

**SUPREME COURT OF NIGERIA**  
FRIDAY 14<sup>TH</sup> DECEMBER, 2012. SC. 96/2012  
**CORAM:- I. T. MUHAMMAD, J. A. FABIYI,**  
**M. U. PETER-ODILI, O. ARIWOOLA, K. B. AKA'AH, JJSC**

SENATOR AMANGE NIMI BARIGHA ..... APPELLANT  
AND  
1. PEOPLES DEMOCRATIC PARTY  
2. HON. CLEVER IKISIKPO ..... RESPONDENTS  
3. INDEPENDENT NATIONAL  
ELECTORAL COMMISSION

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COURT PROCESSES - Abuse - Characteristics - Abuse entails departure through improper use - Or perversion of court processes - After having been filed either in same court - Or various courts (H1)

APPEALS - Notice of appeal - Filing - Appeal is deemed to have been brought - When the notice has been filed at registry of Court of Appeal - Or leave to appeal has been granted (H2)

SUPREME COURT - Appeals - Filing - Appeal is said to be entered in the court - When record of appeal has been transmitted to it - And entered on the cause list (H3)

APPEALS - Notice of appeal - Mere filing - Effect - Mere filing of a notice of appeal without more - Does not constitute an appeal (H4)

APPEALS - Objection - Motion - Objection can be taken at anytime during pendency of appeal before judgment - But party who failed to object on time - Is deemed to have accepted the state of thing as it is (H5)

JUDGMENTS - Conclusion - Precision - Conclusion of judgment must always be very cogent and unambiguous - Capable of easy digestion and execution (H6)

APPEALS - Judgment - Setting aside - Application - By O. 7 r. 12 Court of Appeal Rules - The court rightly entertained the application

- For good cause (H7)

FAIR HEARING - Breach - Allegation of - Appellant by reason of service having been validly effected on him - Cannot be heard to complain that he was not given fair hearing (H8)

### **FACTS**

Plaintiff, a registered member of 1<sup>st</sup> defendant expressed his interest to contest for the seat of Bayelsa East Senatorial District for the 2011 election. Plaintiff alleged that he was validly elected at the primary election conducted on the 7<sup>th</sup> January 2011 at Bayelsa East Senatorial District Headquarters. Plaintiff further alleged that 1<sup>st</sup> defendant nevertheless conducted yet another primary election at Sports Complex Yenogoa Bayelsa State. Plaintiff therefore protested against the latest step of 1<sup>st</sup> defendant. He further averred that despite his protest, 1<sup>st</sup> defendant wanted to forward the name of 2<sup>nd</sup> defendant (who never won any primary election) to 3<sup>rd</sup> defendant as the candidate for the said Senatorial district. Consequently, plaintiff filed originating summons at the Federal High Court Abuja, asking inter alia for the following reliefs- a declaration that the primary election held at the Sports Complex is null and void and declaration that the primary election held at Bayelsa East Senatorial District Headquarters (which produced plaintiff as the winner) is the authentic and subsisting election for the said Senatorial district.

At the end of hearing, the learned trial Judge dismissed plaintiff's originating summons for lack of merit. Dissatisfied, plaintiff appealed to the Court of Appeal Abuja. The court allowed the appeal in part and set aside the trial court's judgment. Aggrieved, 2<sup>nd</sup> defendant filed appeal in Supreme Court. He also filed motion on notice at the Court of Appeal seeking to set aside the judgment of the court on the ground that the court erroneously relied on section 87(9) of Electoral Act 2010 (as amended) having been deleted from the said Act. On his part, plaintiff filed counter-affidavit to the motion for setting aside the judgment of Court of Appeal. The court heard the applications and eventually set aside some aspects of its judgment. Not satisfied, plaintiff appealed to Supreme Court contending that he was not given an opportunity to be heard wherein the judgment of the Court of Appeal was set aside.

# **HELD** (Unanimously dismissing the appeal per **MOHAMMAD JSC**)

## *COURT PROCESSES - Abuse - Characteristics*

**1. I think I should deal first with the issue of abuse of process of court. Where there is an allegation of abuse of process of court, it entails a departure through unreasonable, immoderate, improper use or perversion of court processes after having been filed either in the same court or in various courts. In this appeal, it is not in dispute that after judgment was delivered on 22/11/11 by the court below, the 2<sup>nd</sup> respondent filed a Notice of Appeal against the said judgment. He again, thereafter filed an application for setting aside that judgment. This suggests the co-existence of two court processes contemporaneously, both aiming at the same thing. This ordinary, constitutes an abuse of the process of court. No court or tribunal worth that name should allow its processes to be abused by litigants.** (p. 4240 G)

## *Notice of appeal - Filing*

**2. An appeal is filed or brought as soon as the notice of appeal is filed at the court below/trial court as the case may be. This means that an appeal is deemed to have been brought when the notice of appeal has been filed at the registry of the court below or leave to appeal has been granted and before this court has become seised of the whole proceedings. At this stage, both this court and the court below have concurrent jurisdiction to deal with interlocutory applications.** (p. 4241 D)

## *SUPREME COURT - Appeals - Filing*

**3. An appeal is said to be entered in this court, on the other hand, when the record of appeal has been transmitted to this court and entered on the cause list. It is at this point in time when the court below will cease to have jurisdiction to hear any application. After an appeal has been entered, all other**

**applications can only be made to this court though applications may be filed in the court below for proper transmission to this court. This is because once this court is seised of the appeal, it has the sole jurisdiction to deal with the matter, interlocutory or otherwise.** (p. 4241 D)

B

*Notice of appeal - Mere filing - Effect*

**4. In the appeal on hand, although the 2<sup>nd</sup> respondent did not come out categorically to withdraw or abandon the Notice of Appeal he filed on the 7<sup>th</sup> of December, 2011, yet he did not get the record in respect thereof transmitted to this court up to the date when he filed his motion on notice seeking to set aside the Ruling of the court below of 3/1/12. Yet, he did not inform the court below (in open court) that he still had that Notice of Appeal pending. Further, none of the counsel including the learned SAN for the appellant, drew the court below's attention on the pending notice of appeal. In any event, although pending, the mere filing of a Notice of Appeal without more, does not, in my view, constitute an appeal in the real sense of the word.** (p. 4242 A)

E

*APPEALS - Objection - Motion*

**5. Thus, if same party by whatever guise files another process which is capable of determining the life span of the pending process, and same was not objected to timeously, the court may go ahead to hear the process put in preference by the party prosecuting it. That also means that he no longer intends to pursue the pending matter which must be deemed abandoned and as he has no legal right to pursue it any further in view of the new matter (motion) filed in preference as that would tantamount to abuse of court process. What is even surprising is that the appellant who is now objecting by way of abuse of process of court did not object when the motion was to be taken by the court below. The settled law is that the objection can be taken at any time during the pendency of the appeal before judgment.**

F

G

H

**A party who fails to raise the objection on time will be held to have accepted the state of things as it is.**

***It is my view that the court below was right in assuming jurisdiction to set aside its judgment of 22/11/11 which it found to be a nullity.*** (p. 4242 D)

*JUDGMENTS - Conclusion - Precision*

**6. Before I come to my conclusion on this issue, I should observe some amount of imprecision from the concluding part of the court below's judgment of 22/11/11. It blew both hot and cold. In one breath it allowed the appeal in part, though without specifying which part of the judgment was allowed and which part was dismissed. Although the judgment, generally, is lucid but it gave a conflicting conclusion capable of sending confusing signals to ail the parties or others who may come across it. Conclusion of a judgment must always be very cogent, clear, specific and unambiguous, capable of easy digestion and execution.** (p. 4245 E)

*Judgment - Setting aside - Application*

**7. Other points which were raised by the appellant in challenge of the jurisdiction of the court below, such as the number of days allowed within which to file a motion for the setting aside of a decision and that appellant was not given fair hearing when the motion was heard, in my view, are just to beat around the bush. They are games of chances. I say so because the Rules of this court are very clear that such longer period within which to file such an application can be permitted by the court for good cause. The court below entertained the application, even though aware that the motion on Notice was filed outside the ten days period. This is a tacit approval of the extension of the time within which to file such an application as conferred upon the court by Order 7 Rule 12 of the court below's Rules, 2011 which states:**

***"An application to set aside any judgment or ruling shall not be brought unless it filed within ten days from the date of delivery of such judgment, or ruling or such longer period as the court may allow for good cause."*** (Underline for emphasis)

**Again, no objection was raised by the appellant at the**

**said hearing. In view of what the Rule has provided, it is my view that the court below was right in entertaining the application for setting aside the judgment of 22/11/11.** (p. 4251 C)

*FAIR HEARING - Breach - Allegation of*

**B 8. On the issue of no fair hearing was granted to the appellant (as 2<sup>nd</sup> respondent at the court below), I do not think I can speak more than the record of appeal. On the day of hearing of that application, it is recorded as follows:**

**C “Appearance:  
Dr. J. O. Olatoke with A. O. Popoola for the appellant.  
A. O. Ajana for the 1<sup>st</sup> respondent.  
Adeola Adedipe for the 3<sup>rd</sup> respondent.  
Registrar: The 2<sup>nd</sup> respondent was served on 30/12/2011.”**

**D This shows that neither the appellant nor his counsel was in court on that date though there was service on the appellant as 2<sup>nd</sup> respondent. We are bound by the record of appeal placed before us. The appellant by the reason of service having been validly effected on him cannot be heard to  
E complain that he was not given a (fair) hearing. Who, or what stopped him from making appearance on the date fixed for hearing of the application? Who is to blame? Answers to these questions are best known to the appellant. I do not think it is  
F charitable to lay blames on the court below for doing its own statutory assignment.** (p. 4251 H)

## NOTABLE POINT OF INTEREST

### MUHAMMAD JSC

**G 1. Court of Appeal divisions are for administrative convenience**  
Thus, a Division or Divisions of the Court of Appeal as well as panels constituted by the President of the court or a presiding Justice of a Division of the court are only created as a matter of administrative convenience in order to facilitate a smooth, orderly, effective and  
H coordinated running of the court’s activities. (p. 4248 B)

### REPRESENTATION

Dr. Alex Izinyon, SAN, OFR, for the appellant with Aliyu Saiki, Esq.,

F. O. Izinyon, Esq., E. Oghojafor, Esq., O. Ibori (Miss); O. Fagbemi Esq., D. M. Owoade (Miss) Chief A. O. Ajana for the 1<sup>st</sup> respondent with M. Kilani (Miss)

Ademola Bakre for the 2<sup>nd</sup> respondent with A. T. Soremi; O. S. Omotosho, S. F. Soyemi (Miss)

Ahmed Raji (SAN), for the 3<sup>rd</sup> respondent with Zekeri Garuba, B Oluwatoyi Dunsaro (Miss)

### **CASES REFERRED TO**

Ejezie v. Anuwa (2008) All FWLR (Pt. 422) 1005

Olusanya v. Olusanya (1993) 3 SC 41

Okoye v. Okoronkwo (2009) 6 NWLR (Pt. 1136) 130

FBN v. Isa Ind. Ltd. (2010) 15 NWLR (Pt. 1216) 247

Ogundoyin v. Adeyemi (2001) 13 NWLR (Pt. 730) 403

UBA Ltd v. Achoru (1990) 6 NWLR (Pt. 156) 254

Uwagba v. FRN (2009) 15 NWLR (Pt. 1163) 91

Duke v. Akpabuyo L. G. (2005) 19 NWLR (Pt. 959) 130

Bello v. INEC (2010) 8 NWLR (Pt. 1196) 342

Galadima v. Tambai (2000) 11 NWLR (Pt. 677) 1

Saraki v. Kotoye (1992) 9 NWLR (Pt. 254) 156

CBN v. Ahmed (2001) 11 NWLR (Pt. 724) 369

Dingyadi v. INEC (2010) 18 NWLR (Pt. 1224) 154

Ogojeifo v. Ogojeifo (2006) 3 NWLR (Pt. 966) 205

Shodeinde v. Rgd. Trustees of Ahmadiyya Movement (2001) NWLR (Pt. 58) 1065

### **STATUTES & RULES REFERRED TO**

Electoral Act 2010 (as amended), s. 87(9)

Constitution of Federal Republic of Nigeria 1999, ss. 36, 237(1), G 247(1)

Court of Appeal Rules 2011, O. 7 r. 12

### **LEAD JUDGMENT BY MUHAMMAD JSC**

The appellant herein, as plaintiff at the Federal High Court, H Abuja (trial court) filed originating summons asking for the following reliefs against the respondents who were the defendants at the trial court:-

1. A Declaration that the National Assembly primary con-

ducted on 7<sup>th</sup> January, 2011 for the Bayelsa East Senatorial District at Sport Complex, Yenogoa, Bayelsa State and any result therein are null and void, valid and of no effect whatsoever.

B 2. *A Declaration that the National Assembly primary conducted on 7<sup>th</sup> January, 2011 for Bayelsa East Senatorial District at Bayelsa East Senatorial District Headquarters of Twon Brass which produced the plaintiff as the winner is the authentic, valid, legal and subsisting primary for the Bayelsa East Senatorial District of Bayelsa State for the 2011 National Assembly election.*

C 3. *A Declaration that any result/name or winner of the Bayelsa East Senatorial District of Bayelsa State submitted by the 1<sup>st</sup> Defendant to 3<sup>d</sup> Defendant other than the result/winner at the National Assembly primaries for Bayelsa East conducted at Bayelsa East Senatorial District at Twon Brass is null and void.*

D 4. *An Order of injunction restraining the 3<sup>d</sup> Defendant from accepting, acting upon or taking any step or further step or doing anything whatsoever in giving effect to any name or result from the 1<sup>st</sup> defendant as winner of the Bayelsa East Senatorial District of Bayelsa State other than the name of the plaintiff.*

E 5. *An Order declaring the plaintiff as the winner and duly elected candidate for the Bayelsa East Senatorial District of Bayelsa State for the 2011 National Assembly election on the platform of the 1<sup>st</sup> defendant.*

F *IN THE ALTERNATIVE*

6. *An Order by this Honourable Court ordering a fresh primary for Bayelsa East Senatorial District in accordance with the 1<sup>st</sup> Defendant's Constitution and 2010 Electoral Guidelines for primaries under the observation of the 3<sup>d</sup> defendant.*

G 7. *An Order of injunction restraining the 2nd defendant from parading himself, holding himself out or presenting himself or doing anything of like manner whatsoever before the 3rd defendant or taking any step whatsoever before the 3<sup>d</sup> defendant as the 1<sup>st</sup> defendant's candidate for Bayelsa East Senatorial District/Constituency in Bayelsa State for the 2011 National Assembly Election.*

H In support of the Originating Summons, the plaintiff filed an affidavit of 23 paragraphs with some annexure and a written address. From the totality of these documents one can glean the salient facts giving rise to this action/appeal, as follows: The plaintiff was a



Senator of the Federal Republic of Nigeria. He is a registered member of the 1<sup>st</sup> defendant who expressed his interest to contest for the seat of Bayelsa East Senatorial District of Bayelsa State for the 2011 elections. That the 1<sup>st</sup> defendant (a political party - PDP) has a party Constitution, 2009 (as amended) and Election Guidelines for the conduct of primaries for the 2011 election and that the 1<sup>st</sup> defendant is bound by the Constitution and the Guidelines aforesaid. That the 1<sup>st</sup> defendant accepted and fixed the primary for National Assembly for Bayelsa on the 7<sup>th</sup> of January, 2011, instead of the initial dates of 5<sup>th</sup> and 6<sup>th</sup> of January, 2011. That it was within the knowledge of plaintiff, as a fact that by the provision of the Constitution and the party guidelines relating to the conduct of the National Assembly (Senate) primaries must be held at the Senatorial Constituency, or at worst, Headquarters of all the three Local Government Areas that make up plaintiffs' Senatorial District. The senatorial District Headquarters of Bayelsa East Senatorial Constituency of Bayelsa State is TWON BRASS.

The plaintiff averred further that the 7<sup>th</sup> day of January, 2011, was fixed for the National Assembly Party Primaries for Bayelsa East Senatorial Seat, by the 1<sup>st</sup> defendant. That on that date, 650 persons made of Ward Executive, Local Government Area Exco; State Executive and ad hoc delegates as stipulated by the Constitution and Party Guidelines, converged at NEMBE Headquarters of Bayelsa East Senatorial District for the said election. That when all the delegates waited for the Electoral Committee and materials from 1<sup>st</sup> defendant till 4:00 pm to no avail, the delegates proceeded with the said party primary and the plaintiff won with 525 votes.

The plaintiff averred further that it was on the following day, i.e. 8<sup>th</sup> of January, 2011, that he heard that a parallel primary election for the same Bayelsa East Senatorial District was held at the Sports Complex, Yenogoa, Bayelsa State and that from his inquiry, he was given a report by the Electoral Committee of the Officer of 1<sup>st</sup> defendant sent to conduct the said election. Plaintiff said he then protested and wrote to 1<sup>st</sup> defendant. He apprehended the fear that the State Government of Bayelsa high jacked the said primary for the said constituency and returned a sham election. That the sport complex Yenogoa Capital of Bayelsa State was not one of the Constituencies of Bayelsa East Senatorial District, nor was of any of the Local Gov-

ernment Area as Headquarters.

The plaintiff averred that despite his protest, the 1<sup>st</sup> defendant wanted to forward the name of the 2<sup>nd</sup> defendant who never won any primaries to the 3<sup>rd</sup> defendant as the candidate for the said Senatorial District. The plaintiff believes that it is the law that once a name  
 B has been submitted by a Political Party to the 3<sup>rd</sup> defendant that name cannot be substituted except where that candidate withdraws or dies. It is his further belief that the 1<sup>st</sup> defendant is bound to obey the Constitution of the Federation and Guidelines of the Party. That was  
 C why he, had to approach the Federal High Court for the protection of his legally recognized interest.

Each of the defendants filed a number of relevant documents including, inter alia: conditional memoranda of appearance; counter-affidavits; further counter-affidavits; written addresses; Notice of Preliminary Objection etc. Some of these processes were withdrawn by  
 D the respective applicants and were struck out by the trial court.

After hearing the parties in oral adumbration of their written submissions: the learned trial judge; KAFARATI, J; delivered his judgment on the 16<sup>th</sup> day of; March, 2011, wherein he dismissed the  
 E plaintiffs Originating Summons for lack of merit.

Dissatisfied with the trial court's decision, the plaintiff appeal to the Abuja Division of the Court of Appeal (court below). After hearing, the court below allowed the appeal in part and set aside the trial  
 F court's judgment. Dissatisfied with the decision of the court below, the 2<sup>nd</sup> defendant/ respondent at the two courts below, respectively, filed his Notice of Appeal containing eight (8) grounds of appeal to this court. He again, in a subsequent step, filed a motion on Notice to set aside that aspect of the Judgment delivered by the court below  
 G on 22/11/11, that the court below erroneously relied on section 8/ (9) of the Electoral Act, 2010 (as amended) having been deleted from the said Act.

In a swift reaction to the motion filed at the court below as reflected above, the plaintiff/appellant and 1<sup>st</sup> respondent to that  
 H motion, filed a Respondent Notice of Intention to affirm the judgment delivered on 22/11/11 on grounds that in the absence of section 87(9) of the Electoral Act, 2010, relied upon by the court below to sustain the judgment delivered on 22/11/11. He also filed a counter-affidavit to the motion for the setting aside of the said judgment and

to serve also as counter- affidavit against the motion for leave to appeal on mixed law and facts.

On the 3<sup>rd</sup> of January, 2012, the court below heard the motion on notice to set aside that aspect of its judgment as aforesaid. The plaintiff/1<sup>st</sup> respondent/appellant alleged that the motion was heard by the court below without affording him the opportunity of being heard wherein the judgment of the court below of 22/11/11 was set aside by the same court. Thus, being motion for setting aside as aforesaid, the plaintiff/appellant/1<sup>st</sup> respondent appealed to this court on ten (10) grounds of appeal vide his Amended Notice of Appeal.

The parties complied with the Rules of this court by filing and exchanging of briefs of argument. Learned counsel for the appellant, Dr. Izinyon, SAN, in his amended brief of argument set out six (6) issues for determination. The issues are as follows:

1. *“Whether the court below was right to have set aside the whole judgment delivered on the 22<sup>nd</sup> of November, 2011 contrary to the 2<sup>nd</sup> respondent’s prayer on his motion on notice and when there were other grounds sufficient to sustain the said judgment. (Encompassing grounds 1 and 9 of the Notice of Appeal).*

2. *Whether the learned Justices of the Court of Appeal were not wrong to have assumed jurisdiction over the said 2<sup>nd</sup> Respondent’s Motion on Notice which was an abuse of court process. (Encompassing grounds 2, 3 and 8 the Notice of Appeal)*

3. *Whether the ruling delivered by the court below on 3<sup>rd</sup> January, 2012 setting aside of judgment of the court below delivered on 22<sup>nd</sup> November, 2011 is not a nullity. (Encompassing grounds 4 and 6 of the Notice of Appeal)*

4. *Whether the court below can completely constitute another panel to sit and set aside its earlier judgment delivered by another panel on the 22<sup>nd</sup> November, 2011. (Encompassing ground 5 of the Notice of Appeal)*

5. *Whether the court below was right to have heard and determined the 2<sup>nd</sup> respondent’s motion on Notice without affording the appellant the opportunity of being heard on his counter-affidavit to section 36 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) (Encompassing ground 7 of the Notice of Appeal).*

6. *Whether or not the court below lacks the jurisdiction to entertain the 2<sup>nd</sup> respondent's motion to set aside the judgment of 22/11/11 contrary to the provision of Order 7 Rule 12 of the Court of Appeal Rules, 2011 (Encompassing ground 10 of the additional ground of appeal)."*

B The 1<sup>st</sup> respondent represented by Chief Ajana, firstly, raised a Preliminary Objection that the appeal is incompetent and that this court lacks jurisdiction to entertain it. Secondly, the learned counsel formulated one issue for the determination of the appeal which reads, viz:

C *"Whether given the undisputed facts of the motion leading to the ruling appealed against the court below was in any error in assuming jurisdiction to entertain the application and granting same as it did".*

D In his amended 2<sup>nd</sup> respondent's brief of argument, Mr. Bakre of counsel, set out a Notice of Preliminary Objection as to the competence of the appellant's Notice of Appeal. He then set out the following issues for the determination of jurisdiction to entertain the application and of the appeal:

E 1. *"Whether in view of the gravity of its reliance on a nonexisting Section 87 (9) of the Electoral Act 2010 (as amended) the court below was right when it assumed jurisdiction to set aside its entire decision of 22<sup>nd</sup> November, 2011. (Grounds 1 and 9).*

F 2. *Whether the pendency of the 2<sup>nd</sup> respondent's motions for leave to appeal and notice of appeal at the time he filed his motion to set aside the judgment of 22<sup>nd</sup> November, 2011 rendered the motion for setting aside an abuse of court process to rob the court below of jurisdiction when it entertained and granted the said motion for setting aside. (Grounds 2, 3 and 8 of the Notice of Appeal)*

G 3. *Whether having regard to the nature of the 2<sup>nd</sup> respondent's application for setting aside, the Ruling of the court below delivered on 3/1/2012 can be said to be a nullity merely because of its shortness, delivery after judgment had been delivered on 22/11/11 and the fact that it was delivered before the 2<sup>nd</sup> respondent withdrew his motion for leave to appeal. (Grounds 4 and 6 of the Notice of Appeal)*

H 4. *Whether the difference in the composition of the panel that delivered the judgment of 22<sup>nd</sup> November, 2011 and the one*

which set it aside on 3<sup>d</sup> January, 2012, was fatal. (Ground 5 of the Notice of Appeal)

5. Whether in view of the fact that the appellant was served with hearing notice against the 3<sup>d</sup> of January, 2012 but failed to avail himself of the opportunity given to him by the court below, he can be heard to complain of lack of fair hearing. (Ground 7 of the Notice of Appeal) B

6. Whether the court below did not properly set aside the null judgment delivered on 22/11/11 (Ground 10). ”

In its brief of argument, the 3<sup>rd</sup> respondent, represented by Mr. Raji, (SAN), adopted appellant’s issues (4) and (5) which he, for the avoidance of doubt, re-numbered and set out as follows: C

1. “Whether the court below can competently constitute another panel to sit and set aside its earlier judgment delivered by another panel on the 22<sup>nd</sup> November, 2011. D

2. Whether the court below was right to have heard and determined the 2<sup>nd</sup> respondent’s motion on Notice without affording the appellant the opportunity of being heard on his counter-affidavit contrary to Section 36 of the 1999 Constitution of the Federal Republic of Nigeria. “ E

Now, both the 1<sup>st</sup> and the 2<sup>nd</sup> respondents filed Notices of Preliminary Objection to the appeal. Each of the counsel for the respective parties argued extensively his Notice of Preliminary Objection in his brief of argument. I set out these Notices of Preliminary Objection herein below as follows: F

The 1<sup>st</sup> respondent’s Notice of Preliminary Objection reads:

“TAKE NOTICE that before or at the hearing of this appeal, the 1<sup>st</sup> respondent will raise and rely on preliminary objection on point of law to urge this Honourable Court to: G

Strike out the entire appeal on the ground that same is incompetent and that the court lacks jurisdiction to entertain it.

#### **PARTICULARS OF OBJECTION**

1. The central issue to be resolved in the Originating process before the Trial Court is who between the appellant and the 2<sup>nd</sup> respondent is the valid candidate of the 1<sup>st</sup> respondent for Bayelsa East Senatorial District. H

2. To resolve the above issue, the processes filed before the trial court upon which this appeal is based invites the court to deter-

*mine which of the two primary elections allegedly conducted by the 1<sup>st</sup> respondent in Nembe and Yenagoa on 7/1/2011 is valid or produced the actual candidate of the 1<sup>st</sup> respondent.*

3. *The appellant did not participate at the primary election that produced the 2<sup>nd</sup> respondent in order to have locus to bring this action.*

4. *This Honourable court does not have jurisdiction to resolve a dispute as to which of the two primary elections of a political party produced its authentic candidate as it remains a domestic affairs of the 1<sup>st</sup> Respondent as resolved by this court in Lado v. CPC (2012) AFWLR (Pt.607) page 598 and PDP v. Sylva & Ors. SC.28/2012 (unreported).*

*TAKE FURTHER NOTICE that at the hearing of this objection, the applicant will make use of and rely on processes filed and exchanged in this matter, including the record of appeal."*

The 2<sup>nd</sup> respondent's Objection reads:

*"TAKE NOTICE that the 2<sup>nd</sup> respondent herein shall at the hearing of this appeal raise the following preliminary objection, to wit, that:*

1. *The court lacks jurisdiction to entertain this matter being exclusively the internal affairs of the 1<sup>st</sup> respondent.*

2. *Appellant's Notice of Appeal and his earlier respondent's Notice are incompetent.*

*Grounds in Support of the Objection*

1. *The grouse of the appellant is basically that he is the person that should have been presented by the 1<sup>st</sup> respondent to be the candidate at the election.*

2. *The appellant contends that between the two primary elections allegedly held to produce the candidate of the party at the senatorial election, the primary election that produced him should be validated and the other nullified.*

3. *The applicant did not participate at the primary election that produced the 2<sup>nd</sup> Respondent in order to have the locus to bring this action.*

4. *From the Originating Summons and the affidavit in support it is clear that the Federal High Court had no jurisdiction to have heard the main matter.*

5. *The grounds of appeal, more particularly grounds 2, 4, 8*

and 9 thereof are at best of mixed law and fact, yet no leave was sought to file the appeal.

6. The appeal seeks the setting aside of the Ruling of 3<sup>d</sup> January, 2012 and grant of all his reliefs in the trial court when there is no appeal by the appellant against the 22/11/11 judgment of the court below which merely allowed the appellant's appeal in part. B

7. Respondent's Notice is not cognizable under the Supreme Court Act and Rules of Court."

I have taken a hard look at the two Notices of the Objections; the grounds/particulars upon which they are premised and the submissions by the learned counsel for the respective parties, it appears to me that the objections are more or less a direct challenge against the whole processes filed before the trial court and the decision delivered by the trial court on the 2<sup>nd</sup> day of March, 2011 which was appealed to the court below. The court below delivered its decision D on same on the 22<sup>nd</sup> day of November, 2011 allowing the appeal in part. Although there is a Notice of Appeal which contains eight grounds of appeal, filed on 7/12/11, that is not the appeal under consideration now. The appeal under consideration is interlocutory as a result of the ruling of the court *below* on a motion which was dated and filed on the 14/12/11 seeking for an order setting aside the aspect of the judgment of the court below delivered on 22/11/11. Since the appeal filed against the said judgment of the court below is still pending, it will not be proper for this court to make any pronouncement E on the issues raised in the preliminary objections as they relate to those matters dealt with by the court below in its judgment of 22/11/11. Accordingly, the Notices of Preliminary Objections by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and all submissions made by the learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the learned SAN for the appellant G have, to my mind, no material relevance to the appeal on hand. They are hereby struck out and all arguments in respect thereof are discountenanced. F

I shall now consider the appeal and in doing so, I prefer to adopt the lone issue formulated by the learned counsel for the 1<sup>st</sup> H respondent. At the risk of repetition, the issue reads:

*"Whether giving the undisputed facts of the motion leading to the ruling appealed against the court below was in error in assuming jurisdiction to entertain the application and grant same as it did "*

My Lords, this issue premised on jurisdiction is comprehensive enough to take care of all other issues set out by the appellant and the other respondents in their various briefs of argument.

My spring board is the 2<sup>nd</sup> respondent's Motion of Notice. The learned SAN for the appellant argued that the 2<sup>nd</sup> respondent's motion on Notice did not seek any reliefs or prayer as to the nullification of the entire judgment of 22/11/11 as the court below did, thereby making a different case for the parties. Further, there were other grounds sufficient to sustain the said judgment. The cases of Ejezie v. Anuwa (2008) All FWLR (Pt.422) 1005 at 1049 - D-E; Olusanya v. Olusanya (1993) 3 SC 41, among others, were cited in support. The court below, it is submitted, was in error to have granted the relief not sought by the 2<sup>nd</sup> respondent in his motion on notice. Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, both submitted that the effect or target of the setting aside order of the court below is to remove life out of the judgment (of 22/11/11) and no part of it remains after the setting aside and no utility or value stands in favour of any of the parties. The court below, did not grant more than what the 2<sup>nd</sup> respondent asked for in view of the prayer sought in the main in the said motion.

On section 87(9) of the Electoral Act, 2010 (as amended), the learned SAN for the appellant submitted that in the absence of the section having been deleted and erroneously relied upon by the court below, there were other provision of the Electoral Act, the party's guideline for primary election 2010 to sustain the judgment of 22/11/11. It is the submission of the learned counsel for the respective respondents that as the judgment of the 22/11/11 was predicated on the ground that the court below delivered its judgment without jurisdiction as it was founded on a non-existing law s. 87(9) of the Electoral Act, 2010 (as amended), the court below had no choice than to treat its judgment a nullity.

On the issue of a standard form which a judgment/ruling of a court should assume, the learned SAN for the appellant argued that the Ruling of the court below on 3/1/12 is a nullity as it is devoid of such standard and as it did not demonstrate in full a dispassionate consideration of all the issues raised. It was contended for the 1<sup>st</sup> and 2<sup>nd</sup> respondents through their respective counsel that judgment writing is a question of style. There is no standard or format for writing a



judgment. The case of Okoye v. Okoronkwo (2009) 6 NWLR (Pt.1136) 130 was cited.

The learned senior counsel for the appellant argued on the flat form of abuse of process of court that the filing of the motion on notice by the 2<sup>nd</sup> respondent after having earlier filed a Notice of Appeal constitutes abuse of court process. Learned counsel for the 1<sup>st</sup> respondent argued that filing a Notice of Appeal without more does not constitute an appeal in the real sense of the word. The appellant must have taken steps after the Notice of Appeal towards prosecuting the appeal by settling the record, compiling the record and transmitting same. In this case, the allegation of abuse of court process is not sustainable.

Learned counsel for the 2<sup>nd</sup> respondent submitted that the appeal filed was inchoate and can only translate to or could be viewed as an appeal properly so called if the 2<sup>nd</sup> respondent seeks and obtains leave of the court below or that of this court, otherwise he had no appeal. It is thus wrong to say there was a pending appeal at the time the 2<sup>nd</sup> respondent applied for the setting aside of the judgment of 22/11/11 via his motion of 14/12/11 and no abuse of court process was committed.

Learned SAN for the appellant challenged the composition of the panel that delivered the Ruling of 3/1/12 set-up by Acting President of the court below, that it is a nullity as he cannot competently constitute another panel to sit and set aside the earlier judgment delivered by another panel on 22/11/11. The learned SAN argued further, that where a court of law wants to set aside its earlier Judgment/Ruling, it is only that same court or panel, except for reasons of death or incapacitation that delivered the judgment/Ruling that can set it aside. Otherwise, it will be unconstitutional illegal and abuse of office. He referred to the case of FBN v. ISA Ind. Ltd. (2010) 15 NWLR (Pt.1216) 247 at 305 - 306-H-B.

Learned counsel for the respective respondents submit, in summary, that section 247(1) of the 1999 Constitution (as amended) has made provision for one Court of appeal, its jurisdiction is to be exercised by three Justices sitting. It was the same court which delivered the judgment that exercised jurisdiction to set the same aside and that the court below has inherent power to set aside its null judgment.

The learned SAN for the appellant contended that the court below failed to hear the appellant on the 2<sup>nd</sup> respondent's motion to set aside the judgment of 22/11/11 which amounts to infringement on the appellants right of fair hearing. He cited and relied on the cases of *Ogundoyin v. Adeyemi* (2001) 13 NWLR (Pt.730) 403; *UBA Ltd. v. Achoru* (1990) 6 NWLR (Pt.156) 254, among others. The absence of principles of fair hearing vitiates the proceedings however well conducted. The appellant should be allowed to be heard on his counter-affidavit to the motion on Notice to set aside aspect of the judgment delivered on 22/11/11. It was argued on behalf of all the respondents that from the facts of the case, there was evidence of service of the said Motion on Notice and hearing notice on the appellant. The appellant filed a counter-affidavit against the said motion and same was considered by the court below before delivering its ruling of 3/1 /12. The appellant, it is argued, cannot be said to have been denied fair hearing by the court below. Reliance was placed on the Record of Proceedings on pages 1031 to 1035 of Vol.2 of the Record of Appeal. The court below was in order when it set aside its judgment of 22/11/11.

The last but not the least of the submissions made by the learned counsel for the respective parties is on the effect and application of Order 7, Rule 12 of the court of Appeal which provides that ban application for setting aside any judgment or ruling is to be brought within ten (10) days from the date of its delivery. The learned SAN for the appellant submitted that the court below lacks the requisite jurisdiction to entertain the said motion to set aside the judgment of 22/11/11 as the 2<sup>nd</sup> respondent's motion to set aside the said judgment was grossly out of time and there was no motion before the court below for extension of time to enable the court below to have jurisdiction to entertain the said motion. The case of *Uwagba v. FRN* (2009) 15 NWLR (Pt. 1163) 91 at 107- G - H, was cited in support. Learned counsel for the 1<sup>st</sup> respondent argued that failure by the 2<sup>nd</sup> respondent to file his application for setting aside the said judgment within 10 days of delivery is a procedural irregularity which was waived by the appellant and he is precluded from raising same on appeal. He relied on the case of *Duke v. Akpabuyo L. G.* (2005) 19 NWLR (Pt.959) 130 at 153 - 154 -F - B. The Rule, he argued further, gives the court a discretion to entertain such application brought outside

the ten days if there is a good cause for doing so and the appellant did not complain about the timing of the application. In addition, it was argued, the Rules of Court cannot limit the time to file such application which is on jurisdiction. This equally is the learned counsel for the 2<sup>nd</sup> respondent who added the case of Bello v. INEC (2010) 8 NWLR (Pt. 1196) 342. Rule 12 of Order 6 (supra) is permissive. B The rules of court shall not be used as a clog to the attainment of justice. Galadima v. Tambai (2000) 11 NWLR (Pt.677) 1 at 15 F - G was referred to by the 2<sup>nd</sup> respondent.

At the end, the learned SAN for the appellant, urged us to allow the appeal and grant all the reliefs sought, whereas, all the respondents urged this court to dismiss this appeal as lacking in merit and affirm the Ruling of the court below delivered on the 3<sup>rd</sup> of January, 2012. C

I think it is pertinent for me at this juncture to set out the motion granted by the court below which gave rise to this appeal. The Motion on Notice was dated and filed on the 14<sup>th</sup> day of December, 2011. It is contained on pages 1004 -1005 of Vol.2 of the Record of Appeal. It reads, in part: D

TAKE NOTICE *that this Honourable court shall be moved on the ... day of ..... 2011 at the Hour of 9 O'clock in the forenoon or so soon thereafter as counsel may be heard on behalf of the 2<sup>nd</sup> respondent/applicant for the following orders:* E

i. AN ORDER setting aside that aspect of the judgment of this Honourable Court delivered on 22<sup>nd</sup> November, 2011 *allowing the* F appeal in part based on a repealed and/or nonexisting provision of the Electoral Act, 2010, (as amended) and therefore a nullity. AND for such *further* or other orders as this Honourable Court may deem fit to make in the circumstances. G

#### **GROUND S UPON WHICH THE APPLICATION IS BROUGHT**

1) The aspect of the judgment allowing the appeal in part is based on a repealed and/or non - existent provision of the Electoral Act. 2010 as amended) and therefore a nullity; H

2) Section 87 of the Electoral Act, 2010 (as amended) has no provision for sanction for non -compliance;

3) There is no section 87(9) in the said Electoral Act, (as amended) that provide thus.

*“Where a political party fails to comply with the provisions of the Act in the conduct of its primaries, its candidates for the election shall not be included in the election for the particular position in issue.”*

B 4) The Honourable Court relied on a nonexistent provision of the law in arriving at its decision (now sought to be set aside), hence a nullity;

C 5) The reliance on the repealed and/or non-existent provisions of the Electoral Act, 2010 (as amended) by the Honourable court is such that has deprived that part of the decision, now sought to be set aside, the character of a legitimate adjudication; and

6) A superior courts of law have the inherent power to set aside part of a judgment or decision based on nullity.

D TAKE FURTHER NOTICE that at the hearing of this application, applicant shall rely on all the processes filed by parties in this appeal, the judgment of the Honourable Court and all other relevant process(es) before the court. Dated this 14<sup>th</sup> day of December, 2011.”

E The motion was moved by one Mr. Olatoke, who appeared for the applicant, who is the 2<sup>nd</sup> respondent in this appeal.

F Mr. Ajana, for the 1<sup>st</sup> respondent in both the said motion and this appeal, supported the application. Mr. Adedipe who appeared for the 3<sup>rd</sup> respondent in both the said motion and this appeal adopted the oral submissions of the learned counsel for the applicant and the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent to the application was shown to have been served on 3/12/11 as per the record of proceedings. The court below considered the motion and granted the order as prayed by setting aside the judgment delivered by the same court on 22/11/11 in Appeal No. CA/A/226/2011. The court below, further, discounted the 2<sup>nd</sup> respondent’s affidavit (counter-affidavit) which according to the court below, was argumentative.

H ***I think I should deal first with the issue of abuse of process of court. Where there is an allegation of abuse of process of court, it entails a departure through unreasonable, immoderate, improper use or perversion of court processes after having been filed either in the same court or in various courts. In this appeal, it is not in dispute that after judgment was delivered on 22/11/11 by the court below, the 2<sup>nd</sup> respon-***

**dent filed a Notice of Appeal against the said judgment. He again, thereafter filed an application for setting aside that judgment. This suggests the co-existence of two court processes contemporaneously, both aiming at the same thing. This ordinarily, constitutes an abuse of the process of court. No court or tribunal worth that name should allow its processes to be abused by litigants.** See: Saraki v. Kotoye (1992) 9 NWLR (Pt.254) 156; CBN v. Ahmed (2001) 11 NWLR (Pt.724) 369; Dingyadi v. INEC (2010) 18 NWLR (Pt.1224) 154; Ogojeifo v. Ogojeifo (2006) 3 NWLR (Pt.966) 205.

Now, examining the two processes filed by the 2<sup>nd</sup> respondent, i.e. the Notice of Appeal of 7/12/11 and the motion to set aside the court below's judgment of 22/11/11, it is clear that apart from the Notice of Appeal filed, nothing more was filed. Neither the Record of Appeal in respect thereof nor briefs of arguments by the appellant to indicate his commitment towards prosecuting the appeal. My Lords, I think I need to be clearer on the point of filing/bringing of an appeal and the entry of an appeal with a view to removing all doubts from the Thomases. **An appeal is filed or brought as soon as the notice of appeal is filed at the court below/trial court as the case may be.** See: Shodeinde v. Registered Trustees of Ahmadiyya Movement (2001) NWLR (Pt.58) 1065. **This means that an appeal is deemed to have been brought when the notice of appeal has been filed at the registry of the court below or leave to appeal has been granted and before this court has become seised of the whole proceedings. At this stage, both this court and the court below have concurrent jurisdiction to deal with interlocutory applications.** However, the Rules of this court require that such application should be made at the court below in the first place for adjudication and ruling. **An appeal is said to be entered in this court, on the other hand, when the record of appeal has been transmitted to this court and entered on the cause list. It is at this point in time when the court below will cease to have jurisdiction to hear any application. After an appeal has been entered, all other applications can only be made to this court though applications may be filed in the court below for proper transmission to this court. This is because once this court is seised of the appeal, it has the sole jurisdiction to**

***deal with the matter, interlocutory or otherwise.*** See generally: Coker v. Adeyeme (1915) All NLR 125 at pp 128 - 129; Irisi v. Idika (1987) 4 NWLR (Pt.66) 503, Lazard Brothers & Co. v. Midland Bank Ltd. (1933) AC 289.

***In the appeal on hand, although the 2<sup>nd</sup> respondent did not come out categorically to withdraw or abandon the Notice of Appeal he filed on the 7<sup>th</sup> of December, 2011, yet he did not get the record in respect thereof transmitted to this court up to the date when he filed his motion on notice seeking to set aside the Ruling of the court below of 3/1/12. Yet, he did not inform the court below (in open court) that he still had that Notice of Appeal pending. Further, none of the counsel including the learned SAN for the appellant, drew the court below's attention on the pending notice of appeal. In any event, although pending, the mere filing of a Notice of Appeal without more, does not, in my view, constitute an appeal in the real sense of the word. Thus, if same party by whatever guise files another process which is capable of determining the life span of the pending process, and same was not objected to timeously, the court may go ahead to hear the process put in preference by the party prosecuting it. That also means that he no longer intends to pursue the pending matter which must be deemed abandoned and as he has no legal right to pursue it any further in view of the new matter (motion) filed in preference as that would tantamount to abuse of court process. What is even surprising is that the appellant who is now objecting by way of abuse of process of court did not object when the motion was to be taken by the court below. The settled law is that the objection can be taken at any time during the pendency of the appeal before judgment. See NBN & Anor v. Shoyeye & Anor (1977) 11 NSCC 310 at 304. A party who fails to raise the objection on time will be held to have accepted the state of things as it is. See: Fawehinmi v. NBA (No.1) (1989) 2 NWLR (Pt.105) 495. It is my view that the court below was right in assuming jurisdiction to set aside its judgment of 22/11/11 which it found to be a nullity.***

Another issue of importance is whether the court below in granting the application for setting aside the judgment of 22/11/11

went beyond the prayer(s) contained in the 2<sup>nd</sup> respondent's motion on notice. But, what was it that was asked from the court below in the Motion on Notice for setting aside the judgment of 22/11/11? What was it that the court below granted? At the risk of repetition, the principal prayer/relief, in the motion on Notice to set aside the judgment of 22/11/11 reads as follows: B

*"AN ORDER setting aside that aspect of the judgment of this Honourable court delivered on 22<sup>nd</sup> November, 2011 allowing the appeal in part based on a repealed and/or non-existing provision of the Electoral Act, 2010 (as amended) and therefore a nullity."* C

The court below, after hearing the parties, made the following ruling:

*"Court: Ordered as prayed. The judgment delivered by this court in Appeal Number CA/A/226A/2011 delivered on 22/11/11 is hereby set aside being void ab initio."* D

What appears to be apparent to me from both the motion on Notice (supra) and ruling the court below of 3/1/12 are as follows:

A. From the Motion:

The applicant (2<sup>nd</sup> respondent) asked the court below to:

I. grant him an order setting aside that aspect of the judgment of the court below delivered on 22/11/11 which allowed the (appellant's) appeal in part, which E

II. the court below gave on the basis of a repealed and/or non-existing provision of the Electoral Act, 2010 (as amended) which F

III. made that aspect of the judgment a nullity.

B. From the Ruling of 3/1/12

The learned Justices of the court below:

I. granted the order which was prayed/asked by the applicant in his motion. G

II. that the judgment by the court below delivered on 22/11/11 was set aside because

III. it was void *ab initio*

My Lords, it was a little uneasy for me in coming to the inevitable conclusion as to who is correct between the learned SAN for the appellant on one hand and the learned counsel for the respective respondents and the court below that made the setting aside order. I was compelled to have read, read and read all over again the judgment of the court below of 22/11/11. I find it necessary to reproduce H

some part of the said judgment which, to my understanding, relate to the issue of whether it was the whole judgment that was a nullity or (if there is) part of the judgment which was based on the non-existing provision s. 87(9) of the Electoral Act, 2010 (as amended), upon which the learned justices who delivered the judgment of 22/1 B 1/1 1 relied.

Eko, JCA, who delivered the leading judgment, stated inter alia, on appellant's issue 1:

*"Accordingly, I resolve the issue in favour of the appellant Sports Complex, Yenagoa not being within Bayelsa East Senatorial District, the primary election purportedly conducted there on 7<sup>th</sup> January, 2011 was a sham and invalid ab initio. The judgment of the learned trial judge dismissing the plaintiff/appellant's suit and affirming the validity of the said primary election conducted on 7<sup>th</sup> January, D 2011 at the Sports Complex, Yenagoa outside Bayelsa East Senatorial District is hereby set aside. It follows therefore that PDP, 1st Defendant/Respondent, had no validly nominated candidate for the senatorial election emanating from the shown nomination exercise conducted at the Sports Complex, Yenagoa on 7th January, 2011. I E so declare."* (p. 42 of the Record Vol. 2)."

On page 954 of the same volume of the record, and in relation to the primary said to have been conducted at Nembe by the appellant, the learned JCA stated:

*"From the totality of his own evidence, it is clear that exercise F was conducted without the officials of his own party charged with the responsibility of conducting the said nomination. It is obvious that the Nembe exercise is a mere charade conducted in utter frustration... This mock or phantom election or nomination exercise is, without G doubt, ultra vires and completely void... The totality of all I have said is that neither the appellant, Senator Amange Nimi Barigha nor the 2<sup>nd</sup> respondent, Hon. Clever Ikisikpo could claim to have been duly nominated on 7<sup>th</sup> January, 2011 as the PDP candidate for Bayelsa East Senatorial District. The PDP, 1<sup>st</sup> respondent, had failed woefully H to comply with the mandatory provisions of Section 87 of the Electoral Act, and its own constitution and Guidelines for nomination that stipulate the method or procedure of electing the party candidate for Senatorial Election to be conducted by INEC. Neither the PDP nor any of its organs or members can flout with impunity the*



*method prescribed by Statute, the party constitution or Guidelines as to how its candidate for a general election should emerge. The law on this very dear...*

*Having nullified the purported nominations of the 2<sup>nd</sup> respondent, Hon. Clever Ikisikpo, and the appellant, Senator Amange Nimi Barigha, as PDP candidate for Bayelsa East Senatorial District I do not consider it, now, necessary to issue an injunctive order in the circumstances of the case. Suffice to declare in consequence that in view of section 87(9) of the Electoral Act, 2010 as amended, the 1<sup>st</sup> respondent (PDP) acted illegally in the purported presentation of the name of the 2<sup>nd</sup> respondent, Hon. Clever Ikisikpo, to the 3<sup>d</sup> respondent (INEC) as its candidate for the Senatorial election in Bayelsa East Senatorial District The purported sponsorship of the 2<sup>nd</sup> respondent as the 1<sup>st</sup> respondent's candidate for that election is completely a nullity... That statutory obligation demands fairness, and it obviates prevarication, on the part of INEC."*

Finally, on page 967 of the record (supra) the learned JCA, held:

*"Appeal is allowed in part. The judgment of the Federal High Court Abuja delivered on 16<sup>th</sup> March 2011 in suit No. FHC/ABJ/CS/ 99/2011 is hereby set aside."*

***Before I come to my conclusion on this issue, I should observe some amount of imprecision from the concluding part of the court below's judgment of 22/11/11. It blew both hot and cold. In one breath it allowed the appeal in part, though without specifying which part of the judgment was allowed and which part was dismissed. Although the judgment, generally, is lucid but it gave a conflicting conclusion capable of sending confusing signals to all the parties or others who may come across it. Conclusion of a judgment must always be very cogent, clear, specific and unambiguous, capable of easy digestion and execution.***

Now, coming back to the issue of whether the court below in setting aside the judgment of 22/11/11 went beyond the prayers in the motion on notice of the 2<sup>nd</sup> respondent. It is clear from the body of the prayer set out in the motion on Notice, the grounds upon which the motion on Notice was rested and the supporting affidavit that the applicant prayed for the setting aside of that aspect of the

judgment which was based on S. 87(9) of the Electoral Act which has been repealed and nonexisting as at the time of delivering of the said judgment.

This, in my view, affects largely, the declaration by the court below the primary election held by the 1<sup>st</sup> respondent on 7/1/11 at the Sports Complex, Yenagoa for the Bayelsa East Senatorial District, which produced Hon. Clever Ikisikpo as the winner of the said primary election, void, because it was not conducted in accordance with section 87(9) of the Electoral Act, 2010 (as amended) and other party rules and regulations.

This declaration appears to be the life-wire of the whole case. Apart from it, nothing more can be of any utilitarian benefit to any of the parties. The declaratory reliefs were not issued by the court below in view of section 87(9) (*supra*).

Thus, what the court below granted by way of its ruling of 3/1/12 in setting aside its own earlier judgment was quite in order as the main decision in that judgment was tied to a statute i.e. section 87(9) of the Electoral Act 2010 (as amended) which section has been deleted and no more existing in the Electoral Act, 2010 (as amended). This certainly rendered the whole judgment null and void as it was largely based on a non-existing law.

Another vital point which is worth mentioning is the panel that treated the application for setting aside of the said judgment. I already stated in summary the submissions of the respective learned counsel for the parties in this appeal.

This panel is differently constituted from the one that delivered the judgment of 22/11/11. This panel comprised of the following justices:

1. Hon. Justice Dalhatu Adamu - Presiding
2. Hon. Justice H. Mukhtar - JCA
3. Hon. Justice A. D. Yahaya - JCA

The panel that heard and delivered judgment on Appeal No.CA/A/26/2011 was constitute of the following justices:

1. Hon. Justice Hussein Mukhtar-JCA
2. Hon. Justice Ejembi Eko-JCA
3. Hon. Justice Regina Obiageli Nwodo-JCA

The contention of the appellant is that the Acting President of the court below cannot competently constitute another panel to sit

and set aside the earlier judgment delivered by another panel on 22<sup>nd</sup>/11/11, as it is only that same panel that delivered the judgment/ruling that can set aside that same judgment/ruling aside. The case of FBN v. TSA Ind. Ltd. (2010) 15 NWLR (Pt.1216) 247 at 305-306-H-B, among others was cited and relied on by the appellant.

This proposition of law, made by the learned SAN for the appellant, appears strange and a novelty to me. In the first place, the learned SAN is not disputing the existence of the one and the only COURT OF APPEAL, for the whole country as established by section 237(1) of the constitution of the Federal Republic of Nigeria, 1999 (as amended). Section 247(1) of the same Constitution, provides as follows :

*“For the purpose of existence any jurisdiction conferred upon it by this constitution or any other law, the Court of Appeal shall be constituted if it consists of not less than three Justices of the Court of Appeal and in the case of appeals from -*

*a) a Sharia Court of Appeal, if it consists of not less than three Justices of the Court of Appeal learned in Islamic Personal Law, and*

*b) a Customary Court of Appeal, if It consists of not less than three Justices of the Court of Appeal learned in Customary Law.”*

It is clear from the above provisions of the Constitution that the exercise of any jurisdiction conferred on the court below by the constitution or any other law, can be carried out by any three Justices of that court except in the following cases:

*I. an appeal from a Sharia Court of Appeal of a state or that of the Federal Capital Territory, Abuja, in which case the Justices who will constitute the panel of the three Justices must be Justices of the Court of Appeal who are learned in Islamic personal law. (This requirement applies equally to where such a decision (on Islamic personal law) shall require the setting aside of any such decision).*

*II. an appeal from a Customary Court of Appeal of a state or that of the Federal Capital Territory, Abuja, in which case the justices who will constitute the panel of the three justices must be justices of the Court of Appeal who are learned in customary law. (This requirement applies equally to where such a decision (on Customary law) shall require the setting aside of any such decision).*

It is to be noted that the word ‘panel’ or ‘Division’ of the

Court of Appeal has never been used by the Constitution. Neither is it also traceable to the Court of Appeal Act, 1976, or the Court of Appeal Rules (as variously amended). The only reference which may be related to the two terms ‘panel’ and ‘Division’ is the one made in Order One Rule 5 (interpretation), (item No. 15 from top) which defines the word, “Presiding Justice’ to mean:

*“any Justice of the Court duly designated by the President to take charge of a Judicial Division of the Court.”*

Thus, a Division or Divisions of the Court of Appeal as well as panels constituted by the President of the court or a presiding Justice of a Division of the court are only created as a matter of administrative convenience in order to facilitate a smooth, orderly, effective and coordinated running of the court’s activities.

The 2<sup>nd</sup> panel of the court below presided over by Adamu, Acting President of the court (as he then was), that treated 2<sup>nd</sup> respondent’s application where the earlier judgment of the court delivered on 22/11/11, by a different panel, headed by H. Mukhtar, JCA, was properly constituted and took a valid decision as of right. The two cases are different in terms of subject matter and each independent of the other. The citing and reliance on the case of Sokoto State Government v. Kamdex Nig. Ltd (2007) 7 NWLR (Pt.1034) 466 at pp 492 - 493

H- B; by the learned SAN, is of no relevance to the present appeal. Kamdex’s case (supra and for short), is quite distinguishable from the present appeal. The facts in Kamdex (supra) reveal that three suits were instituted, claiming various sums of money from the 1<sup>st</sup> and 2<sup>nd</sup> appellants (at the Court of Appeal). After hearing the parties, judgment was entered for the respondent, (at the Court of Appeal), in the three suits which gave rise to three separate appeals. The appeals were consolidated and heard by the Lagos Division of the Court of Appeal on 5/11/2003. At the hearing of the appeal the Court of Appeal was constituted as follows:

1. Hon. Justice J. O. Ogebe, JCA (as he then was) (who presided)

2. Hon. Justice P. O. Aderemi - JCA (as he then was)

3. Hon. Justice C. M. Chukwuma-Eneh - JCA (as he then was)

The appeal was adjourned to 22/01/2004 for judgment. The

judgment was delivered by a panel of the Court of Appeal comprising of:

1. Hon. Justice S. Galadima - JCA (as he then was)
2. Hon. Justice P. O. Aderemi-JCA (as he then was)
3. Hon. Justice C. M. Chukwuma-Eneh - JCA (as he then was).

The leading judgment was read by Aderemi, JCA (as he then was) and by S. Galadima, JCA (as he then was) and C. M. Chukwuma-Eneh JCA (as he then was) which unanimously dismissed the appellant's appeal. It was on record that Hon. Justice Galadima who did not participate in the hearing of the appeal actually wrote and delivered a concurring judgment to the leading judgment of Aderemi, JCA (as he then was). Meanwhile, the record of appeal did not contain any opinion of Hon. Justice Ogebe, JCA (as he then was) who presided at the hearing of the appeal on 5/11/2003. The appellants were dissatisfied and they appealed to this court. It is instructive to quote in *extenso*, what this court, per Mohammed, JSC; said:

*"There is no doubt whatsoever in the instant case that when the appellant's appeal was heard by the court below on 5-11-2003 by a panel of Justices of that court made up of Ogebe, Aderemi and Chukwuma-Eneh JJCA, that court was properly constituted for the purpose of exercising the jurisdiction conferred upon it to hear the appellants appeal.*

*However, whether the constitution of that court which heard the appellants appeal was maintained throughout the hearing of the appeal up to the date of the delivery of the judgment on 22-1 -2004, is what the record of this appeal answered in the negative. This of course is quite contrary to the provisions of section 294(1), (2), (3) and (4) of the Constitution of the Federal Republic of Nigeria, 1999 which state as follows:*

*In compliance with the above provisions of section 294 of the 1999 Constitution, each of the Justices of the court below who heard the appellants' appeal, ought to have reduced his judgment or opinion in writing for delivery in person or by any of the court on the date fixed for the delivery of the judgment. This is because a justice of the court who did not take part in the hearing of the appeal may lawfully sit on a panel of the court and participate in delivering a judgment or written opinion of another Justice who actually took*

part in the hearing of the appeal or matter but is unavoidably absent, I must stress however that for such judgment delivered to be valid it must have been put in writing for delivery by all the members of the panel of the Justices that participated at the hearing of the appeal which in law culminates in the determination of the cause or matter by the delivery of the judgment. Failure to comply with these fundamental requirements of the constitution and the law as expounded in the various decisions of our court, renders the judgment a nullity. I am bound by the recent decision of this court in *Ubwa v. Tiv Traditional Council and Others* (2004) 11 NWLR (Pt.884) 427, at 436 where Kutigi, JSC (as he then was) faced with similar proceedings of the Court of Appeal Jos as in the present appeal, declared the proceedings a nullity in allowing the appeal. That case is on all fours with the instant appeal now under consideration in which I have no option but to declare the judgment of the court below delivered by the panel of Justices comprising of Galadima, Aderemi and Chukwuma-Eneh, JJCA on 22-1-2004, also a nullity. I have two reasons for coming to this conclusion. Firstly, the judgment is not a complete judgment of the court of appeal because one of the justices who heard the appeal had not reduced his judgment or opinion in writing capable of being delivered on the day fixed for the delivery as required by sub-section (2) of section 294 of the 1999 constitution which makes it necessary for the judgments or opinion of the three justices who heard the appeal to be produced in writing before a complete judgment of the court could validly emerge.

Secondly, the judgment the judgment of the court of 22/1/2004, was affected by another deadly virus which destroyed it resulting in turning it into something else other than a judgment of the court of Appeal. The judgment delivered by Galadima, JCA who did not sit with the panel of justices that heard the parties in this appeal on the date fixed for the hearing of the appeal, certainly affected the competence of the court in the proceedings conducted in the delivery of the judgment which in law is part and parcel of the proceedings in the hearing and determination of the appellants' appeal. This is because an improperly constituted court as regards its members such that no member is disqualified for one reason or another; is not capable in law of exercising the jurisdiction of the court in delivering a valid judgment. The reason of course is that the any defect in com-

*petence is fatal as the proceedings are a nullity however well conducted and decided. See Madukolu & Ors v. Nkemdilim & Ors (supra). Obviously, a judicial officer, who had not sat in court in that capacity to exercise the jurisdiction of the court in hearing a cause or matter, cannot have the capacity in law to sit in court and write a judgment or opinion to determine a dispute which he did not participate in the hearing.”* B

I think the difference is now clear. The two cases are not the same. Kamedix’s case (supra) cannot be cited as a precedent to be followed in the panel on hand. The decision of the panel headed by Adamu, JCA (Ag. President as he then was) was properly constituted. The Ruling it delivered is quite valid in law and in practice and I affirm it. C

***Other points which were raised by the appellant in challenge of the jurisdiction of the court below, such as the number of days allowed within which to file a motion for the setting aside of a decision and that appellant was not given fair hearing when the motion was heard, in my view, are just to beat around the bush. They are games of chances. I say so because the Rules of this court are very clear that such longer period within which to file such an application can be permitted by the court for good cause. The court below entertained the application, even though aware that the motion on Notice was filed outside the ten days period. This is a tacit approval of the extension of the time within which to file such an application as conferred upon the court by Order 7 Rule 12 of the court below’s Rules, 2011 which states:*** D

***“An application to set aside any judgment or ruling shall not be brought unless it filed within ten days from the date of delivery of such judgment, or ruling or such longer period as the court may allow for good cause.”*** (Underline for emphasis). E

Again, no objection was raised by the appellant at the said hearing. In view of what the Rule has provided, it is my view that the court below was right in entertaining the application for setting aside the judgment of 22/11/11. F

***On the issue of no fair hearing was granted to the appellant (as 2<sup>nd</sup> respondent at the court below), I do not think I*** H

**can speak more than the record of appeal. On the day of hearing of that application, it is recorded as follows:**

**“Appearance:**

**Dr. J. O. Olatoke with A. O. Popoola for the appellant.**

**A. O. Ajanafor the 1<sup>st</sup> respondent.**

**B Adeola Adedipe for the 3<sup>rd</sup> respondent.**

**Registrar: The 2<sup>nd</sup> respondent was served on 30/12/2011.”**

**This shows that neither the appellant nor his counsel was in court on that date though there was service on the appellant as 2<sup>nd</sup> respondent. We are bound by the record of appeal placed before us. The appellant by the reason of service having been validly effected on him cannot be heard to complain that he was not given a (fair) hearing. Who, or what stopped him from making appearance on the date fixed for hearing of the application? Who is to blame? Answers to these questions are best known to the appellant. I do not think it is charitable to lay blames on the court below for doing its own statutory assignment.**

**E This appeal in the end is fully unmeritorious and deserves to fail. The appeal fails and is dismissed by me. Each of the three sets of respondents is entitled to N100,000.00 (One Hundred Thousand Naira Only) costs from the appellant.**

**F**

### **FABIYI JSC**

**G The hegemony in this matter is *stricto sensu*, between the appellant and the 2nd respondent herein. The subject matter in respect of the outcome of the 1<sup>st</sup> defendant National Assembly Primary for the Bayelsa East Senatorial District conducted on 7<sup>th</sup> January, 2011 in which both of them were contestants. The appellant herein, as plaintiff at the trial Federal High Court, Abuja through an Originating Summons, sought a determination of the following question viz:**

**H “Whether having regard to the combined provisions of Articles 2, 28 (A) (i) (ii) of the Electoral Guidelines for primary election 2010 of the 1<sup>st</sup> defendant (PDP) and Articles, 17 (1), (2) (e) of the PDP Constitution 2009 (as amended) and section 87 (1) (c), 9 and 10 of the Electoral Act, 2010 and sections 222 and 223 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)**



*the 1<sup>st</sup> defendant National Assembly Primary for Bayelsa East Senatorial District held at the Sports Complex, Yenagoa Bayelsa State on 7<sup>th</sup> January 2011 instead of the Senatorial District Headquarters at Twon Brass, is not invalid, void and of no legal effect whatsoever.”*

And if the answer to the above is in the affirmative, the plaintiff seeks the following reliefs:- B

**“RELIEFS SOUGHT**

1. *A Declaration that the National Assembly Primary conducted on 7<sup>th</sup> of January, 2011 for the Bayelsa East Senatorial District at Sport Complex, Yenagoa, Bayelsa State and any result therein are null and void, invalid and of no effect whatsoever.* C

2. *A Declaration that the National Assembly Primary conducted on 7<sup>th</sup> of January, 2011 for the Bayelsa East Senatorial District at Bayelsa East Senatorial District Headquarters of Twon Brass which produced the plaintiff as the winner is the authentic, valid legal and subsisting primary for the Bayelsa East Senatorial District of Bayelsa State for the 2011 National Assembly election.*

3. *A Declaration that any result/name or winner of the Bayelsa East Senatorial District of Bayelsa State submitted by the 1<sup>st</sup> defendant to 3<sup>rd</sup> defendant other than the result/winner at the National Assembly Primaries for Bayelsa East conducted at Bayelsa East Senatorial District at Twon Brass is null and void.* E

4. *An Order of junction restraining the 3<sup>rd</sup> defendant from accepting, acting upon or taking any step or further step or doing anything whatsoever in giving effect to any name or result from the 1<sup>st</sup> defendant as winner of the Bayelsa East Senatorial District of Bayelsa State other than the name of the plaintiff.* F

5. *An Order declaring the plaintiff as the winner and duly elected candidate for the Bayelsa East Senatorial District of Bayelsa State for the 2011 National Assembly Election on the platform of the 1<sup>st</sup> defendant.*

**IN THE ALTERNATIVE**

6. *An Order by this Honourable Court ordering a fresh primary for Bayelsa East Senatorial District in accordance with the 1<sup>st</sup> defendant’s Constitution and 2010 Electoral Guidelines for primaries under the observation of the 3<sup>rd</sup> defendant.* H

7. *An Order of injunction restraining the 2<sup>nd</sup> defendant from parading himself, holding himself out or presenting himself or doing*

*anything of like manner whatsoever before the 3<sup>d</sup> defendant or taking any step whatsoever before the 3<sup>d</sup> defendant as the 1<sup>st</sup> defendant's candidate for Bayelsa East Senatorial District/Constituency in Bayelsa State for the 2011 National Assembly Election."*

As usual, the defendants/respondents at the trial court filed counter-affidavits to depict their respective stand points. The learned trial judge considered the addresses proffered by learned counsel to all the parties and applied the law to the best of his ability and dismissed the appellant's action. He felt dissatisfied and appealed to the Court of Appeal which heard the appeal and allowed same in part by nailing the primary conducted at Yenagoa the State Capital as well as the parallel one conducted simultaneously at Nembe under the guise that a valid primary could only be held at Twon Brass - the Headquarters of the Senatorial District. The Court of Appeal relied on section 87 (9) of the Electoral Act 2010 in arriving at its decision. At the material time, the said section of the law had been repealed. To say the least, it was confusion galore.

The 2<sup>nd</sup> respondent capitalized on the inadvertent goof by the court below and applied by Motion on Notice to have the decision set aside on ground of same being a nullity. A Panel of the court below differently constituted from the one delivered the null judgment of 22/11/11 set aside same on 22/1/12. The appellant felt unhappy with the scenario and has appealed to this court.

The appellant cannot in law and in clear conscience on a repealed section of the applicable law at the material time, is null and void. The real grouse of the appellant is that a different Panel of the Court of Appeal from the one that gave the judgment of 22/11/11, set same aside on 22/1/12.

To assuage the feelings of the appellant in this respect, it is apt to remind him of the pronouncement of Lord Denning about five decades ago in the case of *MacFoy v. U. A. C Ltd. (1962) A. C. 150* at page 160. It goes as follows :-

*"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so."*

The 2<sup>nd</sup> Panel did its job by nailing the null decision of the 1<sup>st</sup> Panel without much ado. The length of the decision of the 2<sup>nd</sup> Panel is

immaterial. Tin's (sic) clinches any argument to the contrary.

As usual in this type of matter, the appellant raked up the issue of fair hearing. As extant in the record of appeal, there was report of service on the appellant on 30/12/2011. It is clear that the appellant's complaint should not be countenanced. A court of record should not view fair hearing in the abstract. Based on the plaintiff's dilatory stance, I cannot see how the principle of fair hearing was eroded. See: *Magit v. Uni-Agric. Markudi (2006) 133 LRCN 46; Sburi Adebayo v. Attorney-General Ogun State (2008) 7 NWLR (Pt. 1085) 201 at 221-222.*

For the above reasons and the detailed ones articulated in the lead judgment of my learned brother - I. T. Muhammad, JSC which I hereby adopt, I too feel that the appeal should be dismissed. I order accordingly and endorse all consequential orders therein contained; that relating to costs inclusive. This brings to an end the rat race for the plum job.

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**PETER-ODILI JSC, CFR**

I am in total agreement with the judgment of my learned brother, Ibrahim Tanko Muhammad JSC which I had the opportunity of reading in draft. I have nothing more to add.

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**ARIWOOLA JSC**

I had the opportunity of reading in draft the lead judgment just delivered by my learned brother Tanko Muhammad JSC. His Lordship meticulously and admirably dealt with all the issues that deserve to be attended to and I have nothing more to add. I am in total agreement with the reasoning and conclusion reached in the said lead judgment that the appeal is unmeritorious and lacks substance. It is liable to dismissal. Accordingly, I too dismiss the appeal.

I abide by the order on costs awarded against the appellant but in favour of each of the three sets of respondents.

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**AKA'AH S JSC**

The plaintiff/appellant filed an originating summons in the

Federal High Court Abuja seeking a determination of the following question namely:-

“*WHETHER having regard to the combined provisions of Articles 2, 28 (A) (i) (ii) of the Electoral Guidelines for primary election 2010 of the 1<sup>st</sup> Defendant (PDP) and Articles 2, 17, (1), (2) (e) of the PDP Constitution 2009 (as amended) and section 87 (1) (c), 9 and 10 of the Electoral Act 2010 and sections 222 and 223 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) the 1<sup>st</sup> Defendant National Assembly Primary for Bayelsa East Senatorial District held at the sports Complex, Yenagoa Bayelsa State on 7<sup>th</sup> January, 2011 instead of the Senatorial District Headquarters at Twon Brass, is not invalid, void and of no legal effect whatsoever. If the answer to the above is answered in the affirmative the Plaintiff seeks the following reliefs:*

**RELIEFS SOUGHT**

1. *A DECLARATION that the National Assembly primary conducted on 7<sup>th</sup> January, 2011 for the Bayelsa East Senatorial District at Sport Complex, Yenagoa, Bayelsa State and any result therein are null and void, invalid and of no effect whatsoever.*

2. *A DECLARATION that the National Assembly primary conducted on 7<sup>th</sup> of January, 2011 for Bayelsa East Senatorial District at Bayelsa East Senatorial District Headquarters of Twon Brass which produced the Plaintiff as the winner is authentic, valid legal and subsisting primary for the Bayelsa East Senatorial district of State for the 2011 National Assembly election.*

3. *A DECLARATION that any result/name or winner of the Bayelsa East Senatorial District of Bayelsa State submitted by the 1<sup>st</sup> Defendant to 3<sup>d</sup> Defendant other than the result/winner at the National Assembly primaries for Bayelsa East conducted at Bayelsa East Senatorial District at Twon Brass is null and void.*

4. *AN ORDER of injunction restraining the 3<sup>d</sup> Defendant from accepting, acting upon or taking any step or further step or doing anything whatsoever in giving effect to any name or result from the 1<sup>st</sup> Defendant as winner of the Bayelsa East Senatorial District of Bayelsa State other than the name of the plaintiff.*

5. *AN ORDER declaring the plaintiff as the winner and duly elected candidate for the Bayelsa East Senatorial District of Bayelsa State for the 2011 National Assembly election on the platform of the*

*1<sup>st</sup> Defendant.*

*IN THE ALTERNATIVE*

*6. AN ORDER by this Honourable Court ordering afresh primary for Bayelsa East Senatorial District in accordance with the 1<sup>st</sup> Defendant's Constitution and 2010 Electoral Guidelines for primaries under the observation of the 3<sup>d</sup> Defendant.*

*7. AN ORDER of injunction restraining the 2<sup>nd</sup> Defendant from parading himself, holding himself out or presenting himself or doing anything of like manner whatsoever before the 3<sup>rd</sup> Defendant or taking any step whatsoever before the 3<sup>d</sup> Defendant as the 1<sup>st</sup> Defendant's candidate for Bayelsa East Senatorial District/Constituency in Bayelsa State for the 2011 National Assembly Election".*

The defendants/ respondents filed their respective counter-affidavits to the originating summons after which the learned trial judge after hearing arguments of counsel dismissed the action and the appellant appealed to the Court of Appeal (the Court below) which allowed the appeal in part on 22<sup>nd</sup> November, 2011 by declaring that neither the primary conducted at Yenagoa nor the one which took place in Nembe was valid as a valid primary could only be held at Twon Brass being the Headquarters of the Senatorial District. The court Below relied on section 87(9) of the Electoral Act 2010 in reaching its decision. At the time of delivering judgment, the said section of the Electoral Act had been repealed. Realizing this fact the 2<sup>nd</sup> respondent applied by Motion on Notice to the Court below to set aside the decision which was granted on 22/1/12 by a panel of the lower court which was differently constituted from the one that delivered the judgment on 22/11/11. In addition to filing the motion to set aside the judgment, the 2<sup>nd</sup> Respondent appealed to this Court in his Notice of Appeal dated 7<sup>th</sup> December, 2011. The appellant also appealed against the order nullifying the decision of the earlier panel which delivered the partial judgment of 22/11/11. It is pertinent to point out that by the time the Court below gave its decision on 22/11/11, the National Assembly Election for the Senatorial Districts in the country which included Bayelsa East Senatorial District had taken place and the 2<sup>nd</sup> respondent was declared the winner of the election. This appeal is from the decision of the court below delivered on 22/1/12 which nullified the judgment of the same court delivered on 22/11/11.

My learned brother, MUHAMMAD JSC has set out the issues raised and arguments proffered in the appeal and for the reasons contained in the said judgment, I also agree that the appeal lacks merit and I accordingly dismiss it. The judgment was predicated on a repealed provision of the law and since the complaint centred on law, any panel of the court of appeal could sit to formally nullified the decision. In any event the proper way of challenging the decision of a superior court which is a nullity is by application before the very court which tried the case or by an appeal to the appropriate appellate court. See: *Fawehinmi vs A-G. Lagos State (No.1)* 3 NWLR (Part 112) 707 which followed the decision of this Court in *Aladegbemi vs. Fasanmade (1988)* 3 NWLR (Part 81) 129. The point should be made that while the practice in the High Court in nullifying a decision is to bring the application before the judge who made the order sought to be impugned unless he is no longer around, the same cannot be said of the appellate court which sits in a panel. Any Panel of the Court of Appeal can sit to nullify the decision or order made. It is my view if the issue involved was exercise of discretion, I would not hesitate to say that it should be the same panel that heard the matter and exercised the discretion that should be called upon to reconsider its stance.

For this and the fuller reasons contained in the lead judgment, I find that the appeal lacks any merit and I accordingly dismiss it.

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