Appeal - Concurrent findings that the issues cannot be resolved by affidavits evidence - Were not shown to be perverse (H8)

FACTS

Before the Federal High Court Abuja, plaintiff/appellant commenced this action against defendants/respondents vide an originating summons. Appellant raised six questions in the originating summons, and subject to how the questions are determined by the trial court, he sought a declaration and three orders. Appellant's major issue is that as the winner of the primary election conducted by the PDP (1st respondent) on 12-1-2011 for Nsukka/Igbo Eze South Federal Constituency, he is the duly nominated candidate for the National Assembly Elections scheduled for April 2011. That the PDP cannot conduct another primary election after 15-1-2011 without recourse to appellant and without any petition against the 1st primary election won by him. Appellant sought inter alia for an order restraining 2nd respondent (INEC) from publishing any other name other than his name as a candidate for the said election.

Appellant filed inter alia affidavits in support of the originating summons, connecting documents he considered relevant to his case. Respondent duly entered appearances, filed counter affidavits and written addresses contesting appellant's claim in the originating summons. The trial court found that there were conflicts in the affidavit evidence and that the issues raised were contentious. It held that oral evidence was necessary to resolve the contentious issues and ordered appellant to file a statement of claim for proper adjudication in the interest of justice. Dissatisfied, appellant appealed to the Court of Appeal which upheld the trial court's finding. Still aggrieved, appellant has further appealed to the Supreme Court. Respondent raised preliminary objection against several grounds of the appeal for being of mixed law and facts which require leave of court.

ISSUE FOR DETERMINATION

"I. Was the Court of Appeal correct when it affirmed the decision of the Federal High Court to the effect that from the nature of the allegations of the parties evidence ought to be adduced in order to effectively determine the dispute between the parties."

HELD (Unanimously dismissing the appeal per NGWUTA JSC)

APPEALS - Hearing - Preliminary objection to - Success of

1. The success of the preliminary objection to the hearing of an appeal, a pre-emptive strike, will bring the litigation to an end. On the other hand, if the preliminary objection is dismissed, the appeal will be determined on the merit.

(p. 4184 D)

APPEALS - Leave - To appeal against interlocutory decisions

2. The requirement for leave to appeal against interlocutory decisions and the requirement of s.233 (3) of the 1999 Constitution (as amended) for leave to appeal on grounds of mixed law and facts would indicate that a party seeking to appeal against interlocutory decision on grounds other than law requires two main reliefs-

(1) Leave to appeal against interlocutory decision.

(2) Leave to appeal on grounds other than grounds of law.

Since learned Counsel for the appellant maintained a loud silence on the nature of his grounds 1-3 of the grounds of appeal challenged by the learned Senior Counsel for the 2nd respondent, I am left with the oblique reference to the phrase "and which are of both law and facts" in ground 4 of the grounds upon which the application for leave to appeal was predicated as Appellant's answer to the challenge against grounds 1-3 of the grounds of appeal,

I take liberty to reproduce, once more, the said ground 4 of the motion:

"(4) It is the requirement of the law that leave be sought and obtained within 14 days to appeal against decisions which

do not final (sic) resolve the issues between the parties and which are of both law and facts” (Underlining mine).

In my understanding of the language of the ground re-produced above the underlined phrase “and which are of both law and facts” relate to the “decisions” against which the ap-
pellant sought leave to appeal which may be decision on facts or law or both. But the requirement of leave in s. 233 (3) of the Constitution relates to grounds of appeal of law and facts and not to the decision for which leave to appeal is sought even if the decision involves both law and facts. It has to be borne in mind that neither the motion, the grounds of the motion nor the 8-paragraph affidavit in support of the motion made mention of “ground of appeal” not to mention grounds of mixed law and facts.

In my humble view, the preliminary objection to grounds 1-3 of the grounds of appeal is well-taken. The preliminary objection is sustained and consequently grounds 1, 2 and 3 of the appellant’s grounds of appeal which are grounds of mixed law and facts, are incompetent, having been raised without leave of Court as required by s.233 (3) of the 1999 Constitution (as amended). The said grounds are hereby struck out. This leaves the appellant with only ground 4 of his grounds of appeal. (p. 4186 E)

APPEALS - Ground - Judgment

3. With profound respect to the eminent Counsel for the ap-pellant, not hearing a case on originating summons is not the same thing as saying that oral evidence is required on a particular issue. The Court below did not say that oral evidence is required to prove Exhibit R4. It is a disservice to the Client and to the Court to interpret a judgment of the Court giving it a slant upon which to build a ground of appeal. Not only did the Court not say that oral evidence is required to prove Exhibit R4, it did say that the 1st Respondent’s exhibits PDP1 and 2 contradicted appellant’s Exhibit R4 contrary to the as-assertion by learned Counsel that Exhibit R4 was not disputed as a basis for his ground of appeal.

I agree with learned Counsel for the 2nd and 3rd Respon-

dents that ground 2 of the appellant's ground of appeal is not derived from the judgment of the lower Court and that the said ground is therefore incompetent. (p. 4188 E)

APPEALS - Ground - Speculative & abandoned ground

4. Appellant cannot be heard to predict a ground of appeal on a ground he abandoned at the Court below. As rightly argued by learned Counsel for the 2nd and 3rd Respondents the terse ground 4 of the grounds of appeal has not stated the particulars of the error allegedly committed by the Court below. Moreover "some grounds of appeal of the appellant" in respect of which the error allegedly occurred remain in the realm of speculation and the only ground one mentioned was abandoned as stated above.

I agree with learned Counsel for the 2nd and 3rd Respondents that the appellant's ground 4 is vague and general in terms of "some grounds of appeal", It contravenes Order 8 Rule 2 (4) of the Supreme Court Rules. (p. 4189 D)

Action - Consistency

5. Appellant did not amend his originating summons to incorporate the new set of reliefs numbered 2 (A) (B) (C) and (D) in his notice of appeal. An appellant is not allowed to present a case before the appellate Court different from the one upon which the lower Court pronounced. Without an amendment, properly sought and obtained either at the lower Court or at the appellate Court, a party has to be consistent in his case from the lower Court to the appellate Court. Appellate Court will not entertain matters not in the record of appeal without amendment.

Apart from the inconsistency in his case, appellant's case is bedeviled by another vitiating factor. All the reliefs in the originating summons relate to Nsukka/Igbo Eze South Federal Constituency whereas relief 2 (A) in the notice of appeal was claimed in relation to Nsukka/Uzo-Uwani Federal Constituency which has not been shown to be the same as Nsukka/Igbo Eze South Federal Constituency. Appellant, apart from a consequential order, has not shown how and why the Court

should consider a set of relief he did not seek at the Court below. And even if the Court should award the new relief it cannot be determined on the facts before the Court whether the new reliefs relate to Nsukka/Igbo Eze South Federal Constituency or Nsukka/Uzo-Uwani Federal” Constituency.

B (p. 4191 A)

ELECTION PETITIONS - Party primaries & main election

6. With due respect to the learned Silk for the Respondent, the 2nd respondent as the Electoral Umpire, has an important role to play in ensuring that party primaries are conducted in accordance with the provisions of the Electoral Act and the guidelines of the party. It has a duty to restore, and maintain sanctity in our electoral process, including but not limited to party primaries and the main election.

In my humble view, there is a live issue involving the 2nd respondent in the determination of the question of validity vel non of the process it oversaw. (p. 4191 H)

E APPEALS - Ground - Election - Originating summons

7. Each of questions 1 and 4 above assumes facts which are yet to be proved before the Court can deal with questions 5 and 6; the facts are:

(a) That the 1st respondent conducted primaries or valid primaries on the stated date 12th January, 2011.

(b) That the appellant won the primary election.

Until it is established that the 1st respondent conducted a primary election or valid primary election on 12/1/2011 and that the appellant won the said primary election, it will be premature to answer question 5 and 6 of the originating summons, more so as the two Courts below held that the question and relief in the originating summons cannot be dealt with in originating summons. Appellant did not withdraw any of his questions or claims in the originating summons and I subscribe to the view of learned Counsel for the 2nd and 3rd Respondents that there is need for a holistic approach to the determination of the questions and relief sought by the appellant.

In any case, the issue of denial of fair hearing was not

raised before, or pronounced upon, by the lower Court. The ground is not only premature; it is also incompetent as it is not derived from the judgment appealed against.

In conclusion, the 2nd and 3rd Respondents' preliminary objections based on grounds 1 to 4 and 6 of the preliminary objection are sustained and ground 5 of the objection, though academic with no effect on the appeal one way or the other, is dismissed. (p. 4193 C)

ORIGINATING SUMMONS - Applicability of

8. Appellant's case is bedeviled with internal conflict with regards to the date the election he claimed to have won was held. The trial court found as a fact and the Court below affirmed that, there were very serious contentious and serious dispute which could not be resolved by affidavit evidence. The said findings, among others, are concurrent findings of fact which ordinarily ought not to be disturbed on appeal.

Appellant did not attempt to show either that the concurrent findings are perverse, or there is substantial error in substantive or procedural law which if not corrected will lead to miscarriage of justice.

Originating Summons with its simplicity, resulting from the elimination of pleadings, cannot be resorted to in proceedings potentially hostile even in matters where it is claimed that time is of the essence.

Originating Summons may be employed in situations falling within the provisions of Order 3 Rules 6, 7 and 8 of the Federal High Court (Civil Procedure) Rules. Rule 8 provides:

"A Judge shall not be bound to determine any such question of construction if in the Judge's opinion it ought not to be determined on originating summons but may make such orders as the Judge deems fit."

The rule vests the trial Judge with discretion against the exercise of which the appellant cannot appeal unless he can show that the discretion was not exercised judiciously and judicially, which is not the case in this appeal. The rule relates to "such question of construction" which has been demonstrated not to be the case in this appeal. There are provisions

in the Rules of Court to accommodate urgent matters. Parties and their Counsel should exploit these provisions instead of rushing to Court without compliance with the appropriate provision for commencement of a particular action on the pretext that the matter is time bound. (p. 4195 A)

B

NOTABLE POINTS OF INTEREST

NGWUTA JSC

1. Appeal – Definition – Coverage

C Appeal is an invitation to a higher Court to review the decision of a lower Court to find out whether a proper consideration of the facts pleaded before it and the applicable law, the lower Court arrived at a correct decision.

D The decision appealed against includes the lower Court’s pronouncement on the reliefs sought by the appellant and it is the pronouncement on the said reliefs the appellate Court would have to examine in the light of the facts and applicable law before the lower Court. (p. 4190 G)

E

2. When s. 22 Supreme Court Act may apply

F If the Court comes to the conclusion that the two Courts below were wrong and that the questions and reliefs in the originating summons can properly be dealt with in the originating summons, it has jurisdiction under s.22 of the Supreme Court Act to do what it has determined that the two lower Courts should have done. Be that as it may, the issue is now academic since I have demonstrated that even if the appeal is allowed, the Court, without amendment, cannot grant a relief not sought in the Court below and upon which the Courts below did not pronounce since the new relief is not a consequential order. (p. 4192 B)

G

MUNTAKA-COOMASSIE JSC

3. Finding of court not appealed against remains valid

H This is a fundamental finding of the trial court as regard its jurisdiction to hear this case. The 2 respondent did not appeal against this finding to the Court of Appeal neither did he file any application before this court to raise an issue of jurisdiction not raised before the lower court.

It is trite, I dare say, that the finding of the court not appealed against remains valid and subsisting. (p. 4207 B)

4. Appeals – Findings of court can only be challenged by appeal or cross appeal not preliminary objection

The 2nd respondent cannot challenge such a fundamental finding by way of a preliminary objection. He has to appeal against the finding. In the instant case, where the issue was not taken at the Court of Appeal the proper procedure is for the second respondent to apply for the leave of this court to file a cross appeal out of time and leave to raise the issue of jurisdiction not argued before the lower court. It is for these reasons that I agree with the appellant that the issues as raised are to complete .as you can not challenge the finding in decision of a court by way of preliminary objection. It has to be challenged by way of an appeal properly filed. (p. 4207 C)

5. Need for competent notice and grounds of appeal

I am not unaware of the submission of the appellant where he invited this court to reject technical justice, particularly where no miscarriage of justice would be occasioned. I will haste to point out that the notice and grounds of appeal are the pillars on which an appeal stands, it is the foundation upon which an appeal will definitely collapse. It is not an issue of doing technical justice but to ensure that all the parties to an appeal have a level ground to prosecute an appeal. Where the grounds of appeal are incompetent and any issue distilled from them are incompetent and the court will have no option than to strike them out. (p. 4211 E)

ALAGOA JSC

6. Actions – When originating summons cannot be used

Issue 1 in the 2nd Respondent's Brief of Argument covering Grounds 1, 2 and 3 of the Grounds in the Notice of Appeal which is to be preferred simply asks the question whether the Court of Appeal could have been right in coming to the conclusion as it did that from the nature of the allegations and the conflicting state of affidavit evidence, it would not (sic, delete not) have been better to call oral evidence for which a resort to the ordering of pleadings would be more appropriate than a resort to I the procedure of originating summons in the

determination of the case.

In BARRISTER (MRS.) AMANDA PETERS PAM & ANOR V. NASIRU MOHAMMED & ANOR (2008) 16 NWLR (PART 1112) 1; (2008) 5-6 SC (Pt. 1) 83 the Supreme Court per Oguntade, JSC said as follows:

B *“The procedure of originating summons ought not to be used where the facts are likely to be in dispute.”*

Niki Tobi, JSC went on further to say in that case as follows:

C *“It is not the law that once there is a dispute on facts the matter should be commenced by writ of summons. No, that is not the law. The law is that the dispute on facts must be substantial, material, affecting the live issues in the matter. Where disputes are peripheral not material to live issues an action can be sustained by originating summons”* (Underlining mine for emphasis). (p. 4219 A)

D
REPRESENTATION

Chidi Aroh Esq, with Chimela Okafor, Esq, for the Appellant

O. K. Akujibo Esq, for 1st Respondent

Ifeanyi Okoli Esq, for 3rd Respondent

E Dr. Onyechi Ikpeazu, SAN with Mavis Ekpechi Esq, for 2nd Respondent

CASES REFERRED TO

- F Ezeigwe v. Nwawulu (2010) 4 NWLR (Pt. 11183) 171
 Ogundele v. Agiri (2009) 12 SC (Pt. 1) 135
 Anyanwu v. Uzowuka (2009) 6-7 SC (Pt. 11) 44
 Garba v. University of Maiduguri (1986) 1 NWLR (pt. 18)
 Garba v. Sheda International Nig. Ltd (2002) FWLR (pt. 113) 245
 G Okonkwo v. Okonkwo (2004) 5 NWLR (Pt. 865) 66
 Ugwu v. Ararume (2007) 12 NWLR (Pt. 1048) 412
 Dokubo Asari v. FRN (2007) 12 NWLR (Pt. 1048) 334
 Nigerian Arab Bank Ltd v. Shuaibu (1991) 4 NWLR (Pt. 186) 450
 Alfotrin Ltd v. A-G Federation (1990) 9 NWLR (pt. 475) 634
 H Odedo v. INEC (2008) 7 SC 75
 Agbakoba v. INEC (2008) 18 NWLR (Pt. 1119) 489
 Adebayo v. A-G Ogun State (2008) 2-3 SC (Pt. 11) 50
 Durosaro v. Ayorinde (2005) 8 NWLR (Pt. 927) 412
 Bua v. Dauda (2003) 13 NWLR (Pt. 838) 657

STATUTES & RULES REFERRED TO

Supreme Court Act, s. 22

Constitution of the Federal Republic of Nigeria 1999, s. 233(3)

Electoral Act (as amended) 2011, s. 87(10)

Federal High Court (Civil Procedure) Rules 2009, O. 3 r. 8, O. 1 rr. B
1, 6 & 7

Rivers State High Court (Civil Procedure) Rules 1987, O. 1 r. 2(2)

Supreme Court Rules (as amended) 1999, O. 8 r. 2(4)

LEAD JUDGMENT BY NGWUTA JSC

In one of the intra-party squabbles now traditional of the various political parties in Nigeria as to who bears the flag of a party for a particular election, the appellant as plaintiff approached the Federal High Court sitting at Abuja, seeking answers to the following posers D he formulated:

“1. Whether having won the Primary Election conducted by the Peoples Democratic Party (PDP) on the 12th of January, 2011 for Nsukka/Igbo Eze South Federal Constituency is the plaintiff not the dully nominated candidate for the National Assembly Elections in E April, 2011.

2. Whether the Primary Election conducted by the Peoples Democratic Party (PDP) on the 12th of January, 2011 can be set aside without any petition, complaint or irregularity in the conduct of the F primary.

3. Whether having regard to the extant Laws and Regulations, Peoples Democratic Party (PDP) could conduct another primary election to select a candidate for Nsukka/Igbo Eze South Federal Constituency after the 15th day of January 2011 G without recourse to the plaintiff.

4. Whether by virtue of section 87 (10) of the Amended Electoral Act 2011 the plaintiff having won the primaries can question or complain against his unlawful purported replacement by his party and refusal to issue him with INEC Nomination Forms. H

5. Whether in view of Part VI Section 50 (d) of the Electoral Guidelines for 2011 of the Peoples Democratic Party (POP) any complaint that was not brought to the appropriate levels in writing within 24 hours of completion of the primaries (sic) Elections of the party

can be entertained by the party or said to be valid and proper.

6. *Whether in view of Part VI Section 50 (d) of the Electoral Guidelines for 2010 of the Peoples Democratic Party (PDP) the plaintiff is entitled to be given an opportunity to present his case and whether he is entitled to be communicated in writing within 48 hours the decision of the panel.*

If questions 1 and 2 are answered in the affirmative while Questions 2 and 3 is (*sic*) answered in the affirmative, the plaintiff claims the following reliefs: AND the plaintiff seeks the following reliefs against the Defendant:

“1. Declaration that the plaintiff is the duly nominated candidate of the Peoples Democratic Party (PDP) representing Nsukka/Igbo Eze South Federal Constituency in the primary Election conducted on the 12th day of January 2011 for the elections scheduled for April 2011.

An order of injunction restraining the Peoples Democratic Party (PDP), their servants and privies, howsoever from forwarding the name of any other candidate other than that of the plaintiff to the 2nd Defendant as the Peoples Democratic Party (PDP) candidate for the Legislative Elections scheduled for the April 2011 representing Nsukka/Igbo Eze South Federal Constituency.

3. An order compelling the 1st Defendant to issue INEC Nomination Forms to the plaintiff.

4. An order restraining the 2nd Defendant from publishing any other name other than of the plaintiff as the candidate for the Election into the House of Representatives for Nsukka/Igbo Eze South Federal Constituency in the Elections scheduled for April 2011.”

The Originating Summons was subsequently amended.

In support of his case appellant filed the following processes:

(1) A 19-paragraph affidavit of urgency in support of Originating Summons to which are annexed documents considered relevant to his case by the appellant.

(2) Statement in support of Originating Summons.

(3) Verifying affidavit.

(4) Affidavit of Urgency and.

(5) Written address in support of originating summons.

The Respondents, as defendants, duly entered appearances, and filed counter-affidavit and written addresses contesting the

appellant's claim in the originating summons.

After due consideration of the cases presented by the parties, the trial Court found that there was conflicts in the affidavit evidence and that the issues raised were contentious. The Court held that oral evidence was necessary to resolve the contentious issues and conflict in the affidavits. The Court concluded: B

"The Court therefore orders that the plaintiff file a Statement of Claim and serve the defendants so that the case can be properly adjudicated upon in me interest of justice.

Appellant disagreed with the judgment of the trial Court. He appealed to the Court of Appeal. In the judgment delivered on the 27th April 2012, the lower court dismissed the appeal and affirmed the decision of the trial Court. He then filed a notice containing four grounds of appeal hereunder reproduced, shorn of their particulars. C

"GROUNDS OF APPEAL: D

GROUND ONE

The Court of Appeal erred in law when it affirmed the decision of the lower Court that there are serious disputes in the evidence of the parties at the lower Court when in fact there was sufficient documentary evidence upon which to determine the appeal and when the Court did not consider questions 3, 4, 5 and 6 submitted to it by the appellant for determination. E

GROUND TWO

The Court of Appeal erred in law when it held that Exb. R4 which is the extract of the meeting of the 1st respondent on the 14th day of January, 2011 which was not disputed by the respondents require oral evidence to prove due to some depositions in the affidavit evidence of the respondents. F

GROUND THREE G

The Court of Appeal erred in law in not pronouncing on the constitutional issue of fair hearing raised by the appellant in reference to questions No. 5 and 6 raised in the originating summons before the lower Court.

GROUND FOUR H

The Court of Appeal erred in deciding that some grounds of appeal of the appellant does not relate to the decision of the lower Court particularly ground one.

In compliance with the rules and practice of this court, learned

counsel for the parties filed and exchanged briefs of argument. From the four grounds of appeal, learned counsel for the appellant distilled the following three issues for determination-

B “1. *Whether the Court of Appeal was right in upholding the decision of the Federal High Court that there was serious conflicts in evidence of the parties to warrant filing of pleading without considering questions 3, 4, 5 and 6 submitted to the Court in the Appellant’s Originating Summons for determination and all other documents particularly Exh. R4.*

C (2) *Whether the Court of Appeal was right in holding that ground one of the Appellant’s grounds of appeal before the lower Court does not flow directly from the decision or ruling appealed against.*

D (3) *Whether the Court of Appeal was right in not pronouncing on the constitutional issue of fair hearing raised by the appellant, particularly with reference to questions No. 5 and 6 of the Originating Summons.”*

E In his brief of argument, learned Counsel for the 1st Respondent adopted the three issues presented by the appellant. Learned Counsel for the 2nd Respondent gave notice of preliminary objection to the hearing of the appeal upon the following grounds:

F “1. *Grounds 1, 2 and 3 of the grounds of appeal are grounds of mixed law and fact and the requisite leave of Court to raise and argue the grounds was not sought and obtained.*

2. *Ground 3 of the grounds of appeal does not arise from the judgment appealed against.*

G 3. *Ground 4 of the grounds of appeal is vague and contains no particulars of error. Further, it is academic based on the determination of the Court of Appeal which was not appealed, that the ground 1 was abandoned as no issue was distilled therefrom.*

4. *Reliefs 2A (A) (B) (C) and (D) of the relief sought is a unilateral amendment of the prayer in the Originating Summons.*

H 5. *Based on the relief sought in the appeal, there is no life issue in the case, in that -*

(i) *By relief 1 which seeks the setting aside of the decisions of the two (2) Courts below, if granted, remitting for trial the Originating Summons which does not disclose any cause of action against the 2nd Respondent, will be an exercise in futility.*

(ii) Relief 2 (A) (B) (C) and (D) which invites the Supreme Court to invoke Section 22 of the Supreme Court Act is an invitation to exercise jurisdiction where none exists”

In the alternative, learned Senior Counsel for the 2nd Respondent distilled the following two issues from the appellant’s four grounds of appeal: B

“(1) Was the Court of Appeal correct when it affirmed the decision of the Federal High Court to the effect that from the nature of the allegations of the parties, evidence ought to be adduced in order to effectively determine the dispute between the parties. Grounds 1, 2 and 3 C

(2) Was the Court of Appeal correct when it held that Ground 1 of the grounds of appeal did not arise from the decision of the Federal High Court appealed against. Ground 4”

In Part B, tagged “Preliminary Objection” of his brief of argument, learned Counsel for the 3rd Respondent proceeded to argue his preliminary objection against each of the four grounds of appeal, pursuant to his notice of preliminary objection. The grounds of preliminary objection are:

“1. Ground of the only narrative and argumentative tout also does not-derive from the judgment of the Court below. E

2. Ground 2 of the Appellant’s grounds of appeal is incompetent in that the Court below did not hold in its judgment that ‘Exhibit R4 which is the extract of the meeting of the 1st respondent on the 14 day of January, 2011 which is not disputed by the respondents require oral evidence to prove due to some deposition in the affidavit evidence of the respondents. F

3. Ground 3 of the appellant’s grounds of appeal is incompetent in that the issue of fair hearing was never raised by the Appellant in his Notice of Appeal or brief of argument at the Court below and same did not arise for the consideration of the Court below. G

4. Ground 4 of the Appellant’s grounds of appeal is incompetent in that the Court below did not decide ‘that some grounds of appeal of the appellant does (sic) not relate to the decision of the lower Court particularly ground one. H

5. Ground 4 of the grounds of appeal alleging an error in law did not contain particulars.”

On the merit, learned Counsel formulated the following two

issues for determination:

“B.2 Whether the Court below was wrong in affirming the decision of the trial Court that the issues raised in the affidavit of parties and the documents exhibited thereto are very contentious and conflicting and therefore cannot be effectively resolved by affidavit evidence.” Refined from Grounds 1, 2 and 3.

3.5 Whether the Court below was wrong in striking out Grounds 1 and 3 of the appellant’s grounds of appeal. Refined from Ground 4.”

Learned counsel for the appellant filed replies to the preliminary objections raised by the 2nd and 3rd Respondents. Arguing issue one in his brief, learned Counsel for the appellant questions upon which answers he predicated his claims in the

Originating summons. He submitted that all the questions in the originating Summons sought interpretation of the relevant provisions of the Electoral Act amended and the Guidelines of the 1st Respondent for primary elections. He argued that the interpretation of the Electoral Act 2010 and the Party’s guidelines did not require oral evidence. He argued that the authenticity of the documents exhibited were not questioned by the respondents in their Counter-affidavits and the mere fact that the 1st respondent conceded it ordered a re-run election is conclusive of the fact that there was an original primary election conducted by the 1st Respondent. Learned Counsel relied on *Ezeigwe v. Nwawulu* (2010) 4 NWLR (Pt. 11183) 171 ratio 11 in his submission that his case was a pre-election matter in which the strict rules of writ procedure will yield place to the need to do substantial justice to the parties. He relied on Order 1 rules 1, 6 and 7 of the Federal High Court (Civil Procedure) Rules 2009.

He submitted that since fraud was not alleged oral evidence cannot be led to vary the contents of the documents exhibited and relied upon especially Exhibit R4, the extract of the meeting of the 1st Respondent held on 14/1/2011. He relied on the cases of *Ogundele & Anor v. Agiri & Anor* (2009) 12 SC (Pt. 1) 135 at 153 and 154 and *Anyanwu & 5 ors v. Uzowuka & 13 ors* (2009) 6-7 SC (Pt. 11) 44 at page 47.

Relying on *Nwosu v. Imo State Environmental Sanitation Authority* (1990) 2 NWLR (Pt. 135) 688 at 718 Part (sic) E he argued that the Court will not resort to oral evidence where there is sufficient

and credible documentary evidence to resolve an issue in dispute. It was submitted that even where there is conflict in affidavit evidence, the conflict must be serious and relate to relevant issue in order to justify a resort to oral evidence. Counsel relied on *Garba v. University of Maiduguri* (1986) 1 NWLR (pt. 18) (sic) ratio 34, *Garba v. Sheda International Nig. Ltd* (2002) FWLR (pt. 113) p. 245 at 216 paras A-D. It was further argued that the so-called contradiction found by the trial Court and endorsed by the lower Court were mere discrepancies that did not require oral evidence to resolve. Reliance was placed on *Okonkwo v. Okonkwo* (2004) 5 NWLR (Pt. 865) page 66 ratio 9. B
C

Learned Counsel argued with considerable heat that no amount of oral evidence could alter the contents of the documents or provisions of the law relied on by the appellant. He referred to sections 50 (D) and 50 (E) of the 1st Respondent's Guidelines and argued that the use of the word "shall" imposed an obligation and failure to comply with the provision renders anything done pursuant to same invalid. He relied on *Ugwu v. Ararume* (2007) 12 NWLR (Pt. 1048) 412, ratios 54 and 55. He referred to *Dokubo Asari v. FRN* (2007) 12 NWLR (Pt. 1048) p.334 ratio 10; *Nigerian Arab Bank Ltd v. Shuaibu* (1991) 4 NWLR (Pt. 186) 450; *Alfotrin Ltd v. A-G Federation* (1990) 9 NWLR (pt. 475) 634. Counsel argued that the two Courts below ought to have followed the case of *Duke v. Akpubuyo* (sic) *Local Government* (2005) 9 NWLR (Pt. 959) 137 ratio 11 to hold that in the matter of interpretation of certain documents in a pre-election matter in which time was of great essence the need to do substantial justice takes precedence over all other considerations. He cited and relied on *Odedo v. INEC & 7 ors* (2008) 7 SC 75, a pre-election matter which he said the Court described as unusual but went ahead to discuss the real issues in dispute and invoked its powers under s.22 of the Supreme Court Act to determine the matter on materials before the Court. He relied on *Agbakoba v. INEC* (2008) 18 NWLR (Pt. 1119) page 489. D
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F

Learned Counsel argued that questions 3, 4, 5 and 6 in the Originating Summons required no oral evidence and impugned the position of the two Courts below for ignoring some of the issues brought before the Courts. He relied on the case of *Adebayo v. A-G Ogun State* (2008) 2-3 SC (Pt. 11) 50. With reference to Exhibit R4, Counsel relied on *Durosaro v. Ayorinde* (2005) 8 NWLR (Pt. 927) G
H

412 ratio 6; *Bua v. Dauda* (2003) 13 NWLR (Pt. 838) 657; *Kopex Construction Ltd v. Ekisola* (2010) 1 SC (Pt. 1) 56 in his argument that the said Exhibit which was not challenged should have been taken as proved. He urged the court to resolve issue one in favour of the appellant.

B In issue two, learned Counsel reproduced ground 1 of the appellant's grounds of appeal in the Court below and contended that the Court below was in error to have held that the said ground did not flow from the decision of the trial Court, based on the preliminary objection of the 2nd Respondent. He relied on *Saraki v. Kotoye* C (1992) 9 NWLR (Pt. 264) 156 at 184 in his argument that the said issue relates to the decision of the trial Court, adding that the decision of the Court below was based on form and not substance, contrary to the decision of this Court in *Sosanya v. Onadeko* (2005) 8 NWLR D (Pt. 926) p.199 ratio 22. He urged us to set aside the decision of the lower Court with regards to the competence of ground one of the appellant's grounds of appeal.

In issue three, learned Counsel impugned the refusal of the lower Court to pronounce on the constitutional issue in questions 5 E and 6 of the Originating Summons. He referred to sections 59 (D) and 50 (E) of the 1st Respondent's Guidelines and submitted that irrespective of the word "shall" in the Sections the 1st Respondent never informed the appellant of any petition against him nor did the 1st Respondent afford the appellant opportunity to state his own case F before voiding his nomination. He relied on *Adigun v. A-G Oyo State* (1987) 1 NWLR (Pt. 53) 678 at 694; *Okike v. LPPC* (2005) 15 NWLR (Pt. 949) 489 ratio 25; *Ojukwu v. Obasanjo* (2004) 12 NWLR (Pt. 886) 186 ratio 22 on the need for fair hearing. He urged the Court G to resolve the issue in favour of the appellant. In conclusion, learned Counsel urged the Court to allow the appeal and determine the suit pursuant to its powers in s.22 of the Supreme Court Act as all the necessary documents are before the Court and the same were before the two Courts below.

H Arguing the appellant's three issues which he adopted in his brief, learned Counsel for the 1st Respondent, in Issue One, reproduced Order 3, rules 6 and 7 of the Federal High Court (Civil Proceeding) Rules. He argued that by the nature of the claim and facts deposed in the supporting affidavit hostility is real or apparent and so

originating summons cannot be employed to commence the action. He relied on *N.B.N. v. Alakija* (1978) 8-10 SC 79 at 71, *Ossai v. Wakwah* (2006) All FWLR (Pt. 303) 239 wherein the Supreme Court, interpreting similar provision in Order 1 r.2 (2) of the Rivers State High Court (Civil Procedure) Rules, 1987 laid down the guidelines for determining the applicability or otherwise of originating summons. B He referred to the counter-affidavit and the appellant's further affidavit and submitted that the 1st Respondent denied the appellant's claims and deposed to facts that justified its action.

Counsel argued that from the totality of the affidavit evidence there was serious dispute in respect of, but not limited to the following: C

“(i) Whether a valid primary election was conducted by the 1st Respondent on the 12/1/2011 for nomination of its candidate for Nsukka/Igbo Eze South Federal Constituency of Enugu State.” D

“(ii) Whether there was valid complaints against the conduct of the primary election held on 12/1/2011.”

“(iii) Documents tendered by the Appellants in support of his claim that a valid primary was conducted by the 1st Respondent on 12/1/2011.” E

“(iv) Whether there was a decision of the National Working Committee of the 1st Respondent canceling the purported primary election of 12/1/2011 and ordering a rerun which was held on 20/1/11.” F

“(v) Issues relating to the rerun primary election conducted by the 1st Respondent for the constituency in issue.”

In view of the above and all other processes before the trial Court, learned Counsel contended that the trial Court was right in its decision that the dispute cannot be effectively resolved on affidavit evidence. He cited and relied on the case of *Osunbade v. Oyewunmi* (2007) All FWLR (Pt. 368) 1004 at 1013-1014. He contended that the trial Court exercised its discretion pursuant to Order 3 r.8 of the Federal High Court (Civil Procedure) Rules 2009 and that the lower court was right to have affirmed the decision of the trial Court. He H argued that the question whether or not a matter before the Court is contentious is for the Judge to settle even where no counter-affidavit is filed. He relied on *Ossai v. Wakwah* (*supra*). Counsel made specific reference to Exhibits 4, 5, 6, 1, 8 and 9 attached to the affidavit in

support of the Originating Summons which he said form the gravamen of the appellant's case and submitted that the authenticity and admissibility of the exhibits were vehemently disputed by the 1st Respondent in its affidavit evidence.

With reference to Exhibit R4 which he said forms the bedrock of appellant's argument in paragraphs 4.24-5.29 of the appellant's brief, learned Counsel for the 1st Respondent said that the said exhibit was not part of the appellant's case at the trial Court but was brought in for this appeal. He cited *Ajide v. Klani* (1985) 3 NWLR (Pt. 12) 248 for the principle that a party cannot be allowed to present a case on appeal different from the case at the trial Court. He relied on *Hassan v. Aliyu* (2010) 17 NWLR (Pt. 1223) 547 at 601 in urging the Court not to invoke its powers under s.22 of the Supreme Court Act. He urged the Court to reject all authorities relied on by the appellant as inapplicable to the issue at stake and urged the Court to resolve the issue in favour of the 1st Respondent.

In Issue Two he reiterated the principle that an appeal is an invitation to a higher Court to review the decision of a lower Court to determine whether, on proper consideration of the facts placed before it and the applicable law, the lower Court arrived at a proper decision. He relied on *Oredoyin v. Ariwolo* (1989) 4 NWLR (Pt. 144) 172 SC.

Learned Counsel relied on *Saraki v. Kotoye* (1992) 9 NWLR (Pt. 264) 156 at 164; *Enigbokan v. ALL Ltd* (1994) (*sic*) NWLR (Pt. 348) 1; *Egbe v. Alhaji* (1990) 1 NWLR (Part) 128 546 at 590 for the principle that a ground of appeal must relate to, and attack, the decision of the lower Court on issues decided by that Court. He examined the ruling of the trial Court *vis-a-vis* ground one of the appellant's grounds of appeal and concluded that the said ground did not arise from the decisions of the trial court. He urged the court to resolve the issue against the respondent.

In Issue three on the failure of both the lower Court and the trial Court to pronounce on the constitutional issue of fair hearing, learned Counsel submitted that the lower Court rightly upheld the ruling of the trial Court that in view of conflict in affidavit evidence, the matter ought not to have been commenced by way of originating summons. In the circumstances, argues Counsel, it would not have been proper for the lower Court to turn around and determine questions 5 and 6 in the Originating Summons, nor would it have

been proper for the lower Court to uphold such a decision. He urged the Court to resolve the issue in favour of the Respondent. He contended that the appellant failed to establish perversity in the concurrent decisions of the two Courts below. He relied on *ACN v. Lamido* (2012) All FWLR (Pt. 630) 1316 at 1340; *Cameroon Airlines v. Otutuizu* (2011) All FWLR (Pt. 570) 1260. He submitted further that the appeal came short of the required circumstances for the Court to invoke its powers under s.22 of the Supreme Court Act. He urged the Court to dismiss the appeal.

In his brief of argument, learned Senior Counsel for the 2nd Respondent argued each of the five grounds of preliminary objection extensively and relevant authorities were supplied. At the end of the copious submission, the learned Silk for the 2nd Respondent urged us to strike out the appeal on the basis of ground 5 of the objection on the ground that the Federal High Court lacks jurisdiction to entertain the case. In the alternative, the learned Silk urged the Court to:

“(ii) Strike out grounds 1, 2 and 3 of the grounds of appeal being grounds of mixed law and fact over which leave of neither the Court of Appeal nor the Supreme Court of Nigeria was obtained.

“(iii) Strike out ground 3 of the grounds of appeal for the further reason that it did not arise from the ratio of the decision.

“(iv) Strike out ground 4 of the grounds of appeal on the further ground that it is vague and contains no particulars.

“(v) Strike out Relief 2 (A) (B) (C) and (D) of the reliefs sought as they amount to amendment of the originating summons.”

The learned Senior Counsel argued that if prayers (ii) to (v) above are granted, issues 1, 2 and 3 distilled from the grounds and argument advanced ought to be struck out and there being nothing left the appeal ought to be dismissed for want of merit. Learned Senior Counsel, shying from relying exclusively on his argument in the preliminary objection, submitted the following two issues for the Court to determine:

“1. Was the Court of Appeal correct when it affirmed the decision of the Federal High Court to the effect that from the nature of the allegation of the parties, evidence ought to be adduced in order to effectively determine the dispute between the parties. Grounds 1, 2 and 3

2. Was the Court of Appeal correct when It held that Ground 1

of the grounds of appeal did not arise from the decision of the Federal High Court appealed against. Ground 4"

Arguing issue one in the brief on the propriety *vel non* of the lower Court's affirmation of the decision of the trial Court, learned Senior Counsel for the 2nd Respondent quoted *in extenso* the portion
B of the ruling of the trial Court upon which that Court concluded that it was in the interest of justice that evidence be adduced. (See pages 956-865 of the record). He argued that the two Courts below were right in their decision as there were conflicts in the evidence and documents offered by the parties and that the conflicts relate to material
C particulars. He relied on *Brussels v. Sandstone Securities Ltd* (2009) 17 NWLR (Pt. 1171) 525 at 543 (para. B-C); *Falobi v. Falobi* (1976) 9-10 SC 1 and *Olu Ibunkun v. Olu Ibukun* (1974) 2 SC 41 in his contention that even where parties did not seek to elicit oral evidence
D to resolve conflicts in affidavit evidence that court that has duty to insist on oral evidence.

Learned Senior Counsel argued that apart from the need for oral evidence to resolve conflicts in affidavit evidence, the contents of the diverse documents exhibited by the parties are in conflict as found
E by both Courts below, a finding which was not challenged on appeal. Relying on Order 3 Rules 6, 7 and 8 of the Federal High Court (Civil Procedure) Rules which he reproduced, he conceded that Originating Summons should be usefully employed in resolving certain issues
F in contention. Learned Counsel referred to Question 1 of the originating summons and submitted that the question has nothing to do with construction of any instrument. He referred to the finding of the trial Judge that there is a contradiction between 10/1/2011 and 12/1/2011 on each of which date the election was alleged to have been
G held, adding that there was no appeal against the specific finding of the trial Court.

Learned Senior Counsel referred to Paragraphs 9 and 10 of the affidavit of urgency in support of the originating summons and contended that the election which took place on 12/1/2011 with the
H emergence of the appellant as the winner could not be the same election alleged to have taken place on 11/1/2011. He faulted the claim of the appellant that both the trial Court and the Court below erred in holding that a conflict existed and it was necessary to call oral evidence to resolve the conflict within the case presented by the ap-

pellant. He emphasised that contrary to the appellant's case the 1st and 2nd Respondents were emphatic that no election took place on 12th January 2011 and that appellants questions 1, 2, 3 and 4 were tied to the date of the primary election. He cited and relied on *Ossai v. Wakwah* (2006) All FWLR (Pt. 303) 237 for proceedings that may be rightly commenced by originating summons. Learned Counsel reproduced paragraphs 13, 14 and 16 of the affidavit of urgency in support of the originating summons and submitted that the claim that someone who has a duty to issue a form to the appellant refused to do that duty is evidence of dispute or contest on the fact upon which the appellant rested his claim.

He referred to the claim by the appellant that his name was substituted with the name of another person and submitted that even upon a consideration of the appellant's own case without reference to the Respondents' answers the proceeding was hostile and therefore ought not to have been commenced by originating summons.

On question 2 in the amended originating summons, which reads:

"Whether the primary election conducted by the Peoples Democratic Party (PDP) on 12th January, 2011 can be set aside without any petition" he submitted the question does not call for construction of a statute or even a document. He said the question relates to election conducted on 12/1/2011 which cannot be the same as that conducted on 10th January 2011 as shown on Exhibit 5 relied on by the appellant. He adopted his submission on question 1 in response to question 2.

With respect to question 3 projected on undisclosed *"extant laws and regulation"* with the words *"without recourse to the plaintiff"*, learned Counsel raised the question whether the appellant was aware of the re-run election on which the respondents rested their case. Learned Counsel argued that the parties are divided on the law and regulation and the trial Judge was right that oral evidence was necessary to resolve the question. In question 4, learned Counsel wondered which primary election the appellant won: the one held on 12/1/2011 or the one which the person who conducted the primary election claimed took place on 10/1/2011? He referred to *Lado v. CPC* (supra) and argued that the appellant's case is not founded on substitution following a nomination since the appellant said he

was not issued the nomination forms. With reference to questions 5 and 6 which he said he are intra-party matters, Learned Counsel submitted that they too are rooted on a primary election of which there is a substantial conflict on when or if it took place. He referred to the finding of the trial Court, affirmed by the lower Court and
B submitted that oral evidence was necessary to do justice in the matter.

In reaction to the complaint that the trial Court and the Court of Appeal erred for failure to consider questions 3, 4, 5 and 6 in the
C Originating Summons, Learned Senior Counsel argued that since appellant did not discontinue any of the prayers a holistic approach to the case was the option available to the two Courts below. He argued that by excluding questions 1 and 2 in the originating summons, appellant conceded that the two questions raised dispute that
D cannot be resolved by affidavit evidence. He referred to *Tukur v. Gov. Gongola State* (1989) (sic) NWLR (Pt. 117) and argued that questions 1 and 2 being the principal reliefs, must be settled before the ancillary claims can arise for determination.

Questions 5 and 6, it was argued, rest on the existence of a
E primary election which the appellant claimed he won. He argued that the questions cannot be resolved unless and until the conduct of the election on a particular date had been established.

Learned Senior Counsel contended that the undue emphasis the appellant placed on Exhibit 4 was to divert attention from Appellant's
F Exhibit 5 which contradicted the appellant's case founded on the claim that the election was conducted on 12/1/2011. Exhibit R4, learned Counsel argued, is not the minutes of a meeting, but an extract of the minutes which left out virtual aspects of the minutes.
G He referred to the case of the 3rd Respondent in his letter of 11th January 2010 wherein he complained that the members of the Election Panel never showed up. He submitted that no petition could have been written on the "*conduct of 2010/2011 party primaries*" when no such primary election was held. This, learned Counsel
H argued, is a challenge to appellant's Exhibit R4 contrary to the appellant's argument that Exhibit R4 was not challenged.

On invocation of Section 22 of the Supreme Court Act, the learned Silk referred to Reliefs 2 (a) (b) (c) and (d) in the grounds of appeal at pages 874-875 of the record and submitted that the reliefs

are not what the appellant sought in his originating summons. He urged the Court to strike out the reliefs as an amendment of the reliefs in the originating summons effected without leave of Court. He urged the Court to hold that the conflict in the facts as shown in the ruling of the trial court cannot be resolved without oral evidence. Should the Court invoke its powers under s. 22 of the Supreme Court Act, Counsel contended that the proper order to be made is one dismissing the appellant's case for the reason that the appellant claimed, and tendered Exhibit 5 to back his claim that the election he claimed he won was conducted on 12/1/2011. Exhibit 5, he explained, was the report of the panel mandated to conduct the said election but the same panel showed in its report that no election was held on 12/1/2011 as the entire primaries were conducted on 11/1/2011 with the election for the lower chambers of the National Assembly conducted on 10th January, 2011. Counsel added that the intra-party conflict was not resolved by the appellant to his detriment.

In issue 2 on the competence vel non of ground 1 of the grounds of appeal, learned Senior Counsel referred to page 871 of the Records of Appeal, reproduced appellant's ground 1 and submitted that the ground is incompetent in that the trial Court did not hold that the appellant's suit could only be commenced by writ of summons instead of originating summons. With reference to the records once more, he argued that the trial Court held that owing to conflicting affidavit evidence as well as internal conflict in the appellant's case, it was in accord with justice for the parties to file pleadings and declined the invitation of the 3rd respondent to strike out the suit on the ground that it was improperly commenced. He cited and relied on *Saraki v. Kotoye* (1992) 9 NWLR (Pt. 264) 156 at 184, paragraph E-G; *Egbe v. Alhaji* (1990) 1 NWLR (Pt. 128) 546 at 590; *Senator Adesanya v. President of Nigeria* (1981) 1 NCLR 358; *Chami v. UBA Plc* (2010) 6 NWLR (Pt. 1191) 474 at 502 paragraph C, E, G to buttress his argument that a ground of appeal must relate to the decision appealed against and constitute a challenge to the ratio of the decision. He urged the Court to strike out ground 1 of the appellant's grounds of appeal as well as issue 1 distilled therefrom as incompetent.

In conclusion, learned Senior Counsel urged us to strike out the appeal based on his preliminary objection. In the alternative, he urged us to dismiss the appeal for want of merit for:

(i) In view of the appellant's case and the response of the respondents, the trial Court was right for calling for oral evidence.

(ii) Based on the inherent conflict as to the date of the election on which the appellant rested his case, the appellant's case ought to be dismissed.

B Learned Counsel for the 3rd respondent, in dealing with his issue one on the conflicts in the affidavit and documentary evidence in appellant's case, first of all, invoked the practice of the Court not to disturb concurrent findings of the two Courts below. He relied on C *Sosanya v. Onadeko* (2005) 8 NWLR (Pt. 926) 185 at 234; *Ume v. Okoronkwo* (1996) 10 NWLR (Pt. 447) 133; *Chinwendu v. Mbamali* (1990) 3-5 SC 31; *Ibodo v. Enarofia* (1990) 5-7 SC 42; *Enang v. Adu* (1981) 11 SC 25. He submitted that the appellant has not shown any special circumstance in the case to justify a departure from the D established principle of the Court not to disturb a concurrent finding of the trial Court and the Court of Appeal.

On the merit vel non of the case, learned Counsel referred to pages 172-272 of the record and argued that the counter-affidavit of the 1st respondent and the exhibits attached thereto materially contradict the appellant's affidavit evidence in support of his originating summons. He made the same submission in respect of the counter-affidavit of the 3rd respondent and the exhibits annexed. He reproduced Order 3 Rules 6, 7 and 8 of the Federal High Court Rules (supra) and submitted that originating summons procedure is meant F to be adopted only where the parties are in agreement on the issues of fact giving rise to the need for a construction/interpretation of an instrument enactment, deed or will. He relied on *Famfa Oil Ltd v. A-G Federation* (2003) 18 NWLR (Pt. 852) p.461; *NBN Ltd & Anor v. Lady Alakija & Anor* (1978) 9-10 SO59 at 71 and *Ossai v. Wakwah* (supra). Learned Counsel examined at length the six questions in the originating summons vis-a-vis the affidavit evidence and concluded that the appellant's case was not suitable for originating summons procedure. He referred to and relied on the observation of the learned G H trial Judge that:

"There is also contradiction between the date 12/1/2011 of which the plaintiff said that the election was conducted on (and) the 10/1/2011 shown on Exhibit 5."

He referred to pages 508-509 of the record and said that the

3rd respondent in his counter-affidavit denied that any primary election was conducted by the 1st respondent on the 12th of January 2011 for Nsukka/Igbo Eze South Federal Constituency. Learned Counsel argued that by his own showing in paragraphs 16, 17 and 18 of his affidavit in support of his originating summons, appellant deposed that he was not issued with INEC Nomination Form and concluded thereby that appellant is not the nominated candidate of the 1st respondent for the election and ipso facto his claim that he be declared the duly nominated candidate of the 1st respondent in the primary election conducted on 12/1/2011 for the elections schedule for April 2011 has no basis. B C

Learned Counsel submitted that even going by the totality of the processes filed by the appellant without considering the counter-affidavit of the respondents, the case of the appellant was hostile and contentious. In the light of the counter-affidavit of the 1st and 3rd respondents, he argued, there was no way the case could have proceeded to be determined on originating summons. With reference to Exhibits 4 and 5 at pages 442-445 of the record, he argued that the disputed facts are not such as would be resolved with reference to documentary exhibits as the documents are contradicting and need clarification. Learned Counsel referred to the assertion of the appellant that Exhibit R4 was not challenged by the respondents and contended that neither the 1st nor 3rd respondent admitted that Exhibit R4 reflected the decisions of the meeting of the NWC of the PDP held on 14/1/2011. He argued that Exhibit R4, an extract from the minutes of the meeting of the NWC of the PDP does not purport to be conclusive of the issues and matters dealt with at the meeting. He referred to Exhibit PDP4 in the counter-affidavit to the originating summons and submitted that Exhibit R4 could not resolve the issues in controversy in the case in favour of the appellant. D E F G

On the issue of fair hearing in relation to questions 5 and 6 of the originating summons, he submitted that neither of the two lower Courts could have resolved questions 5 and 6 in the originating summons proceedings. He added that even if questions 5 and 6 of the originating summons raised the issue of fair hearing, the trial Court could not have isolated them out of the six questions for resolution, adding that the appellant did not discontinue any question for determination and that a holistic approach was the only option for the trial H

Court. He reiterated that what was placed before the trial Court for determination in his notice of appeal is the propriety of the decision of the trial Court that the case of the parties are contentious and cannot be resolved by affidavit evidence. He submitted that appellant's grounds 1, 2 and 3 lack merit and so are issues 1 and 3 distilled therefrom. He urged us to endorse the finding of the Court of trial as affirmed by the Court below, that issues raised in the affidavit of the parties and documents exhibited are contentious and conflicting and therefore cannot be effectively resolved by affidavit evidence.

On issue 2 on the propriety vel non of striking out grounds 1 and 3 of the appellant's grounds of appeal, learned Counsel referred to the 2nd respondent's preliminary objection to ground one on the ground that it did not arise from the decision of the trial Court. He said the Court below agreed with the argument of 2nd respondent and also found as a fact that grounds 1 and 3 of the grounds of appeal had been abandoned as no issues were distilled therefrom. Arguing further on ground 1 of the appellant's grounds of appeal, he stated that even if the ground was not abandoned, it was no longer a live issue as the Court below had found that it was incompetent as it did not flow directly from the ruling of the trial Court.

With reference to ground 3 of the appellant's grounds of appeal, at the Court below questioning the propriety of the ruling that Chief Babatope and Mrs. Ofili will have to testify on the veracity of their reports, he submitted that neither issue 1 nor issue 2 can be said to have been formulated from the appellant's ground 3. He urged us to hold that in the circumstances the Court below was right in striking out appellant's grounds 1 and 3 of the grounds of appeal.

In conclusion, learned Counsel for the 3rd respondent urged us to dismiss the appeal for the following reasons:

- (i) The Court below rightly affirmed the decision of the trial Court
- (ii) The Court below was right in striking out grounds 1 and 3 of the appellant's grounds of appeal.

In his reply to the 2nd respondent's preliminary objection, learned Counsel for the appellant divided the objection into the following three issues for the purpose of his reply:

"(1) Whether the appellant sought for leave and was given leave to appeal on grounds of mixed law and facts. He referred to

pages 1196-1205 of the record for his application for leave to appeal. He said he filed his ‘ application within 14 days and the same was heard and granted within the same period. He relied on *Tunji Bowaje v. Moses Adediwura* (1976) 6 SC 147; *Ogbechie v. Onochie* (1986) 2 NWLR (Pt. 23) 484.

(2) Whether grounds 2, 3 and 4 of the grounds of appeal are vague, contain no particulars of error or do not arise from the judgment appealed against. He referred to the judgment of the trial Court at page 862 of the record and page 1228 of the record for the judgment of the lower Court affirming that of the trial Court and submitted that grounds 2, 3 and 4 of the grounds of appeal clearly relate to the decision appealed against.

3. Whether the Federal High Court had jurisdiction to hear and determine the originating summons as raised in ground 5 of the notice of preliminary objection; learned Counsel argued that the 2nd respondent did not appeal against the decision of the Federal High Court on the issue of jurisdiction. He referred to pages 855-856 of the record for decision of the Federal High Court relating to Section 251 of the Constitution and s.87 (10) of the Electoral Act 2010 and submitted that even if the 2nd respondent is not an agency of the Federal Government the Federal, or State, High Court has jurisdiction to hear and determine the case. Learned Counsel emphasised that the issue of jurisdiction determined by the trial Court was not on appeal.”

He referred to the decision of the Court in *Prince John Okechukwu Emeka v. Lady Margery Okadigbo & 4 ors* (SC.69/2012) that the Federal High Court or the High Court of a State or Federal Capital Territory has jurisdiction to hear complaints arising from the conduct of party primaries in which they contested. He urged the Court to dismiss the preliminary objection as based on mere technicalities with no miscarriage of justice shown to exist. He relied on *Famfa Oil Ltd v. A-G Federation* (supra).

In response to the preliminary objection of the 3rd respondent, learned Counsel divided his reply into two issues:

“(1) whether the appellant’s ground 1, 2 and 4 derive from the judgment of the Court below. In reply to this questions, Counsel reproduced grounds 1, 2 and 4 of the appellant’s grounds of appeal and extracts from judgments of the Courts below and argued that

there is no doubt that grounds 1, 2 and 4 of the grounds of appeal derive from the judgment of the Court below.

2. Whether ground 3 of the appellant's grounds of appeal which raised the issue of fair hearing is competent. In response to the question, he reproduced questions 3 and 6 of the originating summons and ground 2 of the grounds of appeal at page 872 of the record and paragraph 4.5 of the appellant's brief in the Court below at page 1040 of the record and submitted that the issue of fair hearing was raised. He referred to *Akpom v. Bob* (2010) 17 NWLR (Pt C 1223) p.421 ratio 30 for exception to the rule that grounds of appeal must derive from the decision appealed against. He urged the Court to dismiss the 3^d respondent's preliminary objections."

Above is a summary of the issues and submissions of learned Counsel for the parties in the preliminary objections of the 2nd and 3rd respondents as well as the merit of the appeal. **The success of the preliminary objection to the hearing of an appeal, a pre-emptive strike, will bring the litigation to an end. On the other hand, if the preliminary objection is dismissed, the appeal will be determined on the merit.** See *Alhaji Sulaiman Mohammed & Anor v. Lasisi Sanusi Olawunmi & ors* (1990) 4 SCNJ 23 at 40.

The 2nd respondent and the 3rd respondent raised preliminary objections to the determination of the appeal on the merit on five and four grounds, respectively. Third Respondent's grounds 1, 2 and 4 are subsumed in the 2nd Respondent's five grounds. These are:

"1. Grounds 1, 2 and 3 of the grounds of appeal are grounds of mixed law and facts and the requisite leave of Court to raise and argue the grounds was not sought and obtained.

2. Ground 3 of the grounds of appeal does not arise from the judgment appealed against.

3. Ground 4 of the grounds of appeal is vague and contains no particulars of error. Further it is academic based on the determination of the Court of Appeal, which was not appealed, that Ground 1 was abandoned as no issue was distilled therefrom.

4. Reliefs 2 (A) (B) (C) and (D) of the relief sought is a unilateral amendment to the prayer in the originating summons.

5. Based on the relief sought in the appeal, there is no life issue in the case in that -

(i) By Relief 1 which seeks the setting aside of the decisions of

the two (2) Courts below, if granted, remitting for trial the originating summons which does not disclose any cause of action against the 2nd respondent, will be an exercise in futility.

(ii) Relief 2 (A) (B) (C) and (D) which invites the Supreme Court to invoke Section 22 of the Supreme Court Act is an invitation to exercise jurisdiction where none exists. B

I will now determine the sustainability or otherwise of each of the grounds of preliminary objection.

Ground 1: Grounds 1, 2 and 3 of the grounds of appeal are grounds of mixed law and facts and the requisite leave of Court to C raise and argue the grounds was not sought and obtained. The learned Senior Advocate for the 2nd respondent argued copiously and cited relevant authorities that appellant's grounds 1 to 3 of the grounds of appeal are of mixed law and fact which the appellant cannot raise D without leave of the lower Court or this Court first sought and obtained. Learned Counsel for the appellant conceded the need for leave to appeal under s.233 (3) of the 1999 Constitution as amended and dwelt extensively on the fact that he applied for leave to appeal and was granted same within the 14 days of the decision of the Court of Appeal delivered on 2K/4/2Q12 in Appeal No. CA/A/587/2011. E The relevant grounds upon which he sought leave to appeal, as reproduced in his brief of argument are:

"2. The said judgment which affirmed the decision of the lower Court to hear the substantive suit by way of a writ of summons did F not finally determine the issues between the parties.

4. It is the requirement of the law that leave be sought and obtained within 14 days to appeal against the decision which does not finally resolve the issues between the parties and which are of both law and facts." G

A party appealing against an interlocutory decision, as the appellant would appear to have done in this case, has to seek leave to appeal within 14 days of the decision appealed against. The relief in the motion and the grounds upon which the single relief is sought are hereunder reproduced: H

"...A leave of this Court to appeal against the judgment of the Court of Appeal Abuja delivered on the 27th of April, 2012 in Appeal No: CA/A/586/2011:

And further take notice that the grounds upon which this ap-

plication is made is as follows:

(1) *The applicant is dissatisfied with the judgment of this Court delivered on the 27th day of April, 2012.*

(2) *The said judgment which affirmed the decision of the lower Court to hear the substantive suit by way of a writ of summons the not (sic) final determine the issues between the parties.*

(3) *The said judgment struck out some of the grounds of appeal and as such the issue raised in the said grounds were not determined on the merit.*

(4) *It is the requirement of the law that leave be sought and obtained within 14 days to appeal against decisions ^ which do not final (sic) resolve the issues between the parties and which are of both law and facts.”* See pages 1196-1197 of the record (Vol. 3).

As I said earlier in this judgment, learned Counsel for the appellant centred his argument entirely on the fact that he applied for and obtained leave to appeal the interlocutory decision of the lower Court. Learned Counsel was studiously silent on the issue of the nature of his grounds of appeal which implies that he conceded that his grounds 1, 2 and 3 are grounds of mixed law and facts. See Joseph Iro & 3 ors v. Christopher Echenwendu and Sons (1996) 8 NWLR (Pt. 468) 629 at p.636 ratio 3.

The requirement for leave to appeal against interlocutory decisions and the requirement of s.233 (3) of the 1999 Constitution (as amended) for leave to appeal on grounds of mixed law and facts would indicate that a party seeking to appeal against interlocutory decision on grounds other than law requires two main reliefs-

(1) *Leave to appeal against interlocutory decision.*

(2) *Leave to appeal on grounds other than grounds of law.*

Since learned Counsel for the appellant maintained a loud silence on the nature of his grounds 1-3 of the grounds of appeal challenged by the learned Senior Counsel for the 2nd respondent, I am left with the oblique reference to the phrase “and which are of both law and facts” in ground 4 of the grounds upon which the application for leave to appeal was predicated as Appellant’s answer to the challenge against grounds 1-3 of the grounds of appeal,

I take liberty to reproduce, once more, the said ground 4 of the motion:

“(4) It is the requirement of the law that leave be sought and obtained within 14 days to appeal against decisions which do not final (sic) resolve the issues between the parties and which are of both law and facts” (Underlining mine). B

In my understanding of the language of the ground reproduced above the underlined phrase “and which are of both law and facts” relate to the “decisions” against which the appellant sought leave to appeal which may be decision on facts or law or both. But the requirement of leave in s. 233 (3) of the Constitution relates to grounds of appeal of law and facts and not to the decision for which leave to appeal is sought even if the decision involves both law and facts. It has to be borne in mind that neither the motion, the grounds of the motion nor the 8-paragraph affidavit in support of the motion made mention of “ground of appeal” not to mention grounds of mixed law and facts. C
D

In my humble view, the preliminary objection to grounds 1-3 of the grounds of appeal is well-taken. The preliminary objection is sustained and consequently grounds 1, 2 and 3 of the appellant’s grounds of appeal which are grounds of mixed law and facts, are incompetent, having been raised without leave of Court as required by s.233 (3) of the 1999 Constitution (as amended). The said grounds are hereby struck out. This leaves the appellant with only ground 4 of his grounds of appeal. E
F

Ground 2: Ground 2 of the appellant’s ground of appeal does not arise from the judgment appealed against. G

Ground 2 of the ground of appeal reads:

“The Court of Appeal erred in law when it held that Exhibit R4 which is the extract of the meeting of the 1st respondent on the 14th day of January, 2011 which was not disputed by the respondents require oral evidence to prove due to some depositions in the affidavit evidence of the Respondents (See page 1235 of the record). H

I have considered the submission by learned Counsel on this ground of objection. I will quote in extenso the portion of the judgment of the Court below wherein Exhibit R4 was dealt with. At page

1228, paragraph 2 in Volume 3 of the record, the Court below stated:

"I have seen Exhibit R4 which the Appellant says was never disputed or denied by the Defendants/Respondents in any counter-affidavit. The said document is an extract of the minutes of the National Working , Committee of the POP held on 14th January, 2011.

B The Appellant introduced the document to contradict the assertion of the 1st and 3rd, Respondents that the same National Working Committee of the POP had cancelled the primary election of 12th January, 2011 and ordered a re-run in Nsukka/Igbo Eze South Federal Constituency. The 1st Respondent's Exhibit PDP1 and 2 also contradict Appellant's Exhibit R4. It is for the reason, that the several documents brought in as exhibits in the case do not speak with one voice, that the Respondents insisted, and the trial Court agreed, that the serious disputes of facts do not warrant the hearing of the case on
D originating summons." (Underlining mine)

A ground of appeal has been defined as error of law or facts alleged by an appellant as the defect in the judgment appealed against upon which reliance has been placed to set the judgment aside. See Albert Akpan v. Senator Effiong Bob & ors (2010) 43 NSCQR 409
 E at 441 ratio 1. The ground of appeal and the portion of the judgment at which it is directed speak for themselves.

With profound respect to the eminent Counsel for the appellant, not hearing a case on originating summons is not the same thing as saying that oral evidence is required on a
 F ***particular issue. The Court below did not say that oral evidence is required to prove Exhibit R4. It is a disservice to the Client and to the Court to interpret a judgment of the Court giving it a slant upon which to build a ground of appeal. Not***
 G ***only did the Court not say that oral evidence is required to prove Exhibit R4, it did say that the 1st Respondent's exhibits PDP1 and 2 contradicted appellant's Exhibit R4 contrary to the assertion by learned Counsel that Exhibit R4 was not disputed as a basis for his ground of appeal.***

H ***I agree with learned Counsel for the 2nd and 3rd Respondents that ground 2 of the appellant's ground of appeal is not derived from the judgment of the lower Court and that the said ground is therefore incompetent.*** See Saraki v. Kotoye (supra); Yusufu v. Kupper International (1916) 4 SCNJ 4 at 48.

Ground 3 of the ground of objection is:

“Ground 4 of the grounds of appeal is vague and contains no particulars of error. Further, it is academic based on the determination of the Court of Appeal which was not appealed; that Ground 1 was abandoned as no issue was distilled therefrom.”

In ground 4 of the appellant’s ground of appeal, he complained that: *“The Court of Appeal erred in deciding that some grounds of appeal of the appellant does (sic) not relate to the decision of the lower Court, particularly ground one.”*

At page 1224 of Volume 3 of the record the lower Court concluded:

“from all I have said grounds 1 and 3 of the grounds of appeal have been abandoned, as no issue have been formulated therefrom.”

Appellant cannot be heard to predict a ground of appeal on a ground he abandoned at the Court below. As rightly argued by learned Counsel for the 2nd and 3rd Respondents the terse ground 4 of the grounds of appeal has not stated the particulars of the error allegedly committed by the Court below. Moreover “some grounds of appeal of the appellant” in respect of which the error allegedly occurred remain in the realm of speculation and the only ground one mentioned was abandoned as stated above.

I agree with learned Counsel for the 2nd and 3rd Respondents that the appellant’s ground 4 is vague and general in terms of “some grounds of appeal”, It contravenes Order 8 Rule 2 (4) of the Supreme Court Rules.

Ground 4 of the 2nd Respondent’s objection is that:

“Reliefs 2 (A) (B) (C) and (D) of the reliefs sought is a unilateral amendment to the prayer in the originating summons.”

Part 4 of the appellant’s notice of appeal is hereunder reproduced:

“(4) RELIEFS SOUGHT FROM THE SUPREME COURT

1. An order setting aside the ruling of the trial Court and the judgment of the Court of Appeal delivered on the 27th April 2012.

2. By way of re-hearing under section 22 of the Supreme Court Act:

(A) A declaration that the plaintiff is the duly nominated candidate of the 1st respondent to represent Nsukka/Uzo-Uwani Federal Constituency in the 1st Respondent's only valid primary election.

(B) A declaration that pursuant to "A" above the appellant Is the only valid candidate of the party for the National Assembly Election for Nsukka/Igbo Eze South Federal Constituency.

(C) A declaration that no valid primary election can be held after the 15th of January 2011 in accordance with the I/A/EC time table guidelines.

(D) Consequential orders of this Court to give effect to Reliefs "A" and "B" above." See pages 1203 of the record, Vol. 3)

The Court below, in its judgment, at page 1216 of Vol. 3 of the record reproduced the four reliefs sought by the appellant in the originating summons thus:

"1. Declaration that the plaintiff is the duly nominated candidate of the Peoples' Democratic Party (PDP) representing Nsukka/Igbo Eze South Federal Constituency in the primary elections conducted on the 12th day of January, 2011 for the elections scheduled for April, 2011.

2. An order of injunction restraining the Peoples' Democratic Party (PDP), their servants and agents, privies, howsoever from forwarding the name of any other candidate other than that of the plaintiff to the 2nd Defendant as the Peoples' Democratic Party (PD) candidate for the Legislative Elections scheduled for the April 2011 representing Nsukka/Igbo Eze South Federal Constituency.

3. An order compelling the 1st Defendant to issue INEC Nomination Forms to the plaintiff.

4. An order restraining the 2nd Defendant from publishing any other name other than of the plaintiff as the candidate for the election into the House of Representative for Nsukka/Igbo Eze South Federal Constituency in the election scheduled for April, 2011."

Appeal is an invitation to a higher Court to review the decision of a lower Court to find out whether a proper consideration of the facts pleaded before it and the applicable law, the lower Court arrived at a correct decision. See *Oredoyin v. Arowolo* (1989) 4 NWLR (Pt. 114) 172. The decision appealed against includes the lower Court's pronouncement on the reliefs sought by the appellant and it is the pronouncement on the said reliefs the appellate Court would have

to examine in the light of the facts and applicable law before the lower Court.

Appellant did not amend his originating summons to incorporate the new set of reliefs numbered 2 (A) (B) (C) and (D) in his notice of appeal. An appellant is not allowed to present a case before the appellate Court different from the one upon which the lower Court pronounced. Without an amendment, properly sought and obtained either at the lower Court or at the appellate Court, a party has to be consistent in his case from the lower Court to the appellate Court. Appellate Court will not entertain matters not in the record of appeal without amendment. See *Nworah v. Nwabueze* (2011) 48 NSCQR 256.3

Apart from the inconsistency in his case, appellant's case is bedeviled by another vitiating factor. All the reliefs in the originating summons relate to Nsukka/Igbo Eze South Federal Constituency whereas relief 2 (A) in the notice of appeal was claimed in relation to Nsukka/Uzo-Uwani Federal Constituency which has not been shown to be the same as Nsukka/Igbo Eze South Federal Constituency. Appellant, apart from a consequential order, has not shown how and why the Court should consider a set of relief he did not seek at the Court below. And even if the Court should award the new relief it cannot be determined on the facts before the Court whether the new reliefs relate to Nsukka/Igbo Eze South Federal Constituency or Nsukka/Uzo-Uwani Federal Constituency.

In ground 5 of the preliminary objection of the 2nd respondent, its learned Senior Counsel stated:

"Based on the Relief sought in the appeal, there is no life issue in the case in that -

(i) By Relief 1 which seeks the setting aside of the decision of the two (2) Courts below, if granted, remitting for trial the originating summons which does not disclose any cause of action against the 2nd respondent, will be an exercise in futility.

(ii) Relief 2 (A) (B) (C) and (D) which invites the Supreme Court to invoke Section 22 of the Supreme Court Act is an invitation to exercise jurisdiction where none exists."

With due respect to the learned Silk for the Respondent,

the 2nd respondent as the Electoral Umpire, has an important role to play in ensuring that party primaries are conducted in accordance with the provisions of the Electoral Act and the guidelines of the party. It has a duty to restore, and maintain sanctity in our electoral process, including but not limited to party primaries and the main election.

In my humble view, there is a live issue involving the 2nd respondent in the determination of the question of validity *vel non* of the process it oversaw. If the Court comes to the conclusion that the two Courts below were wrong and that the question and reliefs in the originating summons can properly be dealt with in the originating summons, it has jurisdiction under s.22 of the Supreme Court Act to do what it has determined that the two lower Courts should have done. Be that as it may, the issue is now academic since I have demonstrated that even if the appeal is allowed, the Court, without amendment, cannot grant a relief not sought in the Court below and upon which the Courts below did not pronounce since the new relief is not a consequential order.

I will deal with 3rd Respondent's ground 3 which is:

"Ground Three: The Court of Appeal erred in law in not pronouncing on the constitutional issue of fair hearing raised by the appellant in reference to questions No. 5 and 6 raised in the originating summons before the lower court."

Questions 5 and 6 of the originating summons, reproduced at page 752 of the record in the judgment of the trial Court, is hereunder reproduced:

"5. Whether in view of Part VI Section 50 (d) of the Electoral Guidelines for the 2010 of the Peoples Democratic Party (POP) any complaint that was not brought to the appropriate levels in writing within 24 hours of completion of the primaries election of the party can be entertained by the party or said to be valid and proper.

6. Whether in view of Part VI Section 50 (e) of the Electoral Guidelines for the 2010 of the Peoples Democratic Party (PDP), the plaintiff is entitled to be given an opportunity to present his case and whether he is entitled to be communicated in writing within 48 hours the decision of the Panel."

With profound respect, Ground 3 of the appellant's grounds of appeal appears to be a demonstration of a misunderstanding of

the appellant's own case. I consider questions 1 and 4 of the originating summons as the bedrock of the appellant's case and they are reproduced hereunder:

"I. Whether having won Primary Election concluded by the Peoples Democratic Party (PDP) on the 12th of January 2011 for Nsukka/Igbo Eze South Federal Constituency, is the plaintiff not the duly nominated candidate for the National Assembly Elections in April 2011.

4. Whether by virtue of Section 87 (10) of the Amended Electoral Act 2011, the plaintiff in the primaries can question or complain against his unlawful purported replacement by his party and refusal to issue him with INEC nomination forms."

Each of questions 1 and 4 above assumes facts which are yet to be proved before the Court can deal with questions 5 and 6; the facts are:

(a) That the 1st respondent conducted primaries or valid primaries on the stated date 12th January, 2011.

(b) That the appellant won the primary election.

Until it is established that the 1st respondent conducted a primary election or valid primary election on 12/1/2011 and that the appellant won the said primary election, it will be premature to answer question 5 and 6 of the originating summons, more so as the two Courts below held that the question and relief in the originating summons cannot be dealt with in originating summons. Appellant did not withdraw any of his questions or claims in the originating summons and I subscribe to the view of learned Counsel for the 2nd and 3rd Respondents that there is need for a holistic approach to the determination of the questions and relief sought by the appellant.

In any case, the issue of denial of fair hearing was not raised before, or pronounced upon, by the lower Court. The ground is not only premature; it is also incompetent as it is not derived from the judgment appealed against.

In conclusion, the 2nd and 3rd Respondents' preliminary objections based on grounds 1 to 4 and 6 of the preliminary objection are sustained and ground 5 of the objection, though academic with no effect on the appeal one way/or the other, is dismissed.

Ordinarily, this ruling on the preliminary objection should bring the matter to an end. See Alhaji Sulaiman Mohammed & Anor v. Lasisi Sanusi Adewunmi & ors (*supra*). However, in view of the apparent novelty of the issues raised, I will determine the fate of the appeal as if there had been no preliminary objection or the objections had been dismissed. Learned Counsel for the appellant isolated three issues for determination while learned Counsel for the 2nd and 3rd Respondents submitted two issues each for determination. I have already reproduced the issues and summarised the submissions of learned Counsel for the parties on each of them.

Issue one in each of the three briefs of appellant, 2nd and 3rd respondents appear to be the same and 1st respondent adopted the three issues framed by appellant. The appeal can be disposed of based on issue one in each brief. I will adopt issue one in the 2nd respondent's brief as more appropriate than the others in determining the appeal. The issue reads:

"1. Was the Court of Appeal correct when it affirmed the decision of the Federal High Court to the effect that from the nature of the allegations of the parties evidence ought to be adduced in order to effectively determine the dispute between the parties. (Grounds 1, 2 and 3)"

Question 1 of the Originating Summons, one of the two questions which form the plank on which the appellant's case rests is:

"Whether having won the primary election concluded by the Peoples Democratic Party (POP) on the 12th January, 2011 for Nsukka/Igbo Eze South Federal Constituency, is the plaintiff not the duly nominated candidate for the National Assembly Elections in April 2011."

That the appellant won the primary election, a fact upon which he rests his claims, is violently contested in the affidavit evidence. Even the date of the alleged election cannot be ascertained from the appellant's side of the case. At page 802 of Vol. 2 of the record the trial Court held, *inter alia*:

"There is also contradiction between the date 12/1/2011 of which the plaintiff said that the election was conducted on 10/1/2011 shown in Exhibit 5. I have above shown that the affidavit filed by the parties in this suit contains lots of facts and issues that are very contentious and are in serious dispute. The issues cannot be resolved by

affidavit evidence.”

Appellant’s case is bedeviled with internal conflict with regards to the date the election he claimed to have won was held. The trial court found as a fact and the Court below affirmed, that there were very serious contentious and serious dispute which could not be resolved by affidavit evidence. The said findings, among others, are concurrent findings of fact which ordinarily ought not to be disturbed on appeal. See Njoku & ors v. Erne & ors (1973) 5 SC 293 at 306; Kale v. Coker (1982) 12 SC 252 at 271.

Appellant did not attempt to show either that the concurrent findings are perverse, or there is substantial error in substantive or procedural law which if not corrected will lead to miscarriage of justice. See Lokoyi & Anor v. Olojo (1983) 8 SC 61 at 68; Bankole v. Pelu (1991) 8 NWLR (Pt. 211) 23. **Originating Summons with its simplicity, resulting from the elimination of pleadings, cannot be resorted to in proceedings potentially hostile even in matters where it is claimed that time is of the essence.** See NBN v. Alakija (1978) 9-10 SC 59 at 71; University of Lagos v. Aigoro (1991) 3 NWLR (Pt. 179) 376. **Originating Summons may be employed in situations falling within the provisions of Order 3 Rules 6, 7 and 8 of the Federal High Court (Civil Procedure) Rules. Rule 8 provides:**

“A Judge shall not be bound to determine any such question of construction if in the Judge’s opinion it ought not to be determined on originating summons but may make such orders as the Judge deems fit.”

The rule vests the trial Judge with discretion against the exercise of which the appellant cannot appeal unless he can show that the discretion was not exercised judiciously and judicially, which is not the case in this appeal. The rule relates to “such question of construction” which has been demonstrated not to be the case in this appeal. There are provisions in the Rules of Court to accommodate urgent matters. Parties and their Counsel should exploit these provisions instead of rushing to Court without compliance with the appropriate provision for commencement of a particular action on the pretext that the matter is time bound.

Even on the merit, the appeal is bound to be dismissed. In conclusion, based on the preliminary objection raised by the 2nd and 3rd respondents, the appeal is incompetent and is consequently struck out. On the other hand, the appeal is bereft of merit and accordingly it is dismissed. Parties to bear their respective costs.

B

MOHAMMED JSC

This appeal is against the Judgment of the Court of Appeal Abuja Division in which the Ruling of the trial Federal High Court Abuja was affirmed that the action brought by the Appellant under the Originating Summon Procedure was so contentious that it was not suitable for hearing and determination by that procedure and therefore the action was ordered to be heard on pleadings.

D My learned brother Ngwuta J.S.C. in his lead Judgment had very carefully considered the Preliminary Objections raised by the Respondents to the four (4) grounds of Appeal filed by the Appellant. I agree that all the four (4) grounds of Appeal are incompetent resulting in rendering the entire Appeal incompetent warranting the striking out of the same. I abide by the order on costs in the lead Judgment.

E

MUNTAKA-COOMASSIE JSC

F

The appellant in its Originating Summons filed before the Federal High Court, Abuja sought the following reliefs:-

1. A declaration that the plaintiff is the duly nominated candidate of the P.D.P. representing Nsukka/Igbo Eze South Federal constituency in the Primary Elections conducted on the 12th day of January, 2011 for the elections scheduled for April, 2011.

2. An Order of injunction restraining the P.D.P, their servants and agents, privies howsoever from forwarding the name of any other candidate other than that of the plaintiff to the 2nd defendant as the P.D.P. candidate for the Legislative Elections schedule for the April, 2011 representing Nsukka/Igbo Eze South constituency.

H

3. An Order compelling the 1st defendant to issue INEC nomination forms for the plaintiff.

4. An Order restraining the 2nd defendant from publishing any

other name other than that of the plaintiff as the candidate for the Election into the House of Representatives for Nsukka/Igbo Eze South Federal Constituency in the Elections scheduled for April 2011. The following questions were raised for determination by the plaintiff/appellant:-

1. Whether having won the Primary Elections conducted by the P.D.P on the 12th January, 2011 for Nsukka/Igbo Eze Federal Constituency, is the plaintiff not the duly nominated candidate for National Assembly Elections in April, 2011. B

2. Whether the Primary Election conducted by the P.D.P. on the 12th of January, 2011 can be set aside without any petition, complaint or irregularity in the conduct of the Primary. C

3. Whether having regard to the extant Laws and Regulations, P.D.P could conduct another Primary Elections to select a candidate for Nsukka/Igbo Eze South Federal Constituency after the 15th day of January, 2011 without recourse to the plaintiff. D

4. Whether by virtue of Section 87 (10) of the Amended Electoral Act 2011, the plaintiff having won the Primaries can question or complain against his unlawful purported replacement by his Party and refusal to issue him with INEC nomination form. E

5. Whether in view of part VI Section 50 (d) of the Electoral Guidelines for the P.D.P any complaint that was not brought to the appropriate levels in writing within 24 hours of completion of the Primary Elections of the party can be entertained by the party or said to be valid and proper. F

6. Whether in view of part VI Section 50 (e) of the Electoral Guidelines for the P.D.P the plaintiff is entitled to be given an opportunity to present his case and whether he is entitled to be communicated in writing within 48 hours the decision of the panel. G
The Originating Summons was supported with an affidavit of urgency with the following Exhibits attached: Exhibit 1- P.D.P membership card Exhibit 2 - Provisional Clearance Certificate Exhibit 3 - Letter dated 10th January, 2011 which named the Members of the Electoral Panel for Primary Election. Exhibit 4 - Form Code P.D.P 004/ WA/2010 in which the plaintiff Scored 615 votes. Exhibit 5 - Report of the P.D.P. State House of Assembly Primary Election Panel. Exhibit 6 - Electoral Guidelines for Primary Election 2010 of the P.D.P. H

Also in supporting the statement in support of the Originating

Summons, verifying Affidavit and written address the main complaint of the plaintiff was that he was the rightful winner of the Primary Elections conducted on the 12th January, 2011 by the P.D.P into the Nsukka/Igbo Eze Federal Constituency having scored the lawful majority votes. There was no complaint against his victory and if there was anyone, none was communicated to him in accordance with the provisions of the Electoral Guidelines of the P.D.P. It was therefore wrong for the P.D.P to have set aside the result of the Primary Election and ordered fresh one. The action of the PDP was therefore wrongful, fraudulent and un-constituted Electoral malpractices.

The 1st defendant filed a counter-affidavit, which was supported with a written address and the following Exhibits were attached: -

1. Exhibit P.D.P 1 - A letter of complaint by pear/partnership a firm of Solicitors representing all other contestants in the Primary Election.

2. Exhibit P.D.P 2 - Report of the Electoral Panel for Electoral Re-Run

3. Exhibit P.D.P 4 - Report of the National Working Committee on the consideration of the results of Re-Run Elections.

4. Exhibit 5 - The constituency of the P.D.P

The plaintiff filed further affidavit of 20 paragraphs and also attached the following Exhibits:-

Exhibit R1 - A counter-affidavit filed in Suit No. FHC/ABJ/C/54. Sworn to by one Wuhori Akunyibo.

Exhibit R2 - INEC Time Table of activities for 2011 General Elections. The further affidavit was also supported with the plaintiffs reply to the written address.

In response the 1st defendant also filed a counter-affidavit to the plaintiff's further affidavit with further written address in opposition to the Originating Summons. The 3rd defendant also filed 34 paragraphs counter-affidavit and attached the following documents:-

(a) Exhibit A - P.D.P Expression of Interest for House of Representative Nomination Form.

(b) Exhibit B - Nomination Form

(c) Exhibit C - Clearance Certificate

(d) Exhibit D - A letter dated 12/1/2011 written by Dr. Pat Asadu.

(e) Exhibit E - A letter dated 13/1/2011 written by .
Pear/Partnership Solicitors to other contestants in the Election.

(f) Exhibit F - Report of Electoral Panel for Election Re-Run.

(g) Exhibit G- Form Code P.D.P 004/NA/2010 Re-Run Primary Election Result.

With the leave of the trial court the 2nd defendant filed its response out of time. By a memorandum of conditional appearance the 2nd defendant objected to the competence of the action on the following terms:-

“(1) Further take Notice that the Grounds upon which the 2nd defendant enters a conditional appearance are as follows:-

(a) The subject-matter of this suit as disclosed on the Originating Summons is not within the competence of the Federal High Court.

(b) No cause of action was disclosed against the 2nd defendant.”

The 2nd defendant filed a written address in support of the objection. Both the substantive and the objection were taken together. In view of the several depositions, and volumes of documents exhibited and major characters whose names were mentioned, it was the opinion of the court that oral evidence is needed to be adduced. In its words the trial court held as follows: -

“The defendants were of the opinion that the court should dismiss or strike out this case for not being properly instituted. But the court is of the opinion that it will not serve the justice of the case. The court has the power to order that these conflicting affidavit evidence and contention issues be resolved by oral evidence. The court therefore orders that the plaintiff file statement of claim and serve the defendants so that the case be properly adjudicated upon in the interest of justice.”

It is against this order of the trial court that the appellant appealed to the Court of Appeal, Abuja Division hereinafter called the lower court. After the consideration of the appeal the lower court dismissed the appeal and affirmed the order of the trial court. In dismissing the appeal the lower court found as follows:-

“The peculiar facts of this case, though significantly hostile suggest that there is a serious dispute as to whether the appellant was duly elected as the party’s candidate for Nsukka/Igbo Eze Federal Constituency, there is still a lingering dispute over whether the nomi-

nation exercise of 12 January, 2011 which the appellant relies on had been cancelled and a re-run of the Primary Election was ordered by the National Working Committee of the P.D.P.

Appellant denies any knowledge of the cancellation and the order of re-run. The 1st and 2nd defendants/respondents vehemently insist that the appellant was aware of both, and that he in fact participated in the re-run exercise.”

It is against this concurrent finding of the two lower courts that the appellant has appealed to this court. By a motion dated 2nd May, 2012 the appellant sought the following reliefs before the lower court.

“Leave of this court to appeal against the judgment of this Court of Appeal, Abuja delivered on 27/4/2012 in Appeal No. CA/A/586/2011.”

The lower court granted the application and the appellant thereafter filed its notice of appeal. In accordance with the rules of this court all the parties filed and exchanged their respective briefs of argument. The appellant in its brief of argument dated 20th June, 2012 formulated three issues for determination as follows:-

“(1) Whether the Court of Appeal was right in upholding the decision of the Federal High Court that there was serious conflicts in evidence of the parties to warrant filing of pleading without considering questions 3, 4, 5 and 6 submitted to the court in the appellants originating summons for determination and all other documents particularly Exhibit R4.

(2) Whether the Court of Appeal was right in holding that ground one of the appellant grounds of appeal before the lower court does not flow directly from the decision or ruling appealed against. (3) Whether the Court of Appeal was right in not pronouncing on the constitutional issue of fair hearing raised by the appellant, particularly with reference to question No. 5 and 6 of the originating summons.”

The issues as formulated by the appellant were adopted by the 1st respondent in its brief of argument. The 2nd respondent on its own formulated two issues for determination as follows:-

“1. Was the Court of Appeal correct when it affirmed the decision of the Federal High Court to the effect that the nature of the allegations of the parties, evidence ought to be adduced in order to effectively determine the dispute between the parties.

2. Was the Court of Appeal correct when it held that Ground 1 of the Grounds of Appeal did not arise from the decision of the Federal High Court appealed against. ”

The 3rd respondent also formulated two issues for determination thus:-

“1. Whether the court below was wrong in affirming the decision of the trial court that the issues raised in the affidavit of parties and the documents exhibited thereto are very contentious and conflicting and therefore cannot be effectively resolved by affidavit evidence.

2. Whether the court below was wrong in striking out grounds 1 and 3 of the Appellant’s grounds of appeal. ”

In the meantime, by a motion of preliminary objection dated 3/10/2012, the 3rd respondent, Hon. Dr. Patrick Asadu, had challenged the competence of the appeal on the following grounds:-

“1. Ground 1 of the appellant’s grounds of appeal is not only narrative and argumentative but also does not drive from the judgment of the court below.

2. Ground 2 of the appellant’s grounds of appeal is incomplete in that the court below did not hold in its judgment that Exhibit R4 which is the extract of the meeting of the 2nd respondent on the 14 day of January, 2011 which not disputed by the respondents require oral evidence to prove due to some dispositions in the affidavit evidence of the respondents.

3. Ground 3 of the appellant’s grounds of appeal is incomplete in that the issue of fair hearing was never raised by the appellant in his notice of appeal or brief of argument at the court below and same did not arise for consideration of the court below.

4. Ground 4 of the appellant’s grounds of appeal is incompetent in that some grounds of appeal of the appellant does (sic) not relate to the decision of the lower court particularly ground one.

5. Ground 5 of the grounds of appeal alleging an error in law did not contain particulars.

The 2nd respondent also adopted these grounds of preliminary objection in its brief and proffered argument in its support. The appellant filed a reply to the preliminary objections of both the 2nd and 3rd respondents.

At the hearing of this appeal both the learned counsel to the

2nd and 3rd respondents moved their preliminary objection. The learned senior counsel to the 2nd respondent arguing ground 1 of the objection contended that the misconception on which the appellant founded the appeal was the premise that the judgment of the lower court appealed against was not a final judgment but rather an interlocutory appeal. Based on this, the appellant brought a motion before the lower court for leave to appeal against the judgment. The prayer sought did not include the leave to appeal on grounds of mixed law and fact and facts. His prayer was to appeal against the “decision”. The lower court’s decision being a final judgment, no leave is required to appeal except where the grounds of appeal involved grounds of mixed law and facts, and facts alone. The judgment of the lower court is a final judgment as nothing was left for it to determine. He cited the case of *Alibgunleri v. Depo* (2008) 3 NWLR (Pt. 1074) 217 at 247.

By virtue of the provisions of Section 233 (3) of the 1999 Constitution as amended, the appellant is compelled to seek leave to appeal where the grounds of appeal involve questions of mixed law and facts or facts alone. But the leave sought by the appellant was to appear against the decision of the lower court on the ground that the judgment was an interlocutory decision and he was compelled to seek leave within 14 days. Ground 1 challenges the decision of the Court of Appeal to the effect that there are serious disputes in the evidence of the parties, therefore the determination of this ground will involve clear evaluation of evidence in order to fault the resolution of the lower court.

On ground 2 of the Notice of Appeal it was also the contention of the learned senior counsel that the ground questions the alleged determination of the lower court that based on some depositions in the affidavit evidence of the respondents oral evidence was required to do justice, it is therefore clearly issue of fact.

Ground 3 complained of the lower court’s failure to pronounce on questions 5 and 6, this issue was not considered by the trial court and no leave was obtained to raise it before this court. It was further contended that ground 2 of the grounds of appeal does not arise from the judgment of the lower court and submitted that the said ground does not relate to the findings of the lower court. It is to be noted that were a ground of appeal does not relate to the judgment

appealed against the said ground is incompetent and would be struck out. I am fortified by the decision in *Osuji v. Ekeocha* (2009) 6 NWLR (Pt. 116) 81 /122; and *Governor of Akwa-Ibom v. Power Com Nig. Ltd. and Anor* (2004) 6 NWLR (Pt. 868) 202.

On ground 4, it was the contention of the 2 respondent that same is incompetent as there was no particulars to support the ground, the said ground is also vague, he referred to order 8 Rule 2(4) of the Supreme Court Rules 1990. It was his submission that a ground of appeal which is not understood or uncertain is deemed vague. See *Oloruntoba Ojo v. Abdul Raheem* (2009) 13 NWLR {Pt. 1157} 83 at 120; and *Atuyeye v. Ashamu* (1987) 1 NWLR (Pt. 49) 267. The use of word “some” in the ground does not depict any certainty.

Learned senior counsel further contended that ground 4 is merely academic. The ground is premised on the sadness arisen from the ratio of the case, and that the ground 1 was abandoned as no issue was distilled therefrom. The law is trite at the moment that when no issue is distilled from ground of appeal that ground is deemed to have been abandoned. See: *Agbareh v. Mimra* (2008) 2 NWLR (pt. 1071) 378. Learned senior counsel referred to the reliefs being sought before this court particularly relief 2 (A) (B) (C) and (D) and contended that it is a drastic amendment to the prayer in the Originating Summons. It was his contention that a party who seeks a favourable exercise of powers of the Supreme Court under the provisions of Section 22 of the Supreme Court Act is not at liberty to unilaterally amend or alter the relief sought in the case. We were than urged to strike out reliefs 2 (A) (B) (C) and (D). Based on the relief sought in the appeal, there is no life issue in the case, in that:

(1) by relief 1 which seeks the setting aside of the decisions of the two courts below, if granted, remitting for trial the Originating Summons which does not disclose any cause of action against the 2 respondent will be an exercise in futility

(2) reliefs 2(A) (B) (C) and (D) which invites the Supreme Court to involve Section 22 of the Supreme Court Act is an invitation to exercise jurisdiction where none exists, the case of *Shettima v. Goni* (2011) 18 NWLR (PL 12-79) 413.

The court was then urged to strike out the grounds of appeal and the issues distilled from them and to consequently dismiss the appeal.

On ground 1, learned counsel referred to the provisions of Order 8 Rule 2 (3) of the Supreme Court Rules, a notice of appeal shall set forth concisely the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and Order 8 Rule 2 (7) empowers the court to strike out a
 B Notice of Appeal when an appeal is not competent. It was therefore submitted that ground 1 is argumentative and does not arise from the judgment of the court below. He relies on *Anie v. Ugbagbe* (1995) 6 NWLR (Pt. 402) 425 at 451.

C On ground 2 it was also contended that a careful reading of the judgment of the court below will not reveal any segment of the judgment where the lower court held that Exhibit R4 was not disputed by the respondents and that same requires oral evidence to prove due to some dispositions in the affidavit evidence of the re-
 D spondents. He 'therefore contended that a party is not at liberty to invent a subjective impression or conceive his own views of what the court decides, the case of *Saraki v. Kotoye* (1992) 9 NWLR (Pt. 264) 156 at 184 was cited. This court was then urged to strike out grounds 1 and 2 and issue No. 1 distilled from them, and all the argument
 E preferred in support.

On ground 3, it was the learned counsel's submission that the ground is incomplete in that the issue of fair hearing was never raised by the appellant either in his Notice of Appeal or brief of argument at
 F the court below and the issue did not arise for consideration at the lower court. Therefore, the issue did not arise from or in respect of the judgment of the court below being appealed against. This ground is therefore in competent and issue No. 2 formulated from it is consequently not competent.

G On ground 4 it was the counsel's submission that this ground is bereft of particulars of any alleged error on the part of the court below. They were statement or allegation that the Court of Appeal erred in law in deciding that some grounds of appeal of the appellant does (sic) not relate to the decisions of the lower court particularly
 H ground 1 without stating the particulars of the alleged error makes ground 4 vague and therefore incomplete. Counsel referred to the case of *C.B.N. v. Okojie* (2002) 8 NWLR (Pt. 768) 48. He therefore urged this court to strike out the ground and issue No. 3 formulated from it.

The appellant in response filed two reply briefs to the objection of the 2nd and 3 respondents respectively. On the 2nd respondent's objection to the issue of leave to appeal raised by the 2nd respondent the appellant referred to his prayers in the motion paper where he sought leave of the lower court to appeal and submitted that his application was valid. He cited in support of Section 233 (3) of the 1999 Constitution of the Federal Republic of Nigeria as amended; and *Tunji Bonaje v. Moses Adediwura* (1976) 6 SC 143. B

On ground 2, it was the contention of the learned counsel to the appellant that the respondents seemed to have shut their eyes from the decision of the Court of Appeal and the decision of the Federal High Court which the Court of Appeal agreed with, he referred to the finding of the trial court to the effect that there are serious dispute in the case. This finding was affirming by the lower court and it was this that gave rise to ground 2. He therefore contended that ground 2 and 3 relate to the judgment appealed against as directed in the case of *Saraki v. Kotoye* (supra) at 184. It was also his contention that the era of questioning Grounds of Appeal purely on form and not substance is gone in our law, he cited the case of *Susanga v. Onadeko* (2005) 8 NWLR (Pt. 926) 199. C D E

On the issue of jurisdiction, it was the contention of the learned counsel that the 2nd respondent never appealed against the decision of the Federal High Court on the issue of jurisdiction of the court to hear and determine the Originating Summons, it was his contention therefore that the issue of jurisdiction had been decided and there was no appeal against it. F

On the 3rd respondent's objection, the learned counsel submitted that grounds 1, 2 and 4 arose from the judgment of the lower court. He referred to the ruling of the trial court which gave rise to the appeal before the lower court and which that court agreed with. The pronouncement of the lower court in exhibit R4 has made its Exhibit an issue. G

The lower court also held that ground 1 does arise directly from the decision of the trial court and it was this finding that gave rise to ground 4. H

On ground 3, learned counsel referred to its Originating Summons and questions Nos. 3 and 6 where the issue was raised. He cited the case of *Alafan v. Bob* (2010) 17 NWLR (Pt. 1223) 421 and

contended that there are exceptions to the rule the grounds of appeal must derive from the decision been appealed against. Such as:-

- (a) The text of the decision appealed against;
- (b) From the procedure under which the clam was initiated;
- (c) The procedure under which the decision was rendered;
- B (d) Other extrinsic factors such as issue of jurisdiction of a court from which the appeal emanates; and
- (e) From commissions or omissions by the court from which the appeal emanates.

C He therefore urged this court not to allow technicalities to defeat the course of justice and dismiss the objection.

I have carefully set out the submissions of the learned counsel for both the appellant and the 2nd and 3rd respondents on this preliminary objection. Before I proceed to consider the issues raised, I need D to point out that the 1st respondent did not raise any objection and did not proffer any argument on same. Firstly, I wish to consider the issue of the jurisdiction of the trial court raised by the learned counsel to the 2nd respondent. The issue of jurisdiction was raised and decided by the trial court. In its ruling per Auta J, the trial court held, on E page 855 as follows:-

“The 1 issue to consider is that of jurisdiction raised by the 2nd defendant; it is pertinent to note that the power of the Federal High Court to entertain cases are stated in section 251 of the Constitution and Section 81 (iv) of the Electoral Act 2010. Section 251 of the F Constitution “notwithstanding anything to the contrary exhibited in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have jurisdiction to the exclusion of any other court G in civil causes and matters that means that apart from the jurisdiction contained in the Constitution, the National Assembly (NASS) can confer additional powers to entertain matters on the Federal High Court. This is what National Assembly (NASS) did under section 81 (10) of the Electoral Act 2010 (as amended) which is here under H reproduced...

In a nutshell this section gives the Federal High Court the authority to entertain case with regard to any complain where the party did not comply with its own rules or guidelines as alleged in this case. Political cases or election cases are sui generis. A party has the right to

go to the State or Federal High Court in this type of cases regardless of the fact that the defendant is a Federal Agency. It is pertinent also to note that the Independent National Electoral Commission (INEC) the 2nd defendant is the only body charged with the conditions and the supervisions of party primaries.

This is a fundamental finding of the trial court as regard its jurisdiction to hear this case. The 2 respondent did not appeal against this finding to the Court of Appeal neither did he file any application before this court to raise an issue of jurisdiction not raised before the lower court. It is trite, I dare say, that the finding of the court not appealed against remains valid and subsisting. See *Ukiri v. Geco Praula Nig. Ltd.* (2010) 7 SCNJ page 1 at 11; and *Akinfolarin & ors. v. Akinola* (1994) 4 SCNJ (Pt. 1) 30/48-49. B
C

The 2nd respondent cannot challenge such a fundamental finding by way of a preliminary objection. He has to appeal against the finding. In the instant case, where the issue was not taken at the Court of Appeal the proper procedure is for the second respondent to apply for the leave of this court to file a cross appeal out of time and leave to raise the issue of jurisdiction not argued before the lower court. It is for these reasons that I agree with the appellant that the issues as raised are to complete .as you can not challenge the finding in decision of a court by way of preliminary objection. It has to be challenged by way of an appeal properly filed. D
E

On the way and manner the appellant obtained the leave to appeal, it was the 2nd respondents contention that what the appellant obtained was against the decision of the lower court and not on grounds of mixed law and facts or facts. Therefore, since grounds 1, 2 and 4 are grounds of mixed law and facts, they are in competent. The application of the appellant before the lower court which was granted is in the following terms:- F
G

“Leave of this court to appeal against the judgment of this Court of Appeal, Abuja delivered on the 25th of April in April No. CA/A/556/2011.”

Section 233 (3) of the provisions of the 1999 Constitution as amended provides as follows:- H

“Subject to the provisions of subsection (2) of this section an appeal shall lie from the decision of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or Supreme

Court.”

It is my considered view that when an appellant obtained the leave of the Court of Appeal to appeal to the Supreme Court the presumption is that the appeal falls within the exception provided in Section 233 (3) of the 1999 Constitution as amended. There is no requirement in Section 233 (3) that an appellant must specifically state in its motion paper that he was seeking the leave of court because he was appealing on grounds of mixed law and facts or facts. To hold otherwise will amount to stretching the rule of technicality to an extreme extent which will defeat the course of justice. The order for leave to appeal granted by the lower court stands and is valid.

The determination of whether there is leave or not is the solely prerogative of appellate court and not on the perception of the objector. See: First Bank (Nig.) Ltd. P.L.C. v. Tsa Ind. Ltd (2010) 7 SCNJ 384. Turning to the grounds of appeal, I will start considering this from the reverse side. Ground 4 of the Notice of Appeal states as thus:-

“The Court of Appeal erred in deciding that some grounds does (sic) not relate to the decision of the lower court particularly ground one.”

It is clear that this ground lacks any particular. There particular/ as to how the alleged error took place. It is just a general statement without particulars. This is not good enough. In a case with similar ground of appeal like in the case at hand, this court per Wali, JSC (as he then was) held as follows:-

“The 1 ground complained of delivering the judgment by learned trial Judge outside three months period. No particulars were given. As for the 2nd ground that complaint was that the learned trial Judge after convicting the appellant under section 221 (b) of the penal code did not pronounce the sentence of death. Here again no particulars were given. The Court of Appeal was therefore right in describing these two additional grounds as mere statements of general nature, vague and disclosing no reasonable ground of appeal and consequently striking them out.”

Similarly in Nwokoro v. Onuma (1999) 9 SCNJ 63 at 72 Uwaifo, JSC (as he then was) put it succinctly thus:-

“The third ground of appeal states “The Court below erred in law and came to wrong conclusion on the facts of failing to observe

that the plaintiff did not prove the act of trespass as pleaded in their amended statement of claim. No particulars of error were supplied. This ground is therefore incompetent. The issue set down for determination in respect therefore (issue 11) and the argument proffered ought to be discountenanced”

I have no cause to depart from the above decisions of this court. Ground 4 of the grounds of appeal is therefore incomplete. Issue No. 2 distilled from it is hereby struck out and all the arguments proffered on it discountenanced. The appellants ground 3 states:-

“The Court of Appeal erred in law in not pronouncing on the constitutional issue of fair hearing raised by the appellant in reference to question Nos. 5 and 6 in Originating Summons before the lower court.”

The appellant admitted that the issue of fair hearing was not raised before the lower court and neither was the lower court given opportunity to consider as it was an issue before it. However, the appellant cited the case of Akpan v. Bob supra and contended that there is an exemption to the rule that a ground must arise from the decision appealed against, but he has woefully failed to show how he falls into that exemptions or exceptions. I shall not belabour this issue further, it is crystal clear that this ground is not a challenge to any of the findings or decisions of the lower court. To that extent it is incomplete and I will not hesitate to strike it out. Consequently, issue No. 3 distilled from it is struck out and all the argument proffered on it is hereby discountenanced. See Saraki v. Kotoye (1995) 6 NWLR (Pt. 402) 425; Balonwu v. Governor of Anambra State (2009) 12 SCNJ 21.

Ground 2 of the appellant states thus:-

“The Court of Appeal erred in law when it held that Exhibit R4 which is the extract of the meeting of the 1st respondent on 14 day of January, 2011 which was not disputed by the respondents requires oral evidence to prove due to some deposition in the affidavit evidence of the respondents.”

The finding of the lower court which the appellant seeks to challenge with the ground is at variance with the statement of the appellant in this ground. The lower court found as follows:-

“I have seen Exhibit R4 which the appellant says was never disputed or denied by the defendants/respondents in any counter

affidavit. The said document is an extract of the minutes of the National Working Committee of the P.D.P held on 14 January, 2011. The appellant introduced the document to contradict the assertion of the 1st and 3rd respondents that the same National Working Committee of the P.D.P cancelled the Primary Election of
 B *12th January, 2011 and ordered a re-run in Nsukka/Igbo Eze South Federal Constituency. The 1st respondent's exhibit P.D.P 1 and 2 also contradict appellant's Exhibit R4. It is for the reason that the several documents brought in as exhibits in the case do not speak with one*
 C *voice, that the respondents insisted and the trial court agreed that the serious disputes of facts do not warrant the hearing of the case on Originating Summons."*

With respect, can ground two be a challenge to these findings? The answer is definitely in the negative. This ground of appeal does
 D not flow or arise from the judgment of the lower court and it is therefore incomplete. See *Saraki v. Kotoye* (supra). As can be seen and gleaned from the appellant's brief of argument issue No. 1 was distilled from both grounds I and 2. Since ground 2 is incomplete would this virus not also effect or contaminate issue No. 1. The answer could
 E be found in the case of *Ngige v. Obi* (2000) 14 NWLR (Pt. 999) 1 at 165 per R.D. Mohammed, JCA retired when he held as follows:-

"When an issue formulated from incomplete ground of appeal is argued in the brief of argument with those formulated from competent grounds, it is not the duty of the court to extract argument in
 F *respect of the valid grounds from the unlawful ones. It will be a futile exercise to take the grounds which are in complete because all the grounds were argued as one ground."*

This view persuasive as it is got approval in the case of *Korode*
 G *v. Adedekun* (20010 15 NWLR (Pt. 736) 483 when Kalgo, JSC (as he then was) held as follows:-

"The Court of Appeal found that the brief was not in compliance with the provisions of Order 3 Rule 2 (5) of the amended and struck it out as in complete and dismissed the appeal for want of
 H *diligent prosecution. This is mixed grill and I am of the firm view that it is not the businesses of the court to sift the chaff from the grain by performing surgical operation on the appellant's brief to extract argument in respect of the valid ground from the invalid ones, as such an exercise may involve the court in descending into the arena... I*

fully agree with the above view as expressed by the Court of Appeal and find that in the circumstances of this case, it was not wrong for that court to proceed to consider the appellant's brief without calling upon him to address that court Mankuola v. Balogun (1989) 3 NWLR (Pt. 108) 192. This court has on many occasions made it abundantly clear that issues in a brief must relate to the grounds of appeal filed. See: Latunde v. Lajinm (1989) 3 NWLR (Pt. 108) 177; Okpala v. Ibeme (1989) 2 NWLR (Pt. 102) 208 and that no brief of a party in an appeal should be based on grounds proposed by that party unless and until those grounds have been duly filed in a notice of appeal. See:

Ogbechie v. Onochie (No. 2) (1988) 1 NWLR (Pt. 70) 370 at 402.

Therefore I find that the appellant's brief in the Court of Appeal was not in accordance with the rules and was therefore incompetent. See Ebueku v. Amola (1988) 2 NWLR (Pt. 75) 128. It was properly struck out by the Court of Appeal and the appeal properly dismissed for want of diligent prosecution."

I will refrain from descending into the arena by refusing to sift argument on the valid ground from the invalid ground. Consequently, issue No. 1 is also in competent. All the issues distilled by the appellant were based on in competent grounds of appeal and they are accordingly struck out.

I am not unaware of the submission of the appellant where he invited this court to reject technical justice, particularly where no miscarriage of justice would be occasioned. I will haste to point out that the notice and grounds of appeal are the pillars on which an appeal stands, it is the foundation upon which an appeal will definitely collapse. It is not an issue of doing technical justice but to ensure that all the parties to an appeal have a level ground to prosecute an appeal. Where the grounds of appeal are incompetent and any issue distilled from them are incompetent and the court will have no option than to strike them out. I am fortified by the decisions in the case of Calabar East Co-op v. Ikot (1999) 14 NWLR (PL 638) 225 at 246, page 247 per Achike, JSC (blessed memory):-

"There is a long unending chain of authorities which establish that an issue is in competent unless it is predicated on a ground of appeal. The court has no powers to engage itself in consideration of issues which do not arise from a ground of appeal. If an issue is in-

competent it should be struck out. To do otherwise and give consideration to the issues, to embark on a worthless academic pursuit. It is bad advocacy for learned counsel to ignore prudence and his reasonability as an officer of the court, and expressly urge the court to embark on a fruitless academic frolic, all in the perceived interest of justice. I shall not accede to such request. Pronouncements or decisions made on incompetent issues or defective grounds of appeal cannot advance the appellant's case, not even the interest of Justice nor our jurisprudence, one jot, because, at best, such pronouncements are mere obiter dicta. *Stricto sensu*, an appellate court lacks jurisdiction, in the sense of competence, to entertain an appeal which is not fought on valid grounds of appeal. See *Godwin v. C.A.C. (1988) 14 NWLR 14 (Pt 584) 16 S.C. (1998) and Kala v. Potiskum (1998) 8 NWLR (pt. 540) 1 S.C.* In the result, Issue No. 6 is baseless and is bereft of substance; the same is accordingly struck out."

I was privileged to have read in draft the lead judgment of my learned brother Ngwuta, JSC just delivered. I adopt the reasoning and conclusion adumbrated therein as mine. I also dismiss this appeal for lack of merit and affirm the decision of the lower court.

GALADIMA JSC

The main complaint of the Appellant herein as Plaintiff at the trial High Court was that having won the primaries conducted by the 2nd Respondent (INEC) he was unlawfully replaced by the 1st Respondent (his party). In support of his Originating Summons, the appellants filed numerous Affidavits and Further Affidavit and many Exhibits.

The 1st and 2nd Defendants filed counter affidavits, attaching copious Exhibits. The 2nd Defendants in its Memorandum of Conditional Appearance objected to the competence of the action. Written addresses were filed and exchanged by the respective parties.

After careful consideration of the submissions by the parties the trial court found that there were conflicts in the affidavit evidence and therefore the issues were contentious requiring oral evidence to resolve these contentious issues. It held thus:

"The court therefore orders that the Plaintiff file a Statement of Claim and serve the Defendants so that the case can be properly

adjudicated”

Appellant was dissatisfied with the Judgment of the trial court. On appeal, the Court of Appeal affirmed the decision of the trial court. Still unhappy with the decision of the Court of Appeal, he further appealed to this Court on 4 grounds and raising three issues for determination which the 1st Respondent adopted. However, the 2nd Respondent’s Counsel deemed it necessary to give Notice of preliminary objection. The grounds are stated as follows:-

“1. Grounds 1, 2 and 3 of the grounds of Appeal are grounds of mixed law and fact and the requisite leave of Court to raise and argue the grounds was not sought and obtained.

2. Ground 3 of the grounds of appeal does not arise from the judgment appealed against.

3. Ground 4 of the grounds of appeal is vague and contains no particulars of error. Further, it is academic based on the determination of the Court of Appeal which was not appealed, that Ground 1 was abandoned as no issue was distilled therefrom.

4. Reliefs 2(A) (B) (C) and (D) of the reliefs sought is a unilateral amendment of the prayer in the Originating Summons.

5. Based on the reliefs sought in the appeal, there is no life (sic) issue in the case in that:

(i.) By relief 1 which seeks the setting aside of the decisions of the two (2) Courts below, if granted, remitting for trial the Originating Summons which does not disclose any cause of action against the 2nd Respondent, will be an exercise in futility.

(ii) Relief 2(A) (B) (C) and (D) which invites the Supreme Court to invoke Section 22 of the Supreme Court Act is an invitation to exercise jurisdiction where none exists.”

The 2nd Respondent, in the alternative submitted the following two issues for determination of the appeal, as follows:

“1. Was the Court of Appeal correct when it affirmed the decision of the Federal High Court to the effect that from the nature of the allegations of the parties, evidence ought to be adduced in order to effectively determine the dispute between the parties Grounds 1, 2, and 3.

2. Was the Court of Appeal correct when it held that Ground 1 of the grounds of appeal did not arise from the decision of the Federal High Court appealed against. Ground 4”

On his own part the 3rd Respondent set out four grounds of preliminary objection as follows:

“(1) Ground 1 of the Appellant’s grounds of appeal is not only narrative and argumentative but also does not derive from the judgment of the Court below.

B *(2) Ground 2 of the Appellant’s grounds of appeal is incompetent in that the Court below did not hold in its judgment that “Exhibit R4 which is the extract of the meeting of the 1st respondent on the 14th day of January, 2011 which is not disputed by the respondents require oral evidence to prove due to some deposition in the affidavit evidence of the*
C *respondents.*

(3) Ground 3 of the Appellant’s grounds of appeal is incompetent in that the issue of fair hearing was never raised by the Appellant in his Notice of Appeal or brief of argument at the court below and same did not arise for the consideration of the court below.
D

(4) Ground 4 of the Appellant’s grounds of appeal is incompetent in that the court below did not decide that some grounds of appeal of the appellant does (sic) not relate to the decision of the lower court particularly ground one.
E

(5) Ground 5 of the grounds of appeal alleging an error in law did not contain particulars.”

In the alternative the following two issues submitted by the 3rd Respondent for determination read thus:
F

“1. Whether the court below was wrong in affirming the decision of the trial court that the issues raised in the affidavit of parties and the documents exhibited thereto are very contentious and conflicting and therefore cannot be effectively resolved by affidavit evidence.” Refined from Grounds 1, 2 and 3.
G

2. Whether the court below was wrong in striking out Grounds 1 and 3 of the appellant’s grounds of appeal. Refined from Ground 4”

My learned brother in his lead Judgment has quite satisfactorily summarized the issues and submissions by respective learned counsel for the parties. I must first deal with the preliminary objections of the 2nd and 3rd Respondents to the competence of the appeal. They have raised five and 4 grounds of such objections respectively, I have noted that, the 3rd Respondent’s grounds 1, 2 and 4 are subsumed
H

in the 2nd Respondent's 5 grounds. The 5 grounds of the 2nd Respondent will be considered seriatim:

The first ground of the 2nd Respondent's complaint is that Grounds 1, 2, and 3 of the Grounds of Appeal are grounds of mixed law and facts and the leave of court to raise and argue same was not obtained. Learned Senior Counsel for the Appellant, conceded that leave of the court below or this Court as provided by S. 233 (3) of the 1999 Constitution (as amended) was necessary but that he obtained such leave within 14 days of the decision of the Court of Appeal.

To appeal against interlocutory decision on grounds of mixed law and facts the following two conditions must be met:-

(i) Leave to appeal against such interlocutory decision must be met.

(ii) Leave to appeal on grounds other than grounds of law.

The question here is what is the nature of the Appellant's grounds 1-3 of the Grounds of Appeal challenged by the 2nd Respondent. I have read Ground 4 of the motion: neither in the motion nor in the Appellant's 8 paragraph affidavit in support of the motion was the "ground of appeal mentioned." The requirement of leave in S. 233(3) of the Constitution (supra) relates to grounds of law and facts and not to the decision for which leave is sought even, if the decision involves both law and facts. In view of the foregoing the preliminary objection to grounds 1-3 is sustained. Grounds 1, 2 and 3 of Appellants Grounds of Appeal are grounds of mixed law and facts. These are incompetent grounds, having been raised without leave of court. The said grounds are hereby struck out.

The second ground of complaint of the 2nd Respondent is against Ground 2 of the Appellant's ground of Appeal. It is that this ground does not arise from the Judgment appealed against. I have carefully read the ground of appeal and the portion of the Judgment at which it is directed. At page 1228 paragraph 2 Vol. 3 of the Record the court below did not state that oral evidence is required to prove Exhibit R4, but that the 1st Respondent's exhibits PDP1 and 2 contradicted Appellant's Exhibit R4 contrary to the assertion by the counsel that Exhibit R.4 was not disputed as a basis for his ground of appeal. The 2nd and 3rd Respondents have rightly contended that the Appellant's ground 2 of the Ground of Appeal is not derived from

the Judgment of the lower court and the ground is therefore incompetent.

Now, to Ground 4 of the Appellant’s ground of appeal. The appellant complained that:

B *“The Court of Appeal erred in deciding that some grounds of appeal of the appellant did not relate to the decision of the lower court, particularly ground one”.*

The court below concluded at page 1224 Vol. 3 of the Record thus:

C *“From all I have said grounds 1 and 3 of the grounds of appeal have been abandoned as no issue have (sic) been formulated therefore.”*

D Appellant cannot predicate a ground of appeal on a ground he has abandoned. Grounds 1 and 3 having been abandoned, appellant cannot be heard to predicate his ground of appeal on those grounds. Furthermore the 2nd and 3rd Respondents rightly argued that the appellant’s ground 4 is vague and general in terms and contravenes Order 8 Rule 2(4) of the Supreme Court Rules (as amended) 1999. It is noteworthy that 4 Ground of the 2nd Respondent’s objection is that:

“Reliefs 2(A) (B) (C) and (1) of the reliefs sought is a unilateral amendment to the prayer in the originating summons.”

F I have as well perused part 4 of the Appellant’s Notice of Appeal reproduced in the lead Judgment. Also reproduced is the Judgment of the Court, at page 1216 of Vol. 3 of the Record. The decision of the Court of Appeal appealed against by the appellant includes that court’s pronouncement on the reliefs sought by the appellant. It is pronouncement on these reliefs this Court is expected to G examine and to decide on. Let it be noted once more that the 2nd Respondent’s 5(ii) and (ii) ground of objection read thus:

“5. Based on the relief sought in the appeal, there is no life (sic) issue in the case that -

H *(i) By Relief 1 which seeks the setting aside of the decision of the two (2) courts below, if granted, remitting for trial the originating summons which does not disclose any cause of action against the 2nd respondent will be on exercise in futility.*

(ii) Relief 2(A) (B) (C) and (D) which invites the Supreme Court to invoke section 22 of the Supreme Court Act in an invitation to

exercise, where none exists.”

If an appeal is an invitation to an appellate Court for a review of the decision of a lower court, as in the instant case, that task becomes difficult if not impossible, since the Appellants failed to amend his originating summons to incorporate the new set of reliefs numbered 2(A) (B) (C) and (D) in his Notice of Appeal. This Court will not entertain matters not in the record of appeal without amendment. See *NWORAH V. NWABUEZE* (2011) 48 NSCQR 256. In other words this Court cannot grant a relief not sought in the court below and upon which that court did not pronounce since the new relief is not a consequential order.

As for questions 5 and 6 of the originating summons, no answer can easily be provided without the proof of the facts that:

(a) That the 1st Respondent-conducted primaries or valid primaries on 12/1/2011

(b) That the Appellant won the primary election.

Simply put, until it is established that the 1st Respondent conducted a primary election or valid primary election of 12/1/2011 and that the Appellant won the said election it will be clearly premature to answer questions 5 and 6 of the originating summons. These are questions dealing with denial of fair hearing which was not raised before or pronounced upon by the lower court. In view of the foregoing I hold the firm opinion that ground 3 is not only premature, but also incompetent, as it is not derived from the Judgment appealed against.

In sum, the 2nd and 3rd Respondents' Preliminary Objection based on their grounds 1 to 4 and 6 are sustained and ground 5 of the objection, being academic, in the circumstance, is dismissed. In effect, in sustaining these objections, it will be needless embarking on the determination of the appeal.

In the final analysis for my above reasons and the fuller reasons in the lead Judgment of my learned brother NGWUTA, JSC I agree entirely with him that this appeal should be struck out on the preliminary objections raised and argued by the 2nd and 3rd Respondents in their briefs of argument. The Appeal is struck out as it is incompetent. Parties to bear their respective costs.

ALAGOA JSC

This is an appeal against the concurrent findings of the Court of Appeal Abuja Division and the Federal High Court. The Appellant as Plaintiff at the Federal High Court Abuja instituted an action by way of originating summons seeking answers to a number of questions which have already amply been stated in the lead judgment and need no further restatement. The main question however appears to be whether as the duly nominated candidate of the Peoples Democratic Party (PDP) representing Nsukka/Igbo Eze South Federal Constituency in the Primary Elections conducted on the 12th January, 2011, Appellant is not entitled to be issued with nomination forms for the elections scheduled for the month of April, 2011 to the exclusion of any other person. The 1st and 3rd Respondents in their counter affidavits to the deposition of the Appellant's affidavit in support of his originating summons contended that the primaries referred to by the Appellant as conducted on the 12th January, 2011 was inconclusive and fraught with several petitions of irregularities which had made the National Working Committee of the party resolve that the said primaries be repeated. The Appellant, it was said by the Respondents took part in the repeated primaries and lost. The Appellant denied all this. The Teamed trial Judge Auta, J. found that there were claims and counterclaims by the parties not only in their affidavits and counter affidavits but also with respect to documents relied upon by them in support of their respective claims which were not only contradictory but violently hostile to each other and resolved that in view of these contradictions and conflicts in affidavit evidence it would not be appropriate to proceed with this action by originating summons and hearing oral evidence was the better option.

Dissatisfied the Appellant appealed to the Court of Appeal which upheld the position of the learned trial Judge and a further appeal has been lodged before this court. The Appellant filed a Notice of Preliminary objection and I endorse the reasoning of my learned brother in his lead judgment upholding same. It is because of the nature of the claim that it has become necessary to proceed further with the substantive appeal and ask whether for whatever it is worth same could have succeeded had the preliminary objection been over-ruled.

Issue 1 in the 2nd Respondent's Brief of Argument covering Grounds 1, 2 and 3 of the Grounds in the Notice of Appeal which is to be preferred simply asks the question whether the Court of Appeal could have been right in coming to the conclusion as it did that from the nature of the allegations and the conflicting state of affidavit evidence, it would not (sic, delete not) have been better to call oral evidence for which a resort to the ordering of pleadings would be more appropriate than a resort to the procedure of originating summons in the determination of the case. B

In *BARRISTER (MRS.) AMANDA PETERS PAM & ANOR V. NASIRU MOHAMMED & ANOR* (2008) 16 NWLR (PART 1112) 1; (2008) 5-6 SC (Pt. 1) 83 the Supreme Court per Oguntade, JSC said as follows: C

"The procedure of originating summons ought not to be used where the facts are likely to be in dispute." D

Niki Tobi, JSC went on further to say in that case as follows:

"It is not the law that once there is a dispute on facts the matter should be commenced by writ of summons. No that is not the law. The law is that the dispute on facts must be substantial, material, affecting the live issues in the matter. Where disputes are peripheral not material to live issues an action can be sustained by originating summons" (Underlining mine for emphasis). E

See also *THEOPHILUS DOHERTY V. RICHARD DOHERTY* (1968) NMLR 241; *NATIONAL BANK OF NIGERIA V. AYODELE ALAKIJA* (1978) 9 & 10 SC 59. Both the High Court and the Court of Appeal found that there are serious disputes and contentions which cannot be resolved by affidavit evidence for which resort to originating summons procedure would not suffice, and this is a concurrent finding on facts which ought not be disturbed by an appellate court except in special circumstances where such findings are perverse which is not the case here. See *AROWOLO V. IFABIYI* (2002) 4 NWLR (PART 757) 356 where the Supreme Court per Iguh, JSC said as follows: F

"This Court will not interfere with the concurrent judgments or findings of both the trial court and the Court of Appeal on essentially issues of fact except there is established special circumstances such as miscarriage of justice or violation of some principles of law or procedure." G H

See also KALE V. COKER (1982) 12 SC 252 at 271. The proceedings in this case are potentially hostile and resort to originating summons will not suffice. The resultant effect is that were this matter to be heard and determined on the merits the appeal will still fail but same is struck out based on the preliminary objections of the
B 2nd & 3rd Respondents as observed by my brother in the lead judgment. It is for these and the fuller reasons advanced by my brother Nwali Sylvester Ngwuta (JSC) in his lead judgment which I was privileged to read in advance in draft form that I too strike out the appeal
C while making no order as to costs.

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